NOTE

THROUGH A GLASS, DARKLY*: PREDICTING BANKRUPTCY JURISDICTION POST-*STERN*

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* 1 *Corinthians* 13:12 ("For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.").

** This Note received the Locke Lord Bissell & Liddell LLP Award for Best Paper in the Area of Banking and Corporate Law (2012). The Author would like to thank Scarlett E. Collings for her help in developing the topic idea and the editors of the Houston Law Review for their tireless work in preparing this Note for publication. The Author thanks his parents, Ralph and Bonnie, sister, Kari, and brother, Scott, for their love, support, and continued interest in the Author's development. Finally, the Author would especially like to thank his wife, Paige, for her encouragement, love, and insight throughout the entire law school experience.

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I. INTRODUCTION

To a majority of the general public, Anna Nicole Smith will be remembered as a controversial celebrity, best known for her outrageous public acts and her desire for the spotlight.[1] In contrast, bankruptcy practitioners will forever remember her by a different name and for a different reason. They will remember Vickie Lynn Marshall as the woman who forever changed bankruptcy jurisdiction.[2] Rather than recall her public displays of decadence and misconduct, bankruptcy practitioners will remember her protracted march through the judicial system, stopping in no less than seven courts before receiving the U.S. Supreme Court's final determination in *Stern v. Marshall*.[3]

As the general public reacted to Anna Nicole Smith's celebrity with confusion, unable to determine the exact reason for her seeming lack of control, bankruptcy practitioners reacted similarly to the Court's holding in *Stern* with mystification, unsure of the Court's rationale.[4] While bankruptcy jurisdiction prior to *Stern* was a straightforward process of following the Bankruptcy Code, the Court's decision muddied that roadmap.[5]

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1. *See* Abby Goodnough & Margalit Fox, *Anna Nicole Smith Is Found Dead at a Florida Hotel*, N.Y. TIMES, Feb. 9, 2007, at A12 (describing Smith as being "sporadically rich," "chronically litigious," and famous for being famous).

2. *See* David Stout, *Justices Hear a Drama Straight from Tabloids*, N.Y. TIMES, Mar. 1, 2006, at A14 (opining that even scholars have an interest in Smith's case due to the serious legal issues before the Court).

3. *See* Stern v. Marshall, 131 S. Ct. 2594, 2600–04 (2011) (chronicling Vickie's progression through state and federal courts in California, Louisiana, and Texas).

4. *See* Husky Int'l Elecs., Inc. v. Ritz (*In re* Ritz), 459 B.R. 623, 631–32 (Bankr. S.D. Tex. 2011) (explaining that the broader implications of *Stern* remain unclear, and attempting to clarify the Court's opinion).

5. *See* Jonathan Azoff & Thomas Szaniawski, Stern v. Marshall *and the Limits of Consent*, AM. BANKR. INST. J., Sept. 2011, at 28 (asserting that *Stern* is the most significant decision addressing bankruptcy jurisdiction in almost thirty years).

Instead of clarifying the lens through which bankruptcy jurisdiction is decided, the Court blurred the distinction between different courts' jurisdictions, creating a new line of questions where lawyers once found certainty.[6]

The primary question in *Stern* was whether a bankruptcy court could constitutionally enter a final judgment on a non-core tort cause of action asserted as a compulsory counterclaim.[7] In other words, did the bankruptcy court, an Article I court, have the authority to resolve a state law matter unrelated to the strict bankruptcy proceeding?

In its decision, the Court struck down 28 U.S.C. § 157(b)(2)(c) as unconstitutional, concluding that Congress could not constitutionally provide non-Article III bankruptcy judges with the power to render final judgments on common law compulsory counterclaims.[8] As a result, the Court held that a bankruptcy court lacks the constitutional power to enter final judgment on state law claims that debtors or trustees bring as counterclaims against creditors.[9]

The Court's decision sent shock waves throughout the bankruptcy community because the holding appeared to remove significant power from bankruptcy judges.[10] More importantly, rather than decide the case using more narrow logic, the Court determined that 28 U.S.C. § 157 is invalid, and therefore must be reworked.[11]

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6. *See id.* (describing the bankruptcy bar's concern that the Court's holding may be controversial and generate widespread confusion); George W. Kuney, Stern v. Marshall*: A Likely Return to the Bankruptcy Act's Summary/Plenary Distinction in Article III Terms*, 21 NORTON J. BANKR. L. & PRAC. 1, 10 (2012) (noting that the broad reasoning in *Stern* has created an unpredictable application of the issues for cases that do not have identical facts).

7. *See Stern*, 131 S. Ct. at 2600; *see also* Wood v. Wood (*In re* Wood), 825 F.2d 90, 91 (5th Cir. 1987) (explaining that bankruptcy courts have limited jurisdiction over non–core tort claims that are ancillary to the bankruptcy proceeding).

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

9. *Id.* at 2611, 2620.

10. *See* Gugino v. Canyon Cnty. (*In re* Bujak), No. 10-03659, 2011 WL 5326038, at *2 (Bankr. D. Idaho Nov. 3, 2011) ("Despite what the majority actually said in *Stern*, some insist that the decision foretells a jurisdictional Armageddon for the bankruptcy courts."); Richard Lieb, *The Supreme Court, in* Stern v. Marshall, *by Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 NORTON J. BANKR. L. & PRAC. 461, 462 (2011) (explaining that the Court's decision will likely cause delay, uncertainty, and added expense to the bankruptcy process).

11. *See Stern*, 131 S. Ct. at 2608 (finding 28 U.S.C. § 157 contrary to the jurisdiction provided by Article III of the Constitution); Todd J. Zywicki, *Bankruptcy Experts Discuss Supreme Court's Ruling in* Stern v. Marshall, AM. BANKR. INST., at 8:55 (June 24, 2011), http://abi-webinars.s3.amazonaws.com/2011_06_24_Stern_v_Marshall/Stern_v_Marshall.mp3 ("I think all of us in the bankruptcy world knew this was going

In the aftermath of the decision, the bankruptcy community is struggling to determine what this decision means for the practice of bankruptcy. Rather than providing a clear view for future jurisdictional questions in bankruptcy, the Court's decision provides only a smudged window through which courts must try to interpret meaning.[12] Unfortunately, the full effect of the Court's decision is currently obscured and will only be fully revealed with further interpretation by the lower courts. This Note will use the most recent body of law that has followed the Court's decision to determine the likely effects of *Stern*.

Part II provides the background to *Stern*, including the Court's previous decision in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, which held the Bankruptcy Reform Act of 1978 unconstitutional. Part II also addresses the congressional response to *Marathon* and the creation of the current Bankruptcy Code (Code) at issue in *Stern*. Part III discusses the nuances of the Court's decision, focusing on the broader implications of the majority and concurring opinions. Part IV then addresses the body of case law decided since *Stern* and analyzes the trends and continued points of confusion for the courts following *Stern*. This Note concludes with a prediction that bankruptcy courts will maintain final jurisdiction over fraudulent transfer and preference avoidance actions.

II. BACKGROUND

Bankruptcy courts are unique in federal jurisdiction, as they are neither Article III courts nor administrative law courts. This unusual structure gave rise to the confusion surrounding *Stern*. This part lays the groundwork for subsequent analysis regarding the Court's decision in *Stern* and the various courts' reactions to its decision. Section A will first address the distinction between Article I bankruptcy judges and Article III federal judges, a distinction that ultimately determines the boundaries of jurisdiction. Next, Section B reviews the United States Supreme Court's interpretation of bankruptcy jurisdiction over the last thirty years. Finally, Section C examines the congressional response to the Court's invalidation of bankruptcy jurisdiction, and describes the statute at issue in *Stern*.

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to be an important case, but I don't think very many of us anticipated really how important this case was going to be and how broad the Supreme Court opinion turned out to be.").

12. *See In re* Safety Harbor Resort & Spa, 456 B.R. 703, 714–16 (Bankr. M.D. Fla. 2011) (expressing skepticism in attempting to interpret the Court's language and apply the *Stern* holding to future bankruptcy jurisdictional issues).

A. Article I v. Article III Judges

Article III, Section One of the United States Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that the judges of those courts "shall hold their Offices during good Behavior" and "receive for their Services, a Compensation, which shall not be diminished" during their tenure.[13] In other words, Article III judges are life-tenured and salary-protected, which in theory protects against possible political influence.[14]

Article I empowers Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[15] Accordingly, in 1978, Congress conferred original jurisdiction on Article I bankruptcy courts over specific proceedings arising under Title 11 of the Code.[16] Their judgments on those issues were final in the sense that they were binding unless reversed on appeal.[17] However, Article I bankruptcy judges may not exercise the general judicial power of the United States given to Article III judges, and therefore may not finally resolve controversies that are not within the core bankruptcy jurisdiction under the Code.[18]

Even with Article III's language, the Court has held that under some circumstances, tribunals created by Congress under Article I of the Constitution may preside over dispute resolution functions.[19] Two of those circumstances are relevant to the *Stern* discussion.

> First, the "public rights" doctrine permits non-Article III federal tribunals whose authority is limited to certain

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13. U.S. CONST. art. III, § 1.

14. *See* Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge's Non-Article III Status*, 16 MICH. J. RACE & L. 181, 188–89 (2011). In contrast, the President appoints Article I bankruptcy judges to fourteen-year terms, subject to Senate confirmation. 28 U.S.C. § 152(a)(1) (2006).

15. U.S. CONST. art. I, § 8, cl. 4.

16. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2668 (codified at 28 U.S.C. § 1471(b) (1978 & Supp. IV 1980)). Title 11 of the United States Code governs bankruptcy in the United States. 28 U.S.C. § 157 (2006); *see also* 1 COLLIER ON BANKRUPTCY ¶ 3.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) (describing the statutory authority for bankruptcy jurisdiction).

17. 28 U.S.C. § 157(b)(1) (2006).

18. COLLIER, *supra* note 16, ¶ 3.02[2].

19. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–52 (1986); *see* J. Clark Kelso, *A Report on the Independence of the Judiciary*, 66 S. CAL. L. REV. 2209, 2211–12 (1993) (addressing the routing of dispute resolution to non-Article III adjudicators).

