LOSING AT DODGE BALL: UNDERSTANDING THE SUPREME COURT'S IMPLIED AUTHORIZATION OF CONSENT IN *EXECUTIVE BENEFITS INSURANCE AGENCY V. ARKISON* AND WHY REVISION OF 28 U.S.C. § 157(B) IS CRITICAL FOR CLARITY

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ABSTRACT

On June 9, 2014, the U.S. Supreme Court issued the latest installment in the jurisdictional saga of bankruptcy courts. As the highly anticipated sequel to Stern v. Marshall, *which deprived bankruptcy judges of authority to hear certain core proceedings,* Executive Benefits Insurance Agency v. Arkison *was expected to resolve the oft-litigated issue of whether parties could consent to bankruptcy jurisdiction. Practitioners and scholars eagerly awaited the opinion, anxious to determine exactly how far the Court would go in divesting bankruptcy judges of their authority. However, what the nation received instead was a classic attempt by the Court to dodge the ball on the consent issue.*

In a unanimous decision, the Court resolved the Stern *gap by allowing litigants to treat* Stern *claims as noncore proceedings but refused to address the overarching theme of consent. Tucking their reluctance away in a footnote, the Court expressly reserved the question of consent for another time, another case, and another day. This Article, however, argues that a straightforward reading of the plain language in* Arkison *impliedly resolves the consent issue. In other words, the Supreme Court has lost at its own game of dodge ball. By broadly applying the entire statutory provision of 28 U.S.C. § 157(c)—which includes subsection (c)(2) on consent—to* Stern *claims, the Court has plainly stated its approval of consent for certain core proceedings. In light of this plain language, this Article proposes two legislative amendments to § 157(b). The first amendment statutorily resolves the* Stern *gap in accordance with* Arkison. *The second amendment authorizes consent for core claims related to*

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bankruptcy proceedings. These amendments provide the necessary clarity and uniformity that bankruptcy courts have so desperately sought in the three years leading up to Arkison. *Finally, provided the Court's implicit authorization of consent in* Arkison*, this Article espouses the only logical resolution of* Wellness International Network, Ltd. v. Sharif*, which poses the same question of consent. The Supreme Court will hear and decide* Sharif *during its October 2014 term.*

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"It's funny. All you have to do is say something nobody understands and they'll do practically anything you want them to."[1]

I. INTRODUCTION

For bankruptcy and civil procedure enthusiasts, speculation over the extent to which the U.S. Supreme Court would divest bankruptcy courts of jurisdiction in *Executive Benefits Insurance Agency v. Arkison*[2] was rampant. In the wake of *Stern v. Marshall*, which prohibited bankruptcy courts from entering final judgments in certain core proceedings based on state law,[3] the status of bankruptcy jurisdiction has become unsettled, undefined, and unknown.[4] The once-simple procedural determination is now wrought with confusion and uncertainty as bankruptcy courts struggle to understand and accept their ill-defined boundaries. Enduring this turmoil for three years, practitioners and judges were hopeful that the Court would clarify its *Stern* analysis in the recent *Arkison* case.[5] Specifically, litigators anxiously awaited an answer to the unsettled question of whether parties could consent to bankruptcy authority.[6] Attempting to predict how far the Court would go in restricting the power of bankruptcy courts made the consent issue one of the

1. J.D. SALINGER, THE CATCHER IN THE RYE 205 (1951).

2. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168 (2014) (discussing the potential Article III prohibition of bankruptcy courts from finally adjudicating certain bankruptcy-related claims).

3. Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).

4. *See Arkison*, 134 S. Ct. at 2168, 2170.

5. *See generally* Jeffrey A. Wurst & John H. Ruiss, Jr., *U.S. Supreme Court: Stage Set for Potential Shift in Bankruptcy Court Jurisdiction*, ABF J. (Apr. 2014), http://www.abfjournal.com/articles/u-s-supreme-court-stage-set-for-potential-shift-in-bankruptcy-court-jurisdiction/.

6. *See id.*

most hotly debated topics of the Court's term.[7] When the decision was announced on June 9, 2014, however, what the nation received was simply another classic attempt by the Supreme Court to dodge the ball.[8]

Although the Justices unanimously held that bankruptcy courts could "issue proposed findings of fact and conclusions of law" when lacking constitutional authority to enter a final judgment,[9] the Court refused to touch on the consent issue with a thirty-nine-and-a-half-foot pole.[10] Slyly "reserv[ing] that question for another day," the Court justified its avoidance by relying on the district court's review of the bankruptcy court's judgment.[11] Because the claims were reviewed de novo, the case did not require the Court to address the topic of consent.[12] In this manner, the Court followed the advice of Patches O'Houlihan by attempting to "dodge, duck, dip, dive, and dodge" the consent ball.[13]

Unfortunately for the Supreme Court, this repeated practice of avoidance failed to push the Justices past the elimination round. Although the Court expressly refused to determine whether parties could consent to bankruptcy authority, the plain language of the Court's holding is ironically

7. *See id.* ("[Arkison] is viewed by many practitioners as the most anticipated case to be decided by the Supreme Court this term."); Doron Kenter, *Breaking News: Unanimous Supreme Court Closes Statutory Gap, Leaves Other "Core"* Stern *Questions For Another Day (*Executive Benefits Insurance Agency v. Arkison*)*, WEIL BANKR. BLOG (June 9, 2014), http://business-finance-restructuring.weil.com/jurisdiction/breaking-news-unanimous-supreme-court-closes-statutory-gap-leaves-other-core-stern-questions-for-another-day-executive-benefits-insurance-agency-v-arkison/ (describing the *Arkison* decision as "hotly anticipated").

8. *E.g.*, Eric Daucher, Arkison*: A Supreme Dodge*, CHADBOURNE (June 23, 2014), http://www.zoneofinsolvencyblog.com/2014/06/arkison-a-supreme-dodge/; G. Ray Warner, *The Supremes Dodge Again*—Executive Benefits Insurance Agency v. Arkison, NAT'L L. REV. (June 14, 2014), http://www.natlawreview.com/article/supremes-dodge-again-executive-benefits-insurance-agency-v-arkison.

9. *Arkison*, 134 S. Ct. at 2170.

