NOTHING NEW: CONSENT, FORFEITURE, AND BANKRUPTCY COURT FINAL JUDGMENTS

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ABSTRACT

Bankruptcy cases often contain distinct contested matters and adversary proceedings. The possibility of these many permutations stokes the tension between the desire for quick adjudications by a non-Article III bankruptcy judge and the need to protect litigants' rights to an Article III tribunal. However, the application of consent to bankruptcy judge authority and forfeiture of the right to proceed before an Article III district judge alleviates this tension. Although the Supreme Court recently endorsed the application of these doctrines, the boundaries remain unsettled. The temptation is to apply the doctrines of consent and forfeiture broadly in order to facilitate bankruptcy judges' authority to enter final judgments. Filing a voluntary petition is a fixture of almost all bankruptcy cases, and entries of a default judgment are also very common. Both are attractive platforms for consent and forfeiture. This Article employs the Supreme Court's teachings and the historical analysis sanctioned by the Supreme Court to evaluate voluntary bankruptcy filings and entries of defaults as bases for consent and forfeiture.

Amidst the uncertainty surrounding consent and forfeiture, clear constitutional rules are needed. Neither a voluntary petition nor the entry of a default constitutes consent to a final adjudication by a bankruptcy judge or forfeiture of the right to an Article III judge. When is a choice not really a choice? A debtor lacks feasible alternatives to obtain a discharge of his or her debts. Without other options, a voluntary bankruptcy petition cannot constitute blanket consent by the debtor to a bankruptcy judge's final adjudication. A debtor only consents to determinations regarding the debtor's property, the debtor's discharge, and the preclusive effects of those determinations. A voluntary petition does not constitute a final judgment providing a basis for forfeiture of a right to an Article III tribunal either. Defaulting defendants are, at most, indifferent to a final adjudication by a bankruptcy judge. The failure to articulate a choice does not

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constitute consent to the final adjudication by a bankruptcy judge. An entry of default, by definition, is not a judgment on the merits and cannot constitute a forfeiture of the right to an Article III judge. A default simply does not alter whether an Article III judge is required to enter a final judgment. Historical practice allows a bankruptcy judge to issue a report suggesting the entry of a default judgment. The report must be confirmed and entered by an Article III judge.

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I. INTRODUCTION

Consent. The very word presupposes alternatives. A litigant's consent to adjudication of an action means a litigant has a choice to proceed in an alternative forum, knows the options, and elects to proceed in the original forum.[1] The relevant example is final adjudication of a *Stern* claim.[2] Through other words or actions, a litigant can consent to a bankruptcy judge adjudicating a *Stern* claim because the litigant has a choice of forums for final adjudication: the bankruptcy court or the district court.[3] Consent not only requires alternatives; it also requires knowledge of these alternatives. More specifically, the litigant must know the implications of consent and the right to withhold consent, and after learning this information, the litigant must still voluntarily continue to litigate in the original forum.[4] The choice between alternatives may similarly be forfeited by a litigant's failure to seek an alternative forum in a timely manner—at the latest, before a final judgment on the merits has been issued.[5]

After *Stern v. Marshall* confirmed the existence of *Stern* claims and the inability of bankruptcy judges to enter associated final judgments, "*Stern v. Marshall* [became] the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court."[6]

1. *See* N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1505 n.10 (7th Cir. 1991) ("[Consent] suggests election of one alternative over another . . . ."); S. Todd Brown, *Consent, Coercion, and Bankruptcy Administration*, 11 J. BUS. & TECH. L. 25, 52 (2016) [hereinafter S. Todd Brown] (explaining that consent must be voluntary without duress or undue coercion).

2. A *Stern* claim is a claim falling: (1) within the core statutory jurisdiction of bankruptcy courts and (2) beyond the constitutional authority of judges lacking the protections afforded to the Article III Judiciary. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014).

3. *See* 28 U.S.C. § 1334(b) (2012). A litigant may also have the option of proceeding in state court. *Id.* § 1334(c). Pursuant to 28 U.S.C. § 1334(b), the federal district court has original, non-exclusive jurisdiction over all civil proceedings arising in a bankruptcy case and arising under the Bankruptcy Code. *Id.* § 1334(b). However, either mandatory or permissive abstention by the district court may result in a matter being adjudicated in state court despite the existence of bankruptcy subject matter jurisdiction in the federal court. *See id.* § 1334(c).

4. Roell v. Withrow, 538 U.S. 580, 590 (2003). Appearance should be construed broadly and could constitute a physical appearance or subsequent filings in the litigation.

5. *See* Kontrick v. Ryan, 540 U.S. 443, 458–59 (2004) (noting that substantive non-jurisdictional rights can be forfeited by failing to assert them prior to a final judgment on the merits).

6. *In re* Ambac Fin. Grp., Inc., 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011), *aff'd sub*

Following *Stern*, courts struggled to abide by both the limiting language in *Stern* and the force of its logic.[7] The many questions left unanswered by *Stern* only exacerbated the uncertainty.[8] Litigants' consent represented one potential avenue to cure the constitutional infirmities presented by bankruptcy judges issuing final judgments on *Stern* claims.[9] This issue sparked commentary and disagreement, including a split among the appellate courts.[10] The Supreme Court granted certiorari regarding this issue

nom. Police & Fire Ret. Sys. of Detroit v. Ambac Fin. Grp., Inc. (*In re* Ambac Fin. Grp., Inc.), 487 F. App'x 663 (2d Cir. 2012).

7. *Compare* Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 469 (Bankr. W.D. Mich. 2012) (comparing the propriety of testing hypothesis using scientific methods and testing other claims using the teachings of *Stern*), *with* Burtch v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 466 B.R. 626, 642 (Bankr. D. Del. 2012) ("The Court must honor the Chief Justice's express limitations and assurances regarding the narrowness of the minimal breadth of the decision.").

8. *See* Robert W. Miller, *Everything Old Is New Again: Why the* In Rem *Summary Jurisdiction of the 1898 Bankruptcy Act Still Limits the Constitutional Authority of Bankruptcy Judges*, 89 AM. BANKR. L.J. 1, 34–35 (2015) [hereinafter Miller, *Everything Old Is New Again*].

9. *See id.*

10. Litigants and courts recognized the importance of consent soon after the *Stern v. Marshall* decision. *See* Stoebner v. PNY Techs., Inc. (*In re* Polaroid Corp.), 451 B.R. 493, 497–98 (Bankr. D. Minn. 2011). This issue split the courts of appeals, and the Supreme Court first granted certiorari on the consent issue in *Executive Benefits Insurance Agency v. Arkison*, but the narrow *Executive Benefits* opinion left it undecided. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014). Prior to *Wellness International Network, Ltd. v. Sharif*, courts were split on the consent issue. *See* Bethany A. Corbin, *Losing at Dodgeball: Understanding the Supreme Court's Implied Authorization of Consent in* Executive Benefits Insurance Agency v. Arkison *and Why Revision of 28 U.S.C. § 157(b) Is Critical for Clarity*, 63 DRAKE L. REV. 109, 111 (2015); Geoffrey K. McDonald, *The Question of Consent in* Executive Benefits*: Can Bankruptcy Courts Exercise the Judicial Power of the United States Under Article III Based on Litigant Consent Alone?*, 87 AM. BANKR. L.J. 271, 291–99 (2013); *see also* Jillian M. Clouse, Comment, *Litigant Consent: The Missing Link for Permissible Jurisdiction for Final Judgment in Non-Article III Courts After* Stern v. Marshall, 20 AM. U. J. GENDER SOC. POL'Y & L. 899, 901 (2012). *Compare* BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (*In re* BP RE, L.P.), 735 F.3d 279, 287 (5th Cir. 2013) (finding litigant consent insufficient to allow a bankruptcy judge to issue a final judgment on a *Stern* claim), *and* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 771 (7th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 1932 (2015), *and* Waldman v. Stone, 698 F.3d 910, 918 (6th Cir. 2012), *with* Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 569–70 (9th Cir. 2012) (holding litigant consent sufficient to allow a bankruptcy judge to issue a final judgment on a *Stern* claim), *aff'd on other grounds sub nom. Exec. Benefits*, 134 S. Ct. 2165.

in *Wellness International Network, Ltd. v. Sharif*.[11]

Wellness has become synonymous with litigant consent allowing a bankruptcy judge to enter a final judgment on a *Stern* claim.[12] Although commentators focused on the consent issue in *Wellness*, a similarly important procedural principle, forfeiture, received little attention.[13] Both the *Wellness* majority and the Seventh Circuit Court of Appeals recognized the possibility of a litigant forfeiting the argument of a *Stern* claim.[14] The *Wellness* majority was unconcerned with whether the defendant had either implicitly consented to or forfeited its *Stern* claim by failing to lodge it prior to an adjudication on the merits.[15] Given the identical analysis of both consent and forfeiture, the effects of the two doctrines on *Stern* claims are identical.[16]

Both forfeiture and consent are potentially implicated by two of the most pressing issues left unresolved by *Wellness*: (1) does a debtor relinquish any right to an Article III adjudication simply by filing a voluntary bankruptcy petition and (2) can a bankruptcy judge issue a final default judgment when faced with a *Stern* claim?

Prior to *Stern*, many cases conflated the filing of a voluntary bankruptcy petition with a debtor's implied consent to the adjudication of any matter in his or her bankruptcy case by a non-Article III bankruptcy

11. *Wellness*, 135 S. Ct. at 1942.

12. In fact, the majority in *Wellness* pinpointed consent as the key distinction between the holdings of *Stern* and *Wellness*. *See id.* at 1946. *Contra id.* at 1957 (Roberts, C.J., dissenting).

13. *See id.* at 1949 (majority opinion).

14. *Id.* (remanding to determine whether the defendant-debtor forfeited its *Stern* claim argument); *id.* (Alito, J., concurring) ("In this case, respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below."); Wellness Int'l Network, Ltd., v. Sharif, 617 F. App'x 589, 590 (7th Cir. 2015); Peterson v. Somers Dublin Ltd., 729 F.3d 741, 747 (7th Cir. 2013) ("The issue in *Wellness International Network* was forfeiture rather than waiver.").

15. *Wellness*, 135 S. Ct. at 1948–49 (majority opinion). This holding left open two possibilities: implied consent is equivalent to forfeiture, Al Bahlul v. United States, 792 F.3d 1, 3 (D.C. Cir. 2015) ("Bahlul's challenge, however, presents a structural violation of Article III and is not waivable or forfeitable."), *vacated*, No. 11-1324, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016) (en banc), or the court excused the forfeiture to analyze the structural challenge on the merits, see *id.* at 34 (Henderson, J., dissenting). Either way, forfeiture is treated the same as consent. *See Wellness*, 617 F. App'x at 590.

16. *See Wellness*, 617 F. App'x at 590.

judge.[17] *Wellness* and *Stern* upset the logic supporting these cases by adopting the standard for implied consent found in *Roell v. Withrow* and confirming the importance of meaningful choice in inferring consent.[18] A debtor's filing of a bankruptcy case does not mean the debtor knows the implications of consent, knows the right to refuse to grant consent, and still voluntarily appears.[19] Moreover, a debtor cannot discharge or restructure his or her debts in an alternative forum. The filing of a bankruptcy petition does not constitute consent because the debtor lacks a meaningful choice.[20] Consequently, a voluntary debtor does not automatically consent to all determinations in his or her case being finally determined by a non-Article III bankruptcy judge.[21] Similarly, the act of filing a bankruptcy petition does not constitute forfeiture.[22] An entry of an order for relief does not constitute a final judgment regarding a particular bankruptcy proceeding—nothing is determined by the entry of an order for relief in a voluntary case.[23] The filing of a bankruptcy petition constitutes neither the debtor's consent nor the forfeiture of his or her right to have *Stern* claims finally adjudicated by an Article III judge.[24]

Bankruptcy judges are not constitutionally permitted to enter final default judgments on *Stern* claims.[25] The Supreme Court's holdings regarding implied consent to magistrate judges and agency adjudications, together with the general policy preference for adjudications on the merits rather than default judgments, caution against default judgments constituting implied consent when the defendant fails to appear.[26] Consent, whether implied or express, must be willing and intelligent.[27] At best, a

17. *See* Longo v. McLaren (*In re* McLaren), 3 F.3d 958, 961 (6th Cir. 1993); N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1505 (7th Cir. 1991).

18. *See Wellness*, 135 S. Ct. at 1947 (citing Roell v. Withrow, 538 U.S. 580, 590 (2003)); Stern v. Marshall, 564 U.S. 462, 493 & n.8 (2011).

19. *Wellness*, 135 S. Ct. at 1948 (citing and quoting *Roell*, 538 U.S. at 587 n.5, 590).

20. *See Stern*, 564 U.S. at 493 & n.8.

21. Robert Miller, *Fleshing Out the Skeleton Defining the Prongs of* Stern v. Marshall, 11 DEPAUL BUS. & COMM. L.J. 1, 68 (2012) [hereinafter Miller, *Defining the Prongs of* Stern].

22. *See Stern*, 564 U.S. at 481.

23. *See* 9A AM. JUR. 2D *Bankruptcy* § 919 (2016).

24. *See* Miller, *Defining the Prongs of* Stern, *supra* note 21.

25. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015).

26. *See, e.g.*, Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 475–76 (Bankr. W.D. Mich. 2012).

27. *See id.* at 475.

defaulting defendant can only be categorized as indifferent.[28] Put another way, an entry of default is insufficient evidence that a defendant knows of the alternative to proceeding before an Article III judge rather than a bankruptcy judge. Consequently, a defaulting defendant has not implicitly consented to a bankruptcy judge entering a final judgment.[29] Similarly, default judgments of *Stern* claims are not constitutionally permitted as forfeitures.[30] Although a litigant may forfeit the right to Article III adjudication by waiting too long, the failure to answer a complaint is not sufficiently dilatory or strategic to occasion forfeiture.[31] The lack of an adjudication on the merits means forfeiture of the right to an Article III adjudication is inappropriate.[32] Neither implied consent nor forfeiture allows a bankruptcy judge to issue a final default judgment on a *Stern* claim.[33]

Historical practice rescues the constitutionality of bankruptcy court default judgments of *Stern* claims, but only if they are confirmed by the district court. The ancient equivalent of default judgments were liquidated by either a chancellor of the equity court or a clerk of the chancellor following referral by the chancellor.[34] However, the master's report was not the last word. It was submitted back to the chancellor for entry of a final

28. *Id.*

29. *See id.* (noting the defendant did not consent to judgment being entered against him simply by not responding).

30. *See id.* at 476 (holding the defendant could not "have forfeited his right to Article III due process").

31. *Id.* at 475, 476 (citing Stern v. Marshall, 564 U.S. 462, 482 (2011)); *see* Dill v. Gen. Am. Life Ins., 525 F.3d 612, 619–20 (8th Cir. 2008) (citing Bowles v. Russell, 551 U.S. 205, 213 (2007)) (holding no forfeiture occurred when litigant raised argument prior to adjudication on the merits). However, a litigant's dilatory actions to set aside a default judgment may prejudice the litigant's ability by being deemed an implied consent. *See* Days Inns Worldwide, Inc. v. Patel, 445 F.3d 899, 905 (6th Cir. 2006) (finding forfeiture of the right to object to lack of personal jurisdiction due to failure to timely move to set aside default judgment).

32. *See In re Sutton*, 470 B.R. at 476 (holding a default judgment not appropriate because of litigant's failure to answer complaint). *But see* Hopkins v. M & A Ventures (*In re* Hoku Corp.), Nos. 13-40838-JDP, 15-08043-JDP, 2015 WL 8488949, at *3 (Bankr. D. Idaho Dec. 10, 2015) (finding forfeiture of Article III right based on litigant's failure to answer complaint).

33. *See, e.g.*, *In re Sutton*, 470 B.R. at 475–76.

34. *See* THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 209 (Liberty Fund, Inc., 5th ed. 2010) (describing the roles of the masters of the chancery), http://oll.libertyfund.org/title/2458.

decree.[35] Courts adopted these same procedures in the United States following the Framing of the Constitution.[36] Given the necessity of an Article III judge entering a final decree, one cannot conclude that historical practice allowed non-judges to enter default judgments. The teachings of the Supreme Court, from *Murray's Lessee v. Hoboken Land & Improvement Co.* to *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, and finally, to *Stern*, link the ability of a non-Article III tribunal to enter a final judgment to the procedure for determining similar actions at common law.[37] The inability of the master, who was not a judge, to enter a default judgment at common law means that, today, default judgments cannot be finally determined by a bankruptcy judge or a clerk of the bankruptcy court. Together with the inapplicability of consent and forfeiture, this lack of a historical practice means that default judgments of *Stern* claims cannot be adjudicated by a non-Article III judge.[38] Only a district court's final order, even without any review, is sufficient under historical practice of the chancellors at common law.[39]

This Article will set the stage for *Wellness* and then confront the preeminent issues surrounding consent and forfeiture left open by *Wellness*. First, it will analyze the distinctions between two similar procedural principles: consent and forfeiture.[40] It will provide an overview of the genesis of the constitutional issues created by *Stern* and the importance of consent and forfeiture in mitigating the effects of *Stern*.[41] It then examines how the Supreme Court has analyzed the parameters of consent and forfeiture as they have intersected with Article III, namely when final adjudications are dispensed by arbitrators, by an agency tribunal, and by magistrate judges.[42] It then reviews the *Wellness* opinion and its treatment of consent and

35. 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 344–53 (Wayne Morrison ed., 2001).

36. *See generally* Pendleton v. Evans, 19 F. Cas. 140 (C.C.E.D. Pa. 1823) (No. 10,920) (explaining how the rules of equity procedures promulgated by the Supreme Court in 1822 were based on English common law procedure regarding decrees *pro confesso*); Williams v. Corwin, Hopk. Ch. 471, 476–77 (N.Y. Ch. 1824).

37. *See infra* Part III.

38. *See In re Sutton*, 470 B.R. at 476 (holding a bankruptcy court cannot enter a default judgment of a *Stern* claim).

39. *See* Thomson v. Wooster, 114 U.S. 104, 119 (1885).

40. *See infra* Parts II.A, II.B.

41. *See infra* Part III.

42. *See infra* Parts IV.A, IV.B, IV.C.

forfeiture.[43] It culminates by evaluating whether a debtor's voluntary bankruptcy filing and the entry of a default judgment constitute consent or forfeiture.[44] Along the way, the Article will also discuss bankruptcy judges' historical in rem jurisdiction and the impact of their archaic roots on their modern ability to finally adjudicate certain actions.

II. DIFFERENT BRANCHES OF THE SAME TREE

Consent and forfeiture are often conflated procedural principles.[45] Each penalizes a litigant's failure to make a substantive assertion.[46] If a litigant falls victim to either of these traps, the court cannot entertain the litigant's right, claim, or argument.[47] Although the results may seem harsh, these principles serve salutary goals. They "induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them."[48] They also ensure the orderly progression of litigation through a "winnowing process."[49] Otherwise, litigants will "sandbag" by contesting the merits and, if they lose, belatedly raise a different error.[50] Bankruptcy cases are particularly appropriate venues to narrow the issues before the court because of the deteriorating financial condition of debtors and the time pressures often endemic to bankruptcy litigation.[51]

43. *See infra* Part IV.D.

44. *See infra* Part V.

45. Justice Antonin Scalia rightly observed the failure of many courts to distinguish between consent or waiver and forfeiture: "The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision." Freytag v. Comm'r, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment). Throughout this Article, the Author has altered the characterization of consent or forfeiture employed by the various courts in order to remain consistent with the definitions and distinctions between the two doctrines.

46. *See id*. at 893–94.

47. *See id.*

48. Puckett v. United States, 556 U.S. 129, 134 (2009).

49. Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 n.6 (2008) (quoting Poliquin v. Garden Way, Inc., 989 F.2d 527, 531 (1st Cir. 1993)).

50. Stern v. Marshall, 564 U.S. 462, 482 (2011).

51. Although an overused analogy, see Michelle Harner, *The Melting Ice Cube Fallacy*, CREDIT SLIPS (Jan. 27, 2015), http://www.creditslips.org/creditslips/2015/01/the-melting-ice-cube-fallacy.html. There are bankruptcy cases where time is of the essence and expedited sales improve the chances of successful reorganization or sale. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 865 (2014) (discussing when a debtor is a melting ice

A. *Consent*

Consent, also known as waiver,[52] is an affirmative defense arising when a litigant intentionally and voluntarily abandons or relinquishes a known personal right or privilege.[53] A litigant who decides to give up a right or claim generally may not reverse positions later.[54]

Consent comes in two different forms: express and implied.[55] Express consent arises from a litigant's words, while implied consent arises from conduct or other circumstances evidencing sufficient intent and knowledge.[56] Express consent may arise from an acknowledgment of the loss of rights in pleadings or during proceedings.[57] Implied consent may arise when a party's conduct, actions, or words are inconsistent with the assertion of the right.[58] Unlike express consent, where a litigant's words are more easily judged, many courts apply a presumption against implied consent that can only be rebutted if the litigant's intent is clear and unambiguous.[59] As a consequence

cube befitting of procedural shortcuts and potential protections for stakeholders in such situations).

52. "Waiver is in fact synonymous with consent." Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 475 (Bankr. W.D. Mich. 2012). This Article uses *consent* rather than *waiver*.

53. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Journe v. Journe, 911 F. Supp. 43, 47 (D.P.R. 1995). The burden of proof for showing consent rests with the party alleging consent. Westfed Holdings, Inc. v. United States, 407 F.3d 1352, 1360 (Fed. Cir. 2005).

54. *See* United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973) (holding defendants who impliedly consented but failed to communicate their alleged change in position to the trial judge, notwithstanding adequate opportunity to do so, could not undo their implied consent).

55. *E.g.*, Irons v. FBI, 811 F.2d 681, 686 (1st Cir. 1987), *opinion substituted on other grounds*, 880 F.2d 1446 (1st Cir. 1989).

56. *See* Roell v. Withrow, 538 U.S. 580, 590 (2003) (noting that implied consent exists when the litigant or his counsel is "made aware of the need for consent and the right to refuse it, and still voluntarily appear[s]" without objection).

57. *See, e.g.*, DuVoisin v. Foster (*In re* S. Indus. Banking Corp.), 809 F.2d 329, 331 (6th Cir. 1987) (finding express consent to bankruptcy court's statutory jurisdiction by acknowledgment of bankruptcy jurisdiction in pleadings and filings); Moonblatt v. Kosmin, 139 F.2d 412, 415 (3d Cir. 1943) (finding consent to bankruptcy referee summary adjudication arose from counsel's statements in open court).

58. *See, e.g.*, PPM Fin., Inc., v. Norandal USA, Inc., 392 F.3d 889, 895 (7th Cir. 2004) (citing Ryder v. Bank of Hickory Hills, 585 N.E.2d 46, 49 (Ill. 1991)).

59. *See* Donaldson v. Ducote, 373 F.3d 622, 624 & n.1 (5th Cir. 2004) (per curiam) (citations omitted); Dooley v. Weil (*In re* Garfinkle), 672 F.2d 1340, 1347 (11th Cir. 1982) (citing Fireman's Fund Ins. v. Vogel, 195 So. 2d 20, 24 (Fla. Dist. Ct. App. 1967)); Journe v. Journe, 911 F. Supp. 43, 48 (D.P.R. 1995) ("[I]f proof of a waiver rests upon one's acts, these acts should be so manifestly consistent with and indicative of an intent to relinquish

of the presumption against implied consent, the simple elapse of time does not imply consent, although it may form the basis for forfeiture.[60]

B. *Forfeiture*

"No procedural principle is more familiar to [the Supreme] Court than that a . . . right may be forfeited in . . . civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[61] The meaning of "timely" varies depending upon the claim-processing rules governing the relevant adjudication. For instance, a defendant forfeits most defenses and many rights when they are not included in an answer or amended answer.[62] If an earlier deadline is not prescribed, the argument must be pursued before the court issues a judgment on the merits.[63] The specter of forfeiture incentivizes litigants to timely marshal all of their arguments, thereby increasing the efficiency of adjudications.[64]

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voluntarily a particular right that no other reasonable explanation of this conduct is possible." (citations omitted)).

60. *See Dooley*, 672 F.2d at 1347 (citing *Fireman's Fund*, 195 So. 2d at 24).

61. Yakus v. United States, 321 U.S. 414, 444 (1944) (citations omitted) (citing O'Neil v. Vermont, 144 U.S. 323, 331 (1891)). In a civil case, forfeiture may be overlooked when it will cause a miscarriage of justice. Ala. Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dall., LLC (*In re* Lett), 632 F.3d 1216, 1227 (11th Cir. 2011) (citing Hormel v. Comm'r, 312 U.S. 552, 558 (1941)). One peculiar exception to forfeiture for bankruptcy proceedings arises when a debtor-in-possession has the burden, irrespective of a lack of objections, to satisfy certain elements certain issues, and the bankruptcy court has a duty to adjudicate such issues. Everett v. Perez (*In re* Perez), 30 F.3d 1209, 1213 (9th Cir. 1994); *see Ball Healthcare-Dall.*, 632 F.3d at 1229–30. The requirements of confirmation, and in particular, the absolute priority rule, implicate this exception. *Ball Healthcare-Dall.*, 632 F.3d at 1230; *Everett*, 30 F.3d at 1214.

62. FED. R. CIV. P. 12(b); Kontrick v. Ryan, 540 U.S. 443, 445 (2004).

63. *Kontrick*, 540 U.S. at 458.

64. As Justice Scalia observed:

> [A] trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review. The very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.