> matters integrated into a public regulatory scheme, arguably including the restructuring of debtor–creditor relationships in bankruptcy. Second, some Article I tribunals have been held to operate under such pervasive supervision by the Article III judiciary that they qualify as its permissible "adjuncts."[20]

As a result, bankruptcy courts have been hearing mixed cases following Congress's enactment of the Bankruptcy Reform Act.[21]

B. The Court's Interpretations of Article I Judge Power

With Congress's establishment of the Bankruptcy Reform Act of 1978, the Court would soon determine the future of bankruptcy jurisdiction.[22] Under the 1978 system, bankruptcy judges were allowed to render final judgments in bankruptcy cases, all proceedings arising under the Code, and all proceedings arising in or relating to bankruptcy cases.[23] For example, they could determine state law claims filed by the debtor against a party who was not involved in the bankruptcy case.[24]

Four years after Congress enacted the Bankruptcy Reform Act of 1978, the Court was asked to determine whether the system would pass constitutional muster in *Marathon*.[25] In that case, debtor Northern Pipeline filed a pre-petition cause of action against Marathon for breach of contract, a state law claim.[26] Marathon, who had never filed a proof of claim[27] or otherwise appeared in the bankruptcy proceeding, moved to dismiss the action, arguing that it "unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution."[28] After hearing the case, a fractured plurality held that Article I

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20. John P. Hennigan, Jr., *May a Bankruptcy Judge Resolving a Creditor's Claim Also Decide a Related Counterclaim?*, 38 PREVIEW U.S. SUP. CT. CAS. 186, 188 (2011).

21. *See* Conrad K. Cyr, *The Right to Trial by Jury in Bankruptcy: Which Judge is to Preside?*, 63 AM. BANKR. L.J. 53, 58–59 (1989) (describing the ability of bankruptcy courts to hear issues prohibited before the codification of the Bankruptcy Reform Act).

22. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified throughout 11 U.S.C.); Coco, *supra* note 14, at 192–99 (cataloguing the debates preceding the passage of the 1978 Act and the Court's determination in *Marathon*).

23. *See* Hennigan, *supra* note 20, at 188 (providing a history of the bankruptcy court's varying responsibilities).

24. *See id.* (describing the bankruptcy jurisdictional scheme in 1978).

25. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982) (plurality opinion).

26. *Id.* at 56.

27. Filing a proof of claim establishes a right to payment for an outside party against the debtor in a bankruptcy proceeding. *See* COLLIER, *supra* note 16, ¶ 101 (defining general bankruptcy terms).

28. *Marathon*, 458 U.S. at 56–57.

bankruptcy courts could not constitutionally enter a final judgment on a state law contract claim when the debtor was the plaintiff.[29] While four justices of the plurality called for the reworking of the entire system,[30] Justice Rehnquist's concurrence focused on the specifics of the issue at hand, namely a cause of action that "arise[s] entirely under state law."[31]

Yet, the determination by the four-justice plurality that the bankruptcy scheme exceeded Article I power carried the greatest weight with the lower courts following the opinion.[32] The Court's decision to hold the entire 1978 Act unconstitutional required Congress to immediately rework the bankruptcy system.[33]

C. Legislative History of § 157

Recognizing the practical problems the holding presented, the *Marathon* Court stayed the ruling's effective date to allow Congress time to devise a new system.[34] However, Congress could not resolve a basic disagreement: some members wanted to simply confer Article III status on bankruptcy judges, while others favored limiting their jurisdiction so that they could function constitutionally without tenure.[35]

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29. *See id.* at 71, 87 n.40 ("[A]t the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon."). Justice Burger dissented on much narrower grounds, specifically recognizing that "ancillary common-law actions" should be rerouted to the United States district court, and ultimately argued that the opinion did "not suggest that there is something inherently unconstitutional about the new bankruptcy courts." *Id.* at 92 (Burger, J., dissenting).

30. *See id.* at 87 n.40 (rejecting the idea that Congress should simply remove jurisdiction over one specific item and decide remaining jurisdiction issues at a later date).

31. *See id.* at 89–90 (Rehnquist, J., concurring) (explaining that Marathon may object to jurisdiction because the lawsuit is before the bankruptcy court only because of Northern Pipeline's petition and because the claim arises entirely under state law). Justice Burger stated that "[i]t will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication." *Id.* at 92 (Burger, J., dissenting).

32. *See, e.g.*, Edgcomb Metals Co. v. Eastmet Corp., 89 B.R. 546, 548 (D. Md. 1988) (noting *Marathon*'s teachings regarding Congress's ability to vest adjudication powers in Article III judges); Massachusetts. v. Dartmouth House Nursing Home, 726 F.2d 26, 28 (1st Cir. 1984) (concluding that *Marathon* struck down the entire 1978 bankruptcy system).

33. *See* Coco, *supra* note 14, at 199 (explaining that Congress had three possible responses to *Marathon*: (1) grant bankruptcy jurisdiction to district courts; (2) provide bankruptcy judges with life tenure; or (3) divide bankruptcy jurisdiction between the district and bankruptcy courts); Frank R. Kennedy, *The Bankruptcy Court and Its Jurisdiction*, 1995 ANN. SURV. BANKR. L. 485, 490–94 (1995) (summarizing the judicial and scholarly opinions proposing restructuring solutions).

34. *Marathon*, 458 U.S. at 88–89.

35. *See* Connolly v. Bidermann Indus. U.S.A., No. 95 CIV. 1791, 1996 WL 325575,

When the Court's stay expired before Congress could act, each of the federal courts of appeal and the district courts across the country adopted the Emergency Rule.[36] The Emergency Rule left the existing Article I bankruptcy judges in place but reduced their authority in two ways.[37] First, instead of directly granting those judges jurisdiction, the Emergency Rule gave district courts the option to refer (or not refer) a bankruptcy matter to those judges.[38] Moreover, the district courts were entitled to withdraw any such reference at any time.[39]

Second, the Emergency Rule allowed bankruptcy judges to enter final judgments only in bankruptcy cases or civil proceedings arising under the Code or in a case under the Code.[40] With respect to other civil proceedings at issue in bankruptcy cases, bankruptcy judges could do no more than submit to the district court their findings of fact, conclusions of law, and proposed judgments.[41] Under the Emergency Rule, judges could enter a final judgment on "counterclaims by the estate" in whatever amount "*against persons filing claims against the estate*," but could only make recommendations for "claims brought by the estate against parties *who have not filed claims against the estate*."[42] The Emergency Rule served the dual purpose of satisfying *Marathon*'s restriction of jurisdiction on paper while simultaneously allowing the bankruptcy courts to continue functioning in nearly the same pre-*Marathon* capacity.[43]

Two years after *Marathon*, Congress enacted new bankruptcy jurisdictional statutes in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),[44]

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at *2 (S.D.N.Y. June 11, 1996) (discussing the congressional reaction to the *Marathon* ruling); Coco, *supra* note 14, at 199 n.103 (describing the Chief Justice's influence on refusing Article III power to bankruptcy courts); Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 29–31 (1985) (explaining the disconnect between submitted congressional bills and the House Judiciary Committee regarding the future status of bankruptcy judges).

36. Thomas C. Galligan, Jr., *Article III and the "Related to" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 8 (1987); *see* Countryman, *supra* note 35, at 20–23 (explaining the Judicial Conference's process of preparing and dispatching the proposed Emergency Rule to the various judges throughout the country).

37. Countryman, *supra* note 35, at 22, 25.

38. 28 U.S.C. § 157(c)(2) (2006).

39. 28 U.S.C. § 157(d) (2006).

40. 28 U.S.C. § 157(b)(1) (2006).

41. Countryman, *supra* note 35, at 22.

42. *Id.* at 22 n.161, 35 (emphasis added).

43. *Id*. at 22–23.

44. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 11 U.S.C. and 28 U.S.C.).

essentially codifying the Emergency Rule.[45] The BAFJA had "the specific purpose of curing the constitutional problems of the scheme under which *Marathon* arose."[46] The Act's primary House sponsor stated that it was designed to codify practice under the Emergency Rule.[47] In all relevant aspects, the 1984 jurisdictional system remained in effect throughout the conflict at issue in *Stern v. Marshall*.[48] In addition, Congress was unwilling to confer life tenure on bankruptcy judges.[49] Therefore, bankruptcy judges continue to be appointed for fourteen-year terms, but are now appointed by the federal appellate courts rather than by the president.[50]

As a result of Congress's actions, bankruptcy jurisdiction is vested in the federal district courts.[51] However, those courts generally refer such matters to the bankruptcy judges by using 28 U.S.C. § 157.[52] According to this statute, each district court may refer proceedings to bankruptcy judges that arise *under* or *in* a Title 11 case, or that are *related to* such a case.[53] Once given a case, bankruptcy judges may "hear and determine" the bankruptcy issues and core proceedings, subject to appellate review.[54]

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45. Kennedy, *supra* note 33, at 489.

46. Duck v. Munn (*In re* Mankin), 823 F.2d 1296, 1305–06 (9th Cir. 1987), *overruled on other grounds by* Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency), 702 F.3d 553, 561 (9th Cir. 2012); *see also* Countryman, *supra* note 35, at 29 (explaining that it is clear from the legislative history that Congress enacted § 157 to cure the constitutional issues the *Marathon* Court found in the previous bankruptcy system).

47. 130 CONG. REC. H6241 (daily ed. Mar. 21, 1984) (statement of Rep. Robert Kastenmeier) ("The solution offered by my amendment has been at work in the last 18 months under the emergency bankruptcy rule known as the Model Rule and has been upheld by five circuit courts of appeal and 24 district courts. It has proven successful. Nothing need be changed. Congressional enactment of the model rule is the purpose of my amendment, and that is all that is necessary.").

48. *See* Stern v. Marshall, 131 S. Ct. 2594, 2610 (2011) (explaining that the bankruptcy courts under the 1984 Act and the 1978 Act granted the same jurisdiction concerning "core" matters).

49. *See* Countryman, *supra* note 35, at 31 (describing congressional members' efforts to prevent life tenure for bankruptcy judges).

50. COLLIER, *supra* note 16, ¶¶ 2.01[2][c], 2.03[1][a].

51. *See* 28 U.S.C. § 1334(a) (2006) (providing district courts with original and exclusive jurisdiction over all bankruptcy proceedings); 28 U.S.C. § 1334(b) (2006) (conferring original jurisdiction on the district courts over "all civil proceedings arising under title 11, or arising in or related to cases under title 11").

52. *See* 28 U.S.C. § 157(a) (2006) (authorizing the district court to refer "any or all cases" to bankruptcy judges); Mark A. Chavez, *Bankruptcy Jurisdiction*, *in* BANKRUPTCY ROAD MAP 37, 37 (2010) ("[P]ractically speaking, most of [bankruptcy] jurisdiction is exercised by bankruptcy judges."). All district courts have availed themselves of this power and have referred the day-to-day administration of Title 11 cases and much of the trial responsibility that arises in such cases to the bankruptcy courts. *Id.*

53. 28 U.S.C. § 157(a) (2006).