10. *Id.* at 2170 n.4 ("[T]his case does not require us to address . . . whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim. We reserve that question for another day."); Warner, *supra* note 8 ("We are given no hint as to whether *Stern* announced a purely private constitutional right that could be waived or a structural rule that could not. Thus, the authority of bankruptcy judges to enter final orders by consent . . . remains under a constitutional cloud."); *Dr. Seuss' How the Grinch Stole Christmas!* (CBS television broadcast Dec. 18, 1966).

11. *See Arkison*, 134 S. Ct. at 2170 n.4.

12. *See id.*

13. DODGEBALL: A TRUE UNDERDOG STORY (20th Century Fox 2004).

broad enough to decide the very issue it punted. This Article therefore argues that the Supreme Court *did* in fact approve jurisdiction by consent through repeated references to the comprehensive statutory framework of 28 U.S.C. § 157(c).[14] Additionally, in light of the *Arkison* precedent, this Article proposes two simple legislative amendments to § 157(b) that will resolve the existing ambiguity surrounding consent and *Stern*, and authorize consent in the context of *Stern* claims. Finally, given the Supreme Court's recent grant of certiorari in *Wellness International Network, Ltd. v. Sharif*,[15] this Article articulates the only logical resolution of the consent issue that will not abrogate the plain language of *Arkison*.

In support of these arguments, the Article is divided into seven substantive Parts. Part II offers a comprehensive understanding of bankruptcy jurisdiction prior to *Stern* and delineates the distinction between core and noncore proceedings. Part III provides a succinct overview of *Stern*, focusing principally on the case's aftermath and consequences. Part III details the immense confusion plaguing bankruptcy and district courts regarding jurisdictional limitations and offers credence to the mantra "no good deed goes unpunished." Part IV describes the facts and holding of *Arkison* and highlights the operative language that fuels this Article's thesis. Part V engages in an extensive discussion of consent. Particularly, Part V argues that the Supreme Court in *Arkison* impliedly authorized parties to consent to bankruptcy authority and explains why consent is necessary for judicial and economic efficiency. In light of this argument, Part VI proposes two amendments to 28 U.S.C. § 157(b) that will statutorily authorize consent in light of *Arkison* and help restore clarity to jurisdictional boundaries. Part VII addresses *Sharif*, the upcoming Supreme Court case, and articulates the only logical outcome of the consent issue given the plain language of *Arkison*. Finally, Part VIII concludes the Article.

14. *Arkison*, 134 S. Ct. at 2173 ("The statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)."); *id.* ("§ 157(c) may be applied naturally to *Stern* claims."). The significance of the applicability of § 157(c), in its entirety, is that § 157(c)(2), notwithstanding the § 157(c)(1) prohibition of adjudication authority in noncore proceedings, allows a bankruptcy judge to enter judgments and orders with the consent of all parties. 28 U.S.C. § 157(c) (2012).

15. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (July 1, 2014).

II. A TALE AS OLD AS TIME: THE EVOLUTION OF BANKRUPTCY JURISDICTION BEFORE *STERN*

A. *Growing Up English*

Unsurprisingly, the origin of American bankruptcy law traces its lineage to eighteenth-century English statutes regulating the emerging field of debtor–creditor rights.[16] Originating in criminal law, the English bankruptcy system sponsored debtors' prison and imposed harsh sanctions, including death, against offenders.[17] Although the English system softened over time and transformed into a property-based institution, discharges were available solely for commercial traders and were not extended to the general public until the mid-nineteenth century.[18] Moreover, debtors were not permitted to initiate bankruptcy proceedings until the 1820s; rather, only creditors could petition the Lord Chancellor for relief.[19] This restriction solidified the belief that "[r]elief was not *for* debtors, but *from* debtors" and persisted for more than three centuries.[20]

Upon receiving a petition for relief, the Lord Chancellor in Equity routinely referred the suit to a panel of five commissioners for potential

16. *See* Elmer Dean Martin III, *Consent: The Constitutional Basis for Bankruptcy Judge Authority*, 19 CAL. BANKR. J. 1, 5 (1991); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 43 (1989) ("There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th-century England."); Yellow Sign, Inc. v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 466 B.R. 750, 760 (Bankr. M.D.N.C. 2012) (noting that "[t]he judicial branch of the United States government was based on the English model," and bankruptcy courts were equity courts in England).

17. Katie Drell Grissel, Stern v. Marshall—*Digging for Gold and Shaking the Foundation of Bankruptcy Courts (or Not)*, 72 LA. L. REV. 647, 649 (2012); Charles J. Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) (explaining that England "was noteworthy for its harsh treatment of defaulting debtors" and that "[i]mprisonment for debt was the order of the day"); Michelle Wright, *From Stem to* Stern*: Navigating Bankruptcy Practice After* Stern v. Marshall, 77 MO. L. REV. 1159, 1161 n.19 (2012) (citing G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. L. 499, 515 (2000)) (noting that punishment for offenders of early English bankruptcy law could include death).

18. *See* Tabb, *supra* note 17, at 9 (stating that bankruptcy law only applied to traders until the nineteenth century).

19. Martin III, *supra* note 16; Tabb, *supra* note 17, at 8.

20. Tabb, *supra* note 17, at 8.

adjudication, seizure, and distribution of the debtor's assets.[21] "[T]he process mirrored a modern straight liquidation case," but the lack of discharge permitted creditors to pursue collection remedies against the individual debtor.[22] Any dispute over res division, the amount of debt, or the validity of liens was heard by the Chancellor's court of equity—not the court of law—and appeal could be taken directly to the Lord Chancellor himself.[23] In this manner, England promulgated the notion that bankruptcy courts were courts of equity,[24] and the Framers federalized this system in Article I of the U.S. Constitution.[25]

Although Article I granted Congress the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States,"[26] this Clause was not exercised until April 4, 1800—more than 11 years following the ratification of the Constitution.[27] Representing the first federal bankruptcy statute in the United States, the 1800 Act mirrored English laws by prohibiting debtors from initiating suit, categorizing fraudulent bankruptcy as a criminal offense, and authorizing the district court to appoint commissioners to supervise the bankruptcy process.[28] The boundaries of bankruptcy courts were determined by summary jurisdiction—the equivalent of in rem jurisdiction today (i.e., jurisdiction over the estate property).[29] The bankruptcy courts did not possess plenary, or in personam, jurisdiction.[30] However, despite the recognized need for an

21. *See* Martin III, *supra* note 16.