Freytag v. Comm'r, 501 U.S. 868, 895 (1991) (citation omitted). Forfeiture may also be imposed as a sanction for failure to abide by court orders, including discovery production orders. *See* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 779 (7th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 1932 (2015). This Article will focus on forfeiture owing to a

C. *Prohibition on Litigant Consent and Forfeiture of Federal Subject Matter Jurisdiction*

Whether perceived or actual, the importance of a litigant's right does not preclude the litigant from waiving or forfeiting it.[65] Claim-processing rules govern and limit when many fundamental constitutional rights must be asserted in order to avoid forfeiture, including the right to a jury trial under the Seventh Amendment.[66] As an exception to this rule, the subject matter jurisdiction of a court is both unwaivable and unforfeitable.[67] "Subject-matter jurisdiction 'can never be forfeited' because 'it involves a court's power to hear a case.'"[68] Because a litigant cannot relinquish this right, the litigant may advance it for the first time at any level, including before the Supreme Court.[69] The subject matter jurisdiction of federal courts is the most well-known of these structural principles.[70] A lesser-known structural principle is federal courts' adjudicatory power under Article III, the principle analyzed by the majority in *Wellness* and another potential limitation to consent and forfeiture.[71]

Subject matter jurisdiction is a necessity in federal court because federal courts are not courts of general jurisdiction.[72] They possess only the jurisdiction and powers "authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."[73] The Article III courts

failure to timely assert an argument or right.

65. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (Although courts may "'indulge every reasonable presumption against waiver' of fundamental constitutional rights," they are still waivable. (citation omitted) (quoting Aetna Ins. v. Kennedy, 301 U.S. 389, 393 (1937))). An appellate court may also employ its discretion to overlook a forfeiture. Peretz v. United States, 501 U.S. 923, 953–54 (1991) (Scalia, J., dissenting); Al Bahlul v. United States, 792 F.3d 1, 4 (D.C. Cir. 2015) (majority opinion), *vacated*, No. 11-1324, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016) (en banc).

66. *See* FED. R. CIV. P. 38(b) (setting forth deadlines for demanding a trial by jury).

67. United States v. Cotton, 535 U.S. 625, 630 (2002).

68. *Al Bahlul*, 792 F.3d at 30–31 (Henderson, J., dissenting) (emphasis omitted) (quoting *Cotton*, 535 U.S. at 630).

69. *See* Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17–18 (1951).

70. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986).

71. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938 (2015).

72. This is as opposed to state courts, which can possess general jurisdiction. Liebhart v. Gates, No. 90 C 5396, 1990 WL 186483, at *1 (N.D. Ill. Nov. 15, 1990).

73. *E.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); *accord* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02 (1982). Federal courts even

below the Supreme Court only exist at the discretion of Congress.[74] Because Congress may abolish these courts, it naturally may also delineate their jurisdiction.[75] Parties do not possess this same power. Parties cannot consensually confer federal courts with subject matter jurisdiction.[76] Parties similarly lack the power to discard or forfeit federal subject matter jurisdiction.[77]

The lower courts created by Congress can only possess the jurisdiction conferred upon them by congressional statute.[78] However, not all threshold limitations imposed on a statute's scope are jurisdictional, i.e., "the courts' statutory or constitutional power to adjudicate the case."[79] Threshold limitations are actually presumed to be non-jurisdictional and simply elements of the plaintiff's claim because they "alter[] the normal operation of the adversarial system."[80] A limitation is jurisdictional only if Congress clearly intends it.[81] According to the Supreme Court, the hallmarks of such congressional intent exist when: (1) the provision is located in the title's jurisdictional provision, (2) it is stated in jurisdictional terms, or (3) it refers to the district court's jurisdiction.[82]

Any discussion of the limits of bankruptcy subject matter jurisdiction must distinguish federal bankruptcy jurisdiction from the core and non-core jurisdictional division of labor between bankruptcy courts and district

presume a cause of action is outside of their limited jurisdiction. Modena v. United States, No. 1:13-CV-293, 2014 WL 1154612, at *7 (W.D. Mich. Mar. 21, 2014). Accordingly, the claimant has the burden of rebutting this presumption and establishing federal jurisdiction. *Id.* (citations omitted).

74. Stern v. Marshall, 564 U.S. 462, 482 (2011) (quoting U.S. CONST. art. III, § 1); Kontrick v. Ryan, 540 U.S. 443, 452 (2004).

75. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 100.20[2] (3d ed. 2016).

76. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986).

77. United States v. Cotton, 535 U.S. 625, 630 (2002).

78. 15 MOORE ET AL., *supra* note 75 (citing Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850)).

79. *Cotton*, 535 U.S. at 630 (emphasis omitted) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998)).

80. Stern v. Marshall, 564 U.S. 462, 479–80 (2011) (quoting Henderson v. Shinseki, 562 U.S. 428, 434 (2011)).

81. Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006).

82. *See id.* at 515 (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

courts.[83] The Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) conferred federal bankruptcy jurisdiction on federal district courts and created the core and non-core jurisdictional dichotomy between district courts and the bankruptcy courts.[84] The BAFJA, specifically 28 U.S.C. § 1334, vests the district courts with original but non-exclusive jurisdiction over all civil proceedings arising under the Bankruptcy Code (Code) and all proceedings arising in or related to a case under the Code.[85] The BAFJA permits, but does not require, the district courts to refer such proceedings to the bankruptcy court.[86] As a practical matter, all district courts have local rules referring all proceedings arising under, arising in, and related to the Code to the bankruptcy court of the district.[87]

However, bankruptcy courts cannot enter final judgments on all cases referred to them, as 28 U.S.C. § 157 "allocates the authority to enter final judgment between the bankruptcy court and the district court."[88] Bankruptcy courts may enter final judgments in core proceedings arising in a bankruptcy case or arising under the Code,[89] which are only reviewed on appeal.[90] Section 157(b)(2) of Title 28 provides a non-exhaustive list of core

83. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

84. BAFJA § 101, 98 Stat. at 333. Congress enacted the BAFJA following the Supreme Court's holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co. See Wellness*, 135 S. Ct. at 1939. In *Northern Pipeline*, the Court struck down the jurisdictional provisions of the Bankruptcy Reform Act of 1978 as unconstitutional because it granted bankruptcy courts, staffed by Article I bankruptcy judges, with the power to enter final judgment on common law claims, which only Article III judges may finally adjudicate. *N. Pipeline*, 458 U.S. at 87. In what turned out to be an unsuccessful effort, Congress narrowed the jurisdiction of bankruptcy judges under the BAFJA by conferring original jurisdiction with the Article III district courts. 28 U.S.C. § 1334(b).

85. 28 U.S.C. § 1334(b).

86. *Id.* § 157(a).

87. Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of* Stern v. Marshall, 86 AM. BANKR. L.J. 357, 361 (2012).

88. Stern v. Marshall, 564 U.S. 462, 480 (2011).

89. *Id.* at 474. The genesis of the term *core jurisdiction* apparently was the Supreme Court's suggestion in *Northern Pipeline* that "the restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power." *N. Pipeline*, 458 U.S. at 71.

90. 28 U.S.C. § 157(b)(1). A court of appeals may establish a Bankruptcy Appellate Panel (BAP) to hear appeals from bankruptcy courts. *Id.* § 158(b)(1). A BAP is composed of bankruptcy judges (still non-Article III judges) serving in the circuit

proceedings.[91] In a non-core proceeding (a proceeding only related to the bankruptcy case), a bankruptcy court submits proposed findings of fact and conclusions of law to the district court for de novo review.[92] However, if no party objects within 14 days of being served with the proposed findings of facts and conclusions of law, the party forfeits any objections to the bankruptcy court's recommendations and the district court will adopt the recommendations of the bankruptcy court.[93]

While federal bankruptcy subject matter jurisdiction under 28 U.S.C. § 1334 is jurisdictional,[94] 28 U.S.C. § 157 is not.[95] Congress clearly intended § 1334 to be jurisdictional, as it is included in Title 11's jurisdictional provision, is stated in jurisdictional terms, and refers to the district court's jurisdiction.[96] A claim failing to satisfy at least the minimum "related to" jurisdiction is not within federal bankruptcy jurisdiction and lacks federal

appointed by the circuit's judicial counsel. *Id.* Currently, the First, Sixth, Eighth, Ninth, and Tenth Circuits have established BAPs. Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 683 n.78 (2009). BAPs may only take appeals when all parties consent; otherwise, the appeal will proceed to the district court. 28 U.S.C. § 158(b)(1). If *Wellness* had not held that *Stern* claims could be finally adjudicated by a bankruptcy judge with the litigants' consent, the BAPs would have stood in the unfortunate position of possessing statutory appellate jurisdiction over such claims without the ability to constitutionally render a final judgment. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1947 (2015) ("Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception.").

91. 28 U.S.C. § 157(b)(2). On appeal of a final judgment in a core proceeding, the district court reviews a bankruptcy courts' final determinations of fact as clear error and conclusions of law de novo. Canal Corp. v. Finnman (*In re* Johnson), 960 F.2d 396, 399 (4th Cir. 1992).

92. 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033; *see, e.g.*, Chi. Bank of Commerce v. Amalgamated Tr. & Sav. Bank (*In re* Mem'l Estates, Inc.), 90 B.R. 886, 894 (Bankr. N.D. Ill. 1988), *aff'd sub nom. In re* Mem'l Estates, Inc., 950 F.2d 1364 (7th Cir. 1991).

93. Nantahala Vill., Inc. v. NCNB Nat'l Bank of Fla. (*In re* Nantahala Vill., Inc.), 976 F.2d 876, 882 (4th Cir. 1992); Messer v. Peykar Int'l Co. (*In re* Fine Diamonds, LLC), 510 B.R. 31, 42 (S.D.N.Y. 2014); *see* 28 U.S.C. § 157(c)(1) (mandating de novo review for only "those matters to which any party has timely and specifically objected"); FED. R. BANKR. P. 9033(d) (finding the district court "shall [only] make a de novo review . . . of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule").

94. *See* 28 U.S.C. § 1334 (2012) (noting district courts have original jurisdiction over bankruptcy cases).

95. *See* 28 U.S.C. § 157 (laying out the procedures for bankruptcy cases); *In re* RNI Wind Down Corp., 348 B.R. 286, 292 (Bankr. D. Del. 2006).

96. *See* 28 U.S.C. § 1334; *In re* RNI Wind Down Corp., 348 B.R. at 292.

subject matter jurisdiction unless an independent source exists.[97] Because no federal subject matter jurisdiction exists over an "unrelated" claim, a litigant cannot confer or consent to subject matter jurisdiction.[98]

Unlike § 1334, § 157 divides the labor of issuing judgments between the bankruptcy court and the district court and therefore is not jurisdictional.[99] A litigant may consent to a claim being categorized as core and subject to final determination by a bankruptcy court pursuant to its statutory jurisdiction.[100] Section 157 satisfies none of the relevant factors for a statute being jurisdictional.[101] It also neither uses the term "jurisdiction" nor speaks in terms of jurisdiction.[102] Thus, litigant consent may alter the allocation of the authority to enter a final judgment under 28 U.S.C. § 157.[103]

The structural right to an Article III judge conferred by Article III, Section One of the Constitution is treated analogously to subject matter jurisdiction.[104] Article III, Section One guarantees an independent and impartial Judiciary,[105] thereby protecting "the role of the independent judiciary within the constitutional scheme of tripartite government."[106] This guarantee has a dual character.[107] It protects two distinct interests: (1) a litigant's personal right to have his or her personal adjudications rendered

97. *See* Yellow Sign, Inc. v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 466 B.R. 750, 766 (Bankr. M.D.N.C. 2012).

98. Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1137–38 (6th Cir. 1991); *see* SAI Admin. Claim & Creditor Tr. v. Benecke-Kaliko AG (*In re* SAI Holdings, Ltd.), Nos. 06-33227, 08-3036, 2009 WL 1616663, at *4 (Bankr. N.D. Ohio Feb. 27, 2009).

99. *Compare* 28 U.S.C. § 157(a) (allowing district court to refer Title 11 proceedings to bankruptcy judges), *with id.* § 1334(a) (conferring original and exclusive jurisdiction of all cases under Title 11 to district courts).

100. *See* Stern v. Marshall, 564 U.S. 462, 476–77 (2011) (categorizing 28 U.S.C. § 157, which includes the subsection delineating core and non-core proceedings, as non-jurisdictional).

101. *Id.* at 480 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction.").

102. *Id.*

103. *See id.* at 481.

104. *See supra* notes 88–103 and accompanying text.

105. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

106. *Id.* (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985)).

107. *Id.*; Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

by an independent and impartial judiciary and (2) the inseparable structural principle preserving the Judicial Branch from the encroachment of the other governmental branches.[108] The personal right protected by Article III, Section One is exactly that—personal—and as a result, it may be abandoned by a litigant just like other personal rights, such as the right to a jury trial.[109] In contrast, "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, [Section Two]."[110] This limitation is natural, considering the collective action problem[111] posed by such institutional interests. To wit, an individual litigant will not protect the separation of powers among the governmental branches if doing so will not advance his or her case, even though such encroachments can undermine the fabric of the judicial process for all future litigants.[112]

> The practical problem, of course, is the difficulty of separating out the waivable personal safeguard from the nonwaivable structural safeguard, for in every case an argument that a party waived the personal protection can be met with the argument that the court must still consider the objection because the structural aspect cannot be waived.[113]

Courts have equated the Supreme Court's jurisprudence concerning consent to forfeiture of Article III rights.[114] Thus, the uncertainty concerning consent permeated the analyses of forfeiture as well.

108. *Schor*, 478 U.S. at 848 (quoting *Thomas*, 473 U.S. at 583; United States v. Will, 449 U.S. 200, 218 (1980)); Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 768 (7th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 1932 (2015).

109. *Schor*, 478 U.S. at 848–49.

110. *Id.* at 850–51.

111. Whether a true "structural principle" exists is subject to controversy. "[S]eparation of powers is not an end in itself." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991). The tenure and salary protections of Article III protect individuals. Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 241 (2012). Therefore, it is best to term the structural principle as a solution to a collective action problem as implied by *Commodity Futures Trading Commission v. Schor*.

112. *See Schor*, 478 U.S. at 851.

113. *Wellness*, 727 F.3d at 769.

114. *See, e.g.*, Res. Funding, Inc. v. Pac. Cont'l Bank (*In re* Wash. Coast I, L.L.C.), 485 B.R. 393, 410–11 (B.A.P. 9th Cir. 2012); Al Bahlul v. United States, 792 F.3d 1, 3–7 (D.C. Cir. 2015) (majority opinion), *vacated*, No. 11-1324, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016).

III. *STERN* CLAIMS

Thus far, this Article has explored subject matter jurisdiction pursuant to a congressional grant and the structural and personal characteristics of Article III, Section One. The final adjudication of a *Stern* claim by a bankruptcy judge implicates the Article III, Section One guarantee.[115] Before analyzing whether a *Stern* claim is jurisdictional or subject to consent and forfeiture, a brief explanation of *Stern* claims is appropriate.

The genesis of *Stern* claims is the distinction between Article III district court judges and their Article I bankruptcy judge counterparts.[116] Congress may establish both Article III courts and Article I courts,[117] but the constitutional protections afforded Article III judges are not required for Article I judges. The judges appointed to the Supreme Court and the inferior courts established pursuant to Article III have life tenure subject only to impeachment, and their salaries cannot be diminished.[118] Article I judges' benefits and protections are not enshrined in the Constitution. Congress determines their protections and benefits, which are less extensive than those provided to Article III judges.[119] Because Congress established bankruptcy courts pursuant to its Article I powers, those courts can be staffed with bankruptcy judges who do not receive the same benefits of life tenure and salary protection afforded to Article III judges.[120]

The separation of powers among the three governmental branches limits Congress's ability to confer adjudicatory authority to an Article I court.[121] Congress may not vest Article I courts with the "judicial power" of the United States.[122] Issuing final judgments in the categories of cases described in Article III, Section Two of the Constitution (including cases at

115. *See* Stern v. Marshall, 564 U.S. 462, 487 (2011) (discussing the bankruptcy court's ability to "exercise[] the 'judicial Power of the United States'").

116. *See id. passim*.

117. *See* U.S. CONST. art. III, § 1.

118. *Wellness*, 727 F.3d at 762.

119. *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 567 (1998) (explaining that the lack of life tenure and appointment by the President preclude bankruptcy judges from being characterized as Article III judges).

120. *See Wellness*, 727 F.3d at 762–63.

121. Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 12, 15 (2012).

122. *See id.* at 5–6.

law and equity) implicates judicial power.[123] This prohibition recognizes the importance of Article III's independence.[124] The retention and pay protections of Article III shield the Article III Judiciary from encroachment by the Legislative and Executive Branches.[125] Otherwise, Congress could simply vest all judicial power in the Article I courts and potentially pressure the Article I judges through pay or retention manipulation.[126] The Supreme Court has recognized three exceptions to this limitation.[127] The military tribunals and territorial courts exceptions are not controversial because "a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue."[128] The boundaries of the third exception, the public rights exception, remain disputed.[129]

The public rights exception derives from the sovereign immunity of the federal government.[130] When the federal government is a party to an action, the sovereign immunity of the federal government is implicated, and without

123. *See* 15 MOORE ET AL., *supra* note 75, § 100.41[1] (quoting Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828)).

124. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc) ("A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas.").

125. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–60, 59 n.10 (1982) (highlighting the importance of separation of powers), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015); *Pacemaker Diagnostic Clinic*, 725 F.2d at 541 (same). Even if an exception to the Article III requirement arguably might apply, "the presumption is in favor of Art[icle] III courts." Stern v. Marshall, 564 U.S. 462, 499 (2011) (quoting *N. Pipeline*, 458 U.S. at 69 n.23).

126. *See* 15 MOORE ET AL., *supra* note 75, § 100.41[1]; *accord N. Pipeline*, 458 U.S. at 73.

127. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585 (1985).

128. *N. Pipeline*, 458 U.S. at 66; *see Ex parte* Quirin, 317 U.S. 1, 46 (1942); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857); Al Bahlul v. United States, 792 F.3d 1, 7–10 (D.C. Cir. 2015) (noting the Court traditionally has held that military tribunals have jurisdiction over certain claims), *vacated by* No. 11-1324, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016) (en banc).

129. *Compare Stern*, 564 U.S. at 487–94 (recognizing the existence of the public rights exceptions, but finding it unsatisfied), *with* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65–71 (1989) (Scalia, J., concurring in part and concurring in the judgment) (citing *N. Pipeline*, 458 U.S. at 69) (suggesting that the public rights exception "at a minimum" requires that the federal government be a party).

130. Atlas Roofing Co. v. OSHARC, 430 U.S. 442, 450 (1977).

a waiver of sovereign immunity, the action will be dismissed.[131] Congress controls whether to allow a determination on the merits of a claim against the federal government.[132] Despite such control, allowing Congress to choose the adjudicator over an action made possible by Congress does not create separation of powers concerns.[133] The early interpretation of the public rights exception only encompassed actions where the federal government was a party,[134] including agency adjudications.[135] This historical basis aligns with the other exceptions to Article III.[136]

More recently, *Thomas v. Union Carbide Agricultural Products Co.* and *Commodity Futures Trading Commission v. Schor* expanded the public rights exception to include actions involving solely private parties.[137] According to *Thomas*, the public rights exception includes "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[138] This practical test weighs both the congressional intent and the benefits of Article I adjudication against the importance of Article III adjudication.[139] The next term, the Court fashioned a multi-factor balancing test (detailed more fully in later decisions): whether "the claim and the counterclaim concerned a 'single dispute'"; whether the vested authority concerned "'a narrow class of common law claims' in a 'particularized area of law'"; whether "the area of law in question was governed by 'a specific and limited regulatory scheme'" under which the

131. *Granfinanciera*, 492 U.S. at 67–68.

132. *Id.* at 68. Unlike the states' Eleventh Amendment sovereign immunity, federal sovereign immunity cannot be impliedly waived. *See* Bilger v. United States, No. CIV F 00-6486 OWWJLO, 2001 WL 169568, at *4 (E.D. Cal. Jan. 10, 2001).

133. *Stern*, 564 U.S. at 488–89 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855)); *Granfinanciera*, 492 U.S. at 68 (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986).

134. *See N. Pipeline*, 458 U.S. at 69 n.23 (noting that the presence of the United States as a party was necessary but not sufficient for an action to be a public right).

135. *See, e.g.*, *Atlas Roofing*, 430 U.S. at 450 n.7; Crowell v. Benson, 285 U.S. 22, 50 (1932).

136. *See Granfinanciera*, 492 U.S. at 66–67.

137. *Schor*, 478 U.S. at 854; Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593–94 (1985).

138. *Thomas*, 473 U.S. at 594.

139. Jason C. Matson, Comment, *Running Circles Around* Marathon*? The Effect of Accounts Receivable as Core or Noncore Proceedings on the Article III Courts*, 20 BANKR. DEV. J. 451, 503 (2004).

agency possessed "obvious expertise"; and whether the orders of the agency "were enforceable only by order of the district court."[140] Relying upon either *Thomas* or *Schor*, many courts categorized actions codified by the Code as public rights.[141] However, as will be discussed later, the Supreme Court has refused to label any claims created by the Code as public rights.[142]

Stern claims arise from the mismatch between Congress's grant of statutory authority to enter final judgments and the limitations imposed on non-Article III judges by the Constitution.[143] Ever since Congress overhauled the power of bankruptcy judges to enter final judgments by enacting the Bankruptcy Reform Act of 1978 (Reform Act), it has been unable to balance its grant of final adjudicatory authority to Article I bankruptcy courts with the demands of Article III. Twice the Supreme Court has rejected congressional legislation delineating the authority of bankruptcy judges to enter final judgments.[144] Because of the lack of Article III protections, statutory subject matter jurisdiction is insufficient to allow a bankruptcy judge to enter a final judgment.[145] The historical practices of bankruptcy judges and their predecessors, stretching back to the common law, help define the scope of modern bankruptcy judges' ability to enter final judgments. This Part will chronicle the adjudication of bankruptcy matters from common law to the present with a focus on the role of consent.

A. *Common Law and Early American Practices*

Even at common law, two different sets of adjudicators handled

140. *See* Stern v. Marshall, 564 U.S. 462, 491 (2011) (citing *Schor*, 478 U.S. at 844, 852–55) (analyzing the *Schor* decision).

141. *See, e.g.*, West v. Freedom Med., Inc. (*In re* Apex Long Term Acute Care–Katy, L.P.), 465 B.R. 452, 457–60 (Bankr. S.D. Tex. 2011) (relying upon both *Schor* through *Stern* and *Thomas*).

142. *See infra* notes 194–95 and accompanying text.

143. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 146–47 (2012) [hereinafter Brubaker, *Summary*] ("Despite finding that the statute authorized the bankruptcy court to enter a final judgment on [the] compulsory counterclaim . . . , the Court held that in this respect the statute was unconstitutionally over-broad.").

144. *Stern*, 564 U.S. at 487; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

145. *See Stern*, 564 U.S. at 480; *N. Pipeline*, 458 U.S. at 87.

bankruptcy proceedings. The bankruptcy commissioners, appointed by the Lord Chancellor of Court of Chancery, exercised in rem jurisdiction by administering the property rightfully in the debtor's estate.[146] The commissioners adjudicated the validity of creditors' claims before distributing the liquidated proceeds of the debtor's property.[147] The commissioners' bankruptcy jurisdiction was limited to in rem determinations administering the property in the particular commissioner's custody or the custody of his representative, the assignee.[148] Additionally, the commissioners' jurisdiction did not encompass deciding what constituted the bankruptcy estate; the courts of law and equity made such determinations.[149] Besides gathering the debtor's property, the assignee could also bring claims to recover debts owed to the debtor or recover the debtor's property.[150] The courts of law and equity also adjudicated these actions because they invoked in personam jurisdiction by imposing liability on third parties.[151] The early federal bankruptcy statutes in the United States were largely modeled on the bankruptcy jurisdiction and bifurcated authority employed in England at the time of the Framing.[152]

B. *1898 Bankruptcy Act*

The 1898 Bankruptcy Act (1898 Act), the first permanent federal bankruptcy legislation,[153] retained the bifurcated structure of bankruptcy

146. Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an* In Rem *Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 263, 263–64 (1999) [hereinafter Brubaker, *One Hundred Years*] (quoting Halford v. Gillow (1842), 60 Eng. Rep. 18, 20, 13 Sim. 44, 49).

147. *Id.* at 263.

148. *Id.*

149. John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: Granfinanciera S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 30–31 (1991).

150. Ezra H. Cohen, *The Effect of* Stern v. Marshall *on Avoidance Actions*, 22 NORTON J. BANKR. L. & PRAC. 77, 85 (2013) (citing Plank, *supra* note 119, at 584–85).

151. *See* McCoid, *supra* note 149.

152. *See* Brubaker, *One Hundred Years*, *supra* note 146.