54. 28 U.S.C. §§ 157(a)–157(b)(1) (2006). As an appellate court with respect to core proceedings, the district court reviews the bankruptcy judge's findings of fact according to

In an effort to comply with the *Marathon* decision, Congress adopted the distinction between "core" and "non-core" proceedings.[55] Section 157 lists sixteen categories of core proceedings for which a bankruptcy judge may offer a judgment, including "counterclaims by the estate against persons filing claims against the estate."[56] In contrast to core proceedings, a bankruptcy judge may only conduct hearings and "submit proposed findings of fact and conclusions of law to the district court" for non-core proceedings.[57] While the multifaceted bankruptcy laws went through considerable debate and confusion during their construction, application of the jurisdictional provisions had been a relatively accepted area of the law. That ease would be thrown into disarray with the Court's decision in *Stern*.

III. STATEMENT OF THE CASE

This Casenote will now address the events preceding *Stern* and dissect the Court's reasoning. Sections A and B narrate the facts surrounding the conflict at issue in *Stern*. Sections C and D chronicle the dispute's journey through the state and federal court system. Finally, Section E identifies the various lines of reasoning in the Court's opinions in *Stern*, particularly that of the majority opinion.

A. Facts

The events preceding the Court's decision span more than fifteen years, four different courts, and three states.[58] In June

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the "clearly erroneous" standard. FED. R. BANKR. P. 8013. In contrast, the proposed findings in non-core proceedings are subject to de novo review, where the district court may rely on the record made in bankruptcy court or may conduct a further trial to receive additional evidence. FED. R. BANKR. P. 9033(d).

55. *See* Wood v. Wood (*In re* Wood), 825 F.2d 90, 91 (5th Cir. 1987) ("Essentially, Congress reenacted the 1978 Act, but divided its jurisdictional grant into 'core' proceedings, over which the bankruptcy courts exercise full judicial power—and 'otherwise related' or 'non-core' proceedings—over which the bankruptcy courts exercise only limited power.").

56. 28 U.S.C. § 157(b)(2)(C) (2006).

57. 28 U.S.C. § 157(c)(1) (2006); *see also* Chavez, *supra* note 52, at 38 (describing the de novo review of non-core procedures that are nevertheless "related to a case under title 11" (internal quotation marks omitted)); Alissa Pittman, *Survey: The Controversy Surrounding the Jurisdiction of Bankruptcy Courts*, 5 J. BANKR. L. & PRAC. 387, 391–94 (1996) (describing the debate over core or non–core jurisdiction over state law claims).

58. *See Stern*, 131 S. Ct. at 2600; Marshall v. Marshall (*In re* Marshall), 275 B.R. 5, 58 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded*, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd*, Stern v. Marshall, 131 S. Ct. 2594 (2011); Kent L. Richland, Stern v. Marshall*: A Dead-End* Marathon*?*, 28 EMORY BANKR. DEV. J. 393, 403 (2012).

1994, Vickie Lynn Marshall (Vickie) married J. Howard Marshall (Howard).[59] Howard, who made a fortune in the oil business, held almost all of his assets in a revocable living trust.[60] However, two weeks after the wedding, he made the trust irrevocable.[61] The primary beneficiary of the trust was Howard's son, Pierce Marshall (Pierce).[62] Howard died on August 4, 1995, approximately one year after his wedding to Vickie.[63]

B. Procedural History

After Howard died, Vickie proceeded to challenge his will in a Texas probate court, alleging that Howard meant to provide for her through a trust but did not due to Pierce's fraud and undue influence.[64] While the probate matters were still pending in Texas, Vickie filed for Chapter 11 bankruptcy in the Central District of California.[65] Pierce filed a defamation action and a proof of claim in that bankruptcy proceeding, asserting that Vickie's use of the media in publicizing her claims of Pierce's fraud constituted defamation.[66] "Vickie responded by filing an objection to the proof of claim and a counterclaim for tortious interference with the gift she expected from Howard."[67]

After being litigated at the United States Supreme Court in 2006, the case was remanded to consider the bankruptcy judge's jurisdiction to enter a final judgment on Vickie's counterclaim.[68] During the interim following the Supreme Court's remand, both Pierce and Vickie died.[69] Pierce's widow Elaine T. Marshall and Vickie's former attorney Howard K. Stern represented each party as executors.[70]

C. Bankruptcy and District Court Decisions

The bankruptcy court granted Vickie summary judgment on the defamation claim and eventually awarded her hundreds of

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59. *Marshall*, 547 U.S. at 300. Vickie Lynn Marshall is also known as Anna Nicole Smith. *Id.*

60. *In re Marshall*, 392 F.3d at 1121.

61. *Id.* at 1122.

62. *Marshall*, 547 U.S. at 300.

63. *Id.*

64. *Id.* at 300–02.

65. Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011).

66. *Id.*

67. *Id.* at 2595–96.

68. *Marshall*, 547 U.S. at 315.

69. *Stern*, 131 S. Ct. at 2600 n.1.

70. *Id.* at 2594. For the sake of clarity, this paper refers to Pierce and Vickie in the present tense as if they are still living and are still the current parties.

millions of dollars in damages on her counterclaim for tortious interference.[71] At issue in the bankruptcy case was whether the court could enter a final judgment on Vickie's counterclaim for tortious interference.[72] The bankruptcy court concluded that Vickie's counterclaim was in fact a core proceeding under 28 U.S.C. § 157(b)(2)(c).[73] However, the district court reversed this decision, referring to the Supreme Court's previous ruling in *Marathon*.[74] Using *Marathon* as the base, the district court held "that it would be unconstitutional to hold that any and all counterclaims are core."[75] Therefore, the district court determined Vickie's counterclaim was not closely enough related to Pierce's claim to be core and could not support a final judgment by the bankruptcy judge.[76] The court treated the bankruptcy court's ruling as a suggestion in line with § 157(c).[77] The district court then proceeded to decide the matter itself in favor of Vickie.[78] However, before the district court's final decision, the Texas probate court conducted a separate trial on the merits of the parties' dispute and entered judgment in Pierce's favor.[79] Therefore, there were two inconsistent conclusions reached by two different courts: the California bankruptcy court and the Texas probate court.

D. Ninth Circuit Decision

The Ninth Circuit vacated the district court's judgment, holding that the bankruptcy court lacked authority to enter final

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71. Marshall v. Marshall (*In re* Marshall), 257 B.R. 35, 40 (Bankr. C.D. Cal. 2000) (affirming a previous award of nearly $450 million), *aff'd in part*, *vacated in part*, *rev'd in part*, 264 B.R. 609 (C.D. Cal. 2000); *see also Stern*, 131 S. Ct. at 2601 (recounting the case's complex procedural history).

72. *In re Marshall*, 257 B.R. at 40.

73. *Id.* at 39–40 (finding that the court had the power to enter a final judgment on counterclaims).

74. *See Marshall*, 264 B.R. at 626 (referencing *Marathon* as the starting point for any discussion of core and non-core matters).

75. *Id.* at 629–30 (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 n.31 (1982) (plurality opinion)).

76. *Id.* at 632.

77. *See id.* at 633 (ruling that the bankruptcy court's judgment was proposed, meaning the tortious interference claim had not been resolved by any court).

78. Marshall v. Marshall (*In re* Marshall), 275 B.R. 5, 58 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded*, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd*, Stern v. Marshall, 131 S. Ct. 2594 (2011). The district court found that Pierce had tortiously interfered with Vickie's expectancy of a gift from Howard, and therefore awarded Vickie compensatory and punitive damages in an amount in excess of $44 million. *Id.*

79. *See Marshall*, 392 F.3d at 1123 (citing the probate court's decision that Howard's trust was legally amended and that there was no intent to give Vickie property). Pierce initiated the proceeding in the probate court separate from Vickie's action in the bankruptcy court. *Id.* at 1126.

judgment on Vickie's counterclaim for tortious interference.[80] The court held that a bankruptcy court's jurisdiction is established only if it passes a two-step jurisdictional test.[81] Specifically, the court held that a bankruptcy judge may enter final judgment only on a claim "that meets Congress' definition of a core proceeding *and* arises under or arises in title 11."[82] On that basis, even if Vickie's counterclaim were a core proceeding, it would be subject to final decision by a bankruptcy judge only if it also qualified as either arising under the Code or arising in a case under the Code.[83]

In support of its two-step jurisdictional test, the court of appeals voiced concern that a broader construction of "core proceeding" would run afoul of *Marathon*.[84] To avoid that concern, the court formulated a narrower interpretation[85] and held that Vickie's claim did not meet that test because the proof required to recover for tortious interference was not necessary to resolve Pierce's claim against the estate.[86]

The Ninth Circuit reasoned that the Texas probate court's judgment was entitled to preclusive effect as the earliest final judgment on the issues of (1) Howard's intent to give Vickie a gift and (2) Pierce's alleged misconduct, resulting in a win for Pierce.[87] Vickie then petitioned for certiorari once again, contending that the decision below conflicted with other circuits' holdings that compulsory counterclaims are within the bankruptcy court's core jurisdiction.[88] The Court granted certiorari to consider the core status of compulsory counterclaims.[89]

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80. *See Marshall*, 600 F.3d at 1049, 1059 (holding that the claim was not "so closely related to [Pierce's proof of claim] that it must be resolved in order to determine the allowance or disallowance of his claim against her . . . estate").

81. *Id.* at 1055.

82. *Id.*

83. *Id.*

84. *Id.* at 1057.

85. *See id.* at 1058 ("[A] counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the [Bankruptcy] Code only if the counterclaim is so closely related to the proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." (quoting Brief for Law Professors S. Todd Brown et al. as Amici Curiae Supporting Respondent at 10–11, Marshall v. Marshall, 547 U.S. 293 (2010) (No. 10-179))).

86. *Id.* at 1060.

87. *Id.* at 1060–61.

88. Petition for Writ of Certiorari at 7–8, 21, Stern v. Marshall, 131 S. Ct. 2594 (2011) (No. 10-179); *see, e.g.*, *In re* Am. Bridge Prods., 599 F.3d 1, 4 (1st Cir. 2010) (asserting that a compulsory counterclaim falls within the statutory definition of a core proceeding); *In re* CBI Holding Co., 529 F.3d 432, 464–65 (2d Cir. 2008) (concluding that counterclaims by the estate claims qualified as core under § 157(b)(2)(C)'s language).

89. *Stern*, 131 S. Ct. at 2600, 2603.