22. Tabb, *supra* note 17, at 8.

23. Yellow Sign, Inc. v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 466 B.R. 750, 760 (Bankr. M.D.N.C. 2012) (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 43–47 (1989)); Martin III, *supra* note 16; Wright, *supra* note 17, at 1162.

24. *See In re Freeway Foods of Greensboro*, 466 B.R. at 760 (citing *Granifinanciera*, 492 U.S. at 43).

25. *See* Tabb, *supra* note 17, at 6–7.

26. U.S. CONST. art. I, § 8, cl. 4.

27. Tabb, *supra* note 17, at 14.

28. *Id.* at 14.

29. *See* David E. Leta, Stern v. Marshall *Changes the Landscape of Bankruptcy Court Jurisdiction*, 26 UTAH B.J., Mar.–Apr. 2013, at 34, 34 (stating that summary jurisdiction "was limited to a debtor's property that actually found its way into the hands of the commissioners and the estate's representatives"); *see also* Joshua C. Gerber, Note, *"Why The Fuss?":* Stern v. Marshall *and the Supreme Court's Understanding of Bankruptcy Court Jurisdiction*, 78 BROOK. L. REV. 989, 998 (2013) (describing the difference between plenary and summary jurisdiction).

30. *See* Wright, *supra* note 17, at 1162 (noting that summary jurisdiction is not

effective national bankruptcy framework, the 1800 Act was repealed only three years later, and the next bankruptcy act was not promulgated until 1841.[31]

B. *Watershed Events: The Bankruptcy Acts of 1841, 1867, and 1898*

In contrast to the 1800 Act, which resembled little more than a plagiarized version of English law, the Bankruptcy Act of 1841 (the 1841 Act)[32] served as an important mile marker in bankruptcy history.[33] Consisting of 17 Sections, the 1841 Act established voluntary bankruptcy proceedings and vested summary jurisdiction over such cases in the district court.[34] Assignees replaced commissioners and effectuated the distribution of the debtor's assets, subject to basic exemptions.[35] While bankruptcy jurisdiction was further deemed to be exclusively federal, the bankruptcy assignees were never afforded Article III judicial protection[36]—a problem which plagues the bankruptcy system to date.[37]

Following the repeal of the 1841 Act two years later, Congress enacted the Bankruptcy Act of 1867 (the 1867 Act)[38] in response to the Panic of

jurisdiction over the individual parties); *see also* Leta, *supra* note 29 (noting that plenary proceedings had to be brought before a superior court judge).

31. Wright, *supra* note 17, at 1163.

32. *See generally* Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

33. Tabb, *supra* note 17, at 17 (discussing new developments under the 1841 Act); Wright, *supra* note 17, at 1163 (discussing the broad authority given to both Congress and bankruptcy courts under the 1841 Act).

34. Tabb, *supra* note 17, at 17; Wright, *supra* note 17, at 1163 (citing Tabb, *supra* note 17, at 17).

35. Tabb, *supra* note 17, at 17.

36. Article III of the U.S. Constitution reads,

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

U.S. CONST. art. III, § 1.

37. Wright, *supra* note 17, at 1163 ("[B]ankruptcy assignees were not given Article III judicial protections; this problem remains the crux of bankruptcy courts' jurisdictional problems today.").

38. *See generally* Act of Mar. 2, 1867, ch. 176, 14 Stat. 517.

1857.[39] The economic consequences of the Civil War mandated efficient and uniform bankruptcy regulations.[40] As part of this legislation, Congress allowed corporations to file for bankruptcy and permitted district courts to hire "registers" to assist with bankruptcy proceedings.[41] "The registers replaced the bankruptcy commissioners and were able to adjudicate bankruptcy claims."[42] Nonetheless, Article III status continued to elude these assistants, and the 1867 Act similarly succumbed to weakness and criticism.[43]

Finally, in 1898, Congress passed the first bankruptcy statute to survive more than a half-decade.[44] Remaining in effect for 80 years, the Bankruptcy Act of 1898 (the 1898 Act) "ushered in the modern era of liberal debtor treatment in United States bankruptcy laws."[45] The 1898 Act devoted considerable attention to the details of estate administration, attempting to ensure an equitable and efficient distribution of assets to creditors.[46] Additionally, district courts outsourced the majority of administrative work on bankruptcy claims to "referees" who were directly appointed by federal courts.[47] As successors to registers under the 1867 Act, referees were initially paid on a fee basis, although this was later substituted with salary compensation.[48] Although they still had not obtained Article III status, referees exercised a large portion of the jurisdiction given to district courts and were afforded discretion in their rulings.[49] However, notwithstanding the appointment of referees, controversy regarding the distinction between summary and plenary jurisdiction was frequent, and state courts retained

39. Wright, *supra* note 17, at 1164.

40. *See id.*

41. *Id.* at 1164–65 (citing Tabb, *supra* note 17, at 19).

42. *Id.* at 1165 (citing Tabb, *supra* note 17, at 19).

43. *Id.* Following the 1867 Act, Congress implemented the Bankruptcy Act of 1874 (the 1874 Act). *Id.* The 1874 Act, however, did not alter bankruptcy jurisdiction and thus is not discussed in this Article. The 1874 Act similarly failed, giving rise to the Bankruptcy Act of 1898. *See id.*

44. Tabb, *supra* note 17, at 23; *see generally* Act of July 1, 1898, ch. 541, 30 Stat. 544.

45. Tabb, *supra* note 17, at 23–24.

46. *Id.* at 25.

47. Latoya C. Brown, *No More Ping-Pong: The Need for Article III Status in Bankruptcy After* Stern v. Marshall, 8 FIU L. REV. 559, 564 (2013) (citing Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383, 384–85 (2005)).