153. Congress enacted the first federal bankruptcy statute in 1800, but Congress repealed it in 1803. *In re* Marshall, 300 B.R. 507, 513–14 (Bankr. C.D. Cal. 2003), *aff'd sub nom.* Marshall v. Marshall (*In re* Marshall), 403 B.R. 668 (C.D. Cal. 2009), *aff'd*, 721 F.3d 1032 (9th Cir. 2013). Congress next enacted a federal bankruptcy law in 1841, but it was again repealed in 1843. *Id.* at 514. Finally, in 1867 Congress enacted a bankruptcy statute, which it repealed in 1878. *Id.* Each of these federal bankruptcy statutes was enacted as a response to a financial panic. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 386 (2006) (Thomas, J., dissenting) (citing Charles Jordan Tabb, *The History of the*

adjudication. The 1898 Act split bankruptcy subject matter jurisdiction into summary and plenary matters and vested summary jurisdiction and part of the plenary jurisdiction in the U.S. district courts.[154] The district court judges appointed bankruptcy referees to six-year terms and referred matters within the district courts' summary bankruptcy jurisdiction to the referees.[155] Summary proceedings, which were rooted in in rem bankruptcy jurisdiction,[156] applied to property rightfully in the constructive or actual possession of the debtor on the petition date, regardless of the property's location.[157] Bankruptcy referees could issue final judgments on summary proceedings, and these final orders were subject to the review of the district court on appeal.[158]

The referees' jurisdiction did not include plenary matters, absent consent of the parties.[159] Plenary jurisdiction generally covered trustees' in

Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5, 14 (1995)). Once the panic subsided, the statute was repealed or expired. *Id.* In the absence of federal legislation, state insolvency laws governed. *See* Sticka v. Applebaum (*In re* Applebaum), 422 B.R. 684, 688–92 (B.A.P. 9th Cir. 2009) (noting that states' bankruptcy and insolvency laws were applied when no federal bankruptcy statute was in effect); Tabb, *supra*, at 13.

154. Brubaker, *Summary*, *supra* note 143, at 127–29 (explaining the scope of plenary and summary jurisdiction, including the limitations on federal subject matter jurisdiction over plenary proceedings, which resulted from federalist concerns).

155. *See* White v. Schloerb, 178 U.S. 542, 546 (1900) (citations omitted) (noting that summary matters in bankruptcy cases were "referred by the court of bankruptcy to a referee . . . [who] exercise[d] much of the judicial authority of that court").

156. The in rem foundations of the referees under the 1898 Act can be traced back to the jurisdiction of English bankruptcy commissioners at common law. Brubaker, *One Hundred Years*, *supra* note 146, at 263.

157. Rathman v. Booth (*In re* Rathman), 183 F. 913, 922 (8th Cir. 1910) (citations omitted). Bankruptcy courts under the 1898 Act possessed exclusive jurisdiction over the administration and distribution of the assets of the debtor. Roberts Auto & Radio Supply Co. v. Dattle, 44 F.2d 159, 161 (3d Cir. 1930) (citations omitted).

158. *See* Weidhorn v. Levy, 253 U.S. 268, 271 (1920) (noting that the referee's "judicial functions, however important, are subject always to the review of the [district] court").

159. *See* MacDonald v. Plymouth Cty. Tr. Co., 286 U.S. 263, 266–68 (1932), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015). The scope of the summary proceedings was a product of statutory limitation of the 1898 Act and the Supreme Court's interpretation of referees' jurisdiction. *See* Katchen v. Landy, 382 U.S. 323, 328 (1966), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (citing Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 431 & n.7 (1924)) (explaining that the Supreme Court's precedents, in the absence of statutory

personam suits to recover property or money from third parties who had not filed a proof of claim and who possessed an adverse claim to the relevant property or money.[160] The now-defunct circuit courts, the district courts, and the state courts exercised plenary jurisdiction.[161] Under the initial version of the 1898 Act, most plenary matters were adjudicated in state court because federal courts could only exercise plenary jurisdiction if an independent basis for jurisdiction existed (like diversity or federal question jurisdiction) or the parties consented.[162] Eventually, Congress expanded the district courts' statutory jurisdiction to cover all bankruptcy proceedings, both summary and plenary, under the 1898 Act.[163]

The standards for consent to summary adjudication and forfeiture of the right to plenary proceedings evolved during the life of the 1898 Act. Consent and forfeiture were initially very limited under the 1898 Act. Because of the initial absence of any claim-processing rules, the Supreme Court set the boundaries for consent, and without precedent, the boundaries of consent and forfeiture were uncertain.[164] Indeed, prior to the Supreme Court's holding in *MacDonald v. Plymouth County Trust Co.*,[165] courts

direction, would define the boundaries of the referees' summary jurisdiction), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549.

160. *See, e.g.*, Schoenthal v. Irving Tr. Co., 287 U.S. 92, 94–95 (1932), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549, *as recognized in* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51–55 (1989).

161. *See* Boss-Linco Lines, Inc. v. Laidlaw Transp. Ltd. (*In re* Boss-Linco Lines, Inc.), 55 B.R. 299, 303–05 (Bankr. W.D.N.Y. 1985) (comparing adjudication under the Code with adjudication under the 1898 Act).

162. *See* Act of July 1, 1989 (Bankruptcy Act of 1898), ch. 541, § 23(a), 30 Stat. 544, 552 (repealed 1978) (providing that the federal courts' jurisdiction regarding plenary suits extended "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants").

163. *See id.* § 1(a)(8), 30 Stat. at 544 (district courts are "courts of bankruptcy"); *id.* § 2, 30 Stat. at 545 ("[C]ourts of bankruptcy . . . are hereby invested . . . with . . . original jurisdiction in bankruptcy proceedings . . . .").

164. *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankrutpcy, with and Without Litigant Consent*, 33 EMORY BANKR. DEV. J. 1, 64–66 (2016) [hereinafter Brubaker, *Non-Article III Adjudication*] (explaining how the Supreme Court, rather than Congress, was initially responsible for allowing express consent to allow summary adjudications by a referee).

165. MacDonald v. Plymouth Cty. Tr. Co., 286 U.S. 263, 267 (1932). For discussion of *MacDonald*, consider Brubaker, *Non-Article III Adjudication*, *supra* note 164, at 60–62.

refused to recognize even express consent as a sufficient basis to allow a referee to issue a summary adjudication in what would otherwise be categorized as a plenary proceeding.[166] Moreover, absent expresse consent, a litigant could challenge a referee's summary jurisdiction at any time prior to a final order.[167] As clarified by the Supreme Court in *Cline v. Kaplan*, participation in the proceedings did not constitute implied consent to final adjudication by a referee.[168] Without implied consent and with no recognized claim-processing rules, only express consent or forfeiture due to failure to object prior to the entry of a referee's final order was sufficient.[169] This rule was heavily criticized for failing to apply the claim-processing rules of Federal Rule of Civil Procedure 12(h) (now 12(b)), which were applicable to bankruptcy courts.[170] In 1952, Congress responded by amending the 1898 Act to supersede the rule of *Cline* and created a claim-processing rule requiring a litigant to object expressly to a bankruptcy referee's summary jurisdiction in the litigant's answer, at the time set by the court or by local rules based upon Rule 12(h).[171]

C. *Reform Act and* Northern Pipeline

In enacting the Reform Act, Congress sought to expand the authority of bankruptcy judges to enter final judgments without granting bankruptcy judges the protections afforded Article III judges. As the number of bankruptcies increased,[172] Congress recognized the importance of expanding

166. Plymouth Cty. Tr. Co. v. MacDonald, 53 F.2d 827, 830 (1st Cir. 1931), *rev'd*, 286 U.S. 263.

167. Cline v. Kaplan, 323 U.S. 97, 99–100 (1944), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978); Louisville Tr. Co. v. Comingor, 184 U.S. 18, 26 (1902).

168. *Cline*, 323 U.S. at 100.

169. *See id.* Courts carved out an exception to *Cline*'s rule by finding implied consent to a referee's summary adjudication when a litigant filed an affirmative pleading, instead of simply contesting another party's complaint. *See In re* Eng'rs Oil Props. Corp., 72 F. Supp. 989, 990 (S.D.N.Y. 1947).

170. *E.g.*, David Tallant, Jr., Note, *Summary Jurisdiction in Bankruptcy: An Expanding Concept*, 5 DUKE B.J. 149, 150 n.10, 151 (1955–1956). Moreover, the rule encouraged gamesmanship because parties could await a referee's ruling and then object to jurisdiction prior to the entry of the final order if they were dissatisfied. *In re* Ahmann, 331 F. Supp. 384, 388–89 (W.D. Mo. 1971).

171. *In re* Ahmann, 331 F. Supp. at 389 (explaining 1952 amendments to 1898 Act § 2(a)(7)); *see* United States v. Gajewski, 419 F.2d 1088, 1091 (8th Cir. 1969) (finding implied consent by participation in trial on the merits).

172. Matson, *supra* note 139, at 457 n.38.

the scope of bankruptcy courts' ability to enter final judgments.[173] Congress debated whether to elevate the recently renamed bankruptcy judges[174] to Article III status or keep them as Article I legislative judges.[175] Congress eventually classified bankruptcy judges as Article I legislative judges, without the pay and retention protections of Article III judges.[176] Instead of the life tenure, removal only by impeachment, and the irreducible salaries of Article III judges,[177] bankruptcy judges under the Reform Act served 14-year terms; could be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability"; and their salaries could be reduced by Congress.[178] Nonetheless, the Reform Act broadened the scope of bankruptcy judges' authority to enter final judgments.[179] The Reform Act vested district courts with original and exclusive jurisdiction over all bankruptcy cases and original but non-exclusive jurisdiction over all civil actions arising in or related to bankruptcy cases.[180] The district courts were required to refer cases within this broad jurisdictional grant to the bankruptcy courts.[181] With very limited exceptions, "[t]he judges of the bankruptcy courts [were] vested with all of the 'powers of a court of equity, law, and admiralty.'"[182]

The Supreme Court invalidated the jurisdictional provisions of the Reform Act in *Northern Pipeline*.[183] In *Northern Pipeline*, the debtor sued a non-creditor third party on a state law breach of contract claim and sought a final judgment from the bankruptcy court.[184] Given the authority vested by

173. *Id.* at 457.

174. The adoption of the first Federal Rules of Bankruptcy Procedure in 1973 renamed bankruptcy referees as bankruptcy judges. *See* 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, 64 (2012) (explaining the genesis for changes).

175. Matson, *supra* note 139, at 458.

176. *Id.*

177. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

178. *Id.* at 60–61.

179. *See* Act of Nov. 6, 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (repealed 1984).

180. *Id.*

181. *See id.*

182. *N. Pipeline*, 458 U.S. at 55 (quoting 28 U.S.C. § 1481 (1976) (repealed 1984)).

183. *See id.* at 87.

184. *See id.* at 56.

the Reform Act, the bankruptcy court possessed the statutory authority to enter a final judgment.[185] Nonetheless, the Court reminded Congress of the limits imposed by Article III and restricted Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[186] Because bankruptcy judges under the Reform Act did not receive the same benefits and protections afforded to Article III judges, they could not wield the judicial power of the United States.[187] The expanded adjudicatory authority under the Reform Act could not allow a non-Article III judge to adjudicate a state law contract claim.[188] Instead of excising the unconstitutional portions of the Reform Act, the Court categorized all the jurisdictional provisions of the Reform Act as unconstitutional.[189]

The requirements of Article III "must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole."[190] A state law-based contract claim "involve[d] a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court."[191] This action required the bankruptcy judge to wield judicial power impermissibly to enter a final judgment.[192] According to the plurality and Justice William Rehnquist's majority-making concurrence, a claim existing independent of the bankruptcy is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" and required the oversight of an Article III judge.[193]

Although they disagreed on the scope of the public rights exception to

185. *See id.* at 54–55.

186. *Id.* at 67 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855)).

187. *Id.* at 87.

188. *Id.* at 87 n.40.

189. *Id.* at 87.

190. *Id.* at 64; *see also id.* at 70 ("[T]his Court has identified three situations in which Art[icle] III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art[icle] III.").

191. *Id.* at 84 (emphasis omitted).

192. *See id.*

193. *Id.* at 90 (Rehnquist, J., concurring in the judgment); *see id.* at 71–72, 72 n.26 (plurality opinion) (citing Crowell v. Benson, 285 U.S. 22, 51 (1932)).

Article III final adjudication, both the plurality and Justice Rehnquist failed to categorize the state law-based contract claim by a debtor against a non-creditor as a public right.[194] While refusing to reject bankruptcy matters as public rights completely, the breach of contract claim was clearly a private right requiring the oversight of an Article III judge.[195]

Both the plurality and concurrence further agreed bankruptcy courts were not adjuncts to the district courts, another exception to Article III.[196] The Supreme Court previously upheld the use of administrative agencies and magistrate judges as adjuncts to the district court, even though their adjudications would otherwise violate Article III.[197] A non-Article III tribunal could only be considered an adjunct if "'the essential attributes' of judicial power [were] retained in the Art[icle] III court."[198] Magistrate judges are appropriately labeled adjuncts because their proposed findings of fact and conclusions of law are subject to de novo review by the district court.[199] In contrast, bankruptcy judges under the Reform Act could issue final judgment subject to appellate review, rather than de novo.[200] Because the ultimate decision was no longer made by the district court, bankruptcy judges were not considered adjuncts of the district court.[201]

In *Northern Pipeline*, the defendant's lack of consent ensured the Article III violation. According to both the plurality and the concurrence, the defendant did not consent to adjudication by the bankruptcy judge.[202]

194. *See id.* at 67–68 (citations omitted); *id.* at 90–91 (Rehnquist, J., concurring in the judgment).

195. *Id.* at 71 (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not.").

196. Stern v. Marshall, 564 U.S. 462, 486 (2011) ("A full majority of Justices in *Northern Pipeline* also rejected the debtor's argument that the bankruptcy court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals.").

197. *See* United States v. Raddatz, 447 U.S. 667, 683 (1980); *Crowell*, 285 U.S. at 60–61.

198. *N. Pipeline*, 458 U.S. at 81 (quoting *Crowell*, 285 U.S. at 51).

199. *Raddatz*, 447 U.S. at 681–82 (citations omitted).

200. *N. Pipeline*, 458 U.S. at 82–83.

201. *Id.* at 87.

202. *Id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 92 (Burger, C.J., dissenting).

Although initially difficult to discern, later cases confirmed the importance of this lack of consent to the Court's holding in *Northern Pipeline*.[203]

D. *The BAFJA*

Congress enacted the BAFJA (the Bankruptcy Amendments and Federal Judgeship Act of 1984) to cure the constitutional deficiencies of the Reform Act while maximizing the adjudicatory authority vested in bankruptcy judges without making them Article III judges.[204] Under the BAFJA, bankruptcy judges became "judicial officers of the United States district court."[205] They retained their Article I status, as marked by their appointment by the overseeing circuit court of appeals to 14-year terms,[206] their removal by the circuit's judicial counsel for the same causes as under the Reform Act,[207] and the setting of their salaries at 92 percent of the Article III district judges' salaries.[208]

Section 157 of Title 28 illustrates Congress's balancing of constitutional concerns with its desire to maximize the scope of bankruptcy judges' authority.[209] Unlike the Reform Act's required referrals, the BAFJA provides the district court judges with discretion by authorizing the district court judges to refer cases to the bankruptcy court.[210] Yet, the BAFJA's

203. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1946 (2015); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986) ("[T]he relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication."); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985) (citations omitted) ("The Court's holding in [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.").

204. Matson, *supra* note 139, at 467.

205. 28 U.S.C. § 152(a)(1) (2012).

206. *Id.*

207. *Id.* § 152(e).

208. *Id.* § 153(a).

209. *See* 28 U.S.C. § 157.

210. *Id.* § 157(a). As a practical matter, all district courts have local rules referring to the district's bankruptcy court all proceedings within the court's bankruptcy jurisdiction. Oxford Expositions, LLC v. Questex Media Grp., LLC, No. 3:10cv00095, 2011 WL 1135354, at *2 (N.D. Miss. Mar. 25, 2011) ("Standing orders of reference (providing for reference of all cases and proceedings as opposed to a case-by-case

scope of referrals is still broader than those under the 1898 Act, as it allowed the district court to refer any "proceedings arising under [a bankruptcy case] or arising in or related to" a bankruptcy case in the bankruptcy court of its district.[211] In contradistinction to the Reform Act, bankruptcy courts under the BAFJA cannot enter final judgments on all proceedings referred by the district courts.

The drafters of the BAFJA used the term "core" to bifurcate bankruptcy judges' authority to enter final judgments.[212] The use of this term stems from its use by the plurality in *Northern Pipeline* to describe the relationship between debtor-creditor relations and federal bankruptcy power.[213] The ability of a bankruptcy court to enter a final judgment depends on whether the proceeding is statutorily core or non-core.[214] Bankruptcy courts may enter final judgments in core proceedings arising in a bankruptcy case or arising under the Code, which are only reviewable on appeal.[215] Section 157(b)(2) of Title 28 provides a non-exhaustive list of core proceedings.[216] The list includes counterclaims by the estate against individuals filing proofs of claims, fraudulent conveyance proceedings, and turnover orders.[217] In a non-core proceeding, a proceeding only related to a bankruptcy case, the bankruptcy court submits proposed findings of fact and

reference) have accordingly been entered by all or virtually all the district courts, including this court."); G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 530.

211. *See* 28 U.S.C. § 157(a); *supra* note 168 and accompanying text explaining bankruptcy referees' lack of statutory jurisdiction over plenary proceedings absent the litigants' consent.

212. *See* 28 U.S.C. § 157(b)(1).

213. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1940 (2015); *cf.* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights . . . ."), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in Wellness*, 135 S. Ct. 1932.

214. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 471 (2011).

215. 28 U.S.C. § 157(b)(1).

216. *Id.* § 157(b)(2). On appeal of a final judgment in a core proceeding, the district court reviews the bankruptcy court's final determinations of fact as clear error and conclusions of law de novo. *See* Canal Corp. v. Finnman (*In re* Johnson), 960 F.2d 396, 399 (4th Cir. 1992) (citations omitted).

217. 28 U.S.C. § 157(b)(2)(C), (E), (H).

conclusions of law for de novo review.[218]

The BAFJA created a partial framework for adjudication of non-core matters by bankruptcy judges with the consent of the parties. Section 157(c)(2) of Title 28 provides that a bankruptcy court may issue a final judgment in a non-core matter.[219] However, no claim-processing rules were initially prescribed for non-core matters.[220] Thus, the courts reverted to the standard of *Cline* and found forfeiture only when a litigant failed to object to a bankruptcy judge issuing a final judgment in a non-core proceeding before a final judgment was issued.[221]

In 1987, the Federal Rules of Bankruptcy Procedure were amended to create claim-processing rules regarding non-core proceedings.[222] Federal Rule of Bankruptcy Procedure 7008 required a complaint, counterclaim, cross-claim, or third-party complaint in an adversary proceeding to expressly state whether the proceeding was core or non-core and, if non-core, state whether the plaintiff consented to final orders by the bankruptcy judge.[223] Its companion, Rule 7012, provides: "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge."[224] If the defendant fails to deny the plaintiff's allegation categorizing a proceeding as core in the initial pleading, the defendant forfeits any argument to the contrary.[225] To ensure consistency, in 1991, Federal Rule of Bankruptcy Procedure 9027 was also amended to require any party who has

218. *Id.* § 157(c)(1); Walter v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 449 B.R. 860, 873 (Bankr. M.D.N.C. 2011). The district court reviews all proposed findings of fact and conclusions of law de novo. *See, e.g.*, FED. R. BANKR. P. 9033(d).

219. 28 U.S.C. § 157(c)(2).

220. *See* FED. R. BANKR. P. 7012 advisory committee's note to 1987 amendment.

221. Taylor v. Wiglesworth (*In re* Wiglesworth), No. 77-01348, 1985 WL 729859, at *4 (Bankr. E.D. Va. Nov. 12, 1985); *see* Men's Sportswear, Inc. v. Sasson Jeans, Inc. (*In re* Men's Sportswear, Inc.), 834 F.2d 1134, 1137–38 (2d Cir. 1987); DuVoisin v. Foster (*In re* S. Indus. Banking Corp.), 809 F.2d 329, 331 (6th Cir. 1987) (finding absence of timely objection prior to final judgment constituted forfeiture).

222. *See* FED. R. BANKR. P. 7012 advisory committee's note to 1987 amendment.

223. FED. R. BANKR. P. 7008(a); Phila. Newspapers, LLC v. Review Publ'g, L.P., Nos. 09-11204 SR, 09-264, 2009 WL 5178333, at *6 (Bankr. E.D. Pa. Dec. 17, 2009).

224. FED. R. BANKR. P. 7012(b).

225. *Cf.* Aero-Fastener, Inc. v. Sierracin Corp. (*In re* Aero-Fastener, Inc.), 177 B.R. 120, 132 (Bankr. D. Mass. 1994).

filed a pleading in a removal action to file a statement expressing whether the matters were non-core and, if so, whether the removing party consented to the entry of a final judgment by a bankruptcy judge.[226]

E. Stern

"Until *Stern*, courts had very little reason to question the constitutionality of the BAFJA."[227] *Stern* concerned whether a bankruptcy judge could enter a final judgment on a debtor's counterclaim for tortious interference with an expected gift, where the creditor-defendant had filed a proof of claim that included a defamation claim against the debtor.[228] The bankruptcy court possessed statutory jurisdiction to enter a final judgment because 28 U.S.C. § 157(b)(2)(C) categorizes counterclaims by the estate against a creditor as core proceedings.[229] However, the BAFJA's statutory jurisdiction was insufficient to allow a bankruptcy judge to issue a final judgment when the bankruptcy judge exercised Article III judicial power without the protections of Article III.[230]

The enactment of the BAFJA did not overcome *Northern Pipeline*'s holding: bankruptcy judges, as Article I judges, may not enter final judgments against third parties on claims based on the common law or state law.[231] Congress cannot vest Article III judges with judicial power over "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[232] This conclusion flowed from the same structural and historical foundations as the judicial power analysis employed in

226. FED. R. BANKR. P. 9027(a)(1); Villegas v. Tex. State Bank (*In re* BFG Invs. LLC), 366 F. App'x 513, 515 nn.7–8, 516 (5th Cir. 2010).

227. Burns v. Dennis (*In re* Se. Materials, Inc.), 467 B.R. 337, 346–47 (Bankr. M.D.N.C. 2012).

228. Stern v. Marshall, 564 U.S. 462, 470 (2011). The defendant's tort claim dealt with a separate issue of bankruptcy court jurisdiction: statutory jurisdiction over personal injury tort claims. *Id.* at 478. However, the defendant's constructive and actual consent allowed the Court to save clarification of this issue for another day. *See id.* at 481–82.

229. 28 U.S.C. § 157(b)(2)(C) (2012).

230. *See Stern*, 564 U.S. at 499–503.

231. *See id.* at 484 (citations omitted).

232. *Id.* (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855)); N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 70 n.25 (1982), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

Northern Pipeline.[233] Just like *Northern Pipeline*, neither the public rights exception nor a characterization of bankruptcy judges as adjuncts to the district court was sufficient to allow an entry of a final judgment in *Stern*.[234] Lastly, and most relevant to this Article, the creditor did not consent to the debtor's counterclaim being finally determined by a bankruptcy judge.[235]

An action seeking to augment the bankruptcy estate, such as the contract action in *Northern Pipeline* or the tort action in *Stern*, is a private right falling outside of the public rights exception to Article III.[236] The Supreme Court distinguished the broader scope of a bankruptcy court's adjudication from earlier examples of the public rights exception.[237] The counterclaim involved a dispute between two private parties, and the rights in dispute existed independently of congressional legislation.[238] The bankruptcy court's authority was not limited to a particularized area of law, unlike a government agency's limited scope.[239] The Court stated:

233. *See* Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern*, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1166.

234. *Stern*, 564 U.S. at 488–95, 500–01; *accord N. Pipeline*, 458 U.S. at 71–72, 76–87; *id.* at 91 (Rehnquist, J., concurring in the judgment).

235. *Stern*, 564 U.S. at 493.

236. *Id*. at 494–95; *see N. Pipeline*, 458 U.S. at 69–70 (plurality opinion); Schoenthal v. Irving Tr. Co., 287 U.S. 92, 94–95 (1932) ("Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it. They may be brought in the state courts as well as in the bankruptcy courts." (citation omitted)). This result was somewhat surprising considering that two subsequent cases expanded the public rights doctrine after *Northern Pipeline*. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853–57 (1986); Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 589–92, 594 (1985). However, the Court's subsequent discussion of public rights, in *Granfinanciera, S.A. v. Nordberg*, signaled another possible path. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51–55 (1989) (majority opinion); S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 174 (1991) ("The fate of core jurisdiction thus may hinge on which line of authority the Supreme Court decides to follow."); *see also* Lipson & Vandermeuse, *supra* note 233, at 1178 (explaining that, while both prior and subsequent Supreme Court jurisprudence regarding the public rights doctrine was pragmatic, *Northern Pipeline* embraced a formalistic view of the doctrine); Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 92–93 (1994).

237. *Stern*, 564 U.S. at 493–94 (noting bankruptcy courts' power to enter final judgments was not limited to a particularized area of the law).

238. *Id.* at 493 ("Congress has nothing to do with it.").

239. *Id.* at 493–94.

> What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.[240]

The broad exercise of traditional judicial power, like the power granted to bankruptcy judges under the Reform Act prior to *Northern Pipeline*, precluded categorizing bankruptcy judges as adjuncts of district court judges.[241] Bankruptcy judges' extensive power to render final judgments on traditional common law actions, subject to review only on appeal, outstripped the authority of mere adjuncts who are not exercising judicial power.[242] Even though the bankruptcy judges were appointed by Article III judges, the character of the appointer is immaterial and cannot transform them into adjuncts.[243]

Consent played an integral role in the majority opinion. First, the Court recognized the creditor's express and implied consent to the bankruptcy court adjudicating his defamation claim as part of his proof of claim.[244] Although courts are split over whether a defamation action is a personal injury tort—an exception to the statutory jurisdiction of bankruptcy courts noted in 28 U.S.C. § 157(b)(5)—the creditor could have timely objected to the bankruptcy court's statutory jurisdiction.[245] Instead, the creditor expressly stated his agreement to the determination of his defamation claim in an adversary proceeding and failed to object to a lack of statutory jurisdiction for over two years.[246] Recall, 28 U.S.C. § 157 is not jurisdictional because it lacks "the hallmarks of a jurisdictional decree."[247] Consequently, the creditor could and did consent to the bankruptcy court's final

240. *Id.* at 494.