E. Supreme Court Opinion

The Court first held that the bankruptcy judge had statutory authority to enter a judgment on Vickie's counterclaim under 28 U.S.C. § 157(b)(2)(C).[90] However, the Court determined that the bankruptcy court's construction of § 157(b)(2)(C) violated the Constitution.[91] Therefore, while the bankruptcy court was correct in following the statute, it had no constitutional authority to make a decision on the counterclaim, and therefore its decision was not binding.[92]

1. Roberts' Majority Opinion. Justice Roberts first rejected the Ninth Circuit's two-pronged interpretation of § 157(b)(2)(C), finding instead that the bankruptcy court correctly interpreted the Code.[93] Next, Roberts concluded that, while the bankruptcy court's jurisdiction was final under the Code, the structure was contrary to the Constitution.[94] He concluded his opinion by dismissing Vickie's arguments that bankruptcy jurisdiction was still proper.[95]

a. "Core" Status Under § 157(b)(2)(C). Roberts quickly concluded that the Ninth Circuit's two-pronged approach was fatally flawed because the language of § 157(b) permitted jurisdiction based on a single inquiry: Does the matter either arise in a bankruptcy case under Title 11 or arise under the federal law of Title 11 itself?[96] He instead found that the bankruptcy court's interpretation and actions relating to § 157 were valid.[97] He determined that Vickie's counterclaim was a "core" proceeding under § 157(b)(2)(C).[98] Therefore, according to the statute, the bankruptcy judges were authorized to adjudicate Vickie's counterclaim for tortious interference.[99]

Roberts also determined that § 157(b)(5) is not jurisdictional, and stated that the court is "not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such."[100]

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90. *Id.* at 2605.
91. *Id.* at 2608.
92. *Id.* at 2620.
93. *Id.* at 2604–05.
94. *Id.* at 2608.
95. *Id.* at 2611–20.
96. *Id.* at 2604–05.
97. *Id.* at 2605.
98. *Id.* at 2604.
99. *Id.* at 2605.
100. *See id.* at 2606–07 (rejecting Pierce's alternative argument that § 157 established a jurisdictional limit, and that a "personal injury tort" was outside the jurisdiction of the bankruptcy court). The Court explained that just as § 157's allocation of

As a result, if the bankruptcy court has proper subject matter jurisdiction, a party is free to consent to entry of a final judgment, even if that party's claim would otherwise fall outside the domain of § 157(b)(5).[101]

b. Constitutionality of § 157. After upholding the bankruptcy court's actions under § 157, Roberts moved into the crux of the opinion: the determination that § 157 was in fact contrary to the Constitution.[102] Roberts first stressed the difference between Article I bankruptcy judges and Article III judges, particularly the difference between their method of appointment and their corresponding roles in protecting the perception of the judiciary.[103] The majority felt that Article III judges in district courts, courts of appeal, or the Supreme Court are guardians of separation-of-power issues, remain part of the system of checks and balances of government, and require independence from other branches of government.[104]

Roberts then discussed the Court's earlier decision in *Marathon* and explained that the Court could apply the same logic to the current issue.[105] Therefore, Roberts applied the same reasoning found in *Marathon* to the situation in Vickie's counterclaim.[106]

Using the *Marathon* plurality opinion as a guide, the majority found Vickie's tortious interference counterclaim to be

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the "authority to enter final judgment between the bankruptcy court and the district court . . . does not implicate questions of subject matter jurisdiction" and therefore does not bar parties from consenting to entry of final judgment on non-core matters, so too is § 157(b)(5) nonjurisdictional. *Id.* at 2607. Rather, it is procedural and "simply specifies *where* a particular category of cases should be tried." *Id*. (emphasis added).

101. *Id.* at 2607–08.

102. *See id.* at 2608 (concluding that while a faithful reading of § 157 did provide statutory authority for the bankruptcy courts to hear and determine Vickie's counterclaim as a core matter, that result violated Article III of the Constitution).

103. *Id.* at 2608–09.

104. *See id.* at 2609 (citing the Framers' vehemence on the need for a truly neutral proceeding free of political influence, and adopting a strict approach to interpreting Article III, under which it is impermissible to allow judges without Article III protections to enter final judgments on matters that are "the subject of a suit at the common law, or in equity, or admiralty" (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856))).

105. *Id.* at 2609–11; *see* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90–91 (1982) (plurality opinion) (permitting a bankruptcy court to enter final judgment on a contract claim, grounded exclusively in state law, at least where the estate had filed suit against a party that had not filed a proof of claim, and was not otherwise a party to the bankruptcy proceeding).

106. *See Stern*, 131 S. Ct. at 2611, 2619 (stating that "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments" because the constitutional bar remains to a bankruptcy court's exercise of the judicial power of the United States).

functionally indistinguishable from the state law contract claim at issue in *Marathon*.[107] The majority, in its second discussion of consent and Article III, was not persuaded by Vickie's attempts to distinguish her counterclaim from the claim in *Marathon* on the basis that Pierce, unlike the defendant in *Marathon*, had filed a claim against Vickie's estate.[108] At the core of the majority's holding, Roberts concluded that Congress's provision of bankruptcy jurisdiction over Vickie's claim exceeded its constitutional authority.[109]

Roberts also addressed Vickie's argument that restricting the bankruptcy court's authority to adjudicate compulsory counterclaims would create significant delays and impose significant costs on the bankruptcy process.[110] He responded that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[111] Roberts also explained the Court's determination that the practical consequences of such limitations are not as severe as Vickie argues.[112] He argued that the framework of the BAFJA contemplates that state and federal district courts will resolve certain state law matters in bankruptcy cases.[113] The Court determined that the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction would not meaningfully change the division of labor in the statute.[114]

Finally, the majority concluded that Vickie's counterclaim simply did not "fall within any of the varied formulations of the public rights exception in this Court's cases."[115] Because Vickie's

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107. *See id.* at 2609–10 (noting that state law contract claims are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring)) (internal quotation marks omitted)).

108. *See id.* at 2614 (explaining that although Pierce *had* consented to entry of a final judgment on *his defamation claim against Vickie*, "Pierce *did not truly consent* to resolution of Vickie's [counter]claim [against him] in the bankruptcy court proceedings" because "[h]e had nowhere else to go [with his claim] if he wished to recover from Vickie's estate" (emphasis added)).

109. *Id.* at 2620.

110. *Id.* at 2619.

111. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)) (internal quotation marks omitted).

112. *Id.*

113. *Id.* at 2619; *see* 28 U.S.C. §§ 157(b)(3), 1334(c) (requiring bankruptcy courts to abstain from hearing specified non-core, state law claims that "can be timely adjudicated[ ] in a State forum of appropriate jurisdiction").

114. *Stern*, 131 S. Ct. at 2620. The majority argued that Vickie's claim was a narrow one, and would therefore have little ultimate effect on bankruptcy jurisdiction. *Id.*

115. *Id.* at 2614.

counterclaim did "not flow from a federal statutory scheme"[116] or "depend[ ] on the will of congress,"[117] the Court held that it could not be characterized as a public right capable of withdrawal from the Article III judiciary's purview.[118] Instead, the Court concluded that Vickie's counterclaim "involves the most prototypical exercise of judicial power," which cannot be "taken from the Article III Judiciary simply by deeming it part of some amorphous 'public right.'"[119]

Roberts's opinion relies heavily on the doctrine expressed in *Murray's Lessee v. Hoboken Land and Improvement Company* that, with the exception of certain "public rights," Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[120] Following this line of reasoning, Vickie's counterclaim, a common law tort claim, could not be withdrawn from the Article III judiciary and adjudicated by an Article I court.[121]

Importantly, the Court was careful to limit its holding to jurisdiction over "a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[122] The Court repeatedly suggested that its decision was a "narrow" one, unlikely to have significant "practical consequences" or "change all that much" beyond invalidating the "one isolated respect" in which § 157(b)(2)(C) exceeded Congress's powers under the Constitution.[123] Roberts simply did not share the dissent's concerns about the practical implications of the holding.[124]

2. Scalia's Concurrence. Even more than Chief Justice Roberts, Justice Scalia discussed the importance of having Article III judges decide the common law issues in a bankruptcy

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116. *Id.* (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584–85 (1985), and Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 458 (1977)).

117. *Id.* (alteration in original) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855)) (internal quotation marks omitted).

118. *Id.* at 2615.

119. *Id.*

120. *Id.* at 2611–12 (quoting *Murray's Lessee*, 59 U.S. at 284).

121. *Id.* at 2614–15.

122. *Id.* at 2620.

123. *Id.* at 2619–20.

124. *See id.* at 2619 ("[W]e are not convinced that the practical consequences . . . on the authority of bankruptcy courts to enter final judgments are as significant as [petitioner] and the dissent suggest."); Zywicki, *supra* note 11 (explaining that, while Roberts's opinion was very formulaic, moving through history, he simply set aside the logistical questions that would result from the opinion).

proceeding.[125] However, Scalia also referenced the Court's myriad of rationales for its holding as evidence that a simpler answer was possible.[126] Specifically, Scalia argued that absent firm historical precedent, an Article III judge is required in all federal proceedings.[127]

Additionally, Scalia would limit the definition of "public rights" to cases involving the government as a party.[128] He leaves open the question about whether bankruptcy judges may constitutionally decide objections to claims (at least claims that are not filed by the government).[129]

3. Breyer's Dissent. In his dissent, Justice Breyer rebuked the majority's focus on relatively antiquated decisions and questioned the Court's refusal to adhere to more recent Court authority.[130] Breyer challenged the majority's reliance on *Marathon*, a plurality opinion from 1982.[131] Instead, Breyer discussed the Court's more recent reasoning in *Thomas v. Union Carbide Agricultural Products Company* and *Commodity Futures Trading Commission v. Schor*,[132] where the Court refused to allow a *de minimis* intrusion of the Article III judiciary to overshadow the practical negative consequences of the rejection of a non-Article III court system.[133]

In contrast to Roberts's interpretation of previous decisions, Justice Breyer emphasized the practical concerns of removing bankruptcy jurisdiction.[134] He cited concerns such as delay and increased costs if district courts must decide all compulsory counterclaims based on state law causes of action asserted in bankruptcy cases.[135]

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125. *See Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) (explaining that, aside from a "firmly established historical practice to the contrary," Article III judges should decide all issues of federal adjudication).

126. *See id.* (noting that there are "at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit").

127. *Id.*

128. *Id.* at 2620.

129. Kenneth N. Klee, *Professor Kenneth N. Klee on* Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 2011 U.S. Lexis 4791 (2011)*, 2011 EMERGING ISSUES 5743 (2011).

130. *Stern*, 131 S. Ct. at 2622 (Breyer, J., dissenting).

131. *Id.*

132. *Id.* (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985) and Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986)).