48. Tabb, *supra* note 17, at 25.

49. *See id.*

concurrent jurisdiction over numerous bankruptcy issues.[50]

C. *Not in Kansas Anymore: The Bankruptcy Reform Act of 1978*

Despite the longstanding success of the 1898 Act, Congress engaged in a comprehensive overhaul of federal bankruptcy law in 1978.[51] This reform process lasted roughly a decade and focused extensively on the status of bankruptcy judges.[52] Under the 1898 Act, bankruptcy referees were limited to hearing only specific core matters, which resulted in a "splintered jurisdictional scheme."[53] The Bankruptcy Reform Act of 1978 (the 1978 Act) strove to create a more unified jurisdictional framework in which bankruptcy judges could hear all "matter[s] arising in, or related to" a pending bankruptcy proceeding.[54]

Given this ambitious goal, the 1978 Act intended to completely eliminate any distinction between summary and plenary jurisdiction.[55] Specifically, the 1978 Act discarded the referee system and established a bankruptcy court in each judicial district to be presided over by bankruptcy judges.[56] The bankruptcy judges were to be appointed by the President, with the advice and consent of the Senate, for 14-year terms.[57] Although the bankruptcy judges did not receive the protection of a guaranteed salary,[58] Congress enlarged the scope of jurisdiction for these courts to "all 'civil proceedings arising under title 11 . . . or arising in or *related to* cases under

50. *Id.*

51. Gerber, *supra* note 29, at 999; *see generally* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1979).

52. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52–53 (1982); Stephanie J. Bentley, Note, *Responding to* Stern v. Marshall, 29 EMORY BANKR. DEV. J. 145, 168 (2012) (detailing the reformation process, which "included over 106 days of hearings, at least 130 witnesses, over 100 adopted amendments, several hundred written statements and comments, competing bills, and eight distinct drafts" (citing Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941 (1979))).

53. Tabb, *supra* note 17, at 34.

54. *Id.*

55. Yellow Sign, Inc. v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 466 B.R. 750, 762 (Bankr. M.D.N.C. 2012) (citing *N. Pipeline*, 458 U.S. at 54).

56. *N. Pipeline*, 458 U.S. at 53 (quoting 28 U.S.C. § 151(a) (1976 & Supp. IV 1980)).

57. *Id.* (citing §§ 152, 153(a) (1976 & Supp. IV 1980)); Gerber, *supra* note 29, at 999 (citing §§ 151(a), 152–54 (1982)). Today, bankruptcy judges are not appointed by the President. Rather, each bankruptcy judge is "appointed by the court of appeals of the United States for the circuit in which such district is located." § 152(a)(1) (2012).

58. *N. Pipeline*, 458 U.S. at 53 (citing § 154 (1976 & Supp. IV 1980)).

title 11.'"[59] This jurisdictional expansion represented a legislative compromise between the demands of bankruptcy judges to be afforded Article III status and the vigorous opposition to this request by current Article III judges.[60] Thus, the 1978 Act granted bankruptcy courts broad jurisdiction without conferring formal Article III powers.[61] This grant of authority vested bankruptcy courts "with all of the 'powers of a court of equity, law, and admiralty,'" with few exceptions.[62] The only limit on this authority was the prospect of review by the district court.[63]

D. *Oh No You Don't: Taking a Step Back with* Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

Congress's valiant effort to effectuate a compromise between Article III judges and bankruptcy courts did not go unnoticed for long. The Supreme Court, catching wind of the expansion in bankruptcy court jurisdiction, wasted no time in declaring this action unconstitutional in 1982.[64] Engaging in a formalist analysis in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court examined the constitutional structure established by the Framers and determined that judicial power could only be vested in an independent judiciary protected by Article III safeguards.[65] Because bankruptcy judges were only appointed to 14-year terms and were subject to a fluctuating salary, there could be "no doubt" that they were not Article III judges.[66] With only three exceptions to the Article III requirement for territorial courts, military tribunals, and courts adjudicating public rights,[67]

59. *Id.* at 54 (quoting § 1471(b) (1976 & Supp. IV 1980)).

60. Gerber, *supra* note 29, at 1019–20.

61. *Id.* at 1020 (citing DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 158 (2001)).

62. *N. Pipeline*, 458 U.S. at 55 (quoting § 1481 (1976 & Supp. IV 1980)).

63. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171 (2014) (quoting *N. Pipeline*, 458 U.S. at 71–72 & n.26) (noting that the powers of federal bankruptcy judges must be differentiated from Article III adjudication powers).

64. *N. Pipeline*, 458 U.S. at 87.

65. *See id.* at 57–61; *see* Jillian M. Clouse, *Litigant Consent: The Missing Link for Permissible Jurisdiction for Final Judgment in Non-Article III Courts After* Stern v. Marshall, 20 AM. U. J. GENDER SOC. POL'Y & L. 899, 903–04 (2012).

66. *N. Pipeline*, 458 U.S. at 60–61; *see* § 152(a)(2) (2012) ("Each bankruptcy judge shall be appointed for a term of fourteen years . . . ."); *see also* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 763 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (July 1, 2014) ("[S]ince they are not Article III judges their salaries may be diminished by Congress . . . .").

67. *See N. Pipeline*, 458 U.S. at 64–70. For each of these three exceptions, the

the Court held that bankruptcy judges did not fall within any of these categories to justify their broad jurisdiction.[68] Rather, under the 1978 Act, Congress provided bankruptcy judges with rights and privileges that were beyond the permissible scope of legislative creation.[69] Specifically,

> The *Northern Pipeline* holding was based primarily on the premise that granting the bankruptcy court such jurisdiction allowed a non-Article III court to adjudicate claims based on state-created private rights arising independent from and antecedent to the bankruptcy proceedings, and involving individuals that would not otherwise be parties to the bankruptcy proceeding.[70]

Thus, "[i]n a surprising move that caught Congress and bankruptcy lawyers off guard, the Court held that the judicial power vested in bankruptcy judges under the 1978 Act violated Article III and thus was unconstitutional."[71]

E. *Congress Strikes Back: Core Versus Noncore Claims*

Unwilling to sit quietly after the Supreme Court stripped bankruptcy judges of their authority, Congress struck back two years later by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act).[72] In an effort to comply with the Court's holding in *Northern Pipeline*, Congress delineated two categories of bankruptcy proceedings: "core" and "noncore."[73] Under the 1984 Act, "[b]ankruptcy judges may hear and enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11.'"[74] Matters arising in a Title 11 case "are generally

Supreme Court "has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus" that justify a departure from the Article III requirements. *Id.* at 70. It is "[o]nly in the face of such an exceptional grant of power" that the Court disposes with Article III safeguards. *Id.*

68. *Id.* at 71 ("We discern no such exceptional grant of power applicable in the cases before us.").

69. *Id.* at 87.