241. *See id.* at 500–01.

242. *Id.*

243. *See id.* at 501 (citing THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

244. *Id.* at 478–79.

245. *See id.* at 480–82. The term "personal injury tort" is not expressly defined by the Bankruptcy Code. Elkes Dev., LLC v. Arnold (*In re* Arnold), 407 B.R. 849, 851 (Bankr. M.D.N.C. 2009) (citing Moore v. Idealease of Wilmington, 358 B.R. 248, 250 (E.D.N.C. 2006)). Lacking further expressed guidance, courts have adopted at least three different definitions of the term. *See id.* at 852–53.

246. *Stern*, 564 U.S. at 480–81.

247. *Id.* at 480.

determination of his defamation claim as part of his proof of claim.[248]

The majority stressed the importance of protecting the separation of powers even in the face of possibly upsetting the balance of labor between bankruptcy courts and district courts.[249] Even though a law may be "efficient, convenient, and useful," such attributes are insufficient to uphold its constitutionality.[250] Allowing a mildly unconstitutional practice could lead down a slippery slope and eventually "compromise the integrity of the system of separated powers and the role of the Judiciary in that system."[251] Although the practical consequences were immaterial, the Court nonetheless expressed skepticism over the impact on the district courts.[252] It highlighted the statutory limitations on bankruptcy courts created by the availability of abstention in non-core matters and the ability of bankruptcy judges to issue proposed findings of fact and conclusions of law on non-core claims.[253] However, as will be discussed subsequently, the creditor did not consent to the final adjudication of the debtor's counterclaim simply by the filing of his proof of claim.[254] Consent must be knowing and voluntary. The creditor's filing of a proof of claim was not voluntary, as there were no other options for recovery from the debtor's estate.[255]

Stern arguably created a two-pronged test to decide whether a bankruptcy judge can constitutionally enter a final judgment in a core proceeding[256]: "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[257] The *Stern* test is disjunctive; if a claim meets either prong, the bankruptcy court

248. *Id.* at 481.

249. *See id.* at 502–03.

250. *Id.* at 501 (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)).

251. *Id.* at 503.

252. *See id.* at 502–03.

253. *Id.* at 502.

254. *Id.* at 493.

255. *Id*.

256. The *Stern* test is only applied to core proceedings. Schafer v. Nextiraone Fed., LLC, No. 1:12cv289, 2012 WL 2281828, at *5 (M.D.N.C. June 18, 2012).

257. *Stern*, 564 U.S. at 499. *Contra* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1177–81 (2015) (explaining the drawbacks of relying upon what "stems from the bankruptcy itself" and *Stern*'s two-pronged test generally); Lipson & Vandermeuse, *supra* note 233, at 1193–94 (criticizing the two-pronged test as redundant because the claims allowance process necessarily stems from the bankruptcy itself).

may constitutionally enter a final judgment.[258] If neither prong is satisfied, but the matter is a core matter, the court faces a *Stern* claim and the bankruptcy judge possesses statutory authority to enter a final judgment but cannot constitutionally enter one, as he or she lacks Article III status.[259]

F. *Questions Unresolved by* Stern

The issues left unresolved by *Stern* spawned confusion among commentators, litigators, and judges. Arguably, the two most important issues were the scope of *Stern*'s holding and whether consent could allow a bankruptcy judge to issue a final judgment on a *Stern* claim. The Supreme Court narrowed the scope of *Stern* in *Executive Benefits Insurance Agency v. Arkison*[260] and addressed the consent issue in *Wellness*.[261] However, the limited holdings in these cases left the parameters of both the scope and consent issues unsettled.

Unlike *Northern Pipeline*, *Stern* did not classify the entirety of 28 U.S.C. § 157(b) as unconstitutional, only § 157(b)(2)(C).[262] The *Stern* majority used language supporting a narrow reading of its opinion and promised its holding would not "meaningfully change[] the division of labor in the current statute."[263] Yet, the Court did not pinpoint the reach of its

258. *Stern*, 564 U.S. at 499; KHI Liquidation Tr. v. Wisenbaker Builder Servs. Inc. (*In re* Kimball Hill, Inc.), 480 B.R. 894, 905 (Bankr. N.D. Ill. 2012); *see* Sol. Tr. v. 2100 Grand LLC (*In re* AWTR Liquidation Inc.), 547 B.R. 831, 836 (Bankr. C.D. Cal. 2016).

259. *See* Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 185 (Bankr. S.D.N.Y. 2011).

260. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168 (2014).

261. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015).

262. *See Stern*, 564 U.S. at 482 (holding 28 U.S.C. § 157(b)(2)(C) (2008) unconstitutional); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (holding 28 U.S.C. § 1471(b) (Supp. IV 1976) unconstitutional), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in Wellness*, 135 S. Ct. 1932.

263. *Stern*, 564 U.S. at 502. The Court also characterized the question presented as a narrow one. *Id.*; *see also* Tanguy v. West (*In re* Davis), 538 F. App'x 440, 443 (5th Cir. 2013) ("[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to 'counterclaims by the estate against persons filing claims against the estate,' *Stern* expressly provides that its limited holding applies only in that 'one isolated respect.' We decline to extend *Stern*'s limited holding herein." (quoting First Nat'l Bank v. Crescent Elec. Supply Co. (*In re* Renaissance Hosp. Grand Prairie Inc.), 713 F.3d 285, 294 n.12 (5th Cir. 2013))); Badami v. Sears (*In re* AFY, Inc.), 461 B.R. 541, 547–48 (8th Cir. B.A.P. 2012) ("Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted

holding. Lacking an expressed limitation, some courts applied *Stern*'s teachings to all bankruptcy proceedings, and "[a]rguably, the constitutional validity of the bankruptcy courts' entire decision making authority may still be in question."[264] This issue was before the Supreme Court in *Wellness*.[265] However, *Wellness* sidestepped this issue and instead tackled the consent issue.[266] Lastly, uncertainty existed over whether bankruptcy judges could treat *Stern* claims like proceedings related to the bankruptcy case and enter proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c), even though 28 U.S.C. § 157(b) classifies *Stern* claims as core proceedings subject to final adjudication by bankruptcy judges.[267] The Supreme Court addressed this issue in *Executive Benefits*.[268]

In *Executive Benefits*, the Supreme Court confirmed bankruptcy judges' ability to enter proposed findings of fact and conclusions of law on a *Stern* claim.[269] *Executive Benefits* concerned the constitutionality of a bankruptcy judge entering a final judgment on a fraudulent transfer action brought by a Chapter 7 bankruptcy trustee against a non-creditor.[270] The Supreme Court granted certiorari on the issues of (1) whether bankruptcy judges may enter proposed findings of fact and conclusions of law subject to de novo review when faced with a *Stern* claim and (2) whether litigants' consent could permit a bankruptcy judge to enter a final judgment on a *Stern* claim.[271]

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to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional."); Burtch v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 466 B.R. 626, 642 (Bankr. D. Del. 2012) ("The Court must honor the Chief Justice's express limitations and assurances regarding the narrowness of the minimal breadth of the decision."); *In re Refco Inc.*, 461 B.R. at 192 n.9.

264. *In re Direct Response Media, Inc.*, 466 B.R. at 642 n.11; *see, e.g.*, Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 469 (Bankr. W.D. Mich. 2012) (analogizing the testing of the laws of physics to the testing of bankruptcy proceedings using *Stern*'s teachings).

265. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1941–42 (2015).

266. *Id.* at 1942 n.7; *id.* at 1952 (Roberts, C.J., dissenting).

267. *Id.* at 1951–52; Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168 (2014).

268. *Exec. Benefits*, 134 S. Ct. at 2168–73.

269. *Id.* at 2173.

270. *Id.* at 2169.

271. Daniele Spinelli & Craig Goldblatt, *Constitutional and Statutory Limits After* Executive Benefits, 33 AM. BANKR. INST. J. 14, 15 (2014); *see Exec. Benefits*, 134 S. Ct. at 2169–70.

Although the Court failed to address the consent issue, it determined that de novo review by an Article III judge allows bankruptcy judges to issue proposed findings of fact and conclusions of law when faced with *Stern* claims.[272] When a party brings a *Stern* claim before a bankruptcy judge, it necessarily involves an invalid application of 28 U.S.C. § 157(b) because the bankruptcy judge possesses statutory authority to finally determine the claim but cannot exercise judicial power under Article III.[273] The BAFJA's severability provision preserves the constitutionality of the rest of the BAFJA, including 28 U.S.C. § 157(c), in spite of this violation. As a result, the treatment of non-core "related to" matters remains valid.[274] Even though a *Stern* claim is a core proceeding, a *Stern* claim is also related to the bankruptcy case because it satisfies the requirements of 28 U.S.C. § 157(c)(1).[275] Therefore, bankruptcy judges may use the procedure for adjudicating "related to" proceedings in order to determine *Stern* claims constitutionally by issuing proposed findings of fact and conclusions of law.[276]

IV. *WELLNESS*: "ADJUDICATION BY CONSENT IS NOTHING NEW"[277]

Article III, Section One of the Constitution guarantees an independent and impartial Judiciary "within the constitutional scheme of tripartite government."[278] This guarantee has a dual character.[279] On the one hand, the structural principle of the separation of powers prevents the aggrandizement

272. *Exec. Benefits*, 134 S. Ct. at 2173.

273. *See id.*

274. *Id.* (citing 28 U.S.C. § 151 note (1984) (designation of bankruptcy courts)).

275. *Id.*

276. *Id.* The proposed Federal Rule of Bankruptcy Procedure 8018.1 "would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined" the judgment adjudicated a *Stern* claim. FED. R. BANKR. P. 8018.1 (COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., Preliminary Draft of Proposed Amendments to Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 2016).

277. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942 (2015) (majority opinion).

278. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985)); *see* McDonald, *supra* note 10, at 280.

279. *See Schor*, 478 U.S. at 848; Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

of the Executive or Legislative Branches at the expense of the Judiciary.[280] On the other hand, an individual also has a personal right to adjudication without the undue influences of the other two branches of government.[281] Consent is not sufficient to waive the structural principle because it presents a collective action problem.[282] The systemic value of the structural principle to the balance created by the separation of powers may be of little value to an individual litigant, but it is fundamental to providing fair judicial process to all future and present litigants. The personal right is naturally subject to litigant consent. The issue of whether a non-Article III adjudicator threatens the structural principle has arisen in cases before magistrate judges, administrative agencies, private arbitrators, and, most relevantly for this Article, bankruptcy judges.

A. *Arbitration*

Like Article III judges, arbitrators determine facts and apply the law to those facts in order to resolve disputes between one or more private parties.[283] When an arbitrator issues an award in a dispute concerning "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,"[284] the arbitrator is replacing an Article III judge. In fact, arbitrators are far more insulated from review than Article III trial judges because the grounds for overturning an arbitration award are far narrower than reversal on appeal[285]: In contrast to the usual appellate standards of review—factual issues as clearly erroneous and legal issues de novo—"the statutory grounds for modification or [vacation of arbitrators' factual or legal determinations are limited to] review essentially only of the arbitrators' conduct."[286] The jurisdiction and determination of arbitrators

280. *Schor*, 478 U.S. at 850 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.)).

281. *Id.* at 848–49 (citations omitted).

282. *See, e.g.*, *id.* at 851 ("When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.").

283. *See* Perlstadt, *supra* note 111, at 220.

284. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

285. *See* Perlstadt, *supra* note 111, at 220.

286. *See id.* The Federal Arbitration Act provides seven grounds for vacation or modification of an arbitration award; legal error is not among the grounds listed. 9 U.S.C. §§ 10–11 (2012).

intrude on Article III judges; how does this standard of review evade separation of powers pitfalls?

Litigant consent upholds the constitutionality of arbitrators' incursions into the preserve of Article III judges.[287] Arbitration does not fit within the three exceptions to the Article III outlined above: military tribunals, courts martial, or the public rights exception.[288] However, arbitration does not implicate the structural principle, and therefore, litigant consent cures any Article III concerns.[289] The structural principle restrains one branch of government from increasing its power at the expense of another branch. Arbitration by consent between private parties does not increase the power of the Legislature or the Executive at the expense of the Judiciary.[290] Indeed, arbitrators' determinations are not enforceable absent a further *judicial* proceeding, and they "carry no official imprimatur."[291] Consequently, arbitration only implicates the personal right of litigants, a right subject to consent.

B. *Agency*

More recently, when confronted with an agency adjudication in *Schor*,[292] the Supreme Court attempted to construct a test for when the structural principle of Article III, as opposed to the personal right, is implicated.[293] *Schor* involved a dispute over whether the Commodity Futures Trading Commission (CFTC) could adjudicate a customer's claims against a broker for violations of federal commodities laws.[294] A customer brought a claim for reparations against a commodities futures broker before the CFTC, and the broker filed a state law counterclaim against the customer.[295] The CFTC rejected the customer's claim and ruled in favor of the broker on

287. *See* Perlstadt, *supra* note 111, at 242–43.

288. *See id.* at 231–35 (analyzing why arbitration would likely not fit within the public rights exception to Article III).

289. *Id.* at 243.

290. *Id.* If anything, "arbitration arguably diminishes the power of all three branches, given the executive and legislative branches' roles in selecting Article III judges." *Id.*

291. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting).

292. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

293. *Id.* at 848–49.

294. *Id.* at 840–41.

295. *Id.* at 837–38.

the counterclaim.[296] On appeal, the customer alleged that the procedure violated Article III by vesting the CFTC with judicial power.[297] Although *Schor* analyzed the distinction between public and private rights using a flexible approach, it also addressed whether litigant consent can allow a non-Article III court to exercise the judicial power otherwise reserved for an Article III court.[298]

Even though the customer clearly consented to adjudication of his reparations claim and the state law counterclaim before the CFTC,[299] such consent still would have been insufficient if the structural principle had predominated. Indeed, consent itself is insufficient to cure a structural violation of Article III.[300] Consent can, however, influence whether a violation of the structural principle of Article III even occurs.[301] If Congress creates a venue for willing parties to resolve their differences without Article III supervision, it is more akin to Congress encouraging settlement or arbitration than subcontracting the work of Article III judges to non-Article III tribunals.[302] The CFTC is one such example because parties could elect to have their claims adjudicated there instead of through typically slower adjudications in district courts.[303] Moreover, "[Congress's] primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals."[304] Congress ensured this narrow focus by limiting the CFTC's jurisdiction to compulsory common law counterclaims.[305] Indeed, the congressional authorization of the CFTC to determine common law counterclaims ensured the effectiveness of the tribunals.[306] Absent such authority, the reparations procedures would have been confounded.[307] The CFTC's ability to resolve common law counterclaims was limited to "a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function

296. *Id.* at 838.
297. *Id.*
298. *Id.* at 848–50.
299. *Id.* at 849.
300. *See id.* at 855.
301. *Id.* at 856–57.
302. *Id.* at 855.
303. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989) (analyzing *Schor*).
304. *Schor*, 478 U.S. at 855.
305. *Id.* at 856 (noting that the CFTC's jurisdiction "is limited to claims arising out of the same transaction or occurrence").
306. *Id.*
307. *Id.*

[that do] not create a substantial threat to the separation of powers."[308] Consequently, consent, together with other factors, including the scope of the tribunal jurisdiction and the significance and relatedness of common law actions to the statutory scheme, can allow a non-Article III adjudication of what would otherwise constitute private rights requiring Article III supervision.[309]

C. *Magistrate Cases*

Bankruptcy judges are not the only non-Article III judges created by Congress to aid the district courts. Magistrate judges play an important role through their supervision of many pre-trial and discovery functions, as well as entering final judgments if the parties consent in civil and some criminal matters.[310] Like bankruptcy judges, magistrate judges do not enjoy the protections afforded Article III judges.[311] Magistrate judges' authority to enter final judgments is similarly circumscribed by both statutory and Article III limitations.[312]

Consent plays a clear role in the statutory limitations on magistrate judges' jurisdiction.[313] A district court may refer any matter, including dispositive adjudications, to a magistrate judge.[314] However, magistrate judges may only finally determine certain adjudications.[315] When faced with

308. *Id.* at 854 (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985)); *see id.* at 856 (characterizing the infringement upon Article III as "*de minimis*").

309. *See id.* at 857.

310. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 540 (9th Cir. 1984) (en banc) (citations omitted). Magistrate judges were created soon after the Framing under the Judiciary Act of 1789 and possessed the authority to set bail in federal cases. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91–92. Their duties expanded thereafter. Lori Yount, Comment, *Litigant Consent as a Constitutional Threat: Reconsidering the Jurisdiction of Magistrate Courts After* Stern v. Marshall, 55 S. TEX. L. REV. 197, 200 (2013) (citations omitted).

311. Wellness Int'l Network, Ltd v. Sharif, 135 S. Ct. 1932, 1944–45 (2015).

312. 28 U.S.C. § 636 serves a similar purpose to 28 U.S.C. § 157 in the bankruptcy judge context. *Compare* 28 U.S.C. § 157 (2012), *with id.* § 636. 28 U.S.C. § 636(b) expressly notes that a magistrate judge may be assigned additional duties by the district court that "are not inconsistent with the Constitution." *Id.* § 636(b)(2)(C). For a discussion of the constitutional limitations on magistrate judges arising from their non-Article III status, consider *infra* Part VII.B.

313. *See* 28 U.S.C. § 636(a)(5), (c).

314. *Id.* § 636(b)(1)(A); United States v. Raddatz, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring).

315. 28 U.S.C. § 636(b)(1)(A).

a dispositive adjudication, the magistrate judge can only issue proposed findings of fact and conclusions of law (also known as a report and recommendation) for the district judge to review de novo.[316] However, the consent of the parties expands the magistrate judges' statutory jurisdiction to include entering a sentence for a class A misdemeanor and a final judgment in a civil case.[317]

The procedure for a district court's review of a report and recommendation differs from an appeal. Once the report and recommendation are served on the parties, they have 14 days to file objections.[318] If no parties file objections, the Article III district court judge exercises sound discretion to determine the appropriate weight to accord the magistrate's report and recommendation.[319] The broad discretion accorded the district court even allows it to adopt a magistrate judge's report and recommendation without further review.[320] In the absence of objections, the parties have forfeited any right to further review.[321] This procedure is constitutional because "[t]he district judge has jurisdiction over the case at all times. He retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment."[322] The failure to request plenary review by an Article III judge, like the defendant's in *Wellness*, forfeits this right.[323]

The Supreme Court has treated consent as talismanic in overcoming Article III concerns over magistrate judge adjudications.[324] In *Gomez v. United States*, the Supreme Court noted the Article III issues raised by a magistrate judge presiding over jury selection in a felony trial.[325] The Court, however, categorized jury selection as falling outside magistrate judges'

316. *Id.* § 636(b)(1)(C); *Raddatz*, 447 U.S. at 673–74 (majority opinion).

317. *See* 28 U.S.C. § 636(a)(5), (c).

318. *Id.* § 636(b)(1)(C).

319. *Id.*; *Raddatz*, 447 U.S. at 673–74, 676 (citing 28 U.S.C. § 636(b)(1)(C) (2012)).

320. Thomas v. Arn, 474 U.S. 140, 152 (1985) (chronicling the legislative history of 28 U.S.C. § 636(b)(1)(C) and its support of forfeiture parties' rights due to failure to timely object).

321. *Id.* at 155.

322. *Id.* at 154 ("Any party that desires plenary consideration by the Article III judge of any issue need only ask.").

323. *Id.* at 140, 153–54; *see* Wellness Int'l Network, Ltd. v. Sharif, 617 F. App'x 589, 590 (7th Cir. 2015).

324. *See, e.g.*, Gomez v. United States, 490 U.S. 858, 867–68 (1989).

325. *Id.* at 860, 864.

statutory authority without tackling the Article III issue.[326] Two years later in *Peretz v. United States*, the Supreme Court upheld a magistrate judge overseeing jury selection based on the consent of the parties.[327] The Court highlighted consent as the distinguishing factor from *Gomez*; it "significantly change[d] the constitutional analysis."[328] The Court equated the criminal defendant's ability to abandon personal rights with the defendant's consent to a non-Article III final adjudication in *Schor*.[329] Applying the teachings of *Schor*, the Court categorized the right to Article III oversight of jury protection as a personal right failing to implicate the structural principle of Article III.[330] The Court stressed the requirement of party consent and then explained why the relationship between magistrate judges and their district judge counterparts mitigated concerns over the structural principle.[331] The district courts' ability to delineate the scope of magistrate judges' jurisdiction over pre-trial proceedings, together with the appointment of magistrate judges by Article III judges, decreases the concerns over the domination of the Judicial Branch by other political branches.[332] Leaning heavily on *Peretz*, all the circuits, including the Ninth Circuit in an opinion authored by then-Judge Anthony Kennedy, have authorized a magistrate judge to enter a final judgment in a civil case based upon litigant consent.[333]

Prior to *Wellness*, the standard for finding implied consent to a non-Article III adjudication in a civil case was uncertain. In *Roell*, the Supreme

326. *Id.* at 871–72.

327. Peretz v. United States, 501 U.S. 923, 935 (1991) (majority opinion).

328. *Id.* at 932.

329. *Id.* at 936.

330. *Id.*

331. *Id.* at 937.

332. *Id.* (first citing United States v. Raddatz, 447 U.S. 667, 683 (1980); then citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986)); *Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring) (noting the ability of a district court to allow a magistrate judge to hear the testimony of the witnesses if a question of credibility arises) ("We confront a procedure under which Congress has vested in Art[icle] III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.").

333. Magistrate judges may finally adjudicate civil cases by consent because the Federal Magistrates Act "invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system." Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984) (en banc); *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 n.12 (2015) (listing cases which have upheld the constitutionality of 28 U.S.C. § 636(c)).

Court outlined the standard for implying a criminal defendant's consent to a final adjudication by a magistrate judge under 28 U.S.C. § 636(c)(1).[334] The majority opinion pragmatically explained the importance of implied consent as a "check[] [on] the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority."[335] Providing guidance to lower courts, implied consent exists when "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the [m]agistrate [j]udge."[336] As will be explained later in this Part, *Wellness* adopted *Roell*'s standard for implied consent, and the standard informs any analysis of implied consent to a bankruptcy judge's final judgment.[337]

D. Wellness

The Supreme Court's recent opinion in *Wellness* confirmed bankruptcy judges' constitutional authority over *Stern* claims when a litigant expressly consents, impliedly consents, or forfeits the right to an Article III final adjudication.[338] In *Wellness*, the debtor's judgment creditors brought a five-count adversary proceeding against the debtor.[339] The first four counts sought to deny his discharge.[340] The last count sought a declaratory judgment that a trust constituted the alter ego of the debtor and the trust's property was part of the debtor's estate.[341] Significantly, the debtor was the trustee of the trust on the petition date and, therefore, the bankruptcy court had custody over the trust based on the debtor's possession.[342] Because of his failure to comply with discovery orders in the adversary proceeding, the bankruptcy judge entered a default judgment against the debtor on all five counts.[343] The district court affirmed the bankruptcy judge's entry of a

334. Roell v. Withrow, 538 U.S. 580, 590 (2003). The Court also grappled with whether Congress intended to permit implied consent, considering the relevant statute provided for only express consent. *Id.* at 587–88. Although the statute delineating core jurisdiction of bankruptcy courts speaks of consent, it did not mandate express consent. *See* 28 U.S.C. § 157(c)(2) (2012).

335. *Roell*, 538 U.S. at 590.

336. *Id.*

337. *See infra* notes 378–87 and accompanying text.

338. *See Wellness*, 135 S. Ct. at 1949.

339. *Id.* at 1940.

340. *Id.*

341. *See id.* at 1940–41.

342. *See id.* at 1941.

343. *Id.*

default judgment.[344]

On appeal, the Seventh Circuit considered the consent issue left unanswered by both *Stern* and *Executive Benefits*.[345] After summarizing the circuit split, the Seventh Circuit classified the right to an Article III adjudication as an unwaivable structural right under the Constitution.[346] This conclusion flowed from the distinctions between the CFTC (*Schor*) and bankruptcy courts (*Stern*).[347] The Commodities Exchange Act "did not implicate structural concerns[;] the Supreme Court ha[d] already held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings [did] implicate structural concerns" when confronted with a *Stern* claim.[348]

After answering the consent question, the court tackled whether the five counts constituted *Stern* claims.[349] The Seventh Circuit easily distinguished the four discharge claims from the actions at issue in *Stern* and *Northern Pipeline* because the Code provided the rule of decision.[350] Thus, the discharge claims stemmed from the bankruptcy itself and could be finally decided by a bankruptcy judge.[351] In contrast, the alter ego claim implicated a state law rule of decision that placed it outside the bankruptcy judge's constitutional authority.[352] Based upon the similarities between the alter ego claim and the actions in *Northern Pipeline* and *Stern*, the court categorized the alter ego claim as a *Stern* claim.[353] The Supreme Court granted certiorari on both the consent issue and whether the alter ego claim was a *Stern* claim.[354]

The majority opinion in *Wellness*, authored by Justice Sonia

344. *Id.*

345. *Id.* at 1941–42.

346. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 771–73 (7th Cir. 2013) ("In sum, we hold that under current law a litigant may not waive an Article III, [Section One], objection to a bankruptcy court's entry of final judgment in a core proceeding."), *rev'd on other grounds*, 135 S. Ct. 1932.

347. *See id.* at 771.

348. *Id.*

349. *Id.* at 773–76.

350. *Id.* at 773.

351. *Id.* at 771.

352. *See id.* at 774–76.

353. *Id.* at 774.

354. Wellness Int'l Network, Ltd. v. Sharif, 134 S. Ct. 2901, 2901 (2014) (granting certiorari for questions 1 and 3).

Sotomayor, characterized litigant consent as sufficient to transform a *Stern* claim into an action subject to final adjudication by a bankruptcy judge without violating Article III.[355] After explaining the long history of adjudication by consent, the Court analyzed *Schor*, *Gomez*, and *Peretz* and the mitigating effect of consent on potential violations of the separation of powers.[356] The Court summarized: "The lesson of *Schor*, *Peretz*, and the history that preceded them is plain: The entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to [consent].'"[357] The Court also reaffirmed the structural principle announced in *Schor*: "[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process."[358]

The Court then applied the balancing test outlined in *Schor*. First, the majority emphasized the parallels between magistrate judges and bankruptcy judges.[359] Principally, both are units of the district court and the adjudicatory authority of both is subject to appeal or even withdrawal by the district court.[360] These limitations, together with litigant consent to non-Article III adjudication, diminish separation of powers concerns.[361]

Where *Stern* stressed historical and structural concerns, *Wellness* emphasized pragmatism and flexibility.[362] The dissenting opinion in *Wellness* by Chief Justice John Roberts—the author of the majority opinion in *Stern*—highlighted these dramatic differences and described the *Wellness* majority opinion as "an imaginative reconstruction of *Stern*."[363] The differing focus of the majorities in *Stern* and *Wellness* is best illustrated by the opposing descriptions of bankruptcy courts' scope of adjudicatory authority. Whereas *Stern* emphasized bankruptcy courts' "substantive jurisdiction reaching any

355. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944–45 (2015).

356. *Id.* at 1944.

357. *Id.* (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986)).

358. *Id.*

359. *Id.* at 1945.

360. *Id.*; *see In re* One2One Commc'ns, LLC, 805 F.3d 428, 445–46 (3d Cir. 2015) (Krause, J., concurring).

361. *Wellness*, 135 S. Ct. at 1945–46.

362. *Compare id.* at 1944 ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers . . . ."), *with* Stern v. Marshall, 564 U.S. 462, 476–77 (2011).

363. *Wellness*, 135 S. Ct. at 1957 (Roberts, C.J., dissenting).

area of the *corpus juris*,"[364] *Wellness* characterized bankruptcy courts as lacking "free-floating authority to decide claims traditionally heard by Article III courts."[365] While *Stern* warned that even a small breach of the separation of powers could lead to greater ruptures, *Wellness* characterized the intrusion as "*de minimis*."[366] In another marked departure from *Stern*, the Court dissected Congress's motives in granting adjudicatory authority to bankruptcy judges.[367] *Stern* focused on bankruptcy judges' lack of Article III status and the potential slippery slope of implications for any breach of the separation of powers, regardless of its magnitude or reasoning.[368] *Wellness*, meanwhile, analyzed Congress's purposes for creating bankruptcy courts and found "no indication that Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the Judiciary."[369] Instead, the creation of bankruptcy judges and their ability to enter final judgments eases the burdens on the Article III Judiciary while still allowing Article III judges to supervise and, when necessary, withdraw jurisdiction from bankruptcy judges.[370]

Given the tension between *Wellness* and *Stern*, the majority attempted to distinguish the two cases.[371] The difference between the two cases is summarized in one word: consent.[372] First, the Court emphasized how *Northern Pipeline*, the precursor to *Stern*, turned on the lack of consent of the defendant.[373] According to the majority, *Stern* similarly turned on the lack of consent of the defendant.[374] Thus, the consent of litigants moves a case outside of the constitutional bar to non-Article III adjudication announced by *Stern* and *Northern Pipeline*.[375] Latching on to the limiting language in *Stern*,[376] adjudication by consent would certainly narrow the scope of *Stern* and protect against a "meaningful[] change[] [in] the division

364. *Stern*, 564 U.S. at 493–94.
365. *Wellness*, 135 S. Ct. at 1945 (majority opinion).
366. *Id.*
367. *Id.* at 1945–46.
368. *Stern*, 564 U.S. at 502–03.
369. *Wellness*, 135 S. Ct. at 1945.
370. *Id.*
371. *Id.* at 1946–47.
372. *Id.*
373. *Id.* at 1946.
374. *Id.*
375. *Id.*
376. *Id.* at 1946–47 (noting the limiting language in *Stern*). The Author changed the language slightly to be more consistent with the holding in *Stern*.

of labor" between the district courts and the bankruptcy courts.[377]

The *Wellness* majority also incorporated the implied consent standard announced by *Roell* as the test for implied consent to final adjudication by a bankruptcy judge.[378] Thus, the three requirements of *Roell* are applicable: (1) the litigant is made aware of the need for consent; (2) the litigant is made aware of the option not to provide consent; and (3) the litigant voluntarily appears to contest the action.[379] This standard dovetails with the alternative-forum concerns voiced by *Stern*. An alternative forum is available for obtaining a final judgment on a *Stern* claim: the district court.[380] Nonetheless, the litigant may be before a bankruptcy judge on other issues in the case where consent is not required, such as a claim adjudication or a dischargability action.[381] The litigant may not realize the option to proceed in another forum.[382] Informing the litigant of these options and inferring his or her choice only from the decision to proceed without choosing a different option provides sufficient safeguards to satisfy the concerns of alternative forum voiced by *Stern*.[383]

With nary a word regarding forfeiture in the majority opinion, the Supreme Court remanded to determine not only whether the debtor had impliedly consented to the final adjudication of the potential *Stern* claims by a bankruptcy judge, but also whether the debtor had forfeited his arguments concerning Article III by failing to raise them.[384] Justice Samuel Alito was more interested in discussing forfeiture in his concurrence. Justice Alito would not have decided the implied consent issue and instead would have relied upon the debtor's obvious forfeiture.[385] Justice Alito would have applied the usual rules of appellate procedure to determine whether the debtor forfeited his argument by failing to raise it prior to determination on the merits.[386] According to Justice Alito, even though a *Stern* claim implicates the structural principle of Article III absent consent, this standing

377. *Stern*, 564 U.S. at 502.
378. *Wellness*, 135 S. Ct. at 1948.
379. *Id.* (citing Roell v. Withrow, 538 U.S. 580, 590 (2003)).
380. *Stern*, 564 U.S. at 502.
381. *See id.* at 493 n.8 (2011).
382. *See Wellness*, 135 S. Ct. at 1948.
383. *See id.* at 1949.
384. *Id.*
385. *Id.* (Alito, J., concurring).
386. *Id.*

does not exempt such claims from forfeiture.[387]

V. PROOFS OF CLAIM AND VOLUNTARY PETITIONS

"[T]he notion of 'consent' does not apply in bankruptcy proceedings as it might in other contexts."[388] On the one hand, implied consent and forfeiture in a specific proceeding function like other federal court litigation where actions, such as the filing of an initial pleading without asserting the right to an Article III judge, constitute forfeiture or implied consent to non-Article III adjudication.[389] On the other hand, courts have implied blanket consent to bankruptcy court final adjudication based upon the filing of a proof of claim or a voluntary bankruptcy petition. This blanket consent is derived from expansive readings of broad language in Supreme Court opinions issued under the 1867 Bankruptcy Act (1867 Act),[390] in a federal receivership case,[391] and under the 1898 Act.[392] Although courts and commentators have characterized the broad language of *Wiswall v. Campbell*, *Alexander v. Hillman*, and *Gardner v. New Jersey* as the guiding principle for implied consent,[393] only recently has the Supreme Court provided limiting principles based upon voluntary choice.[394] Filing of proofs of claim and voluntary petitions does not generally constitute a debtor's or creditor's consent to adjudications outside of those required to obtain a distribution from the estate or a discharge or forfeiture of such rights.[395]

A. *Genesis of Proofs of Claim Constituting Consent*

An explanation of *Wiswall* requires a brief tour of the bankruptcy jurisdiction under the 1867 Act. The division of authority under the 1867 Act was similar to both the 1898 Act and modern proceedings.[396] Bankruptcy

387. *Id.*

388. Stern v. Marshall, 564 U.S. 462, 493 n.8 (2011).

389. *E.g.*, Richardson v. JPMorgan Chase Bank, N.A. (*In re* Jordan), 543 B.R. 878, 882 (Bankr. C.D. Ill. 2016) (finding implied consent from litigants' failure to assert right to Article III judge in either complaint or motion to dismiss, which sought a final order).

390. *See infra* notes 396–408 and accompanying text.

391. *See infra* notes 409–25 and accompanying text.

392. *See infra* notes 443–49 and accompanying text.

393. *E.g.*, *In re* Nathan, 98 F. Supp. 686, 690–92 (S.D. Cal. 1951) (citations omitted); Tallant, *supra* note 170, at 151 & nn.13, 15 (citations omitted).

394. *See infra* notes 458–61 and accompanying text.

395. *Cf.* S. Todd Brown, *supra* note 1, at 51 n.252.

396. *See* Tabb, *supra* note 153, at 25–26 (discussing the similarities between referees, registers, and commissioners).

proceedings under the 1867 Act were initially heard by the register in bankruptcy, a non-Article III tribunal and the forerunner to later referees and bankruptcy judges.[397] The register's adjudications were limited to matters concerning the debtor's estate and proofs of claim, the general boundaries of contested matters.[398] Suits at law or equity brought by the assignee of the debtor were not considered bankruptcy proceedings and were adjudicated before the district courts.[399] Both types of proceedings were subject to appellate review by the circuit courts.[400] Unlike today, the Supreme Court's appellate jurisdiction did not extend to bankruptcy proceedings because they were not distinct suits at law or equity.[401] In *Wiswall*, the Supreme Court reiterated this rule and refused to review a creditor's appeal of a disallowed claim.[402] In support of its holding, the Court first pinpointed goals of the legislation: "(1) the discharge, under some circumstances, of an honest debtor from legal liability for debts he could not pay; and (2) an early *pro rata* distribution, according to equity, of his available assets among his several creditors."[403] Based upon these goals, it explained that:

> Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences.[404]

Read broadly, the last sentence could be interpreted to mean that a debtor who files a petition or a creditor who files a proof of claim consents to the bankruptcy court exercising jurisdiction over any matter related to the bankruptcy case. However, the last sentence is informed by both the previous sentence and the distinction between bankruptcy proceedings and

397. *Id.* at 19 ("These registers thus were the predecessors of the twentieth century referee and bankruptcy judge.").

398. *See* Act of Mar. 2, 1867 (1867 Act), ch. 176, § 4, 14 Stat. 517, 519.

399. Wiswall v. Campbell, 93 U.S. 347, 348–49 (1876).

400. *Id.* at 348.

401. *See id.*

402. *Id.* at 351.

403. *Id.* at 350.

404. *Id.* at 351.

suits at law and equity under the 1867 Act.[405] The proceedings in bankruptcy, i.e., the claims adjudication process before the register, provide a basis for res judicata.[406] Thus, the register's determinations bind the creditor.[407] *Wiswall* failed to provide guidance for whether counterclaims against creditors fit within the "legitimate course of the proceeding."[408]

In the receivership case of *Alexander*,[409] the Supreme Court faced a question it revisited under both the 1898 Act and the BAFJA: Does a creditor's claim to a distribution from a res allow the court administering the res to adjudicate a counterclaim against the creditor?[410] In *Alexander*, through a series of complex transactions, the directors of the debtor allegedly controlled the transfer of assets into and out of the debtor for their benefit.[411] Following the initiation of a federal receivership against the debtor, the receiver brought four counterclaims against the directors to recover funds transferred to the directors or their companies for their individual benefit.[412] Meanwhile, the directors filed claims in the receivership proceeding before a special master to obtain distributions from the debtor's assets.[413] The directors alleged that even though the special master could adjudicate their claims to the debtor's assets, the receivership's affirmative claims against them could not be adjudicated in the receivership proceeding and required a separate plenary proceeding.[414] Like *Wiswall*, the filing of their claims subjected the directors to all the associated consequences.[415]

The Court relied on two separate bases for why the consequence of the

405. *See id.*

406. *Cf. In re* Herrman, 102 F. 753, 754 (S.D.N.Y. 1900) (stating in dicta that proceeding determining discharge under the 1867 Act would have res judicata effect under the 1867 Act but holding that it would not under the 1898 Act), *aff'd*, 106 F. 987 (2d Cir. 1901) (mem.).

407. *See id.*

408. *See Wiswall*, 93 U.S. at 351.

409. Alexander v. Hillman, 296 U.S. 222 (1935).

410. *Id.* at 231; *see* Stern v. Marshall, 564 U.S. 462, 487–99 (2011) (discussing the bankruptcy court's ability to hear a widow's tortious interference counterclaim); Katchen v. Landy, 382 U.S. 323, 335–36 (1966) (allowing summary jurisdiction on a counterclaim), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

411. *Alexander*, 296 U.S. at 231–34.

412. *Id.* at 235–36.

413. *Id.* at 230.

414. *Id.* at 231.

415. *Id.* at 241.

directors' filed claims included allowing the receivership court to adjudicate the counterclaims without a plenary proceeding: (1) recovery of the res and (2) overlap between causes of action and the claims filed by the directors.[416] First, the counterclaims sought "portions of the receivership estate that they wrongfully took and still withhold."[417] In other words, the defendants should be required to account for corporate assets they wrongfully held prior to participating in the distribution of the debtor's assets.[418] The Court stated, "Nothing is more clearly a part of the subject matter of the main suit than recovery of all that to the res belongs."[419] Second, the Court recognized the waste occasioned by the general rule requiring independent plenary suits for affirmative relief against claimants.[420] Stopping short of repudiating the rule, the Court stated, "[I]t would seem that necessarily most of the issues in respect of the counterclaims will be quite similar to those litigated in the main suit. Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere."[421] The flexible underpinnings of equity courts supported adjudicating the counterclaims against the directors in the receivership proceeding to maximize efficiency.[422] Although *Alexander* recognized that the right to a plenary suit could be relinquished by a litigant's implied consent, this would only occur in a proof of claim if the consequences of adjudicating the proof of claim constituted consent to further adjudications. Therefore, even *Alexander* recognizes that the limits of consent are the consequences directly flowing from the creditor's filing of the proof of claim.[423] Unfortunately, the Court also stressed the importance of equity courts providing complete relief,[424] a reasoning prone to broad interpretation of claimants' consent beyond the direct consequences of the filing of proofs of claim.[425]

416. *Id.*

417. *Id.*

418. *Id.* at 241–42. This view is reflected by section 57g of the 1898 Act and its modern analog, 11 U.S.C. § 502(d) (2012). Bankruptcy Act of 1898, ch. 541, § 57(g), 30 Stat. 544, 560.

419. *Alexander*, 296 U.S. at 242 (citations omitted).

420. *Id.* at 242–43.

421. *Id.* at 243.

422. *See id.*

423. *See id.* at 241.

424. *See id.* at 242.

425. *E.g.*, N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1508 (7th Cir. 1991); Markwood Invs. Ltd. v. Neves (*In re* Neves), 500 B.R. 651, 659–60 (Bankr. S.D.

In *Gardner*,[426] New Jersey attempted to invoke its sovereign immunity to forestall a bankruptcy referee adjudicating and disallowing its proof of claim.[427] Invoking *Wiswall*, the Court summarized: "It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure."[428] The Court then explained that the adjudication of the state's claim did not seek a judgment against the state and instead would adjudicate its interest in the res constituting the debtor's estate.[429] Only then did the Court confirm New Jersey's waiver of sovereign immunity resulting from the filing of its proof of claim.[430] *Gardner* still stands for the proposition that a filing of a proof of claim in bankruptcy allows the bankruptcy court to determine all objections to the proof of claim.[431]

The factual circumstances and teachings of *Wiswall*, *Alexander*, and *Gardner* support a limited view of consent in bankruptcy. However, the broad language used to describe it, i.e., the need to "abide [by] the consequences" of filing a proof of claim and provide "complete relief," helped expand the boundaries of implied consent.[432]

Katchen v. Landy built upon the analysis of *Alexander* concerning counterclaims by the estate against creditors.[433] Because of the nature of the preference counterclaim, however, it failed to analyze the degree of overlap necessary for a proof of claim to constitute implied consent.[434] In *Katchen*,

Fla. 2013); Siemens Components, Inc. v. Choi (*In re* Choi), 135 B.R. 649, 651 (Bankr. N.D. Cal. 1991).

426. Gardner v. New Jersey, 329 U.S. 565 (1947), *superseded by statute*, Act of Nov. 6, 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2549–54 (codified as amended at 11 U.S.C. § 101 (2012)).

427. *Id.* at 571.

428. *Id.* at 573 (citing Wiswall v. Campbell, 93 U.S. 347, 351 (1876)).

429. *Id.* at 574 ("No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected *in toto*, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash.").

430. *Id.*

431. Arecibo Cmty. Health Care, Inc. v. Puerto Rico, 270 F.3d 17, 25 (1st Cir. 2001); *see* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 681 n.3 (1999).

432. *In re* Nathan, 98 F. Supp. 686, 690–92 (S.D. Cal. 1951) (tracing how views of consent expanded under the 1898 Act); Tallant, *supra* note 170, at 151 & nn.13, 15.

433. Katchen v. Landy, 382 U.S. 323, 335 (1966), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

434. *See id.* at 335–36 (holding onto the basis of the structure and purpose of the

the Supreme Court confronted the issue of whether a creditor who filed a proof of claim and was a defendant in a preference complaint possesses the Seventh Amendment right to a jury trial concerning the preference claim.[435] The Seventh Amendment jury trial right has repeatedly been found analogous to the right to an Article III adjudication.[436] Accordingly, the Supreme Court has often relied upon cases implicating the right to a jury trial in bankruptcy when analyzing the right to an Article III adjudication.[437] The relationship between the two tests used by each inquiry explains this reliance. Even though courts analyze the right to a jury trial in bankruptcy using a three-part test, the last part of the test—whether the action stems from the bankruptcy itself or is necessarily adjudicated as part of the claims allowance process—mirrors the *Stern* test for Article III adjudication.[438]

The trustee in *Katchen* objected to the creditor's proof of claim based on the creditor's receipt of a preference and sought recovery of the value of the preferential transfer in excess of the creditor's proof of claim.[439] The Court held that the bankruptcy referee's summary jurisdiction under the 1898 Act extended to all property *in custodia legis*.[440] This jurisdictional scope allowed the adjudication of claims and objections thereto concerning

modern analog of the 1898 Bankruptcy Act without discussing any issues of overlap being necessary to constitute implied consent).

435. *Id.* at 336–38. The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII. The Supreme Court has "interpreted the phrase '[s]uits at common law' to refer to 'suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830)).

436. *E.g.*, Stern v. Marshall, 564 U.S. 462, 516–17 (2011) (Breyer, J., dissenting) (supporting its reliance upon Seventh Amendment cases).

437. *See id.*; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852 (1986).

438. *See* Miller, *Defining the Prongs of* Stern, *supra* note 21, at 1.

439. Katchen v. Landy, 382 U.S. 323, 325–27 (1966), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

440. *Id.* at 332. *In custodia legis* is Latin for in the custody of the law. *In custodia legis*, BLACK'S LAW DICTIONARY (9th ed. 2009).

such property[441] as a summary "adjudication of interests claimed in a res."[442] Section 57g of the 1898 Act provided for disallowance of a creditor's proof of claim if the creditor was liable for a preference or fraudulent transfer, unless and until the creditor paid the amount of the preference to the estate.[443] In deciding the section 57g objection, the referee determined both the avoidance and the amount of transfer avoided.[444]

Katchen refined the twin bases of *Alexander*'s holding: adjudications involving the res of the debtor's estate and the waste accompanying a separate suit for a counterclaim related to the creditor's proof of claim.[445] The bankruptcy referee had summary jurisdiction over the section 57g proof of claim objection, a proceeding regarding the res *in custodia legis*.[446] The adjudication of the section 57g objection would leave nothing to determine in a later plenary suit for the recovery of the transfer in excess of the creditor's proof of claim.[447] Collateral estoppel would foreclose the creditor from relitigating the liability or amount of the transfer; both of these issues would be determined by adjudicating the section 57g objection.[448] The

441. *Katchen*, 382 U.S. at 336–37 ("As bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession, and as the proceedings of bankruptcy courts are inherently proceedings in equity, there is no Seventh Amendment right to a jury trial for determination of objections to claims, including [section] 57g objections." (citations omitted)).

442. *Id.* at 329–30 (quoting Gardner v. New Jersey, 329 U.S. 565, 574 (1947), *superseded by statute*, Act of Nov. 6, 1978, Pub. L. No. 95-598 § 101, 92 Stat. 2549, 2549–54 (codified as amended at 11 U.S.C. § 101 (2012)).

443. Bankruptcy Act of 1898, ch. 541, § 57(g), 30 Stat. 544, 560; *Katchen*, 382 U.S. at 333–34. The current statutory analog of section 57g is 11 U.S.C. § 502(d).

444. *Katchen*, 382 U.S. at 333–34 (citing Schwartz v. Levine & Malin, Inc. (*In re* Kelner), 111 F.2d 81 (2d Cir. 1940) (per curiam)) ("But once it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, it can hardly be doubted that there is also summary jurisdiction to order the return of the preference. This is so because in passing on a [section] 57g objection a bankruptcy court must necessarily determine the amount of preference, if any, so as to ascertain whether the claimant, should he return the preference, has satisfied the condition imposed by [section] 57g on allowance of the claim.").

445. *See id.* at 335–37 (citations omitted).

446. *See id.* at 327 (citations omitted).

447. *Id.* at 334 (citations omitted) ("Thus, once a bankruptcy court has dealt with the preference issue nothing remains for adjudication in a plenary suit. The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts.").

448. *Id.* (citations omitted). Unlike *Stern*, the claim objection determined all the

preclusive effect of the section 57g objection was a consequence of the creditor filing a proof of claim seeking his share of the debtor's property held *in custodia legis*.[449] The referee could order the affirmative recovery of the preference without a jury trial because the referee determined all legal and factual issues presented as part of the referee's summary jurisdiction.[450] In a footnote, the Court expressly rejected consent as a basis for its decision and instead embraced the rationale of *Wiswall* and *Gardner*: "Rather, our decision is governed by the 'traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.'"[451] Although the Court quoted *Alexander*'s broad reasoning concerning the need to decree complete relief, it also expressly left unresolved whether any basis, including consent, existed for allowing a bankruptcy referee to determine a counterclaim "for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim."[452] In sum, *Katchen* says nothing about what constitutes implied consent to the adjudication of non-Article III tribunal if the claim is not determined in the process of adjudicating a proof of claim.

In *Granfinanciera, S.A. v. Nordberg*, the Supreme Court finally provided definition, albeit in a footnote, for the boundaries of implied consent based upon the filing of a proof of claim.[453] *Granfinanciera* involved whether a non-creditor possessed a Seventh Amendment right to a jury trial when faced with a fraudulent transfer complaint.[454] The BAFJA designates fraudulent transfers as core proceedings, subject to final determination by a bankruptcy judge without a jury trial, regardless of whether a defendant has filed a proof of claim.[455] Nonetheless, in *Granfinanciera*, the right to a jury

issues required for the affirmative recovery of the preference. The Court in *Katchen* expressly failed to answer the question at issue in *Stern* because it "intimate[d] no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim." *Id.* at 332 n.9.

449. *See id.* at 335 (quoting Alexander v. Hillman, 296 U.S. 222, 241–42 (1935)).

450. *See id.* at 336.

451. *See id.* at 333 n.9 (quoting Gardner v. New Jersey, 329 U.S. 565, 573 (1947), *superseded by statute*, Act of Nov. 6, 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2549–54 (codified as amended at 11 U.S.C. § 101 (2012))).

452. *Id.*

453. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 40–41 n.3 (1989).

454. *Id.* at 36.

455. 28 U.S.C. § 157(b)(2)(H); *see Granfinanciera*, 492 U.S. at 50.

trial attached to the trustee's fraudulent transfer action against a non-creditor because 28 U.S.C. § 157's statutory designation of the issue as core did not overcome the Seventh Amendment.[456]

As part of the Court's distinguishing of *Katchen*, the majority explained why the implied consent reasoning of *Schor* is limited in bankruptcy.[457] In *Schor*, the parties could elect to proceed before either the CFTC or a district court.[458] In contrast, "[p]arallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims."[459] Pursuant to the submission of a proof of claim, a bankruptcy judge could adjudicate claims as part of the claims allowance process like those in *Katchen* without a jury trial.[460] However, this finding "turned . . . on the bankruptcy court's having 'actual or constructive possession' of the bankruptcy estate and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate."[461] Thus, the *Granfinanciera* majority recognized one of the two bases of *Alexander* and *Katchen*: adjudications concerning the res of the debtor. The majority rejected Justice Byron White's (the author of the majority opinion in *Katchen*) dissent and the ability of Congress to eliminate a Seventh Amendment jury trial right in core bankruptcy proceedings, including fraudulent transfer actions.[462]

The Supreme Court finally divorced the filing of a proof of claim from implied consent in *Stern*. In *Stern*, not all the factual and legal issues presented by the debtor's counterclaim would be necessarily determined by adjudicating the creditor's proof of claim.[463] However, the creditor's proof of

456. *Granfinanciera*, 492 U.S. at 61 ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

457. *Id.* at 59 n.14; *id.* at 70 (Scalia, J., concurring in part and concurring in the judgment).

458. *Id.* at 59 n.14 (majority opinion).

459. *Id.*

460. *Id.*

461. *Id.* at 57 (citation omitted).

462. *See id.* at 59 n.14; *id*. at 71–74 (White, J., dissenting).

463. Stern v. Marshall, 564 U.S. 462, 498 (2011) (majority opinion). "Put differently, it is not enough that the bankruptcy estate has some sort of 'counterclaims' against persons who file claims against the estate (28 U.S.C. § 157(b)(2)(C)) because *Stern* held that including all counterclaims is too broad." Sol. Tr. v. 2100 Grand LLC (*In re* AWTR Liquidation Inc.), 547 B.R. 831, 837 (Bankr. C.D. Cal. 2016).

claim could have provided a basis for the entry of final judgment if it provided a blanket implied consent to Article III adjudication.[464] Instead, the creditor did not "truly consent" because "[h]e had nowhere else to go if he wished to recover from [the debtor's] estate."[465] *Stern* clearly recognized the distinction between implied consent in bankruptcy proceedings and implied consent in other federal civil litigation. It anchored its limitation of implied consent to the lack of alternative forums available to creditors.[466]

B. *Bad Interpretation of a Good Analogy Makes Bad Law*

Almost every bankruptcy case presents the potential issue of whether a debtor consents to all adjudications by a bankruptcy judge simply by the filing of a bankruptcy petition and obtaining the entry of an order for relief.[467] In *Stern* and *Granfinanciera*, the Supreme Court outlined a narrow view of consent in bankruptcy consistent with the lack of alternatives available to parties in bankruptcy.[468] Although neither case evaluated the scope of debtor consent, the Supreme Court's reasoning properly applies to debtors as well, based on their similarly limited alternative forums.[469]

Unfortunately, two circuits failed to heed *Granfinanciera*'s logic and classified a debtor's filing of a bankruptcy petition as a blanket implied consent to non-jury trials of all proceedings in a bankruptcy case.[470] The first erroneous opinion was the Seventh Circuit's in *N.I.S. Corp. v. Hallahan (In re Hallahan)*, which concerned whether a debtor possessed a Seventh Amendment right to jury for a creditor's action seeking to categorize a

464. *See Stern*, 564 U.S. at 493.

465. *Id.*

466. *See id.*

467. The vast majority of bankruptcy petitions are voluntary. *See* David S. Kennedy et al., *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1, 3 (2000) (noting that, in 1998, "less than 1/1000 of one percent of all bankruptcy cases filed were commenced involuntarily"). The petition date and the entry of the order for the relief occur on the petition date in a voluntary case. 11 U.S.C. § 301(b). In an involuntary case, as will be discussed below, the order relief is only entered later, once the debtor has received an opportunity to contest it.

468. *See Stern*, 564 U.S. at 493, 502; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989) (majority opinion).

469. *See Stern*, 564 U.S. at 493.

470. Other courts came to similar conclusions. *E.g.*, Splash v. Irvine Co. (*In re* Lion Country Safari, Inc. Cal.), 124 B.R. 566, 572 (Bankr. C.D. Cal. 1991); Haden v. Edwards (*In re* Edwards), 104 B.R. 890, 893 (Bankr. E.D. Tenn. 1989).

willful breach of contract claim as nondischargeable.[471] The court found two independent reasons why the debtor lacked the right to a jury trial. First, the court applied the first two parts of the jury trial test from *Granfinanciera* and characterized the dischargeability action as equitable, which eliminated the Seventh Amendment right.[472] Second, the court broadly construed the debtor's filing of a voluntary bankruptcy petition as consent to adjudication by a bankruptcy judge without a jury trial.[473] The court carefully admitted the limitations *Granfinanciera* placed on consent.[474] Nonetheless, the court perceived a lack of blanket implied consent as an unfair result.[475] If a creditor loses its right to a jury trial when it filed a proof of claim after being forced to seek payment in a voluntary bankruptcy proceeding by a debtor, why should the debtor retain his or her Seventh Amendment rights? In other words, if voluntary debtors retained any rights to a jury trial, "[d]ebtors then would be able to block their creditors' access to a jury trial without compromising their own ability to demand a jury in their preferred forum."[476] In sum, by filing a bankruptcy petition, debtors lose any right to a jury trial in bankruptcy proceedings.[477] The court expressly failed to explain whether its analysis also applied to involuntary debtors.[478] On substantially similar facts, the Sixth Circuit followed the Seventh Circuit and cited heavily to *In re Hallahan* in eliminating a debtor's right to a jury trial for both a nondischargeability proceeding and the liquidation of a nondischargeable debt.[479] Repeating the errors of *In re Hallahan*, the filing of a voluntary petition "stripped [the debtor] of any right to a jury trial he might otherwise

471. N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1502–03 (7th Cir. 1991).

472. *Id.* at 1505.

473. *Id.*

474. *Id.* at 1505 n.10.

475. *Id.* at 1505, 1506 ("[D]ebtors who initially choose to invoke the bankruptcy court's jurisdiction to seek protection from their creditors cannot be endowed with any stronger right."); Irvin v. Faller, 531 B.R. 704, 711 (W.D. Ky. 2015) (quoting Longo v. McLaren (*In re* McLaren), 3 F.3d 958, 961 (6th Cir. 1993)) (following *In re Hallahan* and *In re McLaren*); Charlotte Commercial Grp., Inc. v. Fleet Nat'l Bank (*In re* Charlotte Commercial Grp., Inc.), 288 B.R. 715, 718–19 (Bankr. M.D.N.C. 2003) (following *In re Hallahan*); *see* Sergent v. McKinstry, 472 B.R. 387, 418 (E.D. Ky. 2012) (following *In re Hallahan* and *In re McLaren*).

476. *In re Hallahan*, 936 F.3d at 1506.

477. *Id.*

478. *Id.* at 1505 n.11.

479. *In re McLaren*, 3 F.3d at 960–61, 961.

have claimed."[480]

Many courts strongly criticized *In re Hallahan* and its progeny.[481] Both the legal and equitable arguments undergirding *In re Hallahan* are erroneous. *In re Hallahan* misapprehended the legal implications of a debtor's voluntary petition by failing to follow the Supreme Court's teachings concerning the scope of implied consent in bankruptcy.[482] A debtor's petition grants the bankruptcy court custody of the res in the debtor's legal and equitable possession to determine what constitutes property of the debtor's estate for distribution to creditors and, for an individual debtor, to seek a discharge of creditors' pre-petition claims.[483] As the Fifth Circuit explained in criticizing *In re Hallahan*, the effect of filing a voluntary petition "is to pass ownership and control of the claims to the estate."[484] A creditor who files a proof of claim requests a distribution from the debtor's pre-petition assets and consents to the adjudication of its proof of claim and any matter necessarily determined as part of the claims allowance process.[485] A debtor who requests a discharge similarly consents to any adjudications required for him or her to obtain the discharge and any matters necessarily determined as part of such process.[486] Like a creditor who files a claim against a debtor's bankruptcy estate and never truly consented to any adjudication outside of the scope of the claims allowance process, a debtor must file for a discharge of his or her debts under the appropriate chapter of the Code. A debtor has no other forums to obtain a discharge from all debts.[487]

Justice Stephen Breyer's dissent in *Stern* missed this point when he

480. *Id.* at 961.

481. *See, e.g.*, Germain v. Conn. Nat'l Bank, 988 F.2d 1323, 1330 (2d Cir. 1993); Quarles v. Wells Fargo Home Mortg., Inc. (*In re* Quarles), 294 B.R. 729, 731 (Bankr. E.D. Ark. 2003); WSC, Inc. v. Home Depot, Inc. (*In re* WSC, Inc.), 286 B.R. 321, 332 (Bankr. M.D. Tenn. 2002).

482. *See In re WSC, Inc.*, 286 B.R. at 330.

483. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1967 (Thomas, J., dissenting) (noting discharge and the claims allowance process "involve rights lying outside the core of the judicial power").

484. *In re* Jensen, 946 F.2d 369, 373 (5th Cir. 1991) (citing La. World Exposition v. Fed. Ins. Co., 858 F.2d 233, 246 (5th Cir. 1988)), *abrogated by* U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc., 761 F.3d 409, 420 (5th Cir. 2014).

485. *Id.*

486. *See Wellness*, 135 S. Ct. at 1967.

487. *E.g.*, Leslie Salt Co. v. Marshland Dev., Inc. (*In re* Marshland Dev., Inc.), 129 B.R. 626, 630 (Bankr. N.D. Cal. 1991).

optimistically suggested that the creditor possessed an alternative forum to obtain payment from the debtor.[488] The creditor in *Stern* asserted his claim was nondischargeable, meaning it could have been litigated in a state or federal court after distribution, i.e., in an alternative forum.[489] The logic of this argument appears reasonable at first glance, but it overlooks the vital distinction between the debtor's estate and the debtor's non-estate assets. When a debtor files for bankruptcy, all his or her assets become part of his or her estate, and, subject to exemptions, the value of the assets is either distributed to creditors following liquidation or paid over time through a plan (depending on whether the debtor is in a reorganization or a liquidation case).[490] Following a debtor's discharge, dismissal, or the closing of the case, any property received is not property of the estate and vests with the debtor (post-bankruptcy property).[491] If a creditor, even one possessing a nondischargeable judgment, fails to file a proof of claim, then the creditor will not obtain a distribution from the debtor's estate.[492] Although the failure to file a proof of claim does not affect the dischargeability of the claim, a creditor with a nondischargeable claim who also fails to file a proof of claim may only look to the debtor's post-bankruptcy property; the debtor's estate will only be distributed to creditors who filed proofs of claim.[493] Thus, the creditor holding the allegedly nondischargeable claim will be forced to look to a different pool of assets to obtain payment if the creditor does not file a proof of claim.[494] The debtor's bankruptcy is the only forum to obtain a

488. *See* Stern v. Marshall, 564 U.S. 462, 516 (2011) (Breyer, J., dissenting) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59, n.14 (1989)).

489. *Id.*

490. In a liquidation case under Chapter 7 or 11, the trustee or the debtor-in-possession will distribute the value of the debtor's non-exempt assets to creditors. *See generally* 11 U.S.C. § 726 (2012). In a reorganization case under Chapter 11, 12, or 13, the debtor will pay the creditors the value of the debtor's non-exempt assets over the life of the plan of reorganization. *See id.* §§ 1123, 1222, 1322.

491. In a Chapter 13 case, "[t]he confirmed plan vests all of the property of the estate in the debtor." *In re* Michael, 699 F.3d 305, 309 (3d Cir. 2012) (citing 11 U.S.C. § 1327(b)). In Chapter 11 individual cases, a debtor's property received after confirmation but before case closing is property of the estate. *See* 11 U.S.C. § 1115. In a Chapter 7 case, "the asset will remain property of the estate until it is abandoned, as a matter of law, upon the closing of the estate." Salzer v. Jocquel Supply (*In re* Salzer), 180 B.R. 523, 529 (Bankr. N.D. Ind. 1993), *aff'd sub nom. In re* Salzer, 52 F.3d 708 (7th Cir. 1995).

492. *See* Gallick v. U.S. Dep't of Educ. (*In re* Gallick), 292 B.R. 830, 831 (Bankr. W.D. Pa. 2003).

493. *See id.*

494. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989).

payment from the debtor's estate; no alternative forum exists.[495] The *Stern* majority's limited view of implied consent in bankruptcy strongly cautions against finding a blanket implied consent to non-Article III adjudication based on the filing a bankruptcy petition.[496]

Stern's two-pronged test expressly rejected applying an expansive implied consent theory to creditors who file proofs of claim.[497] Even though the creditor had filed a proof of claim, not all the factual and legal issues presented by the debtor's counterclaim would be determined in ruling on the creditor's proof of claim.[498] In other words, the debtor's counterclaim would not be necessarily determined as part of the claims allowance process, and it could not be finally determined by a bankruptcy judge.

Some courts have dismissed the analogy between the effect of filing a proof of claim and seeking a discharge and instead highlighted the ability of a debtor to obtain relief from creditors outside of court.[499] True, a debtor may negotiate with creditors outside of bankruptcy. Nonetheless, such negotiations are very difficult because a debtor will need to strike a deal with each creditor while often dealing with ongoing litigation, a difficult and expensive process.[500] The unique powers available to debtors pursuant to bankruptcy—principally, the automatic stay of actions against the debtor

495. *See* Stern v. Marshall, 564 U.S. 462, 493 n.8 (2011). This point is not simply academic. Many cases are "no asset cases" (a Chapter 7 case without non-exempt assets and no distribution to general unsecured creditors) or "zero dividend plans" (a Chapter 13 case where the debtor's plan is confirmed with no payment to general unsecured creditors where the general unsecured creditors do not receive any distributions). However, when general unsecured creditors do receive a distribution, a creditor with a nondischargeable claim may only receive a distribution on account of their proof of claim. Bussel & Klee, *supra* note 90, at 687 n.101. In rare cases where a significant avoidance action is successfully prosecuted or large amounts of non-exempt equity in the debtor's property exists, a creditor with a nondischargeable claim who does not file a proof of claim may be prejudiced if the post-bankruptcy debtor cannot pay his or her claim later.

496. *Stern*, 564 U.S. at 494.

497. S. Todd Brown, *supra* note 1, at 51.

498. *Stern*, 564 U.S. at 497–99.

499. N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1505 n.10 (7th Cir. 1991).

500. At the same time, creditors often benefit from greater distributions in an orderly bankruptcy proceeding than they would from individually dismembering the debtor in a race to the courthouse to levy on the debtor's assets. David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 470 (citations omitted).

and the discharge of all dischargeable debts—make this process far easier and cheaper for the debtor.[501] Thus, debtors do not have a true alternative forum, and therefore, the filing of a bankruptcy petition does not constitute "blanket consent." This view is consistent with the Supreme Court's teaching regarding consent in *Stern* and *Granfinanciera*.[502] Indeed, replace "debtor" with "creditor," and this is exactly the rationale embraced by the Supreme Court.

The equitable reciprocity concerns are similarly unsupported.[503] Generally, a lack of reciprocity between debtors and creditors is endemic to many protections for debtors provided by the bankruptcy.[504] Most notably, the automatic stay under 11 U.S.C. § 362 forestalls actions by creditors while a debtor may continue to prosecute actions outside of bankruptcy against his or her creditors.[505] The reciprocity concerns are also mitigated by the claims allowance process. Section 502(d) of the Title 11 requires the disallowance of a creditor's claim until the amount owed from Chapter 5 actions is surrendered to the estate.[506] Both the creditor's proof of claim and the

501. The original basis for federal uniform bankruptcy power was the need to ameliorate the inability of debtors to discharge their debts in multiple jurisdictions. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 366–68 (2006) (majority opinion). States would not always recognize discharges of debts received in other states because the schemes of discharge varied widely. *Id.* at 367. Only a federal uniform bankruptcy system could solve these problems and allow a debtor to obtain a discharge of his or her debts throughout the nation. *See id.* at 369. Similarly, the "[the automatic stay] is integral to a constitutional interest, set forth in Const. Art[icle] 1, [Section] 8, [Clause] 4, that Congress shall have the power to enact uniform laws on bankruptcy." *In re* Congregation Birchos Yosef, 535 B.R. 629, 636 n.6 (Bankr. S.D.N.Y. 2015), *appeal dismissed sub nom.* Bais Din of Mechon L'Hoyroa v. Congregation Birchos Yosef (*In re* Congregation Birchos Yosef), No. 15-CV-6408 (CS), 2016 WL 5394755 (S.D.N.Y. Sept. 27, 2016). It not only gives the debtor a breathing spell but also promotes collective action among creditors to maximize recoveries rather than dismembering a debtor piecemeal. *See* Cardillo v. Moore-Handley, Inc. (*In re* Cardillo), 172 B.R. 146, 151 (Bankr. N.D. Ga. 1994).

502. *See Stern*, 564 U.S. at 495–99; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57–61 (1989).

503. Courts have recently applied *In re Hallahan*'s consent rationale to provide for blanket consent to bankruptcy judge adjudication of *Stern* issues, including in fraudulent actions against a creditors. *See* Kapila v. Bank of Am., N.A. (*In re* Pearlman), 493 B.R. 878, 888–90 (Bankr. M.D. Fla. 2013).

504. *See* Germain v. Conn. Nat'l Bank, 988 F.2d 1323, 1330 n.8 (2d Cir. 1993).

505. *See* 11 U.S.C. § 362 (2012).

506. According to the legislative history of 11 U.S.C. § 502(d), the section "requires disallowance of a claim of a transferee of a voidable transfer in toto if the transferee has not paid the amount or turned over the property received as required under the sections

debtor's Chapter 5 action are bound up and adjudicated together as part of the claims allowance process.[507] "Hence, neither the debtor nor the creditor has a right to a jury trial."[508] If the situation were reversed and the defendant had not filed a proof of claim, the claims allowance process would not have been triggered and, as the Supreme Court recognized in *Granfinanciera*, the defendant would retain the right to a jury trial.[509] Indeed, the denial of the debtor-plaintiff's jury demand or Article III rights in this situation would raise the reciprocity concerns considered repugnant by *In re Hallahan* and *Lango v. McLaren* (*In re McLaren*).[510]

A debtor lacks alternatives to filing for bankruptcy if he or she wants to obtain a consolidated restructuring and discharge of his or her debts.[511] Without other options, a debtor's filing of a bankruptcy petition does not constitute implied consent to a non-Article III bankruptcy judge adjudicating a matter that is not necessarily determined as part of the claims allowance process or stem from the bankruptcy itself.[512] The concerns about the inequity of a debtor eliminating a creditor's right to Article III adjudication are both overblown and irrelevant. At bottom, consent is a function of options, and a lack of other options explains why a debtor's implied consent to non-Article III adjudication arising from a bankruptcy petition is limited.

VI. IN REM AUTHORITY

Consent explains why bankruptcy judges may issue many final determinations of in rem proceedings. The separation of power issue highlighted by *Stern* is also a due process issue.[513] If litigants are denied final

under which the transferee's liability arises." H.R. REP. NO. 95-595, at 354 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6310.

507. *See* Andrews v. AmSouth Bank (*In re* Andrews), Nos. 01-42562-JJR-13, 06-40016-BGC, 2007 WL 2819523, at *4 (Bankr. N.D. Ala. Sept. 26, 2007).

508. *Id.* (citations omitted).

509. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57–59 (1989).

510. *See* Mukamal v. BMO Harris Bank N.A. (*In re* Palm Beach Fin. Partners), 501 B.R. 792, 803 (Bankr. S.D. Fla. 2013).

511. *See Granfinanciera*, 492 U.S. at 59 n.14.

512. *See* Stern v. Marshall, 564 U.S. 462, 494 (2011).

513. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 602 n.5 (1985) (Brennan, J., concurring in the judgment); Crowell v. Benson, 285 U.S. 22, 56 (1932) (stating that the requirement of de novo review of certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate maintenance of the [f]ederal judicial power"); *id.* at 87 (Brandeis, J.,

adjudications by Article III judges when their property is seized, not only is the balance of the separation of powers among the branches disrupted, but the litigants' due process rights under the Fifth Amendment are also violated.[514] As Professor Baird has explained, "Due process and Article III in this sense are fused at the hip."[515] By filing voluntary petitions, debtors voluntarily acquiesce to their property becoming *in custodia legis* of the bankruptcy court.[516] Thus, they consent to any final adjudications regarding their property and their status as a debtor (both in rem adjudications); therefore, no seizure occurs.[517] Adjudications regarding creditors' rights in the res of the debtors' property are similarly not seizures because they are also in rem adjudications; nothing is seized from the creditors.[518] The filing of a proof of claim constitutes the consent to the bankruptcy court's adjudication of the creditor's rights in the res, an in rem adjudication, and

dissenting) ("[T]he constitutional requirement of due process is a requirement of judicial process."); *cf.* Collins v. Foreman, 729 F.2d 108, 120 (2d Cir. 1984) (recognizing possibility of due process right to an Article III judge).

514. *See* Murphy v. Felice (*In re* Felice), 480 B.R. 401, 415 (Bankr. D. Mass. 2012).

515. Baird, *supra* note 121, at 8. For a more general discussion of the relationship between Article III and the Due Process Clause, consider Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672 *passim* (2012). The vested rights doctrine, whereby Congress may not nullify a judicial judgment, displays a similar dual character. Gavin v. Branstad, 122 F.3d 1081, 1091 (8th Cir. 1997) (listing circuit cases recognizing the dual character); *see* Fields v. Wash. Metro. Area Transit Auth., 743 F.2d 890, 894 (D.C. Cir. 1984); *In re* Rivers, 19 B.R. 438, 446 (Bankr. E.D. Tenn. 1982), *rev'd*, 714 F.2d 142 (6th Cir. 1983), and *rev'd sub nom*. Still v. Ala. Furniture Co., 714 F.2d 142 (6th Cir. 1983); *cf.* Kalaris v. Donovan, 697 F.2d 376, 399 n.93 (D.C. Cir. 1983) (noting that although not synonymous, due process and Article III may require the same protections).

516. *In re Felice*, 480 B.R. at 433.

517. *See id.* at 418; Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 333 (Bankr. W.D. Mich. 2011), *reasoning aff'd sub nom.* Meoli v. Huntington Nat'l Bank, No. 1:12-cv-1113, 2015 WL 5690953, at *5 (W.D. Mich. Sept. 28, 2015), *case docketed*, No. 15-2362 (6th Cir. Nov. 9, 2015). A failure to contest an involuntary petition similarly constitutes consent. Miller, *Everything Old Is New Again*, *supra* note 8, at 51 n.415 ("If the debtor timely [contests] the involuntary petition, then the petitioning creditors must show that the alleged debtor is generally [failing to pay] his debts as they come due. This inquiry is clearly within the constitutional authority of bankruptcy courts as it is a determination of . . . [their] own jurisdiction. If the [petitioning creditors prevail], the debtor has a weak claim to his property because a bankruptcy proceeding is necessary to ensure payment of his debts when the debtor's property could be liquidated for that purpose."). This weakness may mitigate a seizure of property and allow a non-Article III judge to make a final adjudication. *See id.*

518. Miller, *Everything Old Is New Again*, *supra* note 8, at 3.

the issues necessarily determined in the scope of the claims allowance process.[519] Thus, the only recognized extensions of a bankruptcy judge's authority beyond in rem determinations are consent and preclusion principles.[520]

The liquidation of a nondischargeable debt illustrates these principles. Courts have come to divergent answers concerning whether a bankruptcy judge has constitutional authority to enter a final judgment in these actions.[521] The Supreme Court has categorized the determination of whether a debtor receives a discharge as an in rem determination.[522] This clarification does not answer whether the liquidation of a nondischargeable debt is similarly an in rem determination. Only when the liquidation of the creditor's debt is necessarily determined (1) as part of the claims allowance process or (2) as part of determining the debtor's discharge can the bankruptcy judge constitutionally enter a final order liquidating the nondischargeable debt.[523] An in personam determination seizing the property of a debtor without any impact upon the bankruptcy estate is an exercise of Article III judicial power requiring the associated oversight of an Article III judge.[524]

When can a bankruptcy judge ever enter a final judgment? The better way to approach this question is from the inverse, because of greater guidance from the Supreme Court on when a bankruptcy judge may not enter a final judgment.[525] If an action augments the bankruptcy estate, the

519. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989); *see* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1967 (2015) (citation omitted) ("We have nevertheless implicitly recognized that the claims allowance process may proceed in a bankruptcy court, as can any matter that would necessarily be resolved by that process, even one that affects core private rights.").

520. The Supreme Court has also suggested that a bankruptcy judge may enter a final judgment when the issue "stems from the bankruptcy itself." Stern v. Marshall, 564 U.S. 462, 499 (2011). However, the explanatory power of this phrase is limited. *See* Casey & Huq, *supra* note 257 (explaining the drawbacks of relying upon what "stems from the bankruptcy itself" and the two-pronged test generally (quoting *Stern*, 564 U.S. at 499)).

521. *Compare* Juan Juan Chen v. Wen Jing Huang (*In re* Wen Jing Huang), 509 B.R. 742, 755 n.19 (Bankr. D. Mass. 2014), *with* Condon Oil Co. v. Wood (*In re* Wood), 503 B.R. 705, 710 (Bankr. W.D. Wis. 2013).

522. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 191–92 (1902).

523. *See* NWI Orthodontics, P.C. v. Bell (*In re* Bell), 498 B.R. 463, 485 (Bankr. E.D. Pa. 2013).

524. Baird, *supra* note 121, at 5–6.

525. *See* Murphey v. Felice (*In re* Felice), 480 B.R. 401, 415 (Bankr. D. Mass. 2012).

bankruptcy judge may not enter a final judgment.[526] In order to enforce a judicial resolution, one must obtain the entry of a final judgment.[527] In federal court, only a judge afforded the protections of Article III may enter such a judgment, when at common law a court of equity, law, or admiralty would have issued the final judgment.[528] Subject to the exceptions chronicled earlier, Congress may not grant a non-Article III tribunal the power to enter a final judgment in these actions without litigant consent.[529] Both the structural principle and the personal right to an Article III judge are thereby protected.[530] However, Fifth Amendment due process protection better frames the personal right. The personal right under Article III and "*Stern* [are] ultimately about due process."[531]

The Fifth Amendment Due Process Clause prohibits the "depriv[ation] of life, liberty, or property, without due process of law."[532] The obvious question is how much process is due. In federal court, when a court of equity, law, or admiralty would have issued the final judgment, the litigant has a right to a final adjudication by an Article III judge.[533] The Supreme Court first analyzed the due process implications of Article III in *Murray's Lessee*.[534] In *Murray's Lessee*, the federal government ordered the levy and sale of a debtor's real property without the intervention of a judge after the debtor engaged in a massive embezzlement of federal funds.[535] A federal statute allowed the summary procedure used by the government without either notice or an opportunity for a hearing when the government attempted to collect its debts.[536] Faced with eviction, one of the debtor's

526. *See* Stern v. Marshall, 564 U.S. 462, 495–99 (2011); *In re Felice*, 480 B.R. at 415.

527. *See Stern*, 564 U.S. at 486–87 (noting final judgments are binding and enforceable).

528. *See In re Felice*, 480 B.R. at 415.

529. *See supra* Part III.C.

530. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 768–69 (7th Cir. 2013) (citations omitted), *rev'd on other grounds*, 135 S. Ct. 1932 (2015).

531. Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 468 (Bankr. W.D. Mich. 2012).

532. U.S. CONST. amend. V; *see also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275 (1855) (observing that the plaintiff's judicial power argument was more appropriately determined under the Due Process Clause of the Fifth Amendment).

533. U.S. CONST. art. III, § 2, cl. 1.

534. 59 U.S. (18 How.) 272.

535. *Id.* at 274–75.

536. *Id.* at 275; *see also* Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 29–30 (1991) (Scalia, J., concurring in the judgment) (explaining the process provided to the debtor in *Murray's Lessee*).

tenants, "Murray's lessee," challenged the constitutionality of the non-judicial sale. According to the tenant, an adjudication by an Article III court was necessary to order the seizure and sale of the debtor's property.[537] Lacking oversight by an Article III judge, the summary procedure employed by the United States allegedly deprived the debtor of his property without due process.[538] The Court summarized the due process issue as:

> [Whether] the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, 'without due process of law;' and, therefore, is in conflict with the fifth article of the amendments of the [C]onstitution.[539]

The levy and sale were admittedly "legal process."[540] The use of legal process, however, does not itself instruct how much due process is required when liberty or property is deprived. After assuring that Congress could not unilaterally determine the required amount of process,[541] "[t]he Court fashioned a two-step inquiry for whether a person received due process: (1) review the Constitution for any conflict [between] its provisions" and the challenged procedure, "and, if [no conflict] existed, (2) review 'those settled usages and modes of proceeding existing in the common and statute law of England' before the Framing, which were not rebuked by the colonies or the states."[542]

Applying this test, the debtor was not deprived of his due process. First, the Constitution's silence concerning the requirements for due process in

537. *Murray's Lessee*, 59 U.S. (18 How.) at 274.

538. *Id.* at 275–76.

539. *Id.* at 275.

540. *Id.* at 276.

541. *Id.* ("It is manifest that it was not left to the legislative power to enact any process which might be devised. The [Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

542. Miller, *Everything Old Is New Again*, *supra* note 8, at 50 (citing *Murray's Lessee*, 59 U.S. (18 How.) at 277); *see* Williams v. Pennsylvania, 136 S. Ct. 1899, 1917–19 (2016) (evaluating common law and early state rules to analyze due process issue); Chapman & McConnell, *supra* note 515, at 1774–75 (describing two-step analysis of *Murray's Lessee*).

civil proceedings did not create any conflict.[543] Second, the relevant colonial and state statutes had adopted the English common law procedures providing for the accounting of debts owed to the Crown and compelling their payment without notice to the debtor or judicial oversight.[544] Given the similarities between the common law, colonial and early state procedures, and the federal statute applied to the debtor, due process did not require the oversight of an Article III judge.[545]

If a historical exception had not existed, Congress could not have deprived the debtor in *Murray's Lessee* of his property without the oversight of an Article III judge.[546] As applied to adjudications by non-Article III bankruptcy judges, "if [an action] involves a seizure of property and no historical exception exists, a bankruptcy judge lacks the constitutional authority over the action because due process requires a judge from the court of law or equity, modernly, an Article III judge."[547]

Chief Justice Roberts's dissent in *Wellness* suggested a historical exception for bankruptcy proceedings based upon the jurisdiction of English bankruptcy commissioners at common law and under the 1898 Act.[548] The constitutional authority of bankruptcy judges is far broader than the jurisdiction of the commissioners. Indeed, commissioners did not have jurisdiction to decide what constituted the bankruptcy estate.[549] This was the exact proceeding at issue in *Wellness*. Nonetheless, Chief Justice Roberts

543. *See Murray's Lessee*, 59 U.S. (18 How.) at 276.

544. *See id.* at 278–79 (identifying the "nearly or quite universal use" of this procedure); Matthew J. Steilen*, Due Process as Choice of Law: A Study in the History of a Judicial Doctrine*, 24 WM. & MARY BILL RTS. J. 1047, 1072 (2016).

545. *See Murray's Lessee*, 59 U.S. (18 How.) at 279.

546. *See* Chapman & McConnell, *supra* note 515, at 1804 ("An Article III judge is required in all federal adjudications, unless the text and historical practice of the Constitution expressly or implicitly give Congress the power to authorize them.").

547. Miller, *Everything Old Is New Again*, *supra* note 8, at 50.

548. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) ("This historical practice, combined with Congress's constitutional authority to enact bankruptcy laws, confirms that Congress may assign to non-Article III courts adjudications involving 'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power.'" (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012), *as recognized in Wellness*, 135 S. Ct. 1932)); *see also* Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring).

549. McCoid, *supra* note 149, at 30.

believed it was within the constitutional authority of a bankruptcy judge because of the historical ability of bankruptcy judges to make such adjudications under the 1898 Act.[550] However, the Supreme Court never confirmed the constitutionality of the summary or plenary jurisdictional scheme of the 1898 Act.[551] Thus, another explanation is necessary besides simple tradition or a historical exception akin to the procedure used in *Murray's Lessee*.[552]

The in rem underpinnings of the summary and plenary jurisdiction of the 1898 Act explain its constitutionality and explain why many proceedings can be finally determined by bankruptcy judges. "An in rem proceeding is an exclusive action that binds the world regarding the status of the res[, which is named as the defendant,] in the custody of the court."[553] As long as the procedural due processes accompanying the in rem action are followed,[554] no seizure occurs and a non-Article III judge may enter a final judgment.[555] Because the property *in custodia legis* is held by the court, an in rem proceeding does not augment the estate by seeking to seize property from a third party.[556] The only seizure involved in the determination of discharge and the claims allowance process is the seizure of the debtor's property, which the debtor acquiesced to by filing a voluntary petition.[557]

550. *Wellness*, 135 S. Ct. at 1952–54; *Stern*, 564 U.S. at 505 (Breyer, J., dissenting) ("Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate . . . .").

551. *N. Pipeline*, 458 U.S. at 79 n.31.

552. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855) (determining constitutionality of a process by the "settled usages and modes of proceeding existing in" the nation's early history).

553. *See* Miller, *Everything Old Is New Again*, *supra* note 8, at 4.

554. The proper amount of due process is determined by the nature of the proceedings. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (announcing the standard for satisfying Fifth Amendment procedural due process generally).

555. Miller, *Everything Old Is New Again*, *supra* note 8, at 51–52.

556. The res itself is the defendant in an in rem action, and the action does not operate against third parties. *See* Black v. HSBC Bank, USA, N.A. (*In re* Black), 514 B.R. 605, 614 (Bankr. E.D. Cal. 2014) (explaining that debtors, who were not parties to the proceeding resulting in the in rem order, did not have due process notice rights regarding in rem order entered against property they inhabited but did not own).

557. *See* Murphy v. Felice (*In re* Felice), 480 B.R. 401, 418, 433 (Bankr. D. Mass. 2012); Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 333–34 (Bankr. W.D. Mich. 2011), *reasoning aff'd sub nom.* Meoli v. Huntington Nat'l Bank, No. 1:12-cv-1113, 2015 WL 5690953, at *5 (W.D. Mich. Sept. 28, 2015), *case docketed*,

A more difficult issue arises when a third party possesses the debtor's property. If the third party possessed a substantial claim to ownership—an "adverse claim" in language of the 1898 Act—the bankruptcy referee could not issue a final judgment requiring turnover or recovery.[558] Conversely, if the third party possessed only a weak claim, a "colorable claim," the bankruptcy referee could summarily order the recovery of the property.[559] The distinction between adverse and colorable hinged upon whether a substantial issue of law or fact existed regarding the debtor's claim to title to the property.[560] If more than a preliminary inquiry was necessary, then the claim would be considered adverse,[561] "even [if possession was] in fact 'fraudulent and voidable.'"[562] The weak ownership claims of colorable claimants alleviate concerns regarding the seizure of their property by a non-Article III judge.[563] Similarly, in the case of a contested involuntary petition, a vexing problem for proponents of the blanket implied consent theory,[564] no seizure occurs because the debtor has such a weak claim to his or her property due to proven insolvency.[565]

No. 15-2362 (6th Cir. Nov. 9, 2015); *cf.* Elmer Dean Martin III, *Consent: The Constitutional Basis for Bankruptcy Judge Authority*, 19 CAL. BANKR. J. 1, 10 (1991) (arguing that bankruptcy judges' authority to constitutionally determine proceedings regarding property *in custodia legis* of the bankruptcy court is based upon the debtors' consensual bankruptcy filings).

558. Miller, *Everything Old Is New Again*, *supra* note 8, at 50–51, 54; *see also* Bankruptcy Act of 1898, ch. 541, § 57(g), 30 Stat. 544, 560.

559. Reed v. Nathan, 558 B.R. 800, 810 (E.D. Mich. 2016) (quoting Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432–33 (1924)).

560. *See id.* at 811 (quoting Harrison v. Chamberlin, 271 U.S. 191, 194–95 (1926)); *see also* Slenderella Sys. of Berkeley, Inc. v. Pac. Tel. & Tel. Co., 286 F.2d 488, 490–91 (2d Cir. 1961) (examining the debtor's title in telephone numbers allegedly owned by a third party); *In re* Borok, 50 F.2d 75, 78 (2d Cir. 1931) (explaining that plenary jurisdiction was required because disputed questions of fact existed).

561. Miller, *Everything Old Is New Again*, *supra* note 8, at 55; *see* Jackson v. Sports Co. of Tex., 278 F.2d 716, 718 (5th Cir. 1960) (reversing the district court's affirmation of the referee's summary proceedings remanding for a full hearing on the merits).

562. *In re Borok*, 50 F.2d at 78 (quoting Harrison v. Chamberlin, 271 U.S. 191, 194 (1926)).

563. Miller, *Everything Old Is New Again*, *supra* note 8, at 54–55. It also helps limit gamesmanship by recalcitrant third parties with weak ownership claims who may attempt to manufacture leverage by seeking an initial adjudication by an Article III judge. *See* S. Todd Brown, *supra* note 1, at 51.

564. Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1250 (3d Cir. 1994); *cf.* N.I.S. Corp v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1505 n.11 (7th Cir. 1991).

565. Miller, *Everything Old Is New Again*, *supra* note 8, at 51 n.415; *cf.* Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 787 (Del. Ch. 1992) (noting corporations' directors

Both the determination of a debtor's discharge and the claims allowance process are in rem proceedings. When a creditor's rights in the debtor's property are adjudicated by the claims allowance process, no property is seized from the creditor as the property subject to adjudication is already in the custody of the bankruptcy court.[566] This determination is a classic in rem adjudication of the rights of the creditor in the res, the debtor's estate, *in custodia legis* of the bankruptcy court.[567] "[B]y submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims . . . ."[568] The determination of whether a debtor receives a discharge is an in rem proceeding determining the status of the creditors' claims against the debtor.[569] Although the debtor's discharge eliminates creditors' rights to obtain payment from the debtor on account of his or her pre-petition debts in excess of their distribution from the debtor's estate, nothing is seized from the creditors.[570] The filing of a proof of claim seeks an adjudication of the creditor's rights in the res and impliedly gives the creditor's consent to an adjudication for this limited purpose.[571] Unsurprisingly, the Supreme Court has confirmed that the claims allowance process and the determination of a debtor's discharge are in rem proceedings.[572]

have a fiduciary duty to creditors upon insolvency).

566. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 336 n.59 (Bankr. W.D. Mich. 2011), *reasoning aff'd sub nom.* Meoli v. Huntington Nat'l Bank, No. 1:12-cv-1113, 2015 WL 5690953, at *5 (W.D. Mich. Sept. 28, 2015), *case docketed*, No. 15-2362 (6th Cir. Nov. 9, 2015).

567. *See* Gardner v. New Jersey, 329 U.S. 565, 573, 581 (1947), *superseded by statute*, Act of Nov. 6, 1978, Pub. L. No. 95-598, Title I, § 101, 92 Stat. 2549, 2549–54 (codified as amended at 11 U.S.C. § 101 (2012)).

568. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989).

569. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (citations omitted) (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 191–92 (1902)); Local Loan Co. v. Hunt, 292 U.S. 234, 241 (1934) (citation omitted) (citing *Moyses*, 186 U.S. at 192, *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978). *Contra Moyses*, 186 U.S. at 191–92; Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 94–97 (2005) (examining early Supreme Court cases including *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), which categorized discharge proceedings as in personam, not in rem).

570. *See In re Teleservices Grp.*, 456 B.R. at 336 n.59.

571. *Granfinanciera*, 492 U.S. at 59 n.14.

572. Other adjudications expressly categorized as in rem by the Supreme Court include whether an entity qualifies as debtor and adjudications concerning the administration of the property of the estate in the bankruptcy court's custody. *See*

The principles of res judicata and collateral estoppel can allow a bankruptcy judge to issue a final judgment regarding a *Stern* claim. According to *Katchen*, a creditor must abide by the consequence of the determination, including res judicata and collateral estoppel.[573] A bankruptcy judge's final judgment is entitled to collateral estoppel effect.[574] A creditor's property may be seized if all the factual and legal issues necessary to seize the creditor's property are determined as part of ruling on its proof of claim.[575] This is simply an application of collateral estoppel based on the bankruptcy court's final adjudication of the proof of claim. However, as *Stern* makes clear, if some factual or legal issues remain unresolved in adjudicating the creditor's proof of claim, the creditor's property may not be seized.[576] The preclusion principles, together with litigant consent, are the only bases identified by the Supreme Court for allowing a bankruptcy court to seize a third party's property.[577]

VII. LIQUIDATION OF NONDISCHARGEABLE DEBTS: AN EXAMPLE OF DEBTORS' LIMITED CONSENT

Pursuant to their in rem authority, bankruptcy judges may only enter a final judgment liquidating a nondischargeable debt in limited situations.[578] A debt need not be reduced to judgment in order for the court to determine

Straton v. New, 283 U.S. 318, 321 (1931) (finding administration of estate is an in rem proceeding); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 661–62 (1875) (finding determination of whether entity could be a debtor is an in rem proceeding).

573. Katchen v. Landy, 382 U.S. 323, 334 (1966) (citations omitted), *superseded by statute*, Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

574. *Id.* (citations omitted).

575. *See supra* notes 450–52 and accompanying text.

576. *See supra* note 465 and accompanying text.

577. *See Katchen*, 382 U.S. at 333–37.

578. As noted by both courts and commentators, bankruptcy courts' subject matter and constitutional jurisdiction over liquidating nondischargeable judgments is suspect at best and courts are split. *See, e.g.*, Deitz v. Ford (*In re* Deitz), 469 B.R. 11, 29 (B.A.P. 9th Cir. 2012) (Markell, J., concurring), *aff'd*, 760 F.3d 1038 (9th Cir. 2014); Johnson v. Weihert (*In re* Weihert), 489 B.R. 558, 564 (Bankr. W.D. Wis. 2013) (citing Stern v. Marshall, 564 U.S. 462, 516 (2011)); First Omni Bank, N.A. v. Thrall (*In re* Thrall), 196 B.R. 959, 966 (Bankr. D. Colo. 1996); Kurt F. Gwynne, *Pandora's Box and Peace on the Darkling Plain: Setting the Article III Limits on Congress' Power to Assign Claims to Article I Bankruptcy Judges*, 88 AM. BANKR. L.J. 411, 445 n.235 (2014) (citations omitted) (explaining the split among courts).

whether that debt is nondischargeable.[579] "Once a debt is rendered nondischargeable, it becomes an ordinary debt, and entering judgment on such a debt is an exercise of federal judicial power."[580] The liquidated debt will seize the debtor's property and, in the absence of consent or collateral estoppel, requires the supervision of an Article III judge.[581]

A debtor does not consent to the liquidation of the nondischargeable debt by filing his or her petition. By filing the petition, the debtor has requested for a discharge of his or her debts—an in rem determination of his or her status.[582] If any debts are found to be nondischargeable, no property is seized from the debtor, as the exact amount of the debt remains unliquidated.[583] Thus, the entry of an order for relief does not signal the debtor's consent to a liquidation of a nondischargeable debt. Only if all the issues required for liquidation of the nondischargeable debt are determined as part of adjudicating the nondischargeability or allowing the creditor's proof of claim can a bankruptcy judge liquidate the nondischargeable debt.[584]

> The claims allowance process and the determination of non-dischargeability may each provide the basis for collateral estoppel.[585] Nonetheless, the preclusive power of the claims allowance process is limited by the sheer number of no-asset chapter 7 cases "[where] no bankruptcy estate is created, [and] a nondischargeability complaint does not invoke the claims allowance process."[586]

A finding of nondischargeability will not be sufficient to eliminate

579. *See In re Weihert*, 489 B.R. at 564.

580. Condon Oil Co. v. Wood (*In re* Wood), 503 B.R. 705, 709 (Bankr. W.D. Wis. 2013); *see* Gwynne, *supra* note 578.

581. *See In re Wood*, 503 B.R. at 709–10 (quoting Baird, *supra* note 121, at 5–6).

582. *See* Gwynne, *supra* note 578, at 445–46.

583. *See In re Weihert*, 489 B.R. at 564.

584. *See* Gwynne, *supra* note 578, at 447.

585. *See, e.g.*, Mandel v. Mastrogiovanni Schorsch & Mersky (*In re* Mandel), 641 F. App'x 400, 403 (5th Cir. 2016) (per curiam) (noting the res judicata effect of the claims allowance process on a later nondischargeability proceeding); Pearson Educ., Inc. v. Almgren, 685 F.3d 691, 695 (8th Cir. 2012) (finding liquidation to be determined as part of claims allowance process).

586. Deitz v. Ford (*In re* Deitz), 469 B.R. 11, 27 n.3 (B.A.P. 9th Cir. 2012), *aff'd*, 760 F.3d 1038 (9th Cir. 2014); M. Sobel, Inc. v. Weinstein (*In re* Weinstein), 237 B.R. 567, 575 (Bankr. E.D.N.Y. 1999); Miller, *Defining the Prongs of* Stern, *supra* note 21, at 73; *see* Gwynne, *supra* note 578, at 446–48.

completely the need for further proceedings.[587] Unless the elements of the claim for the liquidation of the debt mirror the elements for nondischargeability, legal or factual issues will remain requiring the oversight of an Article III judge.[588]

Blanket implied consent derived from a debtor's filing of a bankruptcy petition does not follow the teachings of the Supreme Court; further, it would allow a non-Article III judge to employ the judicial power of the United States to seize a litigant's assets in contravention of the separation of powers and the Fifth Amendment to the Constitution.

VIII. CONSENT AND DEFAULT JUDGMENT

Default judgments entered by bankruptcy judges or clerks of court serve the salutary purpose of relieving the district court of simple administrative functions.[589] Nonetheless, *Stern*'s rejection of pragmatism begs the question: "Is not the risk of an unjust seizure of another's property just the same [when the proceeding is a default judgment]?"[590] Although *Wellness* adopted the standard for implied consent articulated by *Roell*, one of the uncertainties associated with *Roell* has bled into bankruptcy: whether a non-Article III judge may enter a final default judgment. Both bankruptcy courts and magistrate courts have split over this issue.[591] The failure of a litigant to answer a complaint does not constitute implied consent or forfeiture.[592] Thus, the entry of a default judgment would require the oversight of an Article III judge unless a historical exception applies. However, unlike *Murray's Lessee*, no historical exception exists granting bankruptcy judges or clerks of court the authority to enter default judgments.[593] Instead, the most efficient but still constitutional procedure for entry of a default judgment follows Federal Rule of Bankruptcy Procedure 9033.[594] Provided the defaulting defendant does not contest the bankruptcy

587. This issue does not arise if the debt has already been liquidated. Miller, *Defining the Prongs of* Stern, *supra* note 21, at 61 n.478.

588. *Id.* at 73–74 (citing Sheets v. Carter (*In re* Carter), No. 11-53071-JDW, 2012 WL 3440431, at *3 (Bankr. M.D. Ga. Aug. 15, 2012)).

589. *See* Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 477 (Bankr. W.D. Mich. 2012).

590. *Id.*

591. *See, e.g.*, *id*. at 475–76.

592. *See id.*

593. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951–52 (2015) (describing the narrow exceptions for non-Article III judges to enter final judgments).

594. *See* FED. R. BANKR. P. 9033.

judge's proposed findings of fact and conclusions of law, the district judge may enter a final judgment without even reviewing the bankruptcy judge's findings.[595]

A. *Historical and Policy Basis for Default Judgments*

In order to evaluate the potential existence of a historical exception, a brief summary of the history of default judgment is required. Both the common law decrees *pro confesso* of chancery courts and the *nil dicit* judgments of law courts are the predecessors of modern defaults and default judgments.[596] After a defendant failed to timely answer a complaint, the plaintiff would obtain a decree *pro confesso*, or *nil dicit* judgment would be entered premised on the pleadings.[597] As long as the allegations concerning the cause of action and the amount of damages were sufficiently definite, a litigant's failure to answer would be deemed an admission of all allegations in the complaint.[598]

Echoing modern concern about overburdened Article III judges, the chancellors at common law employed a number of clerks, including a Master of the Chancery, to assist them.[599] One of the matters in which masters rendered assistance was the adjudication of decrees *pro confesso*. If the amount of damages sought was uncertain, the chancellor could refer the decree *pro confesso* to a master who would hear proceedings to liquidate the amount of damages.[600] A defaulting defendant could appear and participate and even file objections in the proceedings before the master.[601] Once the

595. *See* Stern v. Marshall, 564 U.S. 462, 471–72 (2011) (majority opinion).

596. John R. Hardin, Note, *Asserting Failure to State a Claim After Default Judgment Under both the Federal and Tennessee Rules of Civil Procedure*, 30 U. MEM. L. REV. 131, 134–35 (1999). Prior to the enactment of the Process Act in 1732, if a defendant never appeared in court, no judgment would be entered against him or her. *Id.* However, a non-appearing defendant would be subject to contempt and sequestration proceedings to force him or her to appear. *Id.*

597. *In re* Sutton, 470 B.R. at 477.

598. Thomson v. Wooster, 114 U.S. 104, 112–13 (1885).

599. PLUCKNETT, *supra* note 34. None other than Francis Bacon criticized the weight of the masters' reports. *See id.* at 701–02. The controversy surrounding the status of the masters is familiar to any lawyer versed in the issue of non-Article III adjudication.

600. *Thomson*, 114 U.S. at 119. If liquidation by the master was unwarranted, the chancellor would enter the final decree without further proceedings. Williams v. Corwin, Hopk. Ch. 471, 477 (N.Y. Ch. 1824).

601. *Thomson*, 114 U.S. at 119 (citations omitted) (limiting objections to the amount of damages, not liability).

master concluded the proceedings to liquidate the default judgment, he submitted his report to the chancellor, who entered the final decree.[602] If the defaulting party did not object, the chancellor would adopt the master's report.[603] Early U.S. practices mirrored the English common law proceedings, and Article III judges entered final decrees following receipt of reports from masters.[604]

Today, Rules 7055 and 9024 of the Federal Rules of Bankruptcy Procedure incorporate Rules 55 and 60 of the Federal Rules of Civil Procedure and prescribe the process for obtaining an entry of default and a default judgment in bankruptcy court.[605] When an opposing party fails to timely answer a plaintiff's complaint, the defaulting party implicitly "admits the cause of action is valid, admits [it] has no defense, and consents to suffer judgment."[606] The plaintiff may then seek the entry of a default and an associated default judgment.[607] Following a motion for entry of default, the clerk of court enters a default against the non-answering defendant; the clerk does not have any discretion.[608] Rule 55, as incorporated by Rule 7055, explains, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."[609] After obtaining a default, the plaintiff may then seek a default judgment using one of two procedures.[610] If the motion for default judgment seeks a sum certain or a sum made certain by computation, then the task of entering the

602. 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 35, at 352.

603. *See id.*

604. *See Thomson*, 114 U.S. at 119; *see also* McMicken v. Perin, 59 U.S. (18 How.) 507, 511 (1855); *Williams*, Hopk. Ch. at 476–77.

605. FED. R. BANKR. P. 7055, 9024. The 1937 enactment of Rule 55 joined the decree *nil dicit* and decree *pro confesso*. *See* FED. R. CIV. P. 55 advisory committee's note to 1937 adoption (joining *nil dilcit* decrees with *pro confesso* decrees).

606. Keeler Bros. v. Yellowstone Valley Nat'l Bank, 235 F. 270, 270 (D. Mont. 1916). Default judgments are also entered against a party who has answered a plaintiff's complaint for failure to abide by litigation schedules and discovery abuse. *See* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 757–58 (7th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 1932 (2015). This Article focuses on default judgments entered as a result of a failure to answer and appear, but it will refer to cases involving later-entered defaults for comparison.

607. *See Keeler Bros.*, 235 F. at 270.

608. *See* FED. R. CIV. P. 55(b)(1).

609. *Id.* r. 55(a).

610. *See id.* r. 55(b).

judgment is so straightforward the clerk of court may enter a default judgment.[611] If the motion for default judgment does not seek a sum certain or a sum made certain by computation, the oversight of a bankruptcy judge is required, and the judge will hold a hearing to determine the amount of damages.[612]

Default judgments protect diligent parties who follow the prescribed procedure for advancing litigation from being prejudiced by the delay of its opposition and deter parties from relying upon delay as a litigation strategy.[613] However, this goal is tempered by a preference for adjudication of disputes on the merits.[614] The defendant's default is not sufficient to allow the entry of a default judgment.[615] Although a default means that the defaulting party is deemed to admit all the allegations in the complaint, the court may not simply enter a judgment based upon the relief sought therein. The allegations must themselves, taken to be true, be sufficient to uphold the judgment.[616] A court may only enter a default judgment "according to what is proper to be decreed upon the statements of the bill, assumed to be true," and not "as of course according to the prayer of the bill."[617] Even then, courts have discretion over whether to enter a default judgment and must balance a number of factors to determine whether the entry is proper.[618]

611. *Id.* r. 55(b)(1).

612. *Id.* r. 55(b)(2).

613. *See* Arthur J. Park, *Fixing Faults in the Current Default Judgment Framework*, 34 CAMPBELL L. REV. 155, 158–59 (2011); Jessica Ruoff, Note, *Rule 55: Why Broadly Interpreting "Otherwise Defend" Protects a Diligent Party's Rights and Encourages an Orderly and Efficient Judicial System*, 88 ST. JOHN'S L. REV. 467, 471 (2014).

614. *See* Park, *supra* note 613, at 160.

615. PepsiCo, Inc. v. Cal. Sec. Cans, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002). Further limitations include determining whether the defaulting litigant is an "infant or incompetent person," whether they are "exempt under the Soldiers' and Sailors' Civil Relief Act of 1940," and whether there was proper service. *See id.* at 1175.

616. Nishimatsu Constr. Co. v. Hous. Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) (quoting Thomson v. Wooster, 114 U.S. 104, 113 (1885)); Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 474 (Bankr. W.D. Mich. 2012) ("Nor is the judge obligated to accept the plaintiff's complaint at face in making that decision. For instance, it is fair to say that a default judgment would not enter if the tort claimed was based solely upon moral indignation.").

617. *Thomson*, 114 U.S. at 113.

618. *See* Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

B. *Magistrate Judges' Authority to Enter Default Judgments*

Magistrate judges' ability to enter final judgments is bounded by their statutory jurisdiction under the Magistrates Act and the limitations of Article III.[619] Magistrate judges may only enter final judgments with the express or implied consent of the parties.[620] This is true even for default judgments.[621] Absent the consent of all parties, the magistrate judge may only issue a report and recommendation to be reviewed de novo by the district court,[622] unless no objection to the report is filed within 14 days of the service of the report on the parties.[623] The issue is whether an entry of default constitutes implied consent to the entry of a final judgment.

Like bankruptcy judges,[624] the entry of judgments by magistrate judges involves the tension between the twin policy objectives of allowing for more efficient and rapid adjudication of cases in federal courts while still protecting Article III from diminution by other branches that have greater control over non-Article III judges.[625] Overlaid atop these competing policies is the rule laid out by *Roell* with its own competing policies of requiring voluntary consent, shown by the party's actions, to preclude

619. *See* Conetta v. Nat'l Hair Care Ctrs. Inc., 236 F.3d 67, 72–73 (1st Cir. 2001) (noting the necessity of both statutory jurisdiction and satisfying the dictates of Article III).

620. *See id.*

621. Vaile v. Nat'l Credit Works, Inc., No. CV-11-674-PHX-LOA, 2012 WL 1520120, at *6 (D. Ariz. Mar. 26, 2012) ("[A] U.S. magistrate judge is not an Article III judge and does not have jurisdiction to enter a final judgment against a non-consenting, defaulted defendant." (citing Henry v. Tri-Servs., Inc., 33 F.3d 931, 932 (8th Cir. 1994); United States v. Jenkins, 734 F.2d 1322, 1325 n.1 (9th Cir. 1983))), *report and recommendation adopted*, No. CV 11-674-PHX-SMM (LOA), 2012 WL 1520115 (D. Ariz. May 1, 2012).

622. Callier v. Gray, 167 F.3d 977, 981–82 (6th Cir. 1999) (affirming a magistrate judge's report and recommendation of entry of default judgment that was adopted by the district court).

623. *See* Hagen v. Sirbaugh (*In re* Goodrich), No. 1:08-cv-1235, 2009 WL 331534, at *1–2 (W.D. Mich. Feb. 9, 2009).

624. *Id.* at *1 ("The Court looks for guidance in this situation to precedents governing [r]eports and [r]ecommendations issued by federal magistrate judges. The similarities between the Federal Magistrate's Act, 28 U.S.C. § 636, and the Bankruptcy Code and Bankruptcy Rules provisions governing [r]eports and [r]ecommendations justify turning to such precedents.").

625. Baker v. Socialist People's Libyan Arab Jamahirya, 810 F. Supp. 2d 90, 98 (D.D.C. 2011) (citing Roell v. Withrow, 538 U.S. 580, 588, 588–89, 589 (2003)).

gamesmanship.[626] Because of these cross-cutting policies, courts have split about whether a defaulting defendant's failure to answer, after being properly served, constitutes implied consent to a magistrate judge entering a final judgment. Courts that find magistrate judges do not have the power to enter final default judgments focus on whether a sufficient inference of consent may be drawn from the failure to answer.[627] Meanwhile, courts that find a magistrate judge may enter a final judgment against a defaulting defendant focus on the importance of dissuading parties from waiting until a default judgment is entered and then later moving to set it aside if the parties do not agree with it based upon its entry by a magistrate judge.[628]

C. *Bankruptcy Judges' Authority to Enter Default Judgments*

Following *Stern*, some districts and circuits allowed bankruptcy courts to enter final judgments on *Stern* claims if the litigants consented.[629] In order to minimize gamesmanship, pre-trial orders were soon amended to require parties to state whether they consented to a bankruptcy judge entering a final judgment on a *Stern* claim.[630] However, a pre-trial order comes too late to affect consent for a defaulting party.[631] In an effort to imply consent from

626. *Roell*, 538 U.S. at 590.

627. *See, e.g.*, Vaile v. Nat'l Credit Works, Inc., No. CV-11-674-PHX-LOA, 2012 WL 1520120, at *7 (D. Ariz. Mar. 26, 2012), *report and recommendation adopted*, No. CV 11-674-PHX-SMM (LOA), 2012 WL 1520115 (D. Ariz. May 1, 2012); Bd. of Trs. v. Charles B. Harding Constr., Inc., No. C 09-2053 MMC, 2009 WL 5215753, at *2 (N.D. Cal. Dec. 29, 2009); U.S. Fid. & Guar. Co. (USF & G) v. PR Enters., Inc., No. Civ. 03-1338(SEC), 2005 WL 2244283, at *2 (D.P.R. Sept. 15, 2005); Don King Prods., Inc. v. Otero, No. Civ. 04-2155(JAG), 2005 WL 2138807, at *1 (D.P.R. Sept. 1, 2005); *cf.* Henry v. Tri-Servs., Inc., 33 F.3d 931, 933 (8th Cir. 1994) (citing Gleason v. Sec'y of Health & Human Servs., 777 F.2d 1324 (8th Cir. 1985)) (pre-*Roell* case finding lack of consent from a defaulting defendant).

628. *Baker*, 810 F. Supp. 2d at 99.

629. *E.g.*, Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 570 (9th Cir. 2012), *aff'd on other grounds sub nom.* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014); Carroll v. Oakland Benta (*In re* Innovative Commc'n Corp.), Nos. 07-30012 (JKF), 09-03085 (JKF), 2014 WL 2442173, at *4 (D.V.I. May 30, 2014); Lewis v. Riley (*In re* High Performance Real Estate, Inc.), No. 13-cv-0663-WJM-MJW, 2013 WL 3216142, at *3 (D. Colo. June 25, 2013).

630. *See, e.g.*, Nation's Capital Child & Family Dev., Inc. v. Marylyn Tree, LLC (*In re* Nation's Capital Child & Family Dev., Inc.), Nos. 09-00576, 09-10019, 2011 WL 6001086, at *1 (Bankr. D.D.C. Nov. 30, 2011).

631. *See* FED. R. CIV. P. 12(a)(1) (providing that a party has 21 days to answer or respond to a responsive pleading); *id.* R. 16(b) (providing that pre-trial order is determined at pre-trial conference, which has to be scheduled no later than 90 days after

the simple failure to answer, summons were soon altered to include the following warning: "IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT."[632] After proper service of this "plain, bold warning," some courts have interpreted a litigant's silence as sufficiently knowing and voluntary to constitute implied consent.[633]

Realizing the defaulting defendant's action may be better characterized as forfeiture than implied consent, some courts turned to forfeiture as a basis for allowing a bankruptcy judge to enter a final default judgment.[634] The most well-reasoned of these cases characterized the forfeiture of the argument for an Article III tribunal based upon the silence of a defendant who has been served with a warning regarding consent as the "'scream or die' approach."[635] This is a "procedural bedrock" of bankruptcy court litigation, as a hearing will typically not go forward if the proper parties are served and no timely objections are filed.[636]

defendant is served); *id.* R. 55(a) (providing that default occurs when party that is being sued for relief fails to plead or defend).

632. *E.g.*, Campbell v. Carruthers (*In re* Campbell), 553 B.R. 448, 452 (Bankr. M.D. Ala. 2016); Hopkins v. M & A Ventures (*In re* Hoku Corp.), Nos. 13-40838-JDP, 15-08043-JDP, 2015 WL 8488949, at *2 (Bankr. D. Idaho Dec. 10, 2015); Exec. Sounding Bd. Assocs. v. Advanced Mach. & Eng'g Co. (*In re* Oldco M Corp.), 484 B.R. 598, 601 (Bankr. S.D.N.Y. 2012).

633. *In re Hoku Corp.*, 2015 WL 8488949, at *2–3; *accord Campbell*, 553 B.R. at 452 (citations omitted); *see* Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 531 B.R. 439, 457–58 (Bankr. S.D.N.Y. 2015) (citations omitted).

634. *E.g.*, Hasse v. Rainsdon (*In re* Pringle), 495 B.R. 447, 460 (B.A.P. 9th Cir. 2013); *In re Hoku Corp.*, 2015 WL 8488949, at *3; *see* Peterson v. Somers Dublin Ltd., 729 F.3d 741, 746–47 (7th Cir. 2013) (citing Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 1932 (2015)) (explaining that the Seventh Circuit's opinion in *Wellness* concerned consent); *In re* Circuit Research, Inc., 360 F. Supp. 426, 427 (C.D. Cal. 1973) (finding consent to entry of default judgment under the 1898 Act); *cf. Exec. Benefits*, 702 F.3d at 568 (suggesting defendant's decision to wait to bring a *Stern* objection created implied consent but citing to cases applying forfeiture).

635. *See In re Hoku Corp.*, 2015 WL 8488949, at *3. For a deep analysis of *Hopkins v. M & A Ventures (In re Hoku Corp.)*, see Kirk S. Cheney & Risa Lynn Wolf-Smith, *Inaction as Implied Consent*, 35 AM. BANKR. INST. J. 20 *passim* (Mar. 2016).

636. *In re Hoku Corp.*, 2015 WL 8488949, at *3 & n.4 (citing 11 U.S.C. § 102(1) (2012)).

A defaulting defendant does not impliedly consent to the entry of a default judgment by a bankruptcy judge. The standard for implied consent was set forth in *Roell* and adopted by *Wellness*.[637] An intelligent decision to proceed with litigation before the bankruptcy judge cannot be implied from a failure to answer a properly served complaint.[638] Although the defendant may know of the option to request a district court judge, his or her decision not to answer the complaint only illustrates indifference by failing to appear and contest the case.[639] Although proper service does mean a defendant is deemed to know of the option to proceed before a bankruptcy judge, the last element of *Roell*'s test (the appearance and decision to continue before the bankruptcy judge) is missing.[640] A defaulting litigant's failure to appear illustrates indifference rather than the choice to have a non-Article III tribunal enter a final judgment.[641]

Similarly, a failure to answer does not constitute a forfeiture of a defendant's argument for an Article III tribunal when faced with a *Stern* claim.[642] The claims processing rules present in Federal Rules of Bankruptcy Procedure 7008, 7012, and 9027 prescribe the deadlines for a litigant to exercise the right to an Article III tribunal.[643] However, a defaulting defendant never files a pleading, so the limitations in these rules are not applicable. The general rule requiring forfeiture when a litigant fails to invoke a non-jurisdictional right prior to a judgment on the merits is similarly inapplicable. No judgment on the merits occurs when a default is entered and the litigant has failed to contest the matter.[644] Litigants' constitutional protections must be upheld, and according to *Stern*, this applies to "the mundane as well as the glamorous."[645] Although *Wellness* suggests a shift

637. *Wellness*, 135 S. Ct. at 1948 (majority opinion) (citing Roell v. Withrow, 538 U.S. 580, 590 (2003)).

638. *See In re Pringle*, 495 B.R. at 460–61.

639. Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 475 (Bankr. W.D. Mich. 2012); *see* Hackman v. Fountain Grp. Cos. of Utah (*In re* Hackman), Nos. 10-17176-BFK, 11-01689-BFK, 2013 WL 343714, at *1 & n.2 (Bankr. E.D. Va. Jan. 29, 2013).

640. *See Roell*, 538 U.S. at 587 n.5.

641. *In re Sutton*, 470 B.R. at 475.

642. *See id.* at 476.

643. FED. R. BANKR. P. 7008, 7012, 9027.

644. *See, e.g.*, Park, *supra* note 613, at 160.

645. Stern v. Marshall, 564 U.S. 462, 484 (2011) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86–87 n.39 (1982), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)).

toward greater pragmatism and away from formalism,[646] a default judgment simply does not align with the Supreme Court's teachings regarding litigant consent to a non-Article III tribunal or forfeiture of such arguments.[647]

Historical default practices at common law and in the early United States do not authorize the constitutionality of bankruptcy court default judgments.[648] The entry of a default judgment seizes the property of the defaulting litigant; thus it implicates protections of Article III and the Fifth Amendment's Due Process Clause.[649] In this situation, if the Constitution does not prescribe a particular procedure, such a seizure may only be accomplished by a non-Article III judge if a court of law or equity was unnecessary at common law and such procedures were not rebuked by the early colonial and state practices. For instance, the due process rights of the defendant in *Murray's Lessee* were not infringed because historical practice at common law and in the colonies and states allowed a government to seize a debtor's property without judicial oversight pursuant to a warrant for government debts.[650]

Although the entry of a default judgment by a clerk of court or by a bankruptcy judge has strong parallels to the entry of decrees *pro confesso* employed at common law and in early U.S. practice, the requirement of a final decree by the chancellor undermines the constitutionality of this practice. If the chancellor did not find that the complaint sought a sum certain, he would refer the matter to a master to liquidate the amount of

646. *Wellness*, 135 S. Ct. at 1948.

647. *See supra* Part IV.D.

648. Because the statutory jurisdiction of magistrate judges requires consent for the entry of a final judgment, even though historical practice allows the entry of final default judgments, the lack of consent precludes magistrate judges from entering such judgments. *Cf.* Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67, 72–73 (1st Cir. 2001) (suggesting that a prohibition on magistrate judge entry of final judgments under Article III was perhaps "overbroad" but that regardless, the statutory limitations of 28 U.S.C. § 636(c)(1) preclude the entry of such judgments). In fact, "Congress intended for a referral to a magistrate judge to only occur with unanimous consent of the parties, noting that '[i]f any party or either party does not care to have his or her case heard by a magistrate, there is no compulsion to do so.'" Elizabeth French, *Respecting the Linchpin: Why Absentee Consent Should Limit Magistrate Judge Jurisdiction*, 3 STAN. J. COMPLEX LITIG. 32, 40 (2015) (alterations in original) (quoting 125 CONG. REC. 26,833 (1979)).

649. *See* Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 477 (Bankr. W.D. Mich. 2012) (noting the convenience of automatic judgments is not worth the risk of unjust seizure of another's property).

650. Davidson v. City of New Orleans, 96 U.S. 97, 107 (1877) (explaining *Murray's Lessee*).

damages.[651] The master would then submit his report to the chancellor.[652] The chancellor would enter a final decree based upon the master's report in the next term.[653] Early U.S. practice retained these features.[654] In the Process Act of 1792, Congress provided that the "forms and modes of proceeding[s]" in causes of equity were governed by the equity procedure of the English chancery courts.[655] In one of its first opinions in *Hayburn's Case*, the Supreme Court affirmed this procedure.[656] The 1822 equity rules promulgated by the Supreme Court also adopted the English common law default procedure.[657]

The necessity of the final decree entered by the chancellor, unlike the distress warrant in *Murray's Lessee*, signals that a clerk or bankruptcy judge who is referred the ability to enter a final default judgment from an Article III judge may not exercise this power based on historical practice. Recall, assignees of the debtor brought actions to augment the bankruptcy estate, modernly called *Stern* claims, in the courts of law and equity at common law.[658] Consequently, if a non-creditor defendant failed to answer an assignee's complaint for a fraudulent transfer, the decree *pro confesso* could be liquidated by a master but the chancellor's final decree would still be necessary to seize a defaulting defendant's property.[659] Default judgments concerning *Stern* claims are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."[660] Lacking consent,

651. At common law, in the cases of default *nil dicit*, the court could convene a jury to fix an unliquidated damage amount. James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1385 n.176 (2015); *see also* Crowell v. Benson, 285 U.S. 22, 51 (1932) (majority opinion) ("In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages.").

652. 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 35, at 344–35.

653. *See* Thomson v. Wooster, 114 U.S. 104, 119 (1885).

654. *See id.* at 119–20 (explaining the similarities between common law practice and New York's and New Jersey's practices).

655. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

656. Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–10 (1792).

657. Pendleton v. Evans, 19 F. Cas. 140, 140–41 (C.C.E.D. Pa. 1823) (No. 10,920).

658. *See supra* notes 245–49 and accompanying text.

659. *See* Crowell v. Benson, 285 U.S. 22, 51 (1932) (noting common law report of master to chancellor's report was "of an advisory nature").

660. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982)

forfeiture, and a historical exception, nothing distinguishes a bankruptcy judge's final determination of a default judgment from the unconstitutional determination in *Stern*.

What can be done to adjudicate default judgments of *Stern* claims efficiently within the constitutional framework of Article III? The most efficient constitutional procedure is for bankruptcy judges to issue default judgments on *Stern* claims as proposed findings of fact and conclusions of law pursuant to *Executive Benefits* and, once the 14-day objection period elapses, for the district court to enter a final judgment.[661] This procedure would have little impact on the workload for district court judges. In fact, the forfeiture of the defaulting defendant's rights under Federal Rule of Bankruptcy Procedure 9033(d) if he or she fails to object to the bankruptcy judge's proposed findings of fact and conclusions of law would minimize the extra labor.[662] Without a timely objection, the district judge would not be required to conduct any review, much less de novo review.[663]

Even though the failure of a litigant to object to the proposed findings of fact and conclusions of law constitutes a forfeiture of such rights,[664] any concern with the constitutionality of such forfeiture is dispelled by the historical practice of the chancellor confirming the master's reports when a defaulting party failed to object.[665] Under Rule 9033(b) and (d), if a defaulting defendant fails to object to a bankruptcy judge's proposed

(Rehnquist, J., concurring in the judgment), *superseded by statute*, BAFJA, Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified as amended at 28 U.S.C. § 1334 (2012)), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

661. Recall, *Executive Benefits Insurance Agency v. Arkison* held that a bankruptcy court may treat a *Stern* claim like a non-core claim and issue proposed findings of fact and conclusions of law notwithstanding the statutory classification of *Stern* claims as core claims subject to final judgment by the bankruptcy court. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014); *see* Meoli v. Huntington Nat'l Bank, No. 1:12-cv-1113, 2015 WL 5690953, at *2 (W.D. Mich. Sept. 28, 2015) (citations omitted), *case docketed*, 15-2362 (6th Cir. Nov. 9, 2015).

662. *See* Thomas v. Arn, 474 U.S. 140, 152 (1985) (noting only objections filed by dissatisfied parties would trigger district court review).

663. Schmidt v. Johnstone, 263 F. Supp. 2d 1219, 1221 (D. Ariz. 2003) (citing *Arn*, 474 U.S. at 152).

664. *See Arn*, 474 U.S. at 153–54.

665. *See* Thomson v. Wooster, 114 U.S. 104, 119–20 (1885). *But see Arn*, 474 U.S. at 156 at n.* (Brennan, J., dissenting) ("The absence of an objection cannot 'reliev[e] the district court of its obligation to act judicially, to decide for itself whether the Magistrates' report is correct.'" (alteration in original) (quoting Lorin Corp. v. Goto & Co., 700 F.2d 1202, 1206 (8th Cir. 1983))).

findings of fact and conclusions of law within 14 days, the defendant forfeits the de novo review by an Article III judge.[666]

In *Thomas v. Arn*, the Supreme Court confirmed that a litigant's failure to timely object to a magistrate judge's report and recommendation could constitute a forfeiture of further review by the district court as long as a district court judge issued the final order.[667] Article III only requires that Article III judges exercise supervision over non-Article III magistrate judges.[668] The retention of authority by the district court "to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment" reflects continued supervision.[669] A party may request plenary review by an Article III judge of the magistrate's decision.[670] A failure to make such a request is a procedural default, and an Article III district court may enter a judgment without any review of the report and recommendation.[671] This conclusion is equally applicable to a bankruptcy judge and conforms to historical common law practice.[672]

The procedure pursuant to Rule 9033(d) provides similar protection to defaulting defendants at common law.[673] At common law, the chancellor had discretion not to refer the matter to the master for a report; rather, the chancellor could simply decree a judgment when liquidation was unnecessary.[674] Because the chancellor possessed such discretion over whether an inquiry to liquidate the judgment even occurred, he naturally could determine whether the defendant would receive notice of the reference to the master.[675] Nonetheless, underlying preference for adjudications on the merits, under the English common law and the first equity rules, the final decree would not become final until the next term.[676] This period provided the defendant with further opportunity to be heard,[677] analogous to the 14-day period in Rule 9033. More importantly, a court of

666. *See* FED. R. BANKR. P. 9033(b), (d).
667. *Arn*, 474 U.S. at 153–54 (majority opinion).
668. *See id.* at 154.
669. *Id.*
670. *Id.*
671. *Id.*
672. *See id.*
673. *See* FED. R. BANKR. P. 9033.
674. *See* Thomson v. Wooster, 114 U.S. 104, 119 (1885).
675. *Id.* at 120.
676. Pendleton v. Evans, 19 F. Cas. 140, 141 (C.C.E.D. Pa. 1823) (No. 10,920).
677. *Id.*

equity or an Article III judge adjudicated the seizure of the defaulting defendant's property.[678] The failure to object is simply a procedural default failing to implicate the limitations of Article III.[679] The bankruptcy judge is not elevated to the status of an Article III judge, who makes the final adjudication.[680] The procedure for a district judge approving a bankruptcy judge's proposed findings of fact and conclusions of law provides the same protections to defaulting defendants as those they enjoyed at common law.[681]

IX. CONCLUSION

The important roles of consent and forfeiture in reducing gamesmanship are particularly vital in bankruptcy cases where time and money are often limited. Although they may be restricted when compared to other proceedings, determining the borders of these doctrines in bankruptcy creates greater certainty. Many local rules require statements concerning consent to bankruptcy judges' adjudication of *Stern* claims;[682] however, an amendment to the Federal Rules of Bankruptcy Procedure is needed to impose a uniform framework.

Although such rules add clarity, recognition of the limited nature of consent in bankruptcy proceedings, especially concerning debtors' consent, should be incorporated into any new or amended rules. A debtor lacks alternatives for obtaining a collective discharge or restructuring of his or her debts.[683] Thus, a debtor's filing of a voluntary petition does not constitute implied consent to non-Article III adjudication outside of in rem determinations concerning property *in custodia legis* of the bankruptcy court (discharge and the claims allowance process) or issues necessarily decided as part of such determinations.

Clarification of bankruptcy judges' ability to enter default judgments may be more elusive. This is unfortunate given the lack of relevant distinction between a default judgment and a usual *Stern* claim.[684] However, the use of proposed findings of fact and conclusions of law, together with the

678. *See* United States v. Raddatz, 447 U.S. 667, 676 (1980) (majority opinion) (noting "that Art[icle] III [is] satisfied if the ultimate adjudicatory determination" is made by a district court judge).

679. Thomas v. Arn, 474 U.S. 140, 154 (1985).

680. *See id.*

681. *See id.* at 155.

682. *See* Feeney, *supra* note 87, at 383–84.

683. *See supra* note 511 and accompanying text.

684. Moyer v. Koloseik (*In re* Sutton), 470 B.R. 462, 477 (Bankr. W.D. Mich. 2012) ("Is not the risk of an unjust seizure of another's property just the same?").

forfeiture rules found in Federal Rule of Bankruptcy Procedure 9033(d), will allow for the constitutional determination of default judgments without significantly altering the division of labor between district courts and bankruptcy courts.