133. *See id.* at 2624–25 (arguing that the focus should be on "substance rather than doctrinaire reliance on formal categories" (quoting *Thomas*, 473 U.S. at 587)).

134. *Id.* at 2629–30.

135. *Id.* at 2630; *see also* G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 515

The dissent gives the example of a tenant filing in bankruptcy with a claim asserted by his landlord for unpaid rent, and the tenant asserting a counterclaim that the landlord failed to fulfill his obligations as a lessor.[136] Under the Court's holding, counterclaims must go to district court.[137] Breyer described the volume of bankruptcy cases as "staggering," pointing to the "almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases."[138] Breyer also expressed fear that "jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[139]

In sum, the plurality under Chief Justice Roberts was primarily concerned with maintaining Article III judicial power with judges who enjoy the protections provided in that Article.[140] Because Roberts determined Congress exceeded Article III's limitations "in one isolated respect," he concluded the bankruptcy court lacked authority to enter a final judgment on Vickie's counterclaim.[141] In contrast, Justice Scalia's concurrence focused on an originalist reading that Article III judges must review all cases or controversies, while Justice Breyer's dissent balked at overlooking recent, relevant decisions in favor of out-of-date precedent.[142]

IV. ANALYSIS

While the Court's decision in *Stern* provided some clarification and bright-line rules regarding bankruptcy jurisdiction, the full effect on bankruptcy jurisdiction was not evident from the opinion.[143] Section A summarizes the aspects of

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(explaining that bankruptcy is grounded in the state laws of tort, contract, property, and trusts and estates).

136. *Stern*, 131 S. Ct. at 2629–30.

137. *Id.* at 2630.

138. *Id.* However, Justice Breyer's numbers do not take into account the adversary proceedings associated with bankruptcy cases. Those proceedings add to the stark contrast between the current caseload. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 324 n.25 (Bankr. W.D. Mich. 2011) (noting concern over *Stern*'s practical effects on bankruptcy).

139. *Stern*, 131 S. Ct. at 2630. Legal scholars also expressed this fear even before the Court's decision. *See generally* Cole & Zywicki, *supra* note 135, at 526–28 (predicting a forum-shopping problem if the Court ruled against Vickie).

140. *Stern*, 131 S. Ct. at 2608–09 (plurality opinion).

141. *Id.* at 2620.

142. *See id.* at 2621 (Scalia, J., concurring); *id.* at 2624–26 (Breyer, J., dissenting).

143. *See infra* Parts IV.A–B (discussing *Stern*'s effect on future bankruptcy jurisdictional questions).

the Court's opinion that provide clear rules for future bankruptcy practitioners. Next, Section B examines the case law following *Stern* related to jurisdiction in fraudulent transfer and preference avoidance actions. Finally, Section B predicts the future outcome of these jurisdictional questions.

A. What Types of Claims May Bankruptcy Courts Still Hear

Stern reaffirmed that only an Article III judge can enter a final judgment regarding contract and tort claims, and that the guarantee of Article III adjudication cannot be avoided by making the recovery part of the claims allowance process.[144] At its "core," *Stern* warns judges and practitioners that Congress's "inclusion in § 157 of an illustrative list of core proceedings cannot cure constitutional defects" and that "[d]eterminations of constitutionality must be informed by [the] Supreme Court's precedent."[145] While these core ideas are clear as related to counterclaims for tortious interference, the jurisdictional boundaries for other actions in bankruptcy remain unclear.[146]

The majority opinion authorizes bankruptcy courts to enter a final order regarding a common law counterclaim if the issues it raises must *necessarily* be decided in order to allow or disallow the creditor's claim.[147] In other words, bankruptcy courts may enter final judgments on estate counterclaims only if "the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[148]

B. Subsequent Courts' Interpretation of Stern on Bankruptcy Jurisdiction

The majority opinion does little to clarify bankruptcy jurisdiction over the multitude of claims typically seen in the bankruptcy courts. Indeed, the most troubling aspect of the Court's opinion was its sheer breadth. The court refused to limit

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144. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011) (reviewing the Court's holding and the impact on future jurisdictional issues).

145. *See* Azoff & Szaniawski, *supra* note 5, at 78 (distilling the Court's opinion into those aspects that affect bankruptcy practitioners).

146. *See* Lieb, *supra* note 10, at 462 (hypothesizing that the Court's "sweeping decision" will limit the bankruptcy courts' ability to enter final judgments in many types of bankruptcy proceedings).

147. *See Stern*, 131 S. Ct. at 2618; Klee, *supra* note 129 (distinguishing the Court's holding from the dicta in the majority opinion).

148. *Stern*, 131 S. Ct. at 2618.

its holding to a specific type of counterclaim, yet condemned the bankruptcy courts' jurisdiction for most common law claims not entwined with the bankruptcy proceeding.[149] While the Court's reasoning was limited to one subsection of the Code, 28 U.S.C. § 157(b)(2)(C), the broad nature of the holding points to the future restriction of the bankruptcy courts' jurisdiction.[150]

Of particular concern to bankruptcy practitioners is the possible removal of the causes of action for fraudulent transfer[151] and preference avoidance actions from bankruptcy jurisdiction.[152] These actions occur with such frequency in bankruptcy proceedings that the extension of *Stern* and the removal of bankruptcy jurisdiction could significantly affect the dockets of the district courts.[153]

The concern stems from the Court's determination in earlier decisions that these bankruptcy proceedings are in fact "suits at common law."[154] As common law suits, the defendant is entitled to the right of trial by a jury as provided by the Seventh Amendment.[155] Given *Stern*'s general language that a bankruptcy judge may not enter a final judgment in suits at common law, even if those issues are a "core proceeding" under § 157, are bankruptcy judges therefore unable to enter a final judgment on common law fraudulent conveyance and preference avoidance actions as well?[156]

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149. *See* Zywicki, *supra* note 11 (discussing the confusion regarding the practical consequences of the Court's decision).

150. *See* Klee, *supra* note 129 (expressing concern over the possible breadth of the Court's opinion). While the Court characterized its decision as narrow, the majority opinion stressed the broad scope of Article III in limiting the authority of non-Article III tribunals, refusing to chip away at the Article III courts' jurisdiction. *Stern*, 131 S. Ct. at 2620.

151. 28 U.S.C. § 157(b)(2)(H) (2006).

152. 28 U.S.C. § 157(b)(2)(F) (2006); *see* Lieb, *supra* note 10, at 465 (questioning whether fraudulent conveyance and avoidance actions are within the bankruptcy jurisdiction post-*Stern*).

153. *See* Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 188 n.6 (Bankr. S.D.N.Y. 2011) (noting that such claims play a significant role in bankruptcy cases, and that while these claims "may not be the meat and potatoes of bankruptcy practice, . . . they are at least the salad and dessert, in marked contrast with the peculiar tortious interference claim in *Stern*").

154. *See* Granfinanciera v. Nordberg, 492 U.S. 33, 41–43, 49–50 (1989) (finding that the statutory recovery for fraudulent conveyance is analogous to an action brought in England prior to the merger of law and equity, and that those suits constituted no part of the proceedings in bankruptcy prior to 1978); Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932) (holding that "common law actions of trover and money had and received" were resorted to for recovery of preferential payments by bankrupts).

155. U.S. CONST. amend. VII; *see Granfinanciera*, 492 U.S. at 49–50 (deciding that although the claims were related to bankruptcy proceedings, they required separate, plenary suits to which the Seventh Amendment applied).

156. *See* Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) ("When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding

After *Stern*, bankruptcy courts can no longer rely upon the distinctions between core and non-core proceedings to determine when they may hear and finally determine a particular cause of action.[157] Instead, they must determine "whether the statutory authority delegated to them by Congress is within the constitutional guidelines provided by *Stern*."[158] While the concerns were initially based on the language in the Court's opinion, the passage of time has allowed for a more concrete analysis of the effect of the opinion on those areas of law.[159] This Note will now evaluate the effect on each cause of action in turn.

1. Fraudulent Transfer. Interpreting *Stern*'s effect on fraudulent conveyance actions yields diametrically opposed lines of reasoning.[160] While fraudulent transfer actions may be determined outside of bankruptcy law,[161] in some instances

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that suit rests with Article III judges in Article III courts." (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (plurality opinion) (citation omitted))); *see also* Susan Block–Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 554 (1998) (arguing that many of the claims adjudicated by bankruptcy courts are determined by state, not federal, law). However, both fraudulent conveyance and preference avoidance action are considered "core" under the Code. 28 U.S.C. § 157(b)(2)(F), (H).

157. *See* Lacey v. BAC Home Loans Servicing, LP (*In re* Lacey), No. 10-19903-JNF, 2011 WL 5117767, at *8 (Bankr. D. Mass. Oct. 27, 2011) (concluding that the distinction between core and non–core matters is no longer dispositive when determining jurisdiction).

158. Tabor v. Kelly (*In re* Davis), No. 05-15794-GWE, 2011 WL 5429095, at *3 (Bankr. W.D. Tenn. Oct. 5, 2011).

159. *See infra* Part IV.B.3 (predicting the future interpretation of bankruptcy jurisdiction over fraudulent conveyance and preference avoidance actions).

160. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 325 (Bankr. W.D. Mich. 2011) ("But *Stern*, when combined with *Granfinanciera*, at the very least suggests that a bankruptcy court's entry of a money judgment in connection with an avoided fraudulent transfer is constitutionally suspect."). *But see* Kelley v. JPMorgan Chase & Co., 464 B.R. 854, 863 (D. Minn. Sept. 21, 2011) (distinguishing fraudulent conveyance actions because the process "is one of those proceedings which is by its very nature essential to the adjustment and restructuring of debtor-creditor relationships that is at the core of federal bankruptcy jurisdiction" (citing Moratzka v. Wencl (*In re* Wencl), 71 B.R. 879, 882 (Bankr. D. Minn. 1987))). While refusing to decide whether the bankruptcy court could enter a final judgment on fraudulent conveyance actions, the *Kelley* court determined that "[a]t a minimum, *Stern* does not require this Court to withdraw the reference at this time." *Id.* at 863.

161. *See* 11 U.S.C. § 544(b)(1) (2010) (permitting the trustee to "avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of . . . title [11] or that is not allowable only under section 502(e) of [title 11]").

> The effect of this statute is to permit the trustee in bankruptcy to avoid for the benefit of the estate . . . transfers made within the applicable reach-back period under state law, but beyond the reach-back period for a similar cause of action provided by federal bankruptcy law at section 548(1).

Tabor, 2011 WL 5429095 , at *2.

fraudulent conveyances may be recovered under federal bankruptcy law.[162]

Thus far, the courts have provided a wide range of interpretations regarding *Stern*'s effect on bankruptcy courts' ability to enter final judgments on fraudulent transfer claims.[163] The interpretations may be split into two categories: (1) those that allow a hearing in the bankruptcy court, but only to provide a recommendation to the district courts; and (2) those that allow the bankruptcy court to enter a final judgment on the issue.[164] Each category will be discussed in turn, with each courts' rationale explained.[165]

a. Refusing Bankruptcy Courts Final Adjudication of Fraudulent Transfer Actions. In the Sixth Circuit, the courts have taken a strong stand against allowing bankruptcy courts to hear any fraudulent transfer issues. In *Meoli v. Huntington National Bank*, the plaintiff trustee brought an action against the defendant bank for fraudulent transfers.[166] The bank argued that, under *Stern*, the non-Article III judge lacked constitutional authority to enter a potential multi-million dollar judgment against it arising from fraudulent transfers.[167] After determining that the bank had not agreed to waive its right to have an Article

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162. *See* 11 U.S.C. §§ 547–548 (establishing the applicable rules regarding a trustee's avoidance of transfers in bankruptcy); COLLIER, *supra* note 16, ¶ 544.01 (describing a fraudulent transfer claim under 11 U.S.C. § 544, a Code provision that permits a trustee to avoid transfers that are avoidable under applicable non-bankruptcy law).

163. *See infra* Part IV.B.1(a)–(b) (analyzing courts that do and do not allow bankruptcy courts final adjudication over fraudulent transfer actions).

164. *See infra* Part IV.B.1(a)–(b). Immediately after the *Stern* decision, some courts refused to admit any fraudulent transfer actions to the bankruptcy court, interpreting *Stern* to refuse jurisdiction entirely. *See* Samson v. Blixseth (*In re* Blixseth), 463 B.R. 896, 906 (Bankr. D. Mont. 2011) (holding that the bankruptcy court has no authority to hear a fraudulent conveyance claim). However, as courts further digested *Stern*'s reasoning, these decisions restricting any access to the bankruptcy court for fraudulent conveyance actions were overruled and replaced with the determination that bankruptcy courts could enter recommendations to the district courts. *See* Samson v. W. Capital Partners LLC (*In re* Blixseth), No. 09-60452-7, 2011 WL 6217416, at *1, *3 (Bankr. D. Mont. Dec. 14, 2011) (finding that *Stern* did not affect the subject-matter jurisdiction of bankruptcy courts, only the ability to enter a final judgment).

165. *See infra* Part IV–B.1(a)–(b) (contrasting courts provision of jurisdiction for fraudulent transfer actions following *Stern*).

166. Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011).

167. *Id.* at 320; *see also* Paloian v. Am. Express Co. (*In re* Canopy Fin., Inc.), 464 B.R. 770, 773, 775 (N.D. Ill. 2011) (holding that reference should not be withdrawn from bankruptcy court even though the court lacked authority to enter a final judgment); Hagan v. Freedom Fid. Mgmt. (*In re* Fife), No 1:11-CV-885, 2011 Bankr. LEXIS 3544, at *1 (Bankr. W.D. Mich. Aug. 22, 2011) (determining a report and recommendation was more appropriate than a final judgment in a fraudulent transfer action).

III judge hear the case, the court converted its order to a report and recommendation to the district court in line with its interpretation of *Stern*.[168] The court based its decision on the fact that any taking required an Article III judge's authority, and the court's final order regarding the fraudulent conveyance would result in monetary relief for the trustee.[169]

Subsequent decisions by other bankruptcy courts in the Sixth Circuit followed *Meoli*'s reasoning, and provided similar "report and recommendation" responses to fraudulent transfer claims.[170] While the courts continued to entertain the motions for summary judgment, the judgments were entered with the understanding that the district court would review the decision under a de novo standard.[171]

In the First Circuit, a bankruptcy court denied a trustee's motion to dismiss for lack of jurisdiction to hear a fraudulent transfer of property action.[172] Upon appealing the bankruptcy court's determination to the district court, the district court determined that *Stern* limited the bankruptcy court's ability to hear the fraudulent conveyance action.[173] Similar to the courts in the Sixth Circuit, the court in *Sitka Enterprises v. Segarra-Miranda* based its reasoning on *Stern*'s continued reference to the *Grandfinanciera v. Nordberg* decision, which also involved a fraudulent conveyance.[174]

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168. *See In re Teleservices Grp., Inc.*, 456 B.R. at 325, 339–40 ("But *Stern*, when combined with *Granfinanciera*, at the very least suggests that a bankruptcy court's entry of a money judgment in connection with an avoided fraudulent transfer is constitutionally suspect.").

169. *See id.* at 338.

170. *See* Boyd v. King Par, LLC, No. 1:11-CV-1106, 2011 WL 5509873, at *2 (W.D. Mich. Nov. 10, 2011) (deciding that, even if the bankruptcy court may not enter a final judgment, that does not deprive the bankruptcy court of the power to entertain all pre-trial and summary judgment proceedings); Tabor v. Kelly (*In re* Davis), No. 05-15794-GWE, 2011 WL 5429095, at *1 (Bankr. W.D. Tenn. Oct. 5, 2011) (concluding that bankruptcy courts only have authority to make a report and recommendation to the district court concerning fraudulent transfers).

171. *See In re Davis*, 2011 WL 5429095, at *15 (concluding that, similar to "related to" bankruptcy proceedings, the bankruptcy court may prepare proposed findings of fact and conclusions of law for the district court's de novo review).

172. Sitka Enters., Inc. v. Segarra-Miranda, No. Civ. 10-1847CCC, 2011 WL 7168645, at *1, *3 (D.P.R. Aug. 12, 2011).

173. *See id.* at *3 (interpreting *Stern's* determination as "definitive" that the resolution of a fraudulent conveyance action cannot be adjudicated by the bankruptcy court since it lacks constitutional authority to do so).

174. *See id.* (referencing the fact that *Granfinanciera* rejected the argument that a fraudulent conveyance action fell within the public rights exception, and that the Court stated that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." (quoting Stern v. Marshall, 131 S. Ct. 2594, 2614 n.7 (2011))); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54–55 (1989) (rejecting the argument that a fraudulent conveyance action fell within the public rights exception).

Similar reasoning was applied in the Second Circuit, as various Article III courts prohibited bankruptcy courts from entering final determinations on fraudulent transfer actions.[175] In summary, courts in the First, Second, and Sixth Circuits have refused to grant bankruptcy courts the authority to decide fraudulent transfer claims.

b. Allowing Bankruptcy Courts Final Adjudication of Fraudulent Transfer Actions. In contrast to restricting bankruptcy courts' jurisdiction over fraudulent transfer actions, a smaller number of courts continue to allow final judgment.[176] The prevailing logic among these courts centers on the *Stern* majority's statement that the holding was "narrow."[177] Courts rely on the majority's language and refuse to try and predict the future by restricting other areas of bankruptcy jurisdiction.[178] Other courts reference *Stern*'s guarantee that the decision would not substantially affect the distribution of work between the bankruptcy and district courts.[179]

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175. *See* Dev. Specialists, Inc. v. Orrick, Herrington & Sutcliffe, LLP, No. 11 Civ. 6337, 2011 WL 6780600, at *2 (S.D.N.Y. Dec. 23, 2011) (granting a motion to withdraw a fraudulent conveyance action from the bankruptcy court in light of *Stern*'s determination that fraudulent conveyance actions encompassed a private right); Picard v. Flinn Invs., Inc., 463 B.R. 280, 287–88 (S.D.N.Y. 2011) (withdrawing reference to the bankruptcy court as a result of the uncertainty following *Stern*).

176. *See In re* Salander O'Reilly Galleries, 453 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) (holding that *Stern* does not affect the ability of the bankruptcy court to rule on state law fraudulent conveyance claims and that a bankruptcy court may rule "with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy"); Miller v. Greenwich Capital Fin. Prods., Inc. (*In re* Am. Bus. Fin. Servs., Inc.), 457 B.R. 314, 320 (Bankr. D. Del. 2011) (finding *Stern* did not deprive it of ability to enter final judgment on fraudulent transfer claims (citing *In re Salander O'Reilly Galleries*, 453 B.R. at 117)).

177. *See* Field v. Lindell (*In re* The Mortgage Store, Inc.), 464 B.R. 421, 425 (D. Haw. 2011) (emphasizing that *Stern* "made a point of noting that Congress exceeded its constitutional authority only in 'one isolated respect,' and that 'no other subsection of 28 U.S.C. § 157(b)(2) was found to be unconstitutional'" (quoting Badami v. Robert A. Sears & Riversource Life Ins. Co. (*In re* AFY, Inc.), No. 10-40875, WL 3812598, at *1 (Bankr. D. Neb. Aug. 18, 2011))); Brook v. Ford Motor Credit Co. (*In re* Peacock), 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011) ("The narrow holding in *Stern*, as just described, does not impact a bankruptcy court's ability to enter a final judgment in any other type of core proceeding authorized under 28 U.S.C. § 157(b)(2)."); *In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 698 (Bankr. N.D. Ill. 2011) (explaining that *Stern* has a "narrow effect"); Tibble v. Wells Fargo Bank (*In re* Hudson), 455 B.R. 648, 656–57 (Bankr. W.D. Mich. 2011) ("Except for the types of counterclaims addressed in *Stern v. Marshall*, a bankruptcy judge remains empowered to enter final orders in all core proceedings.").

178. *See* Gugino v. Canyon Cnty. (*In re* Bujak), No. 10-03569, 2011 WL 5326038, at *2 (Bankr. D. Idaho 2011) (discounting concern that the "sky is falling" and refusing to extend *Stern*'s holding without further guidance from the Court).

179. *Stern*, 131 S. Ct. at 2620; *see* Heller Ehrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), No. 08-32514DM, 2011 WL 4542512, at *1 (Bankr. N.D. Cal. Sept. 28, 2011) ("Withdrawal of the reference at this time would amount to an unnecessary

Also, in the Ninth Circuit, a district court refused to withdraw reference to the bankruptcy court, even after admitting the bankruptcy court's jurisdiction over fraudulent conveyance actions lacked constitutional authority.[180] The district court cited judicial efficiency as a sufficient reason to allow the bankruptcy court to provide findings and recommendations on the issue.[181] Judicial efficiency and bankruptcy expertise are continually cited by courts that allow bankruptcy courts to enter final determinations, despite the possible rebuke.[182] Thus, the decision to allow bankruptcy courts to enter final determinations on fraudulent transfer actions crosses districts.[183]

Along with *Stern*'s narrow language, courts have focused on the difference between fraudulent conveyance actions and the state law counterclaim at issue in *Stern*.[184] As the majority focused on the difference between a strict bankruptcy cause of action and Vickie's state law counterclaim,[185] a cause of action that is essential to bankruptcy should fall under the umbrella of bankruptcy court jurisdiction.

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extension of the narrow holding in *Stern*, would be an inefficient use of judicial resources by overburdening the district court and foregoing the services of a bankruptcy court ready, willing and able to do its job and would distort the traditional way to challenge and decide the constitutionality of a federal statute.").

180. *See In re Heller Ehrman LLP*, 464 B.R. at 354 (determining that the bankruptcy court was the proper forum for the proceeding, even though the district court had authority to remove the case).

181. *See* Field v. Trust Estate of Rose Kepoikai (*In re* Maui Indus. Loan & Fin. Co.), No. 11-00559, 2011 WL 6934757, at *10 (D. Haw. Dec. 29, 2011) (citing judicial efficiency in refusing to remove pre-trial proceedings from bankruptcy jurisdiction, even though removal may ultimately prove necessary); *In re Heller Ehrman LLP*, 464 B.R. 356–57 (concluding that the bankruptcy court provides a more efficient use of resources and a more consistent interpretation of the Bankruptcy Code than a district court).

182. *See, e.g.*, *In re Maui Indus. Loan & Fin. Co.*, 2011 WL 6934757, at *10; *In re The Mortgage Store, Inc.*, 464 B.R. at 428–29 (deciding not to withdraw the reference even if *Stern* applied to fraudulent transfer proceedings because "[w]ithdrawal of reference at this stage would result in this court losing the benefit of the bankruptcy court's experience in both the law and facts, resulting in an inefficient allocation of judicial resources").

183. *See In re* Safety Harbor Resort & Spa, 456 B.R. 703, 715–17 (Bankr. M.D. Fla. 2011); Springel v. Prosser (*In re* Innovative Commc'n. Corp.), No. 07-30012, 2011 WL 3439291, at *3 (Bankr. D.V.I. Aug. 5, 2011); Miller v. Greenwich Capital Fin. Prods., Inc. (*In re* Am. Bus. Fin. Servs., Inc.), 457 B.R. 314, 319–20 (Bankr. D. Del. 2011).

184. *See* Kirschner v. Agoglia (*In re* Refco, Inc.), 461 B.R. 181, 187 (Bankr. S.D.N.Y. 2011) (distinguishing a fraudulent transfer claim from the state law tortious interference claim in *Stern*); Husky Int'l Elecs., Inc. v. Ritz (*In re* Ritz), 459 B.R. 623, 631–32 (Bankr. S.D. Tex. 2011) (emphasizing the integral relationship of fraudulent conveyance actions to bankruptcy).

185. *See* Stern v. Marshall, 131 S. Ct. 2594, 2618 (2011) (discussing how the state law counterclaim was "in no way derived from or dependent upon bankruptcy law").

2. Preference Avoidance. Preferences in bankruptcy provide a creditor with access to the debtor's property during the bankruptcy proceeding.[186] An avoidance action is brought by the bankruptcy trustee to disallow a creditor's claim.[187] The majority and dissent in *Stern* disagreed about preference avoidance jurisdiction in their discussion of *Katchen v. Landy*[188] and *Langenkamp v. Culp*,[189] as the majority refused to accept the dissent's analogy to Vickie's case.[190] Previous decisions by the Court allowed for preference avoidance actions to proceed before a bankruptcy court.[191] Indeed, Justice White's dissent in *Marathon* provides an argument for the fundamental nature of preference avoidance litigation in bankruptcy.[192] Similarly, in discussing the relation between Vickie's bankruptcy and her counterclaim for tortious interference, the Court directly contrasted her counterclaim with a preference claim.[193] The Court noted that a preference claim relates more closely to bankruptcy than Vickie's claim.[194] However, as with the fraudulent transfer adjudication, the courts have responded with differing judgments regarding preference avoidance actions.

a. Refusing Bankruptcy Courts Final Adjudication of Preference Avoidance Actions. Following the *Stern* decision, some

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186. *See* 11 U.S.C. § 547 (2006) (establishing the rules and procedures for preferences in bankruptcy).

187. *Id.*

188. Katchen v. Landy, 382 U.S. 323 (1966).

189. Langenkamp v. Culp, 498 U.S. 42 (1990) (per curiam).

190. *See Stern*, 131 S. Ct. at 2615–17 (discussing the dissent's focus on the Court's previous grant of jurisdiction over preference avoidance actions in *Katchen* and *Lagenkamp*); Lieb, *supra* note 10, at 465 (questioning the effect of the majority's decision on federal avoidance claim jurisdiction).

191. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 372 (2006) (addressing preference avoidance litigation and determining that pursuit of avoidance claims has been "a core aspect of the administration of bankrupt estates since at least the 18th century"); *Katchen*, 382 U.S. at 325 (allowing preference avoidance actions to proceed before a bankruptcy court because creditors had filed claims in bankruptcy against the estate).

192. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 96 (1982) (White, J., dissenting) (explaining that the routine in bankruptcy cases is to adjudicate preferences, and that the Court would be incorrect to invalidate all bankruptcy court jurisdiction rather than the specific provision discussed in the case).

193. *See Stern*, 131 S. Ct. at 2616 (noting that Vickie's bankruptcy claim did not "make any difference" in relation to her tortious interference counterclaim as state law creates and defines property interests). The Court compared her claim to cases involving preferences, which "in effect increase that creditor's proportionate share of the estate," and require a ruling before adjudicating the creditor's proof of claim. *Id.* (citing *Katchen*, 382 U.S. at 330).

194. *See id.* at 2618 (noting that federal law created the right to recovery in a preference action while Vickie's counterclaim was a state tort action that existed "without regard to any bankruptcy proceeding").

courts interpreted the opinion as restricting jurisdiction for all "core" claims under § 157(b)(2).[195] For other courts, the uncertainty associated with the breadth of *Stern*'s jurisdictional restrictions has forced them to revert to the default "report and recommendation" rather than finally adjudicate the issue.[196] In some instances, courts that propose limiting the jurisdictional restriction to the specifics of *Stern* are nonetheless forced to restrict the bankruptcy courts' jurisdiction in response to the confusion the majority opinion provides.[197]

b. Allowing Bankruptcy Courts Final Adjudication of Preference Avoidance Actions. Similar to the rationales allowing final adjudication of fraudulent transfer claims, courts refuse to abandon the Bankruptcy Code's distinction between core and non-core, using the language as their guide for permission to enter final judgments on preference claims.[198] Still other courts have used the Court's "narrow" reasoning to allow jurisdiction for avoidance claims.[199] The distinction between a preference claim and Vickie's counterclaim is similarly used to allow final adjudication of avoidance actions.[200] This determination is made

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195. *See* G & B Invs., Inc. v. Henderson (*In re* Evans), 460 B.R. 848, 859 & n.5 (2011) (concluding that the Court's refusal of jurisdiction over § 157(b)(2)(C) similarly applied to preference claims under § 157(b)(2)(F)).

196. *See, e.g.*, Richardson v. BDSM Corp. (*In re* Tevilo Indus., Inc.), No. DK 09-07311, 2011 WL 4434894, at *1 (Bankr. W.D. Mich. Sept. 23, 2011) (issuing a Report and Recommendation rather than a default judgment in a preference action based on concerns springing from *Stern*).

197. *See* Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 188, 192–93 (Bankr. S.D.N.Y. 2011) (arguing that the bankruptcy court's jurisdiction over preference claims should be allowed based on historical references, but providing a recommendation if the appellate court concludes that *Stern* prohibits a final judgment); Rancher Energy Corp. v. Gas Rock Capital, LLC (*In re* Rancher Energy Corp.), No. 09-32943, 2011 WL 5320971, at *5 (Bankr. D. Colo. 2011) (requesting that both parties file formal documents consenting to bankruptcy jurisdiction before proceeding with the adjudication of preference avoidance claims).

198. *See* Mercury Cos., Inc. v. FNF Sec. Acquisition, Inc., 460 B.R. 778, 781 (D. Colo. 2011) (emphasizing the parties' admission that preference claims were "core" to allow the bankruptcy court final adjudication); Burtch v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 446 B.R. 626, 642–43 & n.11 (Bankr. D. Del. 2012) (determining that a bankruptcy court has authority to enter final adjudications on alleged preferences as § 157(b)(2)(F) is a "core" issue under Title 11, and there would be no state law causes of action without the bankruptcy filing).

199. Miller v. Greenwich Capital Fin. Prods., Inc. (*In re* Am. Bus. Fin. Servs. Inc.), 457 B.R. 314, 319–20 (Bankr. D. Del. 2011) (holding that bankruptcy courts have the authority to decide matters "directly and conclusively related to the bankruptcy" and grant summary judgment to defendants on avoidance and state law claims brought by trustee (quoting *In re* Salander O'Reilly Galleries, 453 B.R. 106, 117 (Bankr. S.D.N.Y. 2011))).

200. *See* Bayonne Med. Ctr. v. Bayonne/Omni Dev. (*In re* Bayonne Med. Ctr.), No. 07-15195, 2011 WL 5900960, at *7 & n.35 (Bankr. D.N.J. 2011) (emphasizing the

despite the possibility that jurisdiction may be restricted in the future.[201]

3. The Future of Fraudulent Transfer and Preference Avoidance Jurisdiction. With the limited body of case law after *Stern*, it is difficult to predict how this split will be handled at the highest level and when it will reach the Supreme Court. As demonstrated by the varying lines of reasoning regarding *Stern*'s effect on fraudulent transfer and preference avoidance actions, the Court's opinion provides ample room for interpretation but also causes confusion.[202] Many courts argue that *Stern* does not preclude a bankruptcy court from issuing a final judgment on a fraudulent transfer claim, while others appear to wrestle control from the bankruptcy courts.[203] Recently, one court described the view restricting bankruptcy jurisdiction as the "Broad Interpretation" while paradoxically the interpretation broadening bankruptcy jurisdiction provided a "Narrow Interpretation."[204]

When trying to predict how the Court will rule on this issue, it is helpful to recall how lower courts interpreted bankruptcy jurisdiction after the *Marathon* ruling and the enactment of the BAFJA. In response to the *Marathon* ruling, the Emergency Rule, which provided jurisdiction for bankruptcy courts over fraudulent transfer and preference avoidance claims,[205] was

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"substantive Bankruptcy Code underpinnings" of preference actions when allowing final adjudication).

201. *See In re* Safety Harbor Resort & Spa, 456 B.R. 703, 718 (Bankr. M.D. Fla. 2011) ("Bankruptcy courts should not invalidate a Congressional statute, such as section 157(b)(2)(F)—or otherwise limit its authority to finally resolve other core proceedings—simply because dicta in *Stern* suggests the Supreme Court may do the same down the road.").

202. *See, e.g.*, *In re Refco Inc.*, 461 B.R. at 186 (hypothesizing that the confusion among courts stems from the Court's various rationales used for its holding).

203. *See* Diaz-Barba v. Kismet Acquisition, LLC, No. 08CV1446, 2010 WL 2079738, at *5 (S.D. Cal. 2010) (arguing that fraudulent transfer litigation has been a core aspect of the administration of bankrupt estates); *In re Refco Inc.*, 461 B.R. at 187 ("Unlike the state law tortious interference claim in *Stern*, the Trustee's fraudulent transfer claim here 'flow[s] from a federal statutory scheme,' and is 'completely dependent upon adjudication of a claim created by federal law.'" (quoting Stern v. Marshall, 131 S. Ct. 2954, 2614 (2011) (alteration in original))). *But see In re* Ortiz, 665 F.3d 906, 915 (7th Cir. 2011) (concluding that the appeals court lacked proper appellate jurisdiction because the bankruptcy court's previous final adjudication conflicted with *Stern*).

204. *See* Burtch v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 466 B.R. 626, 638 (Bankr. D. Del. 2012) (explaining the two views regarding the effect of *Stern*, and defining the "Broad Interpretation" as stripping bankruptcy courts of authority to enter final judgments while the "Narrow Interpretation" takes the Court's express language that it stands for a "narrow proposition" as literal).

205. Galligan, *supra* note 36, at 8.

upheld.[206] Of particular interest is the interpretation that the *Marathon* holding was narrow, and therefore did not restrict the remaining bankruptcy jurisdiction.[207] Where previous courts interpreted *Marathon*'s holding as narrow, the majority explicitly states that *Stern*'s holding is narrow.[208] This begs the question: because the courts interpreted the narrow holding in *Marathon* to allow bankruptcy judges continued jurisdiction over similar claims as before the ruling, will that same rationale apply to the Court's decision in *Stern*?

While proponents for a continued breadth of bankruptcy jurisdiction may point to the courts' initial reactions to *Marathon*, those in favor of restricted jurisdiction will consistently point to *Granfinanciera*, which abrogated jurisdiction over fraudulent transfer actions where the defendant has not filed a proof of claim.[209] Following the Court's *Granfinanciera* decision, some courts began to question the bankruptcy courts' ability to enter final judgments on fraudulent transfer claims.[210] However, the overall consensus remained that

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206. *See* Salomon v. Kaiser (*In re* Kaiser), 722 F.2d 1574, 1582 (2d Cir. 1983) (explaining that fraudulent transfer actions are "inextricably tied" to bankruptcy proceedings, and that "there would be no cause of action without the federal bankruptcy statutes that authorize it"). The *Kaiser* court differentiated the fraudulent transfer cause of action from the action in *Marathon*, which "was independent of the bankruptcy laws." *Id.*; *see also* Comm. of Unsecured Creditors of F S Commc'ns. Corp. v. Hyatt Greenville Corp. (*In re* Comm. of Unsecured Creditors of F S Commc'ns. Corp.), 760 F.2d 1194, 1199 (11th Cir. 1985) (affirming the constitutionality of the Emergency Rule's allowance of bankruptcy jurisdiction over preference claims); John E. Burns Drilling Co. v. Cent. Bank of Denver, 739 F.2d 1489, 1493–94 (10th Cir. 1984) (upholding the Emergency Rule's provision of bankruptcy court jurisdiction over fraudulent transfer and preference avoidance claims).

207. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985) ("The Court's holding in [*Marathon*] 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."); *In re* Millenium Seacarriers, Inc., 419 F.3d 83, 99 (2d Cir. 2005) ("Since BAFJA's enactment in 1984, 'both the Supreme Court and this Court have concluded that the *Marathon* holding was a narrow one and have broadly construed the jurisdictional grant in [BAFJA].'" (alteration in original) (quoting Cent. Vt. Pub. Serv. Corp. v. Herbert, 341 F.3d 186, 191 (2d Cir. 2003))).

208. *See* Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).

209. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 55–56 (1989) (holding that fraudulent conveyance actions were more accurately a private decision in response to *Marathon*'s distinction between public and private rights, and were therefore entitled to a full jury trial under the Seventh Amendment).

210. *See* McFarland v. Leyh (*In re* Tex. Gen. Petroleum Corp.), 52 F.3d 1330, 1336–37 (5th Cir. 1995) ("Whether an Article III court is necessary involves the same inquiry as whether a litigant has a Seventh Amendment right to a jury trial."); Zahn v. Yucaipa Capital Fund (*In re* Almac's, Inc.), 202 B.R. 648, 659 (D.R.I. 1996) (withdrawing the reference in part because of conclusion that bankruptcy court could not issue a final judgment).

bankruptcy courts could finally adjudicate fraudulent transfer and preference avoidance actions.[211]

The *Stern* majority places significant weight on the Court's previous opinion in *Marathon*. However, it is important to remember the context of *Marathon* to appreciate fully the precedent the majority cites and to predict the correct process in the future. *Marathon* involved a state law contract claim initiated by the debtor against a party wholly uninvolved in the bankruptcy proceeding.[212] Given this murky relation to bankruptcy law, the Court held the bankruptcy court unable to provide final adjudication of the contract claim.[213] While the *Stern* majority focuses on *Marathon*'s strong condemnation of the entire bankruptcy system and the subsequent efforts by Congress to re-create bankruptcy law, the *Marathon* court was a fractured plurality. The Court's holding therefore was not Justice Brennan's opinion, but was in fact Justice Rehnquist's narrow concurring opinion, which restricted the holding to the specific claim at issue in *Marathon*.[214] Additionally, given the Court's explicit instruction regarding the narrow breadth of the opinion, the *Stern* holding should be restricted to the narrow facts of the case, a state law tort counterclaim. Therefore, given the specific language in each decision, bankruptcy courts are only explicitly restricted from entering final judgments in contract and tort causes of action that arise during the bankruptcy proceeding. Other than those two specific issues, the Court has provided no explicit restriction on the bankruptcy courts' ability to finally adjudicate the remaining "core" claims under § 157's grant of authority. Given the Court's opinions, as well as the lower courts' interpretation of the causes of action and their close relation to

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211. *See, e.g.*, Turner v. Davis, Gillenwater, & Lynch (*In re* Inv. Bankers, Inc.), 4 F.3d 1556, 1561 (10th Cir. 1993) (holding that preference and fraudulent transfer actions are the types of cases traditionally adjudicated by non-Article III bankruptcy courts); John E. Burns Drilling Co. v. Cent. Bank of Denver, 739 F.2d 1489, 1493–94 (10th Cir. 1984) (declaring the holding in *Marathon* only limited bankruptcy court adjudication of related proceedings, not core proceedings); Stein v. Miller, 158 B.R. 876, 879–80 (S.D. Fla. 1993) (differentiating *Granfinanciera*'s emphasis on the right to a jury trial from the power of a bankruptcy court to enter a final order given their Article I status).

212. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 56–57 (1982) (plurality opinion).

213. *See id.* at 71 (holding that bankruptcy courts did not have an exceptional grant of power to adjudicate issues outside bankruptcy law).

214. *See id.* at 91–92 (Rehnquist, J., concurring) (explaining that there was not something inherently unconstitutional with the 1978 bankruptcy system, and that the Court's holding was limited to the common law action unrelated to the bankruptcy proceedings). The limited holding was the emphasis of Justice White's dissent, which emphasized that the Court's holding was limited to Rehnquist's opinion. *Id.* at 102 (White, J., dissenting).

bankruptcy, the bankruptcy courts should retain their ability to enter final judgment on fraudulent transfer and preference avoidance claims under 28 U.S.C. §§ 157(f) and (h).

As these actions are frequently adjudicated in bankruptcy litigation, and as courts throughout the country are determining the bankruptcy courts' jurisdiction in patently inconsistent ways, the issue is likely to move through the various appellate courts and finally to the Supreme Court. The courts should find ample evidence to allow the bankruptcy courts to retain jurisdiction over the fraudulent transfer and preference avoidance actions for three reasons: (1) a fundamental difference in the relation to bankruptcy law between fraudulent transfer and preference avoidance actions when compared to tortious interference; (2) the courts' reaction following the decisions in *Marathon* and *Granfinanciera*; and (3) the Court's emphatic language that *Stern* was a narrow decision. Maintaining bankruptcy jurisdiction will allow for the bankruptcy courts to exercise their expertise over these issues and decrease the caseload for the district courts in the interest of judicial efficiency.

V. CONCLUSION

In determining the future outcome of bankruptcy jurisdiction, the Court could have used Justice Scalia's opinion for the most hassle-free means of defining jurisdiction—embed all federal jurisdiction with Article III judges, and either convert bankruptcy judges to Article III judges, or dissolve that portion of the judiciary.[215] Such a sweeping decision would provide a smudge-free glass through which to view bankruptcy jurisdiction issues in the future, preventing the inevitable waste created by jurisdictional questions.[216] Unfortunately, the majority's decision provided a confusing juxtaposition between a narrow holding and references to expansive restrictions in the future.[217] Therefore, as

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215. *See* Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (arguing that Article III judges have sole jurisdiction over federal adjudications). Justice Scalia's opinion regarding the simplification of the system was similarly voiced in response to the *Marathon* decision. *See* Erwin Chemerinsky, *Ending the Marathon: It is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311, 313 (1991) (discussing the flaws in the Supreme Court's reasoning in *Marathon*, specifically that "[t]he arbitrary and unjustified distinctions drawn in [*Marathon*] necessitate further arbitrary and unjustified distinctions in defining the permissible scope of bankruptcy court jurisdiction").

216. *See* Kennedy, *supra* note 33, at 485, 497 (arguing the complicated bankruptcy system creates inordinate, time-consuming, expensive, and wasteful litigation regarding jurisdictional questions).

217. *See* Lieb, *supra* note 10, at 461–62 (predicting widespread confusion following *Stern* in response to the Court's perplexing opinion).

the proverbial looking glass remains grubby and dim, the decisions responding to *Stern* must guide bankruptcy jurisdiction until the Court provides a more definitive answer. In predicting the likely outcome of jurisdiction over fraudulent transfer and preference avoidance claims, the Court's previous decisions regarding the Emergency Rule compared with its stance in *Stern* provide ample argument for maintaining bankruptcy court jurisdiction at its pre-*Stern* levels.

Michael Fillingame