70. Samson v. Blixseth (*In re* Blixseth), Bankr. No. 09-60452-7, Adv. No. 10-00088, 2011 WL 3274042, at *3 (Bankr. D. Mont. Aug. 1, 2011) (citing *N. Pipeline*, 458 U.S. at 84).

71. Gerber, *supra* note 29, at 1000 (footnote omitted); *see N. Pipeline*, 458 U.S. at 87.

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

73. Leta, *supra* note 29, at 35 (citing Bankruptcy Amendments and Federal Judgeship Act § 157).

74. Stern v. Marshall, 131 S. Ct. 2594, 2603 (2011) (quoting 28 U.S.C. § 157(b)(1)

'administrative-type matters . . . that could arise only in bankruptcy.'"[75] Matters arising under Title 11 typically invoke "a substantive right created by the Bankruptcy Code."[76] When faced with a core proceeding, a bankruptcy court has complete authority to enter a final judgment.[77] On the other hand, noncore bankruptcy actions "are simply *related to* the underlying bankruptcy case."[78] These actions are subsumed under § 157(c) and require adjudication by an Article III court unless the parties consent.[79] Thus, when presented with a noncore claim, bankruptcy courts can only issue "proposed findings of fact and conclusions of law" in the absence of consent.[80] The proposed findings and conclusions are subsequently reviewed de novo by the district court to the extent "to which any party has timely and specifically objected."[81]

In accordance with this statutory scheme, Congress remedied the defects of bankruptcy authority by essentially reinstating the summary–plenary divide.[82] Although the categories were renamed and redefined, they nonetheless destroyed the cohesive and unified framework that existed under the 1978 Act.[83] However, it is important to note that the core–noncore distinction did not alter the subject matter jurisdiction of bankruptcy

(2012)).

75. German Am. Capital Corp. v. Oxley Dev. Co. (*In re* Oxley Dev. Co.), 493 B.R. 275, 283 (Bankr. N.D. Ga. 2013) (alteration in original) (quoting Cont'l Nat. Bank of Miami v. Sanchez, 170 F.3d 1340, 1348 (11th Cir. 1999)). For example, "objections to proofs of claims and objections to discharge of particular debts" are "[e]xamples of matters that could only arise in a bankruptcy case." *Id.* (citing *Sanchez*, 170 F.3d at 1348).

76. *Id.* (quoting *Sanchez*, 170 F.3d at 1345) (internal quotation mark omitted). "For example, an action by a trustee to avoid a preferential transfer under 11 U.S.C. § 547 would invoke such a substantive right." *Id.* (citing *Sanchez*, 170 F.3d at 1348).

77. 28 U.S.C. § 157(b)(1).

78. *In re Oxley Dev. Co.*, 493 B.R. at 284 (emphasis added) (citing *Stern*, 131 S. Ct. at 2605). "A non-core proceeding is 'related' to a bankruptcy case only when 'it affects the amount of property available for distribution or the allocation of property among creditors.'" *In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 699–700 (Bankr. N.D. Ill. 2011) (quoting *In re* Xonics, Inc., 813 F.2d 127, 130 (7th Cir. 1987)).

79. § 157(c).

80. *Id.*

81. *Id.* § 157(c)(1).

82. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171 (2014) ("The 1984 Act largely restored the bifurcated jurisdictional scheme that existed prior to the 1978 Act.").

83. *See id.*

courts.[84] Rather, subject matter jurisdiction exists over any proceeding related to a bankruptcy case, and is set forth in 28 U.S.C. § 1334.[85]

While the 1984 Act seemingly cured the jurisdictional deficiencies of bankruptcy judges, uncertainty arose over the designation of core versus noncore claims.[86] "Determining the proper classification of a proceeding . . . requires the Court to identify the nature of the cause of action itself, and whether the action invokes a right under title 11 or that arose in a case under title 11."[87] As part of this inquiry, the court must look past the formal labels attached to the allegations and examine the substance of the proceedings.[88] Even though Congress provided a nonexclusive list of 16 statutorily core matters,[89] bankruptcy courts struggled to decipher exactly *when* they possessed final dispositive authority over state law causes of action.[90] However, despite this confusion and the return to a jurisdictional dichotomy, the constitutionality of 28 U.S.C. § 157 remained unchallenged until 2011,

84. PNC Bank v. Rolsafe Int'l, LLC (*In re* Rolsafe Int'l, LLC), 477 B.R. 884, 899 (Bankr. M.D. Fla. 2012) ("Thus, the designation of a claim as 'core' or 'non-core' is separate from the issue of whether the bankruptcy court even has subject matter jurisdiction in the first place."); *see* Burns v. Dennis (*In re* Se. Materials, Inc.), 467 B.R. 337, 345 (Bankr. M.D.N.C. 2012).

85. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."); *see In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 700 (Bankr. N.D. Ill. 2011) ("Subject matter jurisdiction over bankruptcy cases is conferred by statute on District Courts . . . who may then refer those cases to Bankruptcy Judges . . . ." (citing §§ 157(a), 1334)); *see also* German Am. Capital Corp. v. Oxley Dev. Co. (*In re* Oxley Dev. Co.), 493 B.R. 275, 283 (Bankr. N.D. Ga. 2013) (noting that "the subject matter jurisdiction of bankruptcy courts is extremely broad").

86. *See* Brown, *supra* note 47, at 562 (citing G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 519–20 (2010)).

87. Chesapeake Trust v. Chesapeake Bay Enters., Inc., No. 3:13CV344, 2014 WL 202028, at *3 (E.D. Va. Jan. 17, 2014) (citing Corliss Moore & Assoc., LLC v. Credit Control Servs., Inc., 497 B.R. 219, 224 (E.D. Va. 2013)).

88. *See* Silverman v. A–Z RX LLC (*In re* Allou Distribs., Inc.), Bankr. No. 8-03-82321, Adv. No. 04-08369, 2012 WL 6012149, at *8 (Bankr. E.D.N.Y. Dec. 3, 2012) (requiring bankruptcy courts to look past labels "to determine if constitutional authority exists to enter a final judgment").

89. § 157(b)(2).

90. *See, e.g.*, *Chesapeake Trust*, 2014 WL 202028, at *2 (citing *Corliss Moore*, 497 B.R. at 224) (analyzing bankruptcy court jurisdiction); *In re Allou Distribs.*, 2012 WL 6012149, at *7–9 (examining, among other things, constitutional principles and Supreme Court precedent in determining whether the bankruptcy court had authority to enter a final judgment).

when the Supreme Court decided *Stern*.[91]

III. LET'S TALK ABOUT *STERN*, BABY

A. *A Brief Recap of an Unforgettable Case*

Charles Dickens's prose quoted in the Supreme Court's opening paragraph of *Stern* could not have more accurately foreshadowed the impending confusion that would plague bankruptcy courts over the jurisdictional debate. In a suit that had "become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises,"[92] the Court singlehandedly undermined decades of foundational bankruptcy practices overnight. Splitting 5–4,[93] the Court created an unprecedented distinction between statutory and constitutional authority for the adjudication of bankruptcy claims.[94] In so doing, the Court once again highlighted the lack of Article III protections available to bankruptcy judges and concluded that even the exercise of core versus noncore jurisdiction was insufficient to pass constitutional muster.[95]

In *Stern*, Vickie Lynn Marshall, publicly known as Anna Nicole Smith, "filed a petition for bankruptcy in the Central District of California" following the death of her husband, J. Howard Marshall II.[96] Prior to his death, J. Howard signed a living trust and will, both of which excluded Vickie and granted all property to J. Howard's son, Pierce Marshall.[97] In response to these documents, Vickie alleged that Pierce fraudulently induced J. Howard to sign the trust, despite J. Howard's intention to give Vickie half of the property.[98] Following the commencement of Vickie's bankruptcy case, Pierce filed a complaint for defamation against Vickie, arguing that she

91. Burton v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 466 B.R. 626, 640 (Bankr. D. Del. 2012).

92. Stern v. Marshall, 131 S. Ct. 2594, 2600 (2011) (alterations in original) (quoting Charles Dickens, *Bleak House*, *in* 1 WORKS OF CHARLES DICKENS 4–5 (1891)) (internal quotation mark omitted).

93. *See id.* at 2599.

94. *See id.* at 2600–01 ("We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment . . ., it lacked the constitutional authority to do so.").

95. *Id.* at 2608 ("Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment . . ., Article III of the Constitution does not.").

96. *Id.* at 2600–01.

97. *Id.*

98. *Id.*

induced her lawyers to publicly announce "he had engaged in fraud to gain control of his father's assets."[99] Vickie responded by asserting truth as a defense and alleged "tortious interference with the gift she expected from J. Howard."[100] The bankruptcy court agreed with Vickie and awarded her $400 million in compensatory damages and $25 million in punitive damages.[101] Pierce appealed and argued that the bankruptcy court lacked jurisdiction to decide Vickie's counterclaim because it was not a core proceeding.[102] In light of the conflicting opinions espoused by the district and circuit courts, the Supreme Court granted certiorari.[103]

The lengthy opinion penned by Chief Justice John Roberts concluded that while Vickie's tortious interference counterclaim was "a 'core proceeding' under the plain text of § 157(b)(2)(C)," the bankruptcy court nonetheless lacked constitutional authority under Article III to adjudicate the claim.[104] Returning to the formalist approach[105] of *Northern Pipeline*, the Court explained that Congress could not transgress the basic limitations of Article III.[106] As "an inseparable element of the constitutional system of checks and balances," Article III prohibits the sharing of judicial power with the Executive and Legislative Branches.[107] By articulating the defining features of Article III judges, the Constitution guards against the threat of abuse by ensuring that only individuals with "[c]lear heads" and "honest hearts" perform adjudicatory functions.[108] However, by delegating bankruptcy proceedings to Article I judges, Congress impermissibly bestowed judicial power on term judges.[109] This power, according to the

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 2603.

104. *Id.* at 2604, 2608.

105. *See* Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 185 (2011) ("The only way to understand *Stern v. Marshall* is to see it as a very formalistic application of legal rules that have developed over more than a century and a half concerning when Congress can vest judicial matters in non-Article III judges.").

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

107. *See id.* at 2608 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982)) (internal quotation marks omitted).

108. *See id.* at 2609 (alteration in original) (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896)) (internal quotation marks omitted).

109. *See id.* ("Article III could [not] serve its purpose . . . if the other branches of the Federal Government could confer the Government's 'judicial power' on entities outside

Court, was not Congress's to sell.[110]

Moreover, the Court rejected Vickie's argument that her tortious interference counterclaim was "a matter of 'public right'" capable of adjudication outside the Article III system.[111] Although the contours of the public rights exception have not been concretely defined, the doctrine must involve a claim "derive[d] from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."[112] While the government need not be a party to the suit, the invoked right must be "integrally related to particular federal government action."[113] As a state law counterclaim implicating no federal rights, Vickie's alleged claim to relief did not flow from any federal statute or federal regulatory objective.[114] Because Article III courts are "experts" at resolving common law counterclaims, Vickie's counterclaim must be heard within the Article III system, not by Article I tribunals.[115]

Finally, the Court dismissed Vickie's argument that bankruptcy courts were adjuncts of district courts under the 1984 Act and thus able to render final judgments on state law claims.[116] Adjunct agencies and courts possess limited power to issue orders in specialized areas of law, and these orders must be enforced by the district court.[117] Bankruptcy courts, on the other hand, resolve all issues of fact and law on claims *related to* the underlying bankruptcy proceeding.[118] As such, these courts do not make specialized and narrowly confined factual and legal determinations on a single particular area of law.[119] Thus, "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an

Article III.").

110. *See id.*

111. *Id.* at 2611.

112. *Id.* at 2613.

113. *Id.*

114. *See id.* at 2614.

115. *Id.* at 2615 (internal quotation marks omitted).

116. *Id.* at 2618.

117. *Id.* at 2619 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

118. *See id.* at 2618–19 (quoting *N. Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring)).

119. *See id.*

'adjunct' of the court of appeals."[120] In this manner, the majority refused to allow an Article I bankruptcy court to decide a core state law cause of action.

B. *Isn't It Ironic . . . Don't You Think?: Analyzing* Stern

The irony of *Stern* cannot be easily overlooked. Amid allegations that "Congress [was] trying to undermine" the constitutional independence of the judiciary, the Supreme Court ignored the essential fact that tortious interference is a *state* law claim.[121] Article III courts, by their nature, possess limited jurisdiction and are not typically proper forums for purely state law causes of action.[122] Rather, state law claims are adjudicated in state courts, where the judges are elected, not appointed, and must publicly run for office.[123] Bankruptcy judges, on the other hand, are appointed by circuit courts, receive direct appeal to the district courts, possess a salary controlled by the federal government, and can only be removed for cause.[124] "Never does the Court explain why allowing a bankruptcy court to issue a final judgment on a state law counterclaim risks undermining judicial independence in any way."[125] Because the claim would not typically be adjudicated by an Article III court, the need for Article III protection is irrelevant.

Moreover, the Court ignores the fundamental fact that Vickie's tortious interference allegation constituted a compulsory counterclaim.[126] By definition, a compulsory counterclaim *must* be brought within the suit if it "arises out of the [same] transaction or occurrence that is the subject matter of the opposing party's claim; and does not require adding another party over whom the court cannot acquire jurisdiction."[127] In this case, Vickie's tortious interference allegation stemmed from the same circumstances as

120. *Id.* at 2619.

121. Chemerinsky, *supra* note 105, at 184–85.

122. *See* U.S. CONST. art. III, § 2, cl. 1.

123. *See* Chemerinsky, *supra* note 105, at 185 ("State law claims are generally adjudicated by state law judges who rarely have life tenure.").

124. *Stern*, 131 S. Ct. at 2627 (Breyer, J., dissenting); *see* 28 U.S.C. § 152(e) (2012); Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 763 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (July 1, 2014) ("[A] bankruptcy judge may be removed 'for incompetence, misconduct, neglect of duty, or physical or mental disability' by a majority vote of 'the judicial council of the circuit in which the judge's official duty station is located' . . . ." (quoting § 152(e))).

125. Chemerinsky, *supra* note 105.

126. *See Stern*, 131 S. Ct. at 2621 (Breyer, J., dissenting).

127. FED. R. CIV. P. 13(1).

Pierce's defamation claim.[128] Specifically, Vickie argued that Pierce fraudulently induced J. Howard to sign a living trust and will that prevented any property from passing to her.[129] When these accusations reached the press, Pierce filed a defamation action against Vickie in bankruptcy court.[130] In adjudicating this claim, Vickie intended to assert truth as a defense, which would have brought to light whether Pierce engaged in fraudulent behavior.[131] If Pierce did commit fraud, Vickie's tortious interference claim would likely be granted.[132] Thus, the same underlying facts and transactions supporting Pierce's defamation claim simultaneously gave rise to Vickie's counterclaim.[133]

Additionally, Pierce had already consented to the jurisdiction of the bankruptcy court.[134] Pierce's first objection to the bankruptcy court's jurisdiction was made two full years after he filed his claim and after several adverse discovery rulings had been entered against him.[135] Although the district court initially agreed to withdraw the reference to the bankruptcy court, it nonetheless returned the proceeding to the bankruptcy judge on the basis of consent.[136] According to the district court, Pierce "chose to be a party to that litigation" and even remarked that he was "happy to litigate" in that forum.[137] Hence, the bankruptcy court possessed personal jurisdiction over Pierce.[138] Therefore, given that both requirements for a compulsory counterclaim were satisfied in this instance, Vickie was obligated to submit her tortious interference claim to the bankruptcy court or risk permanently losing the claim.[139]

Yet, despite the requirement that Vickie assert her compulsory counterclaim in the bankruptcy court proceeding, the majority stripped the court of its authority to hear the claim.[140] Focusing on an irrelevant analysis

128. *See Stern*, 131 S. Ct. at 2601.
129. *Id.*
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.*
134. *Id.* at 2606–08.
135. *Id.* at 2607.
136. *Id.*
137. *Id.* at 2607–08 (internal quotation marks omitted).
138. *See id.* at 2606–08.
139. *See supra* text accompanying note 127–33.
140. *Id.* at 2620.

of Article III, the Court held that only Article III judges could hear suits "made of the stuff of the traditional actions at common law."[141] The Court never articulated how Vickie should have initiated suit on her compulsory counterclaim in federal district court and whether the claim could even constitutionally be adjudicated in that forum. Instead, the Court offered a blanket assertion that state law counterclaims, which are normally adjudicated in state court, cannot be heard by bankruptcy judges who lack life tenure and a permanent salary.[142] The Court ignored the blatant fact that this claim had to be brought as part of the bankruptcy proceeding.[143] Asserting her counterclaim in a separate forum would have resulted in two different court systems adjudicating the same, identical facts and wasted judicial resources.[144]

Furthermore, even assuming that the counterclaim implicated Article III jurisdiction, any "intrusion on Article III turf was de minimis, and hence, permissible."[145] As noted by the dissent, bankruptcy courts often adjudicate claims resembling common law actions, and these adjudications have never posed a genuine or serious threat to the separation of powers.[146] Functionally, bankruptcy judges are nearly identical to magistrate judges, "whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch."[147] The majority fails to distinguish between bankruptcy and magistrate judges[148] and neglects to explain why an Article I magistrate judge can constitutionally hear common law or state law claims but a bankruptcy judge cannot.[149] This artificial distinction between classifications of Article I judges is unjustified and ignored completely in the majority's opinion. Thus, "*Stern* . . . is inherently

141. *Id.* at 2609 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (internal quotation mark omitted) (Rehnquist, J., concurring)).

142. *See id.* at 2609–10 (quoting *N. Pipeline*, 458 U.S. at 87 n.40) (citing *N. Pipeline*, 458 U.S. at 53).

143. *See supra* text accompanying notes 126, 140.

144. *See Stern*, 131 S. Ct. at 2630 (Breyer, J., dissenting).

145. Brown, *supra* note 47, at 568 (citing *Stern*, 131 S. Ct. at 2625–26 (Breyer, J., dissenting)).

146. *See Stern*, 131 S. Ct. at 2626 (Breyer, J., dissenting) ("A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.").

147. *Id.* at 2627.

148. *See id.* at 2626–27.

149. *See id.*

unpersuasive because it is built on a framework that makes little sense."[150]

C. *The Aftermath of* Stern*: Confusion, Chaos, and a Whole Lot of Controversy*

Due to its incomprehensible reasoning, *Stern* proceeded to shake and crumble the foundation of bankruptcy law. Although the Supreme Court made clear that its holding was "a 'narrow' one" and thus, should not have broad implications,[151] *Stern* nonetheless shattered the sense of complacency that had grown out of the 1984 Act.[152] In the six short months following the *Stern* decision, the case was cited in more than 100 opinions.[153] By its one-year anniversary, *Stern* was referenced in more than 506 decisions and continues to be cited at a rate of 40 cases per month.[154] As of December 2014, a brief search on Westlaw revealed more than 1,350 opinions citing *Stern*. Thus, *Stern*'s reception has been frenzied and it has created a litany of litigation fueled by disagreement over what the case actually means.[155]

Specifically, courts have divided into two camps in the wake of *Stern*. The majority interprets *Stern* according to its plain language and upholds the Court's assertion that the opinion is narrow.[156] At the far end of this spectrum are courts that limit *Stern* to its specific facts and decline to extend *Stern* beyond its unique circumstances.[157] According to these latter courts, *Stern* "does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection

150. Chemerinsky, *supra* note 105, at 212.

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

152. *See* Gerber, *supra* note 29, at 1010.

153. Leta, *supra* note 29, at 36.

154. *Id.* "As of February 16, 2013, a little over a year and a half after the Supreme Court handed down *Stern v. Marshall*, the case had been cited by 705 courts nationwide and by 571 scholarly sources." Gerber, *supra* note 29, at 1020–21. "A simple search on Lexis Advance reveals that there are over 1,000 cases citing to *Stern* and 118 law review articles written about the opinion." David A. Kazemba, *Granting Certiorari on* In re Bellingham*: A New Case to an Old Problem*, 49 GONZ. L. REV. 383, 384 (2013).

155. *See* Brown, *supra* note 47, at 570.

156. *Id.* at 571 & nn.120–21 (discussing the views of this majority and supplying a number of cases that have applied *Stern* narrowly).

157. *Id.* at 571; *see, e.g.*, Burton v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 466 B.R. 626, 638 (Bankr. D. Del. 2012) (explaining that the narrow interpretation of *Stern* limits the case to "the unique set of facts that was before the Supreme Court"); *In re* Salander O'Reilly Galleries, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011) ("*Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case . . . .").

with restructuring debtor and creditor relations."[158] Rather, *Stern* only deprives a bankruptcy court of jurisdiction over state law counterclaims that cannot be finally resolved in the claims-allowance process.[159] Nowhere in the opinion does the Court divest bankruptcy courts of jurisdiction over all state law causes of action.[160]

On the other end of the spectrum, however, are courts that espouse a broad interpretation of *Stern* and rely heavily on *Stern*'s reasoning.[161] These courts refuse to adjudicate any action that seeks to augment the estate, believing that such an action can only be heard by Article III judges.[162] Courts following this reasoning gain justification from the sweeping language used in *Stern*, particularly the phrase that "traditional actions at common law" must be decided by "Article III judges in Article III courts."[163] At the extreme end of this camp, courts may even refuse to issue proposed findings of fact and conclusions of law on claims they are not constitutionally authorized to hear, even when the parties consent.[164] Regardless of which

158. *In re Salander O'Reilly Galleries*, 453 B.R. at 115–16.

159. *See, e.g.*, Sundale Assocs., Ltd. v. Fla. Assocs. Capital Enters. (*In re* Sundale, Ltd.), 499 F. App'x 887, 892–93 (11th Cir. 2012) ("Under the clear language of the decision, the Supreme Court held that bankruptcy courts lack 'the constitutional authority to enter a final judgment on a state law counterclaim *that is not resolved in the process of ruling on a creditor's proof of claim*.' Because the underlined phrase is included, it must follow that a bankruptcy court would have jurisdiction to enter final judgment on state law counterclaims that are necessarily resolved in the process of ruling on a creditor's proof of claim." (citation omitted) (quoting Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011))); Samson v. Blixseth (*In re* Blixseth), 463 B.R. 896, 905 (Bankr. D. Mont. 2012) ("The Supreme Court . . . conclude[d] only that bankruptcy courts lack the constitutional authority to enter final judgments on state law counterclaims that are not resolved in the claims allowance process." (citing *Stern*, 131 S. Ct. at 2620)); Steinle v. Fall River Vill. Cmtys., LLC (*In re* CCI Funding I, LLC), Bankr. No. 09-17437, Adv. No. 09-1530, 2012 WL 3070093, at *11 (Bankr. D. Colo. July 30, 2012); Burns v. Dennis (*In re* Se. Materials, Inc.), 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012).

160. *See* Wadsworth v. Baker (*In re* DeLaFuente), Bankr. No. 10-25220, Adv. No. 10911, 2012 WL 1535848, at *3 (Bankr. D. Colo. Apr. 30, 2012) (claiming that *Stern* dealt only "with a bankruptcy court's power to enter final, binding judgments as to a *certain narrow group* of state law actions." (emphasis added)).

161. Brown, *supra* note 47, at 571.

162. *Id.* at 571–72 (quoting *In re Direct Response Media*, 466 B.R. at 638).

163. *Id.* at 572; *Stern*, 131 S. Ct. at 2609.

164. *See* Samson v. Blixseth (*In re* Blixseth), Bankr. No. 09-60452-7, Adv. No. 10-00088, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug. 1, 2011); *see also* Brown, *supra* note 47, at 573 (noting that *In re Blixseth* is, "[t]o date, the broadest interpretation given to *Stern*").

position a court chooses to adopt, one overarching principle has acquired unanimous support: *Stern* does not affect a bankruptcy court's subject matter jurisdiction—only its constitutional authority to adjudicate state law claims.[165]

Despite the division over *Stern*'s interpretation, the Supreme Court's opinion is equally as famous for what it failed to decide. In the aftermath of *Stern*, two important questions have remained unanswered. First, how should a bankruptcy court treat core proceedings that do not arise in a bankruptcy case or arise under Title 11?[166] This inquiry has become known as the *Stern* gap, in which a specific subset of core proceedings is forced to remain in judicial limbo.[167] "No statute directly addresses the issue of the nature of the counterclaim that arose in *Stern*," and thus, bankruptcy courts have been left without guidance on how to adjudicate core claims that are related to bankruptcy proceedings.[168]

Second, can parties consent to bankruptcy court adjudication where such jurisdiction is statutorily but not constitutionally authorized?[169] This issue of consent has garnered conflicting opinions and created a circuit split among the Ninth, