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Abstract

This Article reconsiders the implementation of Article III in the bankruptcy context. Recent rulings limiting the delegation of adjudicative power to non-Article III tribunals have generated only uncertainty and a profusion of litigation. The reason for this is that the Court's Article III cases in this domain lack any foundational account of why bankruptcy judges implicate a constitutional problem. This Article identifies more precisely the Article III stakes in bankruptcy. Drawing on the well-tested creditors' bargain theory of bankruptcy, it then develops a tractable, economically sophisticated constraint on congressional delegations. This account of bankruptcy's necessary domain minimizes Article III and federalism harms while also enabling bankruptcy's core operations to continue unhindered. To illustrate its utility, the Article applies that test to a range of common bankruptcy disputes, demonstrating that most (if 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, judges have delegated important decisions within the bankruptcy process to non-judicial agents called commissioners.[1] Bankruptcy law today continues this English practice.[2] Non-Article III bankruptcy judges routinely handle many aspects of complex corporate, corporate group, and individual bankruptcies, and in the process must render many consequential rulings on state and federal law.[3] This adjudicative assignment, however, seems to contradict Article III of the Constitution. That provision purports to constrain delegations of "the judicial Power" to officials possessing the appointment, tenure, and salary accouterments of Article III judges.[4] Article III, section 1, has never been read literally to preclude *all* non-Article III tribunals.[5] But even a nonliteral reading of Article III compels the question whether the current bankruptcy system – and its broad delegation to such tribunals – transgresses constitutional bounds.[6]

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[1] For descriptions of the role of commissioners, see W.J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Perio*d, 69 TRANS. AM. PHIL. SOC. 1, 29 (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).

[2] Douglas G. Baird, *Blue-Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 16 (2012) [hereinafter Baird, *Blue-Collar*] ("The bankruptcy system drew on the fact that in eighteenth century England, the Chancellor was charged with administering bankruptcy matters.").

[3] *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 773-78 (2010) [hereinafter McKenzie, *Judicial Independence*] ("Bankruptcy cases frequently raise a broad range of legal issues beyond the intricacies of bankruptcy-specific doctrine.).

[4] U.S. 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.").

[5] *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts, and Article III*, 63 IND. L.J. 233, 235 (1990) ("[Literal readings of Article III have] utterly failed to withstand the test of time.").

[6] 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 U.S. 356, 367 (1990); *accord* Testa v. Katt, 330 U.S. 386, 389-90 (1947).

This tension has yielded a string of divided Supreme Court opinions on the appropriate bounds of a bankruptcy court's power.[7] In these rulings, the Supreme Court has employed formalist[8] doctrinal tools in order to draw up a "limiting principle"[9] that can restrain congressional dilution of federal courts' authority. These efforts, however, cannot be ranked a success. Formalist reasoning has yielded an entangling sequence of ambiguous rules and a thicket of doctrinal puzzles. In brief, the Court first frontally confronted bankruptcy's Article III problem in 1982. In *Northern Pipeline Construction v. Marathon Pipe Line,* a plurality of the Court invoked the "public rights" doctrine to exclude certain contract actions from the bankruptcy court's ambit.[10] Twenty years later, in *Stern v. Marshall*, 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."[11] *Stern* fostered a spate of new litigation – for example, over litigants' ability to consent to bankruptcy-court adjudi-

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[7] We refer here to the power 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 infra* note 255 (discussing this 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. *In re* Refco Inc., 461 B.R. 181, 184 (Bankr. S.D.N.Y. 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." (internal citations omitted)).

[8] "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." Larry Alexander, *"With Me, It's All Er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999).

[9] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982) (plurality opinion); *see also* Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3266 (1986) (Brennan, J., dissenting) (expressing concern of the risk of federal courts being placed on a "slippery slope" by Congress that would "seriously impair Article III's structural and individual protections").

[10] 458 U.S. 50, 67-68 (1982) (plurality opinion).

[11] 131 S. Ct. 2594, 2616-17 (2011) (quoting *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (per curiam)).

cation.[12] Last Term, the Court evaded that question, holding that Article III error could be cured by de novo review and entry of judgment by a district court.[13] In late 2014, the Court again accepted a certiorari petition raising the consent question.[14] That case also bids fair to open up a new front in the *Northern Pipeline*/*Stern* vein about bankruptcy courts' permissible adjudicatory power.[15] The current formalist regime, in short, has yet to generate institutional stability or litigation peace.

This Article proposes a new formalist rule to serve as a "limiting principle" to Congress's power to allocate adjudicative responsibilities to bankruptcy judges. We focus on the *Stern* Court's holding that a bankruptcy judge may resolve only matters where that resolution is "integral to the restructuring of the debtor-creditor relationship."[16] Surprisingly, no opinion of the Court explains how to determine whether or not resolving an issue is "integral" to the restructuring of creditor-debtor relations. 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 court's ambit.[17] Having rejected this legislative gloss, though, the Court has yet to supply any alternative rule. We fill this gap by offering a new normative account of the necessary scope of the bankruptcy procedure. Our account picks out a limited number of claims that must fall within a bankruptcy procedure if the latter is to fulfill its core mission. It thus yields clear limits on congressional authority to delegate away adjudicative authority and harmonizes with

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[12] Baird, *Blue-Collar*, *supra* note 2, at 20 ("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.").

[13] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014).

[14] Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted,* 134 S. Ct. 2901 (2014).

[15] *Id.* (accepting review in the same case of the question whether state-law questions entangled in a determination of the proper scope of a bankruptcy estate must be resolved by an Article III court).

[16] 131 S. Ct. at 2616-17 (quoting Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (per curiam)).

[17] *See* Troy McKenzie, *Getting to the Core of* Stern v. Marshall*: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23, 24 (2012) [hereinafter McKenzie, *Getting to the Core*]; *see also infra* text accompanying notes 84 to 85.

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.

The inspiration for our proposal is a widely accepted justification for bankruptcy called the creditor's bargain theory that was originally proposed by Thomas Jackson and Douglas Baird.[18] We invoke the creditors' bargain theory, more specifically, in order to explain the necessary metes and bounds of a bankruptcy, and not as a guide to specific substantive rules in bankruptcy. Although we detail this theory in Part III, we briefly set forth its nub here as a way of intimating how it can be used to identify, as a practical matter, clear boundaries to the 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.[19] Moreover, the mere existence of the creditors' claims may prevent the debtor from financing wealth maximizing projects that can benefit all creditors. To attract new capital for those projects, old claims would have to be voluntarily subordinated. But no single creditor has the

[18] The key works are THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986) [hereinafter Jackson, *Logic and Limits*]; *see also* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) [hereinafter Jackson, *Bankruptcy, Non-Bankruptcy*]; Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984); Thomas H. Jackson & 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 Scott deploy the creditors' bargain theory to generate guidance as to the *substance* of bankruptcy law—i.e., the proper content of the Bankruptcy Code. Our project is distinct: We rely upon the creditors' bargain theory to inform the necessary procedural scope of the bankruptcy—i.e., the class of claims to which the bankruptcy court's adjudicatory power must necessarily extend.

[19] For an explanation of the going-concern value and an exploration of its relevance in bankruptcy, see Douglas G. Baird & Robert K. Rasmussen, *Reply: Chapter 11 at Twilight*, 56 STAN. L. REV. 673 (2003).

right incentives to agree to that. And collectively the group has no power to deal with hold-outs.[20]

Thus, these creditors, each possessing a different interest in the debtor's assets and different information, face a common-pool problem.[21] At its heart, bankruptcy can be understood as a strictly procedural solution to that collective-action dilemma. To that end, it imitates the hypothetical bargain we expect that 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 as a *procedural* mechanism designed to maximize the net welfare of all parties by preventing impetuous waste, enabling coordination, and preserving going concern value. The necessary domain of 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 here to resolve bankruptcy's Article III problem.

An account of the bankruptcy judge's necessary power grounded in the creditors' bargain theory harmonizes with federalism and separation-of-powers concerns. For the creditors' bargain theory supports the longstanding principle that bankruptcy rules should depart from non-bankruptcy rules only if a specific bankruptcy justification demands it, and then provides a limited taxonomy of such justifications.[22] Bankruptcy aspires to preserve state-law entitlements and both state- and federal-law adjudicative processes outside bankruptcy. 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. This limitation on the power of the bankruptcy court is necessary to ensure that the specific operation of bankruptcy law does not cast a distorting shadow on the resolution of non-bankruptcy adjudicative processes. The preservation of a bankrupt's expected value in a period of dis-

[20] This phenomenon is commonly referred to as the "debt overhang" problem. *See infra* text accompanying note 221.

[21] Jackson, *Logic and Limits*, *supra* note 18, at 10-11.

[22] Jackson, *Bankruptcy, Non-Bankruptcy*, *supra* note 18, at 858; Baird & Jackson, *supra* note 18, at 101-02.

tress is accordingly appropriate solely when it minimizes destruction of expected value of the same firm in other states of the world.

The creditors' bargain theory, which underwrites this model of bankruptcy, is a theory that aims to minimize the distorting spillovers of bankruptcy system onto private ordering of contract and tort rights. As a correlative, it 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 to the bankruptcy judge's power using the creditors' bargain as a guide, therefore, is a way to minimize spillover effects onto state-court adjudication of state-law questions, and to ensure that when state law questions are at stake without a strong justification for a bankruptcy tribunals' involvement, an Article III judge is placed at the helm.[23]

That our proposed limiting principle aligns with the normative ambitions articulated by the Court—preserving individual liberty and limiting distortions of state law[24]—is a powerful factor in its favor. To date, the Court has not cogently explained how the *Northern Pipeline/Stern* line of cases serves these goals. The creditor's bargain theory, by contrast, brings the normative justifications for Article III limits into alignment with the specific decision rules that restrain Congress from delegating adjudication outside Article III.[25] An incidental benefit of our proposal is that, unlike all other doctrinal solutions, it takes seriously the particularized textual commitment to Congress of power to enact "necessary and proper" bank-

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[23] This core creditors' bargain account has been supplemented by scholarship identifying other socially inefficient dynamics that are "tightly linked" to creditor coordination problems. Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. CHI. L. REV. 1557, 1560-61 (2013) (describing liquidity problems as "tightly linked" to creditor coordination problems). The efficiency justification for individual debtors' discharge, by contrast, rests on separate grounds. *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1395 n.5 (1985) [hereinafter Jackson, *Fresh-Start Policy*]. These modifications and extensions do not alter the basic resolving power of the creditor's bargain theory as a heuristic for resolving the proper domain of non-Article III bankruptcy adjudication.

[24] On liberty, see *Stern v. Marshall*, 131 S. Ct. 2594, 2608-09 (2011) (invoking a threat to "liberty" as a warrant for the holding in that case). On the need to avoid distortions to state-created rights, see *id.* at 2617.

[25] U.S. CONST. art. I, §8, cl. 4.

ruptcy laws[26] insofar as it assigns Congress no "great substantive and independent power" over state-created rights that are not at risk of dissipation.[27] Finally, as we detail at length, it generates a clear, normatively limiting principle for adjudicatory delegations. These boundaries, as we demonstrate in Part IV, largely but not completely align with precedent.

Our account of what is integral to the debtor-creditor restructuring fits tightly with the Constitution's text, with the structural goals the Court has identified, and with its repeatedly expressed desire for an effectual limiting principle. Nevertheless, it necessarily competes with other strands of doctrine within the *Northern Pipeline*/*Stern* majority opinions, as well as the alternative approach proffered by dissenting Justices. For example, there is a strand in Separation of Powers doctrine that rejects formalism for a functionalist analysis of the consequences of institutional innovation.[28] Dissenting in *Stern* on functionalist grounds, Justice Breyer urged the Court in this vein to "determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates … Article III."[29] We do not, however, pursue the possibility of a functionalist solution here. A majority of the Court has firmly rejected a functionalist approach to bankruptcy's Article III problem. There is no reason to expect that majority to shift course. Rather, we assume that any solution to bankruptcy's Article III problem must sound in formalist tones. That said, our analysis suggests that the "integral to the debtor-creditor restructuring" test properly understood does not impose the costs that Justice Breyer

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[26] U.S. CONST. art. I, § 8, cls. 4, 18 (authorizing Congress "To…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 the Constitution in the Government of the United States").

[27] Nat'l Fed'n of Indep. Business (NFIB) v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

[28] 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). The Court has applied a functionalist analysis when dealing with federal administrative agencies that imposes a relatively weak constraint on adjudicative delegations. *See, e.g.,* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

[29] 131 S. Ct at 2625-26 (Breyer, J., dissenting).

identifies.[30] Absent the costs associated with formalism, the *Stern* dissenters may have some cause to reconsider their opposition to Article III formalism.

In addition—and more importantly for our analysis—the Court's Article III jurisprudence contains alternative formalist tests. Most importantly, the dispositive opinions in both *Northern Pipeline* and *Stern* drew 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 & Improvement Company*.[31] This public rights/private rights distinction has a longer pedigree than the "integral to the debtor/creditor relationship" test. It throws deep roots into American legal tradition.[32] Accordingly, we consider at length in Part II whether it provides an alternative source of constraint on Congress. We conclude 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 courts' power. Alternative doctrinal specifications that lower courts have drawn from *Stern* fare no better.

Competing doctrinal specifications may be irredeemably flawed, but 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 bankrupts under American law, for example, benefited individual merchants, not joint-stock companies.[33] Our interpretation of 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

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[30] *Id.* at 2629-30 (Breyer, J., dissenting) (expressing concern that the majority opinion would instigate "jurisdictional ping-ping between courts").

[31] 58 U.S. (18 How.) 272, 284-85 (1855).

[32] Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566-68 (2007) [hereinafter Nelson, *Adjudication*] (tracing history of the distinction).

[33] *See* Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19 (repealed 1803). Indeed, one of the reasons for its repeal was precisely that it benefited wealthy individual merchants such as Robert Morris. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 20 (1935).

elements of government. We offer, that is, a novel doctrinal specification that aims to maximize fidelity to a set of original aspirations and practices reflected in the constitutional text. The most salient example of this way of using doctrine is the Commerce Clause, where the Court has strived to identify limiting principles in order to prevent Congress's authority from becoming boundless.[34] 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 Chief Justice Roberts suggested in a recent case, that the proffered distinction "would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers."[35] The creditors' bargain account of the 'integral to the restructuring test,' we suggest, easily clears that hurdle to perform well the restraining function it is asked to play in relation to Congress.

The argument proceeds in the following steps. Part I provides exposition on the historical roots of the Article III problem in bankruptcy, and demonstrates that the current jurisprudence lacks a secure conceptual foundation. Part II explains why the pubic rights analytics must fail and then offers an alternative conceptual foundation. Part III then introduces the creditors' bargain interpretation of *Stern*, and defends that gloss as faithful to the constitutional text, structure, and the Court's articulated ambitions. Finally, Part IV applies that interpretation to several categories of legal claims commonly encountered in bankruptcy. Our analysis is largely consistent with precedent, but also provides guidance as to the Court's forthcoming consideration of consent to bankruptcy adjudication.[36]

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

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[34] *See, e.g.*, NFIB v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (Roberts, C.J.,) (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).

[35] *NFIB*, 132 S. Ct. at 2589 (Roberts, C.J.).

[36] Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted,* 134 S. Ct. 2901 (2014).

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 decision-makers called bankruptcy judges.[37] The text of the Constitution's bankruptcy clause, however, is silent as to adjudicator choice. The justification for using non-Article III adjudicators in bankruptcy emerges not from the Constitution's text, but rather from a background understandings about English legal practice that informed the Constitution's drafting and ratification.

English bankruptcy practice provided a backdrop against which debates on Congress's bankruptcy power unfolded.[38] On August 29, 1787, Charles Pinckney of South Carolina proposed a federal power to create "uniform laws upon the subject of bankruptcies," in the course of debate concerning the states' full faith and credit obligations.[39] The sole recorded debate on Pinckney's proposal concerns an objection, voiced by Roger Sherman of Connecticut and rebutted by Gouveneur Morris of Pennsylvania, to the effect that Congress might punish bankrupts with death.[40] Sherman's concern on first reading might seem at best speculative. The concern, though, comes into sharper focus once it is realized that the Eng-

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[37] *See* 28 U.S.C. § 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 under title 11").

[38] States also had bankruptcy laws prior to 1787. PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900 (1974) (detailing such laws on a state-by-state basis). But since it was the variance in those state rules that prompted the need for a distinct federal bankruptcy in the first instance, it is more difficult to infer constitutionally relevant understandings of bankruptcy from those regimes.

[39] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 546-47 (Ohio Univ. Press 1966); *see also* Kurt H. Nadelmann, *On the Origins of the Bankruptcy Clause*, 1 AM. J. LEG. HIST. 215, 220 (1957). States at the time of the Convention 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.

[40] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 489 (Max Farrand ed., 1966) (recording Morris's argument that Congress would not abuse its bankruptcy power in the fashion Sherman suggested).

lish law of bankruptcy permitted capital punishment for certain debtors.[41] Sherman's concern thus implies that the Constitution's reference to bankruptcy was understood as a term of art that took meaning from an English legal context familiar to the Framers.[42]

English law had regulated debtor-creditor relations from the 1260s onward.[43] The "first bankruptcy act" was enacted in 1542 under Henry VIII.[44] Enacted for the benefit of creditors, the law proved insufficient to deter fraudulent behavior and was superseded by Elizabethan legislation in 1570 that was to endure without substantial change for 150 years.[45] Under the Henrician dispensation, bankruptcy was handled by "specified great officials, one of whom was the lord chancellor," called commissioners.[46] These statutes nonetheless envisaged "severe penalties" for evasive or fraudulent bankrupts.[47] Subsequent parliaments "did not endow bank-

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[41] Nadelmann, *supra* note 39, at 217 n.9.

[42] *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 Blackstone contains an extensive discussion of the English bankruptcy statutes. W. BLACKSTONE, 2 *COMMENTARIES* at *471-88. On the use of background technical conceptions to inform constitutional interpretation, see Caleb 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").

[43] 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); *see generally* R.H. Helmholz, *Bankruptcy and Probate Jurisdiction Before 1571*, 48 MO. L. REV. 415, 416 (1983).

[44] Thomas Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 500 (1996).

[45] Cohen, *supra* note 43, at 156.

[46] Jones, *supra* note 1, at 10, 25 (explaining that the lord chancellor would appoint as commissioners "such wise and honest discreet persons as to him shall seem good"). 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).

[47] Cohen, *supra* note 43, at 157.

ruptcy commissioners with the attributes of a court."[48] Instead, a typical commission would include three barristers and four gentlemen or merchants.[49] Commissioners would exercise "substantial powers, originally somewhat akin to a combination of today's trustee and bankruptcy judge."[50] The notion that the bankruptcy process might be channeled though nonjudicial hands, in short, was built into the fabric of the institution before the Founding. Early constitutional 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,[51] whether the constitutional provision preempted state insolvency laws even in the absence of federal legislation,[52] and whether the operation of bankruptcy laws conflicted with the constitutional protections of individual property and contract rights.[53] Article III, by contrast, was not among the grounds for early constitutional complaint against the federal bankruptcy power.[54]

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.[55] Each contained an antecedent institution to today's

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[48] Jones, *supra* note 1, at 10.

[49] *Id.* at 26-27 (noting that commissioners had to "prove the debtor's status and make a declaration of bankruptcy"); *id.* at 29-30 (describing commissioners' powers).

[50] Tabb, *supra* note 42, at 8; 13 Eliz., ch. 7, § X (1570) (setting out those powers).

[51] *See* WARREN, *supra* note 33, at 24 ("[I]t was believed by most statesmen [in the 1810s] that Congress had no power to pass a bankrupt law except for traders."). *But cf.* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1113, at 52-53 (1851) (offering a broad view of bankruptcy jurisdiction).

[52] *See* Sturges v. Crowninshield, 4 U.S. (17 Wheat) 122, 124-31 (1819) (finding no implied preemption merely by dint of the bankruptcy clause).

[53] *Id.* at 131-24 (concluding that New York's discharge provisions violated Article I, section 10 of the Constitution); *see also* Odgen v Saunders, 25 U.S. (12 Wheat.) 213 (1827) (holding that states could not discharge the debts due a citizen of another state).

[54] *See* Plank, *supra* note 44, at 533-40 (documenting constitutional challenges to nineteenth century bankruptcy statutes).

[55] Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19 (repealed 1803); Act of Mar. 2, 1867, ch. 9, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878). All

bankruptcy judges. Under the 1800 statute, a district court would appoint commissioners, who would supervise the bankruptcy process while exercising powers similar to their English counterparts.[56] Under the 1841 statute, in contrast, the district court would appoint assignees, who would operate akin to the way trustees now behave, managing liquidations and distributions in lieu of commissioners.[57] And under the 1867 statute, district courts appointed "registers in bankruptcy, to assist the judge of the district court in the performance of his duties."[58] These registers were the most direct "predecessors of the twentieth century … bankruptcy judge."[59]

Only in 1898 did Congress finally settle on a stable statutory bankruptcy regime.[60] Once more, the Act designated federal district courts as "courts in bankruptcy," but allocated the body of adjudicative and administrative work to "referees in bankruptcy" who were appointed by district courts.[61] Opposition to the creation of a new federal bureaucracy led to referees being organized through a fee-based system.[62] Referees would be renamed bankruptcy judges in 1973.[63] The 1898 statute limited referees' authority so as to respond to a perceived fault in the 1867 act, which had been criticized for subjecting litigants to an inconvenient federal, rather

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told, these statutes endued for sixteen years. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 25 (2001).

[56] Act of Apr. 4, 1800, ch. 19, § 2, 2 Stat. at 21-22.

[57] Act of Mar. 2, 1867, Ch. 9, § 3, 5 Stat. at 443.

[58] Act of Mar. 2, 1867, Ch. 176, 1§ 3, 14 Stat. at 518.

[59] Tabb, *supra* note 42, at 21.

[60] Ch. 541, 30 Stat. 544, *amended by* Act of June 22, 1938, (Chandler Act), ch. 575, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. During the 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 & Robert K. Rasmussen, Boyd*'s Legacy and Blackstone's Ghost*, 1999 SUP. CT. REV. 393, 397 (1999) (tracing the "modern law of corporate reorganizations" back to an 1886 railroad receivership case).

[61] Ch. 541, § 2, 30 Stat. at 545.

[62] SKEEL, *supra* note 55, at 41.

[63] Tabb, *supra* note 42, at 25.

than state, forum.[64] To that end, the 1898 Act responded in a number of ways. First, it created concurrent jurisdiction in state courts.[65] Second, it drew a distinction between summary and plenary forms of jurisdiction. Summary jurisdiction comprised proceedings involving administration of the bankruptcy estate and property in the bankruptcy court's possession, including all creditors' claims against the estate. Plenary jurisdiction comprised disputes between the bankruptcy trustee or receiver and third parties concerning property not in the possession of the bankruptcy court.[66] The district court could not exercise summary jurisdiction in the absence of an alternative, non-bankruptcy ground.[67] The Act anticipated that referees would exercise much the same jurisdiction as district courts had under the bankruptcy act.[68] In 1920, the Court construed the language of the 1898 Act to mean that referees' authority reached matters within summary, but not plenary, jurisdiction.[69]

Throughout the eighty years of this Act's existence, the statutory distinction between summary and plenary jurisdiction remained "a point of

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[64] 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 disputes in federal bankruptcy debates. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93.137, Pt. 1, at 91 (1973), *reprinted in* COLLIER ON BANKRUPTCY (Lawrence P. King et al. eds., 16th ed. 2011).

[65] Ch. 541, § 23, 30 Stat. at 552-53. The 1898 Act also allowed debtors to claim (sometimes generous) state exemptions, a provision that was unsuccessfully challenged in a failure of uniformity. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188-90 (1902).

[66] *See* Tabb, *supra* note 42, at 25 n.167; Brubaker, *supra* note 64, at 127-28. For judicial discussions of the distinction, see Katchem v. Landy, 383 U.S. 323, 329-30 (1966) (noting that "bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession"); Taubier-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 430-34 (1924); Mueller v. Nugent, 184 U.S. 1, 13 (1905)

[67] Ch. 541, § 23b, 30 Stat. 552-53.

[68] Ch. 541, § 22, 30 Stat. at 552; *id.* § 38, 30 Stat. at 555; *see also* White v. Schloeb, 178 U.S. 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 ... exercises much of the judicial authority of that court").

[69] Wedhorn v. Levy, 253 U.S. 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 in respect to matters falling within summary jurisdiction. MacDonald v. Plymouth C'ty Trust Co., 286 U.S. 263, 266-68 (1932).

enormous contention" that produced "frequent" litigation.[70] In time, the Court was to recognize expressly that the line had largely become "a matter to be determined by th[e] Court," given the absence "congressional determination."[71] And only on occasion did Congress did step in. One example of such legislative involvement focused on the treatment of fraudulent transfers, which had fallen with bankruptcy's scope since the Henrician legislation.[72] The 1898 Act seemed to allow avoidance actions against third parties to be filed in federal court.[73] After the Supreme Court narrowly construed summary jurisdiction to reach only prebankruptcy fraudulent conveyance actions,[74] however, Congress amended the statute to permit trustee suits to avoid liens and recover preferential and fraudulent transfers.[75] The summary/plenary distinction, in short, never generated predictability, but remained a work in progress with occasional contributions from both the Court and Congress.

B. Constitutional Constraints on non-Article III Bankruptcy Adjudication

Eighty years' litigation under the 1898 Bankruptcy Act produced no Article III challenges to referees' (or, later, bankruptcy judges') adjudicatory authority. Subsequent congressional iterations of federal bankruptcy, 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 has enunciated formal rules to constrain such congressional delegations.

The successor statute to the 1898 Act, the 1978 Bankruptcy Reform Act, 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.[76] The new bankruptcy judges were appointed by

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[70] Tabb, *supra* note 42, at 25.

[71] Katchem v. Landy, 383 U.S. 323, 328 (1966).

[72] Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 422 (1947).

[73] Brubaker, *supra* note 64, at 128.

[74] Bardes v. First Nat'l Bank, 178 U.S. 524, 539 (1900).

[75] Brubaker, *supra* note 64, at 128 n.34.

[76] Pub. L. No. 95-598, §§ 201(a), 241(a) 92 Stat. 2549, 2657, 2668 (1978).

the president, and removable only by circuit judicial councils.[77] Four years later, the Supreme Court invalidated that scheme as a violation of Article III in *Northern Pipeline Construction v. Marathon Pipe Line*.[78] Justice Brennan's plurality opinion in that case spun a straight line of reasoning from constitutional first principles to a decision rule for limiting bankruptcy adjudication.[79] The first principle was that the Constitution's allocation of the "judicial Power" to Article III courts alone, explained Justice Brennan, was "jealously guarded" to maintain both interbranch "checks and balances" and judicial impartiality.[80] In consequence, he explained, exceptions to the strong default rule of Article III adjudication were permissible solely in three "historically and constitutionally exceptional" pockets: the use of territorial courts, military courts, and the adjudication of "public rights" that concern suits between the government and its citizens.[81] Bankruptcy did not fall into the third exception since it did not concern a set of questions that "may be, and at times has been, committed exclusively to executive officers."[82]

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 Justice 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 rights," and implied that the former, but not the latter, could be assigned to a non-Article III adjudicator.[83]

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[77] *Id.* § 201(a), 92 Stat. at 2657.

[78] 458 U.S. 50 (1982) (plurality opinion).

[79] Justices Rehnquist and O'Connor filed a brief concurrence in the judgment insisting on a minimalist approach and suggesting that claims "which 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, J., concurring in the judgment).

[80] *Id.* at 57-60 (Brennan J., plurality op.).

[81] *Id.* at 63-68 (Brennan J., plurality op.).

[82] *Id.* at 69 (Brennan J., plurality op.) (quoting *Ex Part Bakelite Corp.*, 279 U.S. 438, 458 (1929); italics omitted).

[83] *Id.* at 71 (Brennan J., plurality op.).

Responding to *Northern Pipeline*, Congress in the Bankruptcy Amendments and Federal Judgment Act ("BAFJA") of 1984 picked up on *Northern Pipeline*'s reference to "core" matters. It directed that 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.[84] That list reflected Congress's effort at applying the "extremely opaque" constitutional distinction offered in *Northern Pipeline*.[85]

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.[86] In a formalist opinion by Chief Justice Roberts, the Court in *Stern v. Marshall* found a state-law tort "counterclaim[] by the estate against persons filing claims against the estate"[87] to be beyond the permissible scope of adjudicatory delegation under Article III.[88] The *Stern* Court, by contrast, cited with approval two earlier cases in which voidable preference actions had been found to be within the scope of a bankruptcy referee's powers to adjudicate provided that the preferred creditor had already filed a proof of claim.[89]

Stern's logic tracks *Northern Pipeline*'s formalist structure, but elaborates on both the constitutional first principles at stake and also the specific application of those rules to the bankruptcy context. First, in addition to

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84 Bankruptcy Amendments and Federal Judgeship Act ("BAFJA") of 1984, Pub. L. No. 98-353, 157(b)(1) & (c)(1), 98 Stat. 333; *id.* § 157(b)(2) (listing sixteen "core" matters).

85 Brubaker, *supra* note 64, at 135; *see also* Susan Block-Lieb, *What Congress Had to Say: Legislative History As A Rehearsal of Congressional Response to* Stern v. Marshall, 86 AM. BANKR. L.J. 55, 59, 112-14 (2012) (noting 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").

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

87 28 U.S.C. 157(b)(2)(C).

88 *Stern*, 131 S. Ct. at 2615 ("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").

89 *Id.* at 2616-17 (discussing *Katchem v. Landy*, 383 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990) (per curiam)).

revisiting Brennan's libertarian account of the separation of powers, Chief Justice Roberts gestured at a federalism concern by noting the possibility that bankruptcy judges would have to decide novel questions of state law.[90] Second, the *Stern* majority again relied on the private rights/public rights distinction.[91] But echoing *Northern Pipeline*, it also suggested another distinction applicable only within bankruptcy: 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.[92] In other parts of the opinion, the Court employs again 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."[93] 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.[94]

C. The Current State of Article III in Bankruptcy

Stern fostered uncertainty about other elements of "core" adjudicatory power under BAFJA[95] and about the trajectory of cases that once fell within "core" statutory adjudicatory bounds but no longer fall within constitutional boundaries.[96] It also left unanswered questions about the substantive values animating Article III jurisprudence. As a result, lower courts are not clear what justifies the formalist decision rule that the *Stern* Court has lighted upon as a means to realize those values. They are uncertain how that rule should be extended beyond the facts of *Stern*.

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[90] For the libertarian element of *Stern*, see *id.* 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"). 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).

[91] *Id.* at 2611-13 (discussing the public rights precedent).

[92] *Id.* at 2611, 2628 (quoting *Langenkamp,* U.S. at 44).

[93] *Stern*, 131 S. Ct. at 2618.

[94] See *infra* text accompanying notes 103 to 105.

[95] *See* Brubaker, *supra* note 64, at 147; Brooke Gotberg, *Preferences are Public Rights*, 2013 WISC. L. REV. 1355, 1357 n.8 (citing cases).

[96] *See generally* Tyson A. Crist, Stern v. Marshall*: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627 (2012) (canvassing immediate lower-court responses to *Stern*).

1. Doctrinal Uncertainty after Stern *in the Lower Courts*

As one bankruptcy judge drily 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."[97] The result is uncertainty that is anathema to the constraining function of formalist rule-making.[98] Uncertainty arises in the first place because there are "several inconsistent" rules available to lower courts seeking to apply *Stern*.[99] In addition to focusing on the "stems from" language, different lower courts have stressed the presence of state-law issues as a trigger for an Article III problem,[100] or alternatively looked for some sort of functional nexus to the bankruptcy at bar,[101] or some sort of theoretical connection between bankruptcy and a given claim[102] to vindicate the bankruptcy judge's power. All of these tests draw on different 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 upon whether an action "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[103] The Seventh Cir-

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[97] Manning v. Methodist Hosps., Inc. (*In re* Merrillville Surgery Ctr., LLC), 474 B.R. 618, 620 (Bankr. N.D. Ind. 2012).

[98] *Cf.* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638-39 (1999) (noting that formalism strives to "constrai[n] the discretion of judges in deciding cases").

[99] Jonathan C. Lipson & Jennifer L. Vanadermeuse, Stern*, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WISC. L. REV. 1161, 1189.

[100] *See, e.g.,* Waldman v. Stone, 698 F.3d 910, 919 (6th Cir. 2012) (stating that Article III concerns attach "when a debtor pleads an action arising only under state-law").

[101] *See, e.g.,* Pulaski v. Dakota Fin., LLC (*In re* Pulaski), 475 B.R. 681, 688 (Bankr. W.D. Wis. 2012) ("Because the defendant seeks to have the claim treated as a secured claim and paid through the debtors' plan, the issues raised by the debtors are now 'integral to the restructuring of the debtor-creditor relationship.'" (citing Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906, 914 (7th Cir. 2011))).

[102] *See, e.g., In re* CCI Funding I, LLC, 2012 WL 3421173, at *6 (Bankr. D. Colo. Aug. 15, 2012) (inquiring, inter alia, whether the action "stems from" the bankruptcy).

[103] Stern v. Marshall, 131 S. Ct. 2594, 2618 (2011).

cuit Court of Appeals, in addition to many district courts, have homed in upon this phrase.[104] 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.[105]

Even aside from whether the *Stern* Court intended it to be a talismanic *ratio decidendi*, the "stems from" language on close analysis turns out to be no test at all. It is at war with earlier bankruptcy precedent, inconsistent with *Stern* itself, and incapable of generating stable limits on non-Article III adjudication. Extended consideration of the "stems from " test is therefore warranted here as a way of illustrating the uncertainty and confusion sowed by *Stern* in the lower courts.

The "stems from" test 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 the balance of the Court's constitutional jurisprudence on bankruptcy. In an earlier ruling, 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.[106] 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.[107] The "stems from" test, on the other hand, generates a different outcome.

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[104] *See* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 765 (7th Cir. 2013) (focusing on the "stems from" language as a test for adjudicatory power); *In re* McCrory, 10-36998, 2011 WL 4005455 (Bankr. N.D. Ohio Sept. 8, 2011) ("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 B.R. 841, 851 (Bankr. S.D.N.Y. 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").

[105] *In re* Se. Materials, Inc., 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012).

[106] Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 35 (1989).

[107] *Compare* Douglas A. Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 1989 SUP. CT. REV. 261, 280-81 ("[T]he Court did not rule that conducting a jury

Nor does the "stems from" test accord with the current treatment of fraudulent transfers. The present substantive regime for such claims was established in the (now canonical) 1931 Supreme Court opinion of *Moore v. Bay*, which holds that a transfer invalid against one creditor is invalid against all in bankruptcy.[108] 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 which that phrase is found, the Court was comparing the tort claims in *Stern* 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.'"[109] This distinction, which echoes an in rem conception of bankruptcy, is hard to square with a "stems from" test.[110] Indeed, the distinction is hard to understand even on its own terms. Because many claims that stem from the bankruptcy do nothing more than augment the estate, the distinction has little resolving power.

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 the bankruptcy court's adjudicatory power.[111] In the absence of a bankruptcy filing, preference actions do not exist. They are uniquely creatures of the substantive federal law contained 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 con-

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trial is itself an exercise of the judicial power"), *with* Gotberg, *supra* note 95, at 1358-59 (suggesting that the holding of *Granfinanciera* has Article III implications).

[108] *Moore v. Bay*, 285 U.S. 4, 5 (1931) ("[C]laims for which want of record or 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.").

[109] Stern v. Marshall, 131 S. Ct. 2594, 2616 (2011) (quoting *Granfinanciera*, 492 U.S. at 56).

[110] For extended critical examination of the use of "in rem" framing, *see infra* text accompanying notes 254 to 255.

[111] *Stern*, 131 S. Ct. at 2616-17.

tract is voided because it prefers one creditor over the others in anticipation of bankruptcy.[112] 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.[113] Although it is possible for a doctrinal test to repudiate by implication earlier precedent, 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 uses the phrase to mean simply but-for causation.[114] But, as judges and scholars have long recognized in the tort-law context, to rely upon but-for causation alone is to abandon any effort at a limiting principle.[115] To rely on a but-for test to determine the necessary linkage between bankruptcy and a claim is to invite long and unpredictable chains of reasoning. No less than in the tort context, the logic of but-for causation cannot supply a limiting principle for the operation of bankruptcy courts. We think it unlikely, however, that the *Stern* Court mean 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

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[112] *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.").

[113] There are other problems with excluding preference actions from the power of the court, which we discuss below. See *infra* text accompanying notes 258 to 264. Namely, the Court's assumption that such actions do not have a role in determining claims against the estate ignores 11 U.S.C. § 502(d)&(h) (providing 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).

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

[115] Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry., 179 N.W. 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); *see also* DANIEL B. DOBBS, THE LAW OF TORTS 415 (2000).

wrenched from context, without accounting for the aims or tenor of the balance of the overall opinion, we think, is to disregard the clear intent of the *Stern* Court.

Lower courts' construal of *Stern*, 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 hardly likely to prove enduring.

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 at the high court. In *Executive Benefits Insurance Agency v. Arkison*, a unanimous Court construed the Bankruptcy Code to allow bankruptcy judges to enter proposed findings of fact and conclusions of law.[116] The unanimous ruling in *Arkison*, however, belies the depth of discord that persists after *Stern*. Disagreement still obtains, for example, as to whether fraudulent conveyance actions can be adjudicated to finality by bankruptcy judges.[117] Other courts have flagged the question of how *Stern* affects cases involving a mix of core and non-core claims.[118] *Stern* may also have implications for substantive consolidation, where "the liabilities and assets of the various entities are put into the same pot, and the assets are distributed ratably among the general creditors."[119] *Arkison* does nothing to settle these difficult questions.

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[116] 134 S. Ct. 2165, 2170 (2014).

[117] *Compare In re* Heller Ehrman LLP, 464 B.R. 348, 350 (N.D. Cal. 2011) (holding that fraudulent transfers claims cannot be adjudicated with finality by a bankruptcy judge); Rosenberg v. Bookstein, 479 B.R. 584, 588 (D. Nev. 2012) (same), *with* Andrews v. RBL, L.L.C. (*In re* Vista Bella, Inc.), Adv. No. 12-00060, 2012 WL 3778956, at *4 (Bankr. S.D. Ala. Aug. 30, 2012); *In re* Appalachian Fuels, LLC, 472 B.R. 731, 739 (E.D. Ky. 2012) (finding fraudulent conveyance claims within bankruptcy court's adjudicatory power); *In re* Safety Harbor Resort & Spa, 456 B.R. 703 (Bankr. M.D. Fla. 2011) (same). The one Circuit to weigh in has found fraudulent conveyance claims to be within the bankruptcy court's remit. Onkyo Eur. Elecs. GMBH v. Global Technovations, Inc. (In re Global Technovations, Inc.), 694 F.3d 705, 722 (6th Cir. 2012).

[118] *In re* Appleseed's Intermediate Holdings, LLC, BR 11-10160, 2011 WL 6293251 (D. Del. Dec. 15, 2011).

[119] Douglas G. Baird, *Substantive Consolidation Today*, 47 B.C. L. REV. 5, 6 (2005).

Mere months after *Arkison* was handed down, the Court granted a second post-*Stern* certiorari on the question whether litigants can consent to bankruptcy judges' adjudication of a claim that otherwise requires Article III review in the wake of a circuit split arising on that issue.[120] In the same petition, moreover, the Court also granted review on the question whether a bankruptcy court's adjudicatory power can extend to a question of whether property belongs to the bankruptcy estate if the dispute involves state property law issues.[121] An answer limiting the power of the bankruptcy court based on the presence of a state law issue would raise the possibility of a far larger category of legal questions pertaining to the size of the estate falling outside the purview of the bankruptcy court.

D. The Missing Constitutional First Principles

The depth of discord engendered by *Stern*'s rejection of BAFJA's core/non-core distinction is not merely a result of the opacity of the Court's decisional rule. The Supreme Court routinely employs open-textured standards as decision rules in constitutional matters.[122] The fact that a constitutional principle is distilled into a standard rather than a rule, need not entail confusion or incoherence.[123] The formalist rules offered by *Northern Pipeline* and *Stern*, however, are ambiguous because

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[120] *Compare* Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency), 702 F.3d 553, 572-73 (9th Cir. 2012) (holding that "Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties' consent") *aff'd on other grounds* 134 S. Ct. 2165 (2014), *with* Waldman v. Stone, 698 F.3d 910, 921 (6th Cir. 2012) (holding that the bankruptcy courts entry of final judgment on a state law claim was in violation of Article III, regardless of agreement between the parties on the bankruptcy court's ability to enter a final judgment); *accord* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 771-72 (7th Cir. 2013), *cert. granted,* 134 S. Ct. 2901 (2014). In a subsequent Seventh Circuit opinion, Judge Easterbrook has pointed out that the facts in Sharif raise the issue of forfeiture, rather than waiver, i.e., "a belated objection rather than a unanimous consent." Peterson v. Somers Dublin Ltd., 729 F.3d 741, 747 (7th Cir. 2013).

[121] Pet'n for Cert. in *Wellness Intern. Network, Ltd. v. Sharif*, 727 F.3d 751, 771-72 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901, at *4 (2014).

[122] For example, the recent reinvigoration of substantive constraints on conditional spending programs announced in another opinion by Chief Justice Roberts employs a standard rather than a rule. *See* NFIB. v. Sebelius, 132 S. Ct. 2566, 2604-07 (2012).

[123] *See* 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).

the Court has not explained their justification. Those rules were not compelled mechanically by the text.[124] Instead, both the *Stern* and the *Northern Pipeline* Courts identified structural principles embedded in the Constitution, and then sought to craft a rule of decision that honored faithfully those principles.[125] 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.

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 play a checking function, promoting liberty and limiting "abuses" of governmental power.[126] In *Stern*, the Court also gestured toward a federalism concern, by noting with apparent concern the possibility that bankruptcy judges would be called upon to decide questions of state law.[127] Bankruptcy legislation has long raised federalism concerns, so their return here should perhaps not be surprising.[128] 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. As a consequence, 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.

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[124] Such an argument has been derived from the Vesting Clause of Article III. *See* Steven G. Calabresi & 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 of Article III 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* not *Stern* offer extensive textual arguments of this kind. Instead, they invoke general structural principles that are infused with particular normative concerns.

[125] 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").

[126] Stern v. Marshall, 131 S. Ct. 2594, 2608-09 (2011); *accord* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-60 (1982) (plurality opinion).

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

[128] *See supra* notes 51 to 54.

Any separation-of-powers account of *Northern Pipeline* and *Stern* must reckon first of all 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.[129] Exercise of any enumerated power, moreover, lies within Congress's untrammeled discretion. As the sporadic early history of federal bankruptcy demonstrates, it is well within Congress's discretion not to create a federal bankruptcy system.[130] Consistent with this discretion, federal bankruptcy was the exception, not the rule, during the Republic's first century.[131] In the absence of a federal bankruptcy system, the sole Article III involvement in debtor-creditor disputes would arise through Supreme Court review of state supreme-court judgments. Such review, however, is categorically unavailable if the sole error identified in a state supreme-court judgment concerns state law.[132] 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.[133] 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 in which 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 the separation of powers" in this distinct fashion.[134]

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[129] *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1620 (1990) (summarizing canonical view of "congressional prerogative to create lower federal courts.")

[130] Indeed, Congress might have elected other instruments to resolve the conflict of laws problem that initially motivated inclusion of the bankruptcy power. For example, Congress might use its authority under the Full Faith and Credit Clause to enact a statute that regulated the interjurisdictional effects of state bankruptcy laws. See U.S. CONST. art. IV, § 1.

[131] *See supra* text accompanying note 60.

[132] *See* Murdock v. City of Memphis, 87 U.S. 590 (1874)

[133] 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).

[134] Stern v. Marshall, 131 S. Ct. 2594, 2615 (2011).

Perhaps, though, this misunderstands the nub of the Article III concern in *Stern* and *Northern Pipeline*. The "greater-includes-the-lesser" argument sketched above might simply "not work."[135] 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 between the three branches is 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,[136] so too Congress can enact a bankruptcy system but cannot assign certain elements of that system outside Article III. 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, however, 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.[137]

Stern alludes to one possible explanation when it conjures the risk of impermissible sharing of functions between branches.[138] Similarly, *Northern Pipeline* articulated a concern about impermissible "encroachment or aggrandizement of one branch at the expense of the other."[139] This is the

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[135] Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 212-13. 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 institutional or an entitlement that is 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. – (forthcoming 2014).

[136] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[137] *See* Aziz Z. Huq, *Libertarian Separation of Powers*, 8 NYU J.L. & LIBERTY– (forthcoming 2014) (developing skepticism about the necessary connection between functional separation different elements of governmental power and the promotion of liberty).

[138] *Stern*, 131 S. Ct. at 2608.

[139] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*). The concern with self-

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. Aggrandizement undermines the possibility of a branch being a check or a counterbalance on the others. Further, aggrandizement provides analytic traction even on the assumption 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 fact of policy execution itself.

The aggrandizement concern, to be sure, might have had traction in regard to the Bankruptcy Act of 1978 invalidated in *Northern Pipeline*, which provided for bankruptcy judges nominated by the president and confirmed by the Senate.[140] By the time *Stern* was decided, however, bankruptcy judges were appointed by the courts of appeals for the circuits in which their districts are located.[141] The *Stern* Court flagged this difference, but found no significance in it.[142] 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 delegee in question is a political branch actor, as opposed to an appointee of the Article III judiciary. But the opposite is currently the case.[143]

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aggrandizement is often invoked to resist institutional innovation in the separation-of-powers context. *See, e.g.*, NLRB. v. Noel Canning, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., 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 U.S. 361, 382 (1989); Morrison v. Olson, 487 U.S. 654, 694 (1988).

[140] 28 U.S.C. §§ 152, 153(a) (1976 ed., Supp. IV).

[141] 28 U.S.C. § 152(a)(1).

[142] Stern v. Marshall, 131 S. Ct. 2594, 2619 (2011) (noting that "it 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, *Getting to the Core*, *supra* note 17, at 35.

[143] *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 & Kathryn A. Watts, *The Structural Ex-*

Article III's bailiwick is vigorously defended in the bankruptcy context, where no adjudicative power is transferred to the political branches, and only weakly enforced in the administrative agency context, where another branch (the executive) gains commensurate to the judiciary's loss.[144] The anti-aggrandizement principle, in short, cannot serve as a constitutional first principle to explain *Stern*, even if it could have played that role in *Northern Pipeline*.

Perhaps, in the alternative, the shadow over liberty occurs on a more retail basis. The *Stern* Court thus alluded to the comparative expertise of Article III judges in resolving state-law issues.[145] It also conjured the specter of "judicial abuses" that result from the absence of tenure and salary protections.[146] 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 default locus for the adjudication of state-law claims is *state* court, not a federal district court.[147] Absent bankruptcy jurisdiction, an individual bankruptcy implicating less than $75,000 would find no berth under the district courts' diversity jurisdiction.[148] At least 15 percent of Chapter 7 cases in which a trustee was appointed between 2000 and 2011 would have fallen outside diversity jurisdiction for this reason.[149] (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. The latter, however, often lack tenure and salary protections—and worse, face elections largely fund-

ceptionalism of Bankruptcy Administration, 60 UCLA L. REV. 384, 417-18, 452-60 (2012) (proposing creation of an bankruptcy agency).

[144] *See* cases cited in *supra* note 139.

[145] *Stern*, 131 S. Ct. at 2615.

[146] *Id.* at 2609.

[147] *Accord* Erwin Chemerinsky, *Formalism without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 189 (2012).

[148] 28 U.S.C. § 1332 (imposing amount-in-controversy requirement as well as diversity requirements).

[149] This is nationwide data from the Executive Office for U.S. Trustees from between 2001 and 2011, and excludes North Carolina and Alabama. Ed Flynn, *Chapter 7 Asset Cases and Trustee Compensation*, AM. BANKR. INST. J., June 2014, at 48.

ed by a small pool of big donors[150]—in ways that render them on par or inferior to bankruptcy judges. Even in respect to Article III courts, moreover, one commentator has argued that post-*Erie* bankruptcy judges may do better than their counterparts in the district courts in resolving state-law claims because they have greater familiarity with state property and contract law.[151] *Stern*'s federalism-based concern about distortions in state law, therefore, has yet to receive an adequate theoretical justification.[152]

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 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"[153] cases that would swamp district-court dockets.[154] 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 quali-

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150 For nationwide data on the use of judicial elections, and the rates of campaign contributions, see Adam Skaggs, Maria da Silva, Linda Casey & Charles Hall, *New Politics of Judicial Elections, 2009-10,* BRENNAN CENTER FOR JUSTICE (Charles Hall, ed. 2011), http://brennan.3cdn.net/23b60118bc49d599bd_ 35m6yyon3.pdf.

151 McKenzie, *Getting to the Core*, *supra* note 17, at 43-44. 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, e.g.,* Arizonans for Official English v. Arizona, 520 U.S. 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' " (brackets in original)).

152 We offer such a justification in Part III *infra*.

153 Felix Frankfurter & 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).

154 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* ICC v. Brimson, 154 U.S. 447, 456-57 (1893) (invalidating jurisdiction that required courts to engage in "administrative" rather than judicial functions).

ty adjudication on a per capita basis. No less than in the late nineteenth century, federal dockets today are often described as overloaded.[155] Recent empirical work, moreover, identifies a decline in the quality of judicial attention when dockets become overloaded.[156] 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 solely because of ambiguity in the verbal formulation of doctrine. Courts employ open-textured standards routinely. Rather, the problem lies 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 merely to gesture toward vague threats of liberty lost and tyranny courted: Rarely is there an obvious and mechanical connection between the discrete elements of constitutional structure design and such outcomes.[157] 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 that 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 Court has invoked and the actual rules of decision employed in the cases. Many accounts of the jurisprudence begin with the distinction between public and private rights. We therefore begin by ex-

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155 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 & n.1, 403 & nn.2-42 (2013) (collecting statements by judges and numerical evidence of increasing caseload pressures).

156 Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1115 (2011) (finding that "when flooded by the [administrative] agency cases, ... circuit courts began to reverse district court rulings less often--in the civil cases"); *see also* Eric Helland & Jonathan Klick, *The Effect of Judicial Expediency on Attorney Fees in Class Actions*, 36 J. LEG. STUD. 171 (2007) (fining an effort aversion among federal judges).

157 *See* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013); Huq, *Libertarian Separation of Powers*, *supra* note 137, at --,

plaining 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."[158] Many scholarly accounts have focused on this language,[159] notwithstanding the fact that the *Stern* Court explicitly declined to analyze the precise relationship between the public rights doctrine and bankruptcy.[160] Undertaking the inquiry that the *Stern* Court bracketed, however, suggests that the historical division of claims into private rights and public rights matters cannot generate a workable Article III jurisprudence *for bankruptcy*—a domain in which the private/public rights distinction proves hopelessly incoherent.

The distinction between public and private rights derives from the tax administration context[161] and in its modern formulation was initially employed in a Seventh Amendment challenge to agency adjudication.[162] It migrated from the context of administrative regulation to bankruptcy in *Northern Pipeline Construction v. Marathon Pipe Line*.[163] The *Northern*

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[158] Stern v. Marshall, 131 S. Ct. 2594,2609, (2011) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)).

[159] *See, e.g.,* Gotberg, *supra* note 95, at 1360; *see also* Lipson & Vandermeuse, supra note 99, at 1166; Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1594 n.143 (2013).

[160] *Stern*, 131 S. Ct. at 2614 n.7 (declining to consider whether restructuring the debtor-creditor relationship in bankruptcy "'is in fact a public right'… [b]ecause neither party asks us to reconsider the public rights framework for bankruptcy" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 n.11 (1989)).

[161] Murray's Lessee v. Hoboken Land & Improvement Co., 58 U.S. (18 How.) 272, 284-85 (1855).

[162] Atlas Roofing Co. v. OSHA, 430 U.S. 442, 449-57 (1977) (using the concept of public rights to elucidate the difference between law and equity); *see also Granfinanciera* , 492 U.S. at 35 (reiterating public rights frame 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. Baird, *Seventh Amendment*, *supra* note 107, at 267.

[163] 458 U.S. 50, 64-68 (1982) (plurality opinion).

Pipeline plurality calibrated the mandatory boundaries of Article III by identifying "historically and constitutionally ... exceptional" domains in which no federal court involvement was required.[164] Public rights, on this logic, is a residual category that supplemented specific congressional powers respecting the territories and the military.[165] 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 context. The use of non-judicial 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.[166] Moreover, given the express invocation of English bankruptcy statutes as background context during the Philadelphia convention,[167] the practice of using non-judicial agents to resolve bankruptcy 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 in light of its origins in early administrative contexts. It cannot as a result 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.[168] The key teaching of early Republican material is simple: "when the government wanted to act authoritatively against core private rights that had vested in a particular individual, courts and commentators agreed that an exercise of 'judicial' power was

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[164] *Id.* at 64; *see also id.* at 84 n.36 (suggesting that "exceptional constitutional grants to Congress" to create non-Article III courts may be "explicit in the language of the Constitution," but not asking whether the bankruptcy clause might be one of these "explicit" grants).

[165] *Id.* at 64-66.

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

[167] *See supra* text accompanying notes 39 to 41.

[168] Nelson, *Adjudication, supra* note 32, at 567-68.

usually indispensible."[169] 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 "[p]roperty interests … created and defined by state law."[170] Private rights are thus "in the balance"[171] not only for the contract action at issue in *Northern Pipeline*, the fraudulent conveyance claims in *Arkison*, and the tort claim in *Stern*, but in the overwhelming majority of bankruptcy adjudications.[172] 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. Assessed against the state of the world prior to 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, moreover, generates no principled way of distinguishing between these two benchmarks. Rather, its overinclusiveness yields an all-or-nothing quality in the bankruptcy context 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.

Bankruptcy's proper goal is, indeed, best understood as one of limiting certain private rights to protect others. This lays bare the incoherence of the public-rights vs 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

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[169] *Id.* at 569.

[170] Butner v. United States, 440 U.S. 54-55 (1979); *accord* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982) (plurality opinion) (noting the presence of state-law issues in the case at hand).

[171] Nelson, *Adjudication, supra* note 32, at 583 ("[A]uthoritative adjudication did not require 'judicial' power unless core private rights hung in the balance.").

[172] *Id.* at 606 (critiquing the private rights analysis in *Northern Pipeline*).

between the debtor and the government. But there is no hint in the Article III bankruptcy jurisprudence that the power of the bankruptcy court turns on the identity of the creditor. Indeed, the Code's power is significantly limited in the context of dealings with governments. For example, the automatic stay has a significantly diluted effect on actions by governments.[173]

The only plausible "public right" at play is the general public desire to maximize the value of the 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 the idea in footnotes in *Stern*.[174] But the idea is too abstract to lend 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-right conflicts that protect the collective private rights of the debtor and its creditors but not to adjudicate other private-right conflicts that arise in the bankruptcy. That is a definitional sleight of hand, that – if it means anything – means that the creditor's bargain analysis we put forward below will do all of the work and the "public rights" exception is merely a label for the results that are produced.[175] 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 distortion of states' law-making and adjudicative autonomy.

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[173] 11 U.S.C. § 362(b)(4) (the automatic stay does not apply to government actions to enforce police or regulatory powers).

[174] Stern v. Marshall, 131 S. Ct. 2594, 2614 n.7 (2011) (quoting *Northern Pipeline*, 492 U.S. at 56 n.11). *See also In re* Reeves, 509 B.R. 35, 58 (Bankr. S.D. Tex. 2014) ("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'.")

[175] It also renders meaningless Justice Brennan's distinction between "restructuring of debtor-creditor relations" and "adjudication of state-created rights," N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71-72 (1982) (plurality opinion), showing that the former is a simply a subset of the latter.

1. *The Constitutional Need for A Limiting Principle*

In recent cases about the scope of congressional power, the Court has repeatedly underscored a "background principle of enumerated (and hence limited) federal power" that is separate and distinct from state sovereignty-related constraints.[176] In recent Commerce Clause cases, for example, the Court has reiterated a worry not just of the effects of a regulation at bar, but also on what decisions an individual "could *potentially* make [would be brought] within the scope of federal regulation."[177] This demand for a limiting principle to congressional power is not confined to one side of the Court. It is heard from all nine Justices in Commerce Clause cases.[178] 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.[179] And in the Article III context, the Court has installed a categorical rule against congressional interference in final judgments.[180] Structural constitutional jurisprudence, in short, is characterized by a demand for formal, generally applicable, and broadly applicable rules.

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[176] NFIB v. Sebelius, 132 S. Ct. 2566, 2646 (2012) (Roberts, C.J.); Sabri v. United States, 541 U.S. 600, 611 (2004) (noting "the Framers' purpose of establishing a National Government of limited and enumerated powers").

[177] *NFIB*, 132 S. Ct. at 2587 (emphasis in original); *accord* United States v. Morrison, 529 U.S. 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 traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."); United States v. Lopez, 514 U.S. 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").

[178] Mark D. Rosen & 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*).

[179] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010) (expressing concern that "[i]f Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?").

[180] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995).

This demand for such rules is hard to explain by empirical evidence of rampant interbranch encroachment. Rather, the demand is better understand as underwritten by the theoretical account of ambition pitched against ambition famously offered by James Madison.[181] 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.[182] Consistent with this republican conception of liberty, the Constitution must be read not only with actual but also with potential abuses of governmental authority in mind.

2. *The Distortion of State Law-Making and Adjudicative Autonomy*

The second, perhaps more important, Article III concern in bankruptcy is that the mere presence of federal bankruptcy law can distort the operation of state contract and other law outside bankruptcy. This concern with distortion sounds in the first instance in a federalism register, but it 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 is likely to be sensitive to federalism concerns must be at the tiller, whenever possible, rather than a nonjudicial agent.

As an initial matter, Congress plainly has power to alter state law rights when doing so serves a constitutional purpose.[183] 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. Alterations to state-law entitlements generally entail the involvement of two separate branches.

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[181] THE FEDERALIST NO. 51, at 319 (James Madison) (I. Kramnick ed., 1987) (predicting that "[a]mbition [would] counteract ambition"). Of course, that prediction has not generally been vindicated.

[182] *See* Quentin Skinner, HOBBES AND REPUBLICAN LIBERTY (2008). On the role of republican theory at the Founding, see Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-87, at 467 (1969).

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

Bankruptcy courts pose a threat to this system of safeguards. The operation of bankruptcy can distort state-created property, tort, or contract rights. Bankruptcy law provides a distinctive set of rules for *mitigating* wealth-destroying collective action dynamics among creditors.[184] But value (and certain state-created rights) are preserved by *altering* rights that threaten the value of the estate and by centralizing procedures that could destroy value if adjudicated in a disperse manner. Centralizing claims within the bankruptcy jurisdiction 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 central 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. But when such procedural aggregation occurs, the ensuing resolutions will often be unreviewable because of the compressed timeframe in which bankruptcies often occur.[185] Matters that are included within the core of a bankruptcy court's adjudicatory power can be wrapped in a massive restructuring that cannot be unwound without Herculean effort.

Bankruptcy, in short, has the potential to have spillover effects on the substance and procedures of state-created contract, property, and tort rights.[186] Even if bankruptcy judges are infallible, the substantive consequences of bankruptcy rules means 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 perhaps implicate the most serious structural constitutional concerns.

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[184] Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of* Gibbons *and* Marathon, 1982 SUP. CT. REV. 25, 34-35 [hereinafter Baird, *Bankruptcy Procedure*] ("[F]ederal bankruptcy law is largely procedural, rather than substantive, as far as the creditors are concerned."); *accord* Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 935 (2004).

[185] Douglas G. Baird & Anthony J. Casey, *Bankruptcy Step Zero*, 2012 S. CT. REV. 203, 205 (2013).

[186] Bankruptcy also influences rights created by Congress, such as patents and trademarks. We focus on state-created rights here in light of the *Stern*/*Northern Pipeline* analysis.

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.[187] But if the procedural scope of bankruptcy is extended beyond that domain, it risks distortion of state-created rights and state judicial proceedings. Assets have different values within and outside bankruptcy matters because the presence of a bankruptcy system does not entail its use in any or even all cases.[188] Creditors almost always have procedural options outside the federal bankruptcy system, such as the use of state-law liens on debtors' property.[189] 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."[190]

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. A federal procedural fo-

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[187] An additional reason for the narrow construction of non-judicial bankruptcy is worth noting here. Nineteenth century understandings of due process of law 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 U.S. 97, 102 (1878); *see also* Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829) (Story, J.) ("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 required not merely bare political branch action, but judicial involvement to legitimate such transfers, it generates a reason for carefully cabining bankruptcy jurisdiction to those instances in which participants ex ante would have acquiesced.

[188] Jackson, *Bankruptcy, Non-Bankruptcy*, *supra* note 18, at 867. A canonical example is the distribution rule of *Moore v. Bay*, 285 U.S. 4, 5 (1931) ("[C]laims for which want of record or 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*, a transfer that is invalid against one creditor is invalid against all in bankruptcy.

[189] *See* Robert K. Rasmussen, *Bankruptcy and the Administrative State,* 42 HASTINGS L.J. 1567, 1571-72 (1991).

[190] Jackson, *Bankruptcy, Non-Bankruptcy*, *supra* note 18, at 867-68. Recent empirical work, for example, demonstrates that substantive consolidations of large corporate groups are often influenced by the specific doctrinal choices embedded within bankruptcy jurisprudence. William H. Widen, *The Reality of Substantive Consolidation Results from an Abi-Funded Empirical Study*, AM. BANKR. INST. J., July/August 2007, at 14, 60.

rum is potentially influencing the way in which state-created rights are raised and vindicated. The latter, "no less than state legislatures[,] make law on behalf of the states."[191] To the extent that federalism reflects the authority of states to create their own tribunals to make and adjudicate their own autochthonic law, then 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 v. Tompkins*[192] set forth choice of law rules for diversity actions in federal court. A touchstone of the *Erie* analysis is the concern for federal-court distortion of state court proceedings due to "forum shopping."[193] Although the Court has not yet spoken clearly to the question whether *Erie* rests on constitutional foundations,[194] some post-*Erie* cases have identified a constitutional problem if diversity jurisdiction "would invade the local law field."[195]

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 by 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 as "not beholden to the political interests that act as gatekeepers to the offices of federal district or circuit judges," but instead intimately tied to the local bankruptcy bar.[196] However skilled they might be in discerning the going-

[191] Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1415 (2001).

[192] 304 U.S. 64 (1938).

[193] Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010).

[194] Commentators have sharply divided on this question. *Compare* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (no), *with* Henry Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 NYU L. REV. 383 (1964) (yes). We take no position on *Erie*'s status.

[195] Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956).

[196] McKenzie, *Judicial Independence*, *supra* note 3, at 793-807; *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

concern value of an entity,[197] there is no *structural* reason to expect them 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 enforcement of constitutional federalism values. Although federal judges tend to be sensitive to federalism values in correlation with the preferences of appointing politicians,[198] it is precisely this entangled sensitivity to both partisan preferences and to federalism values that renders them in this regard superior to the more narrowly, technocratic focused bankruptcy bench. Absent the need for centralized resolution, therefore, their authority should not extend to adjudications that might distort parallel state processes.

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. Rather, the substantial concern is that the bankruptcy court is not a sufficient guard of federalism values. That is not

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influence assumes away some aspiration for higher office and the depths of political influence. The recent proceedings in *In re Fisker Automotive Holdings, Inc.* provide a stark example of how parties can attempt to use political influence and the impose the views of the "gatekeepers to the offices" of Article III judges on bankruptcy judge. 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. 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 to refer it to the press releases by the state of Delaware's Governor, Senator and Representative. Those press releases noted the public officials approval of actions that would keep the plant open. The Governor's statement concluded by noting that, "We hope the court sees it that way too." The Congressmen's joint statmeent noted their intent to "do what we can" to keep the plant open. STATEMENT OF THE DELAWARE ECONOMIC DEVELOPMENT AUTHORITY CONCERNING THE MOTION OF CREDITORS COMMITTEE, The See for example *In re Fisker Automotive Holdings, Inc.*, Case No 13-13087 at Docket # 407; STATEMENT OF THE DELAWARE ECONOMIC DEVELOPMENT AUTHORITY CONCERNING THE MOTION OF CREDITORS COMMITTEE (Feb. 12, 2014). The bankruptcy judge decided the case consistent with the public officials' desires. That, of course, does not mean that the judge was actually swayed by those desires. But the intent of the statement filed with the court cannot be seriously doubted.

[197] 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 empirical study, that bankruptcy judges perform well in differentiating between companies warranting liquidation and those amenable to restructuring or sale).

[198] *See* J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233, 240-43 (2004).

a task for which the Court deems bankruptcy judges to be well suited.[199] Federalism interests, in short, can be accommodated in the bankruptcy context by adjusting the choice of adjudicator—as distinct from the *Erie* context, where choice-of-law rules provide the safety valve. In the absence of any need to centralize claims resolution in a single forum (historically, the bankruptcy commissioner and now the bankruptcy judges) then 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 decision-maker. In the administrative law context, for example, the Court has also promoted federalism values by "denying *Chevron* deference to an agency interpretation that alters the federal-state balance of power."[200] In *Gonzales v. Oregon*, for example, the Court seemed to account for the states' regulatory autonomy by narrowly construing statutory delegation.[201] More tentatively, it has also suggested (albeit not in a consistent fashion) that the "agencies have no special authority to pronounce on pre-emption [of state law] absent delegation by Congress."[202] 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 about altering state law and procedure and implanting a federal-policy-driven bankruptcy law. So, it should not be surprising that this federalism concern pervades bankruptcy jurisprudence.

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[199] Baird & Casey, *supra* note 185, at 205.

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

[201] 546 U.S. 243, 267 (2006); *see also* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2032-36 (2008) (discussing federalism aspect of *Gonzales*).

[202] Wyeth v. Levine, 555 U.S. 555, 577 (2009). For criticism of the Court's inconsistent approach to agency pre-emption, see David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1126 (2012). A particularly thorny pre-emption has arisen in bankruptcy context of 11 U.S.C. § 546(e). The code prohibits recovery of fraudulent transfers that are part of certain financial transactions. Courts have struggled over whether this pre-empts state law fraudulent transfer actions outside of bankruptcy. 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 pre-emption question out of the bankruptcy court. *In re* Tribune Company Fraudulent Conveyance Litigation, 214 B.R. 713 (S.D.N.Y. 2013). That outcome is consistent with the administrative law jurisprudence we reference here.

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 bankruptcy system that has value, 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, it is too late to insist that every 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) is to be avoided. Such power should not extend to categories of claims when doing so would cast the shadow of such bankruptcy power so broad 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.[203]

To summarize, a cogent separation-of-powers justification can be developed from two strands in recent jurisprudence. 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 deep-engrained demand for limited government at the national level. The second, 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 from 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 defining the scope of Article III's shadow in bankruptcy.

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[203] In cases interpreting the Necessary and Proper Clause, the Court has recently suggested that Congress lacks any "great" powers not listed in Article I, including the authority to require individuals to enter contracts. NFIB v. Sebelius, 132 S. Ct. 2566, 2591 (2012). 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.

III. The Creditors' Bargain and Article III

In this Part, we enlarge on the proposal that the creditors' bargain theory provides a useful guide for navigating bankruptcy's Article III problem. In this part we examine the guidance it provides. We start by playing out the contours of the bargain. Central to our argument is the observation that the creditors' bargain implies not only substantive but also 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 the proper forum for adjudication, as the "stems from" test implies.[204] Some claims that arise only by virtue of a bankruptcy filing can nonetheless be adjudicated independent of the central reorganization.[205] Other disputes, either arising from bankruptcy law or from pre-existing state law rights, cannot be adjudicated without having dynamic and deleterious effects on the balance of the creditors' collective rights. Those claims must be adjudicate by one central tribunal to advance the central aim of bankruptcy law 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 claims that are tied to the determination of the set of claims against the estate, the bankruptcy court's 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 there will be a non-Article III tribunal that determines some subset of claims. In theory, Congress could make all of these questions disappear by either transforming bankruptcy courts into Article III or by simply placing *all* bankruptcy matters exclusively before the district court judges.[206]

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[204] *See supra* text accompanying notes 92 to 93.

[205] For those disputes, there is no bankruptcy purpose to require they be adjudicated before the central bankruptcy tribunal and the countervailing spillover and federalism concerns dictate that the Article III baseline should be applied.

[206] *See, e.g.*, Latoya C. Brown, *No More Ping-Pong: The Need for Article III Status in Bankruptcy After* Stern v. Marshall, 8 FIU L. REV. 559 (2013) (advocating Article III status for bankruptcy judges).

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 as far as to require that solution. Hence, we turn to the alternate task of fashioning a workable formal rule for determining what claims need to 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 non-bankruptcy rights in order to protect other non-bankruptcy rights, and thereby maximize net social welfare.[207] 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.[208] As a consequence of the automatic stay, secured creditors cannot foreclose on assets,[209] potential claimants cannot file lawsuits,[210] and even third parties who have outright ownership of property in the possession of the debtor lose the right to take immediate repossession of the property.[211] Bankruptcy law also alters purely substantive non-bankruptcy rights. In bankruptcy, a defaulted contract or lease can be assumed and a loan reinstated if

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[207] These "non-bankruptcy" rights are rights provided by other sources of law. Those sources 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. Additionally, while important non-bankruptcy federal issues such as environmental protection rules and spectrum licensing come up often 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.

[208] *See* 11 U.S.C. § 362(a) (authorizing automatic stay prohibiting the beginning or continuing of lawsuits or other collection efforts involving claims that arose prior to a debtor filing his or her bankruptcy case).

[209] 11 U.S.C. § 362(a)(4).

[210] 11 U.S.C. § 362(a)(1).

[211] *See* 11 U.S.C. § 362(a)(3) (staying actions "to obtain possession of property of the estate"), *and* 11 U.S.C. § 541(a)(1) (defining "property of the estate" to include "all legal or equitable interests of the debtor in property"); Chrysler LLC v. Plastech Engineered Prods., Inc. (*In re* Plastech Engineered Prods., Inc.), 382 B.R. 90, 105 (Bankr. E.D. 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.").

certain conditions are met.[212] Contract provisions triggered by the insolvency of the debtor are rendered null for some purposes.[213] And the Bankruptcy Code eliminates a creditor's claims of constructive fraud against charitable organizations[214] and it caps the damages a landlord can claim for termination of a lease. [215]

The creditors' bargain framework provides a justification for aggregating and altering these state-created interests in bankruptcy.[216] In the ab-

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[212] 11 U.S.C. § 365; 11 U.S.C. § 1124(2) (2006) (setting forth requirements for reinstatement). Some courts have even suggested that the code allows a debtor to entirely avoid state law obligations by rejecting a contract. *In re* HQ Global Holdings, Inc., 290 B.R. 507, 513 (Bankr. D. Del. 2004) ("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. Sunbeam Products Inc. v. Chicago American Mfg., LLC, 686 F.3d 372, 377 (7th Cir. 2012) ("But nothing about this process implies that any rights of the other contracting party have been vaporized."). But the reading stems from the uncontroversial principle that bankruptcy law can and does extinguish some non-bankruptcy rights. *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 code.

[213] *See, e.g.,* 11 U.S.C. § 365(b)(2)(A); *see also* 11 U.S.C. §§ 365(e), 541(c), and 363(l).The same is true of provisions triggered by the filing of a bankruptcy petition. 11 U.S.C. § 365(b)(2)(B). But there is a circularity in saying that bankruptcy nullifies state law there – as the provisions would, of course, not exist in the absence of the bankruptcy process. But some courts have read the prohibition on such clauses broadly enough to include the use of at-will termination provisions if their exercise might be impacted by the bankruptcy filing. *See, e.g., In re* Haire Ford, Inc 403 B.R. 740 (M.D. Fla. Bankr. 2009) (holding 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 code's ban on enforcement of these *ipso facto* clauses. *Compare In re* AMR, 730 F.3d 88 (2d Cir. 2013), *with In re* W.R. Grace & Co., 475 B.R. 34, 154 (D. Del. 2012).

[214] 11 U.S.C. § 544(b)(2).

[215] 11 U.S.C. § 502(b)(6); *see In re* Integrated Telecom Express, Inc., 384 F.3d 108 (3d Cir. 2004) (holding that it was not bad faith for a debtor to file a bankruptcy petition to take advantage of the cap on lease damages).

[216] We have provided here examples of code provisions that are generally thought to alter non-bankruptcy rights consistent with the hypothetical creditors' bargain. That is not to say that the Bankruptcy Code is at all times consistent with 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 regulation of interstate commerce. For example, the Bankruptcy Code currently provides special treatment for aircraft financing. 11 U.S.C. §1110. It is to difficult to explain this provision in creditors'-bargain terms. But it is perfectly consistent with understandings of the interstate commerce power for Con-

sence of a coherent bankruptcy procedure, the set of rights one creditor has contracted for will come into conflict with the set another has contracted for. This can lead to the debtor firm being torn apart. Collectively, the creditors will all do better if they come to an agreement to preserve and capture the firm's going concern value.[217] Without that agreement, each creditor will, instead, 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.[218] The optimal solution is, therefore, for all creditors to enter an ex ante agreement to suspend, forego, or restructure certain rights and act for the collective good if the firm enters distress.[219] It is generally assumed, however, that transactions costs are too high for all creditors to effectively come together to negotiate this agreement ex ante.[220] The goal of bankruptcy law is to mimic the agreement that would have been reached by creditors if costs had been low enough and the bargain could have occurred. That hypothetical deal would maximize value—and hence minimize the destruction or distortion of state-created rights. It is here that the creditors' bargain harmonizes most clearly 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 in-

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gress to regulate the terms of aircraft financing. Congress's decision to include that regulation is the Title 11 of the legislative code rather than another part is of no consequence.

[217] Jackson, *supra* note 18, at 865 ("[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 D's business.").

[218] *Id.*

[219] *Id.*

[220] The existence of the current bankruptcy code implies acceptance that this assumption is true. If, on the other hand, such an agreement could be bargained for, bankruptcy law would be largely unnecessary. *See, e.g.,* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807 (1998). Some have suggested mechanisms to facilitate the bargain as an alternative to a mandatory bankruptcy law. *See, e.g.,* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992).

dependently. 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 where a firm cannot undertake profitable projects because of its legacy liabilities.[221] Imagine a firm that has 10 creditors each who are owed $1. The firm also has $1 in assets. As it stands, it could be liquidated and each creditor would receive $.10. Now imagine that if it was able to borrow an additional dollar it could invest its $2 and produce a revenue of $6 (that is to say $4 in profit). In that state of the world, the debtor firm could pay each of its existing creditors $.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 dollar of existing assets. It needs to stop any run. The next thing that bankruptcy law needs to do is provide a mechanism for the debtor to borrow the $1 so that all parties can increase their recovery.[222] This cannot be achieved outside of bankruptcy because of debt overhang. 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. That means that the new lender can expect to put $1 in to the investment and only get about $.55 back.[223] No lender will make an investment with an expected loss of forty-five cents 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 $.5 (or convert them 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 and the older creditors can divide the

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[221] *See* Ayotte & Skeel, *supra* note 23, at 1570-72 (describing the concept of debt overhang).

[222] *Id.* at 1571 (describing illiquidity problems).

[223] The firm takes in the $1 and now has liabilities of $11. It then proceeds with the project and has $6 in assets. The creditors each get one eleventh of that pie (assuming no security interests).

proceeds or it can be restructured where each old creditor takes a 10% 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 are better off because the value of the old claims has multiplied by almost 5 times. To reach that outcome, however, the bankruptcy process must resolve fully the claims each creditor has against the estate with finality. It must establish the fact we have so far assumed: that there are, in fact, ten creditors and that each are 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 the project in the above example is the prosecution of a tort or contract claim. The firm has the same 10 creditors, $1 in cash, and the same $10 in liabilities. It also has a contingent claim against a third party that will cost $2 to finance. That claim has a 50% chance of producing a $12 judgment award and a 50% chance of producing no award. This is the same exact firm. It can invest $2 for an expected profit of $4. The tort or contract litigation, however, need not be played to conclusion 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 the adjudication of the claim is nonessential, but the creditors' may affirmatively desire for it to be litigated outside of 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 the potential defendant, then the defendant will do everything it can to avoid litigation in the bankruptcy forum. In contrast, the plaintiff-debtor will do everything 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 premature bankruptcy filing and the potential defendant to strategic maneuvering to make that filing costly or to expedite litigation processes on the eve of bankruptcy. If the bankruptcy courts are more favorable to the defendant, then the defendant has incentives to push the debtor into involuntary bankruptcy. The value of the non-bankruptcy rights in either scenario will be significantly altered as the likelihood of bankruptcy increases or decreases. In the federalism terms identified in Part II, 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, is twisting state law out of joint. The hypothetical creditors' will seek to avoid this kind of distortions to non-bankruptcy private ordering when defining the terms of the ex ante bargaining.

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. To be more precise, bankruptcy in theory assumes that parties would seek to maximize the value of assets in all states of the world, and then seeks to implement that aspiration. On the other hand, in the non-distressed world, the contracts of individual creditors do not conflict with each other in a way that triggers the common-pool problem. Interference in those contracts in the absence of financial distress risks costly strategic action and forum shopping by parties. The avoidance of these costs is the root of the idea of scrupulously respecting non-bankruptcy rights.[224] In navigating between these two risks to state-created rights, bankruptcy law will alter non-bankruptcy rights only when that is necessary to preserve the collective value of the creditors' others rights. In this fashion, even though bankruptcy's central mode of function is the transformation of state rights its, its core purpose is, nonetheless 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 necessary metes and bounds of bankruptcy. As long as we accept, as the Court appears to, that the bankruptcy court is a 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 a limitation on the adjudicatory power of the bankruptcy court. The hypothetical

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[224] It is assumed that those are products of an efficient market. As one of us 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* Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11 Bankruptcy*, 78 U. CHI. L. REV. 759, 771 n.43 (2011). But, as noted then, the solution to that problem is for states to amend their non-bankruptcy laws. 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 those rights.

creditors would insist that the bankruptcy court only exercise adjudicatory power when such exercise is necessary to mitigate collective action problems, and 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 risks *distortion* of those rights. 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. Proper bankruptcy procedure will be designed to coordinate action on those claims. Where the risk of distortion of 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 for the most part outside the necessary reach of bankruptcy.

It is important to underscore that the creditors' bargain theory of bankruptcy does not sort categories of claims based on the underlying source of law. Recall that at its origin, bankruptcy arose from the Philadelphia 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.[225] The idea that Illinois could invalidate certain contracts in the name of the creditors' bargain while Indiana respects those contracts and invalidates others, itself, violates the hypothetical creditors' bargain. The forum shopping inherent in such a proposal would cause a race among creditors to be the first to push a debtor into bankruptcy in a favored forum.[226] The parties' to the hypothetical bargain would no doubt include a term that provides one uniform set of rules rather than an ex post choice among 50 to address the collective-action problem.

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[225] *See supra* text accompanying notes 39 to 40.

[226] This problem is not fully solved by a uniform federal system. Differences in the application of federal law by and the biases and expertise of bankruptcy judges in different districts no doubt leads to forum shopping at some level. *See* Laura Napoli Coordes, *The Geography of Bankruptcy,* 68 VAND. L. REV. -- (forthcoming 2015). Increasingly, there is also the problem of international bankruptcy. The bankruptcy code attempts to deal with this to some degree in Chapter 15. 11 U.S.C. § 1501 et seq. But there are obvious limits on any attempt to create uniform international laws and procedure.

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 rules governing them form a uniform bankruptcy code to be efficient (defined as promoting the hypothetical creditors' bargain) even if it is not necessary that those relationships and disputes be adjudicated by the central tribunal who oversees a debtor's bankruptcy. For other relationships and disputes, it is not only necessary that the law governing them is uniform but also that those claims are aggregated into 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 meant that it is integral for it to be adjudicated by the central bankruptcy tribunal. Conversely, just because a right remains governed by a non-bankruptcy law does not mean that it is not integral for it to be adjudicated by the central bankruptcy tribunal. Determining whether resolution of a claim is "integral to the restructuring of the debtor-creditor relationship,"[227] that is, cannot be done by merely looking to the source of that claim.

Instead of 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 non-bankruptcy rights as much as possible. At first blush, this might suggest that as long as bankruptcy courts follow state law, non-bankruptcy rights that are not integral to the restructuring could easily be brought along for the ride through bankruptcy. If there were no reason to think that bankruptcy courts are any worse at respecting non-bankruptcy rights than the various state courts who might otherwise hear the ancillary disputes. But there is reason for such concern. Our hypothetical creditors worry about federalism values as much as the 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.

The Article III judiciary comes with federalism protections built in both through the doctrinal limitations of *Erie* and the general structure of the judiciary as a co-equal branch in the federal system. Bankruptcy judges on the other hand do not have (or at least are presumed not to have) the same

[227] 131 S. Ct. at 2616-17 (quoting Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (per curiam)).

selection and decisional constraints to channel their discretion. Indeed, one of us has elsewhere suggested, 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 bankruptcy judges are granted discretion over non-bankruptcy rights.[228]

On this view, Congress lacks power to delegate to the bankruptcy court the ability to reconfigure non-bankruptcy rights as the bankruptcy court sees fit. Bankruptcy judges are not permitted to exercise judicial power over matters where that power might be misused to reconfigure rights that are not central to the effectuating the creditors' bargain. Further animating that concern, is the fact that the decisions by a bankruptcy judge – when they are wrapped into its core rulings – are often de facto unreviewable.[229] Legislators must therefore identify with some specificity the categories of claims to be altered to effectuate the hypothetical creditors' bargain.

These feared unreviewable expansions of bankruptcy power over non-bankruptcy law can be limited if the final judgments of the bankruptcy court are contained to those matters the adjudication of which is necessary to effectuating 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 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 the hypothetical creditors would demand that that issue be decided by the central bankruptcy tribunal.

In summary, we have 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 bankruptcy court; and conversely, (2) issues that need not be decided in that way must, to minimize spillover

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[228] Baird & Casey, *supra* note 185, at 205.

[229] *Id.* at 218-20.

distortions and in the interest of federalism and other constitutional considerations, be reserved for Article III or state courts.[230] This is consistent with one key strand of reasoning in *Stern*: the idea 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 the Article III analysis grounded on the creditors' bargain theory that we have to this point developed to several questions that may be expected to arise in bankruptcy with some frequency. We focus here on the set of hard cases, comprised largely of the estate's claims against outsiders. By contrast, claims against the estate generally raise few doubts under any analytic rubric. Indeed, 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 the 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 non-core claims,[231] 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.

With this background in mind, several items on the core list continue to raise the Article III problem.[232] Here, we consider § 157(a)(2)(C), which was the provision at issue in *Stern,* and which comprises counterclaims against parties who have filed claims against the estate as core; §§ 157(a)(2)(F) and (H), which cover voidable preferences and fraudulent transfers; § 157(E), which covers orders to turn over property of the estate; and finally the question of consent, which is currently *sub judice* at the Su-

[230] We are not suggesting that the bankruptcy court would not here maintain its non-core power to make proposed findings.

[231] *See* 28 U.S.C. 157(b) (statutory enumeration of core claims).

[232] The most likely to raise these issues are 28 USC §§ 157(b)(2) (C), (E), (F), & (H).

preme Court.[233] For the sake of analytic clarity, we consider claims in conceptual rather than statutory categories.

A. Debtor's Conventional Tort, 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 they 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.[234] This entails that the rights to pursue claims that the debtor has against a third party are all vested in the trust. Various creditors are then awarded rights in the trust in exchange for the claims they have against the estate. The litigation trust is a particularly useful settlement mechanism when certain creditors have different risk or liquidity preferences and value can be created by separating the contingent (or risky) assets from the more certain assets.

Close examination of how a litigation trust operates through the use of an example 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.[235] Assume that the change of the debtor winning that claim is 25%. One class of creditors might receive the right to any payout from the trust in exchange for approving the plan

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[233] Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted,* 134 S. Ct. 2901 (2014).

[234] *See generally* 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, 600-9 (2012) (discussing the post-confirmation operation of litigation trusts).

[235] This example is a stylized version of the facts in *In re Tronox, Inc.*, 464 B.R. 606 (Bankr. S.D.N.Y. 2012). While *Tronox* case was a fraudulent transfer case, many fraudulent transfers will be no different from run-of-the-mill tort claims. There is a class of cases where that is not true. We discuss those below in the main text.

of reorganization. Because the lawsuit is worth $5 billion in expectation, that is the equivalent of giving those creditors $5 billion in cash or equity.[236] The plan of reorganization can, thus, be proposed and confirmed without ever resolving the fraud litigation. Its resolution was 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 zero or $20 billion. But there is no reason to take this precaution. 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 there is an *expected* value that 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 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 parties would treat assets arising from litigation claims any differently.

In this way, claims the estate has on assets or property outside the estate will not *generally* be subject to the power of the bankruptcy court. But that is not always the case. In some instances, the viability of the estate cannot be determined in the absence of resolving certain claims 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 put in place a

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[236] Critical to this point is that the class of creditors must be able to collect the full $10 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 id.*

process for orderly reorganization. Once in place, the bankruptcy process facilitates the debtor's attempts to obtain financing to operate. With the problems 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 bankruptcy's contingent claims and other assets of the debtor – 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.[237]

Counterclaims, however, were treated differently under the 1984 statutory structure of BAFJA prior to *Stern*. Under 28 U.S.C. § 157(a)(2)(C), a counterclaim against a creditor was ranked as core, and hence could be resolved to finality by a bankruptcy court. The *Stern* Court (correctly, on our theory) held this to be unconstitutional[238]: The inclusion of counterclaims in the core of the bankruptcy court's 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.

To see why this is wrong, consider the difference between a counterclaim and a recoupment defense.[239] A counterclaim merely creates a liability that transforms into a separate debt of the creditor (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 creditor's bargain theory changes that. The two separate claims are not inextricably linked.

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[237] Where the financing is unobtainable for other reasons, we have a liquidity problem. Ken Ayotte and David Skeel have pointed out that bankruptcy can serve as a liquidity provider in various ways in service to the grander goal of the creditors' bargain. *See* Ayotte & Skeel, *supra* note 23, at 1559-63. But rushing the resolution of a claim against a third party is not a viable the means for supporting liquidity.

[238] Stern v. Marshall, 131 S. Ct. 2594, 2608-15 (2011).

[239] 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 Ins. Co., 95 F.3d 1392, 1399 (9th Cir. 1996) (quoting *Morris v. Achen Constr. Co., Inc.,* 155 Ariz. 507, 747 P.2d 1206, 1209 (1986)).

This was true on the facts in *Stern*.[240] Vicki Marshall's tortious interference claim against Pierce Marshall in *Stern* was in no sense inextricably linked with Pierce's defamation claim against Vicki. The liability of Vicki's estate for defamation could be determined independently of the tortious interference claims. 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 non-core. From the perspective of a hypothetical creditors' bargain nothing turns on the identity of the defendant in the interference claims.[241]

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.[242] Unlike a counterclaim, recoupment must be ascertain 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.[243] If a debtor defends that a claim against it should be reduced by an amount that it is owed by the claimant on the same transaction, that dispute is part and parcel of the claim against the estate.

Recoupment is an affirmative defense that is not a separate counterclaim. The idea behind recoupment is that if offsetting liabilities arise from the same transaction, they are not separate claims but factors determining damages.[244] Imagine a Contractor goes into bankruptcy. A Subcontractor

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[240] *See* Marshall v. Marshall, 547 U.S. 293, 300-05 (2006) (setting forth factual background of case in detail).

[241] To be sure, some moderate administrative cost is saved when we can litigate claims and counterclaims together. But the creditors' bargain is not a theory that aims at minimizing adjudicative costs; nor does Article III aim at such economies. As a result, that sort of argument from cost savings does not supply the kind of integral necessity that would justify the federalism concerns raised by encroaching on the state law.

[242] *See, e.g.,* First Nat'l Bank v. Master Auto Serv. Corp., 693 F.2d 308, 310 n.1 (4th Cir. 1982) ("Recoupment is the right of the defendant to have plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very same contract giving rise to the plaintiff's claim.").

[243] On the equitable nature of recoupment, see Craig H. Averch & 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).

[244] *In re* Sigman, 270 B.R. 858, 860-61 (Bankr. S.D. Ohio 2001) ("[R]ecoupment involves offsetting claims of the creditor and the debtors that arise from the **same** transaction.").

makes a claim against the Contractor for missed payments under their contract. The Contractor defends 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 integral part of that claim, it must be adjudicated within a bankruptcy. The same does not hold for most other counterclaims the debtor has.

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

Note that the recoupment is limited to the amount of Subcontractor's claim. The defendant cannot recoup more that it owes. Only a counterclaim would allow recovery beyond that. That 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. The longstanding rule of *Moore v. Bay*[245]

[245] 285 U.S. 4 (1931).

changes the contours of the state law right allowing all creditors to benefit from the action where that was not the case under state law. Outside of bankruptcy a fraudulent transfer claim does not belong to the debtor, but rather to particular creditors who were affected by the transfer. In bankruptcy, 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 transfers actions. Thus, by operation of 11 U.S.C. § 548, the estate has a broader authority to recover transfers than would otherwise be available in the absence of a bankruptcy filing. Conversely, other provisions of the code narrow the scope of actionable transfers.[246] But that operation of bankruptcy's substantive provisions has no impact on whether the claim must, in the eyes 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*.

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 either cash or other property, it can also be an interest in the estate that becomes a claim upon bankruptcy in the form of either a debt claim or security interest. In such cases, resolution of the fraudulent transfer action is a condition precedent to resolution of the estate. In these cases, the creditors' bargain theory would encompass the resolution of such fraudulent transfer actions.

For example, one common form that a fraudulent transfer can take is as a guarantee of another entity's debts.[247] That is, one debtor entity may guarantee the debts of an affiliate entity, in practice often within the same corporate group.[248] If that guarantee were to be made without full com-

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[246] *See, e.g.*, 11 U.S.C. §§ 544 and 546.

[247] A recent high-profile example is *In re* TOUSA, 422 B.R. 783 (2009). The bankruptcy estate there brought an action to recover a guarantee and security interest that an entity transferred to a bank to secure debts that entity's corporate parent. *Id.*

[248] *See* Anthony J. Casey, *The New Corporate Web,* (work in progress 2014), available at http://works.bepress.com/anthony_casey/1/.

pensation at a time when the guarantor was insolvent, it would rank as a fraudulent transfer. An action to recover the property transferred would then be an action to void the guarantee.[249] In such cases, the claim against the estate is valid unless the fraudulent transfer action is successful, and so the latter action is integral to the restructuring as viewed from the ex ante creditors' bargain perspective. In this limited class of cases, therefore, the fraudulent transfer claim properly falls within the bankruptcy court's power.

C. Turnover of property

Bankruptcy law allows the trustee to bring motions to compel third parties in possession of property of the estate to turn that property over.[250] The ownership of the property has to be beyond dispute, or else the action is simply a state law contract, tort or property dispute. These motions are reserved for attempts to regain possession. Congress has deemed these actions to be core.[251] And courts dealing with these claims have almost universally held that demarcation to be constitutionally sound.[252] The rationale offered for this result has generally been that these actions stems from the bankruptcy and the principle that "bankruptcy jurisdiction, at its core is *in rem*."[253] The idea is that bankruptcy courts exercise power over the property of the estate and therefore have wide authority to exercise that power. Because turnover motions are concerned with property for which there is no dispute about ownership, the argument goes, the court is merely exercising its power over the bankruptcy estate.

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[249] The estate may also seek to recover the value of the guarantee from the transferee or the party for whose benefit the transfer was made. *In re* TOUSA, 422 B.R. 783 (2009); Douglas G. Baird, *Beyond Formalism: The Reach of Fraudulent Conveyance Law* (forthcoming) (on file with authors). Where the action is to recover the value of the transfer is akin to the traditional tort claim. It is only the action to recover (i.e. void) the guarantee that is integral to the restructuring.

[250] *See* 11 U.S.C. § 542; see also 11 U.S.C. §§ 541 and 704(a)(1).

[251] 28 U.S.C. § 157 (a)(2)(E).

[252] *See, for example, In re* Pali Holdings, Inc., 488 B.R. 841, 850-51 (Bankr. S.D.N.Y. 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); *see also In re* Falzerano, 686 F.3d 885, 887 (8th Cir. 2012); *In re* McCrory, 10-36998, 2011 WL 4005455 (Bankr. N.D. Ohio Sept. 8, 2011).

[253] *In re* Pali Holdings, Inc., 488 B.R. at 850.

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.[254] The bankruptcy court unquestionably has both subject-matter and personal jurisdiction to *hear* disputes about the property of the estate. Any defect in either subject-matter jurisdiction or personal jurisdiction would extend to the district court. None of the Court's Article III cases concerning bankruptcy, however, have suggested that district courts also lack authority to proceed to resolve state law questions for want of personal or subject-matter jurisdiction. The Article III question is not one of jurisdiction therefore, but whether or not the bankruptcy judge has the constitutional *power* to enter judgment about those disputes.[255]

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 ligation to establish title to property would fall within the court's remit. But actions to establish ownership of property in possession of others fall plainly outside of 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 the bankruptcy courts do not have

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[254] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160-61 (2010) (quoting Kontrick v. Ryan, 540 443, U.S. 445 (2004); quotation marks omitted).

[255] The Court, by contrast, has employed both jurisdictional terminology, and relied on the idea of in rem jurisdiction, where the question presented was not one of power but rather subject-matter or personal jurisdiction. Hence, in *Marshall v. Marshall*, the probate exception to federal-court jurisdiction was limned in terms of the "rem" subject to state court probate action. 547 U.S. 293, 312 (2006). 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* Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 370 (2006) (reasoning that "courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications"); *accord* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 444-45 (2004). It is a category mistake to import the jurisdictional concept of authority over the rem to the distinct Article III question of 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 Brubaker's suggestion that *Stern* be read to lend a constitutional imprimatur to the 1898's distinction between plenary bankruptcy jurisdiction over the rem only. *See* Brubaker, *supra* note 64, at 173-74. Although we agree with Professor 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.

adjudicatory power.[256] Focusing on the *in rem* nature of the estate begs the question of how far the bankruptcy court's 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.

Third, and relatedly, it is not sufficient to say that Congress created the turnover right as part of the Bankruptcy Code.[257] 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 is happening in a turnover motion. It would be wrong to think of a turnover motion as leaving state rights in tact. They alter the status quo and extinguish a state law possessory interest.

The theory of Article III informed by the creditors' bargain that we offer, in contrast, provides a more sophisticated and 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 claim is one for turnover rather than for 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. If bankruptcy could be accomplished instantaneously, this would not be an issue. 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 out-

[256] Stern v. Marshall, 131 S. Ct. 2594, 2616 (2011) (quoting Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 56 (1989)).

[257] *See supra* text accompanying note 225 (discussing why source of law is not the appropriate analysis).

side of the debtor's possession, ripe or unripe, would not fall within the concept of integral to the restructuring of the debtor.

D. Voidable preferences

Our theory suggests that preference actions[258] fall within the adjudicatory power of the estate. 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 is determined.

The Court has long recognized this.[259] But at the same time it has suggested an exception for cases where the creditor has not filed a claim against the estate.[260] On first blush this seems consistent with our account of bankruptcy courts' power. The Court's distinction, however, ignores the implications of a preference action, and as such is unfounded. If the debtor made 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.[261] 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.[262] Thus, a creditor who 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 loses the preference action, it is hard to see how the a preference action, even against a creditor that has not filed a claim, can

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[258] Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 714 (1985) (describing preferences as one of the trustee's "powers to avoid prebankruptcy transfers made by the now bankrupt debtor").

[259] *See, e.g.,* Katchen v. Landy, 382 U.S. 323, 333-34 (1966) (noting as a matter of statutory construction, that "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").

[260] *Stern*, 131 S. Ct. at 2616; *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58 (1989) (relying on the same distinction for Seventh Amendment purposes).

[261] 11 U.S.C. § 547.

[262] 11 U.S.C.§ 502(h).

be viewed as one *not* impacting the restructuring of the pro rata claims against the estate.

The justification for the Court's view of these preference claims in *Stern* and earlier cases[263] may be animated by the notions of *in rem* power as the source of the bankruptcy court's adjudicatory authority. As we have suggested above,[264] defining the constitutional boundaries of non-Article III tribunals by reference to property before the tribunal lacks both principled foundation and workable boundaries. Moreover, the conflict between the *in rem* view of these claims and the result 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 that is consistent with both federalism-minded constitutional concerns and the core principles animating the creation of bankruptcy system in the first place.

E. Consent

The implication of our analysis on the question of whether parties can consent to the adjudicatory power of the court should be fairly obvious at this point. An adjudication in a non-Article III court by consent of the relevant rights-holders poses no threat of distortion to 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. In the absence of bankruptcy, parties are of course free to consent to have disputes adjudicated by binding arbitration.[265] The preservation of that right in the bankruptcy proceeding disrupts no state law rights and creates no threat to the preservation of going concern.

We can imagine two main objections to this conclusion. First, 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

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[263] *See, e.g., Granfinanciera*, 492 U.S. at 58; Schoenthal v. Irving Trust Co., 287 U.S. 92, 97 (1932).

[264] *See supra* text accompanying notes 254 to 256.

[265] *See* 9 U.S.C. § 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, e.g.,* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011) (finding broad preemption of state-law rules that limited arbitration).

enter an enforceable judgment to a non-Article III judge.[266] Even if arbitrators exercise the first authority, they lack the second power to impose final judgment, which is distinctive to Article III actors. The account of Article III concerns 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 *Stern* and *Northern Pipeline*. Simply put, the ability of all parties to consent after the fact to bankruptcy procedure does not create a risk of distortion of state-created rights or state procedures. Attention to the creditors' bargain suggests that there is no reason to believe ex post consent induces other parties to reallocate state rights or otherwise to act strategically. In the absence of any potential for interjurisdictional distortion, there is no cause for mandating Article III involvement.[267]

Second, it is possible that there will be no statutory grant of authority over issues simply because the parties have consented. In the aftermath of *Stern*, for example, some lower courts perceived a statutory "gap" in respect to previously core claims that could not be resolved finally by a bankruptcy court.[268] Where parties consent to the resolution of a claim that a bankruptcy court otherwise might want constitutional authority to settle, a similar gap might arise. As a threshold matter, this *statutory* concern is distinct from the *constitutional* problem posed by Article III. In any event, the bankruptcy statute contains a separate provision creating adjudicatory

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[266] Waldman v. Stone, 698 F.3d 910, 917, 921 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1604 (2013).

[267] This analysis of consent for Article III purposes has limitations. There are two characteristics of the delegation of adjudicatory power here that avoid potentially thorny problems. First, the consent does not implicate separation of powers concerns by empowering another branch of government. *See infra* text accompanying notes 140 to 142. Where the delegation was to a tribunal that was appointed by the legislative or executive branch, as was the case under the Bankruptcy Act of 1978 invalidated in *Northern Pipeline*, these concerns might be merit a different outcome. Second, the possibility of consent here does not introduce distortions into the parties' incentives. Imagine a legislative scheme that gave asymmetrical tax breaks to parties who consented to non-Article III adjudication; such a scheme might pose a risk of distortions of state law that implicated Article III concerns.

[268] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172-73 (2014) (discussing the question whether 28 U.S.C. §157(c) extended to core claims that fell outside the bankruptcy court's adjudicative power).

power when parties consent.[269] In addition, the Court's recent analysis of the § 157(c) in *Executive Benefits Insurance Agency v. Arkison* suggests that the statutory grant of adjudicatory power in bankruptcy should be read to limit the inhibitory effect of Article III, while maximizing the practical capacity of the bankruptcy system to resolve claims.[270]

F. Individual Bankruptcy

The above analysis has been presented in the context of corporate reorganization rather than individual bankruptcy. We have proceeded in that manner as that is the environment where the creditors' bargain has had the most influence and development. Our analysis is not, however, limited to that context.

In its pure form the creditors' bargain theory is not entirely applicable to individual bankruptcy. The substantive policy of discharging individual debt is driven by larger concerns of general social welfare.[271] Creditors would not necessarily agree ex ante to the concept of discharge. Rather the discharge stems from a broader view of stakeholders and takes into account society's interest in maintaining the productive capacity of its members. At the same time, the creditors 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 to say that the procedural concerns at the heart of the corporate reorganization are equally present when an individual debtor enters bankruptcy with multiple creditors. These concerns drive the need for a centralized bankruptcy tribunal and should be the centerpiece for the resolving the Article III problem.

At least to the extent that the question is one of the procedural bounds of bankruptcy, therefore, 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 also works equally well as an effectual limiting principle in the individual bankruptcy context too.

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[269] 28 U.S.C. 157(c)(2).

[270] *Arkison*, 134 S. Ct. at 2173.

[271] Jackson, *Fresh-Start Policy*, *supra* note 23, at 1395 n.5.

Conclusion

In this Article, we have offered a new theoretical foundation for understanding the Article III problem in bankruptcy. To date, that problem has been the object of ample litigation, but it has not yet received any cogent theoretical resolution. The ensuing opinions have what one circuit court, in a nice euphemism, calls "a potluck quality."[272] Lacking any foundational account of precisely why bankruptcy adjudication offends Article III, that is, the 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 can be identified by taking the ex ante perspective of creditors seeking to maximize their returns, and correspondingly to minimize the wasteful dissipation of private rights. This creditors' bargain theory, in addition to being well-credentialed in efficiency terms 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 that they are best resolved through 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 heart of the creditors' bargain, be those necessary to resolve and coordinate the collective claims the creditors have 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.

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[272] Waldman v. Stone, 698 F.3d 910, 918 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 1604 (2013).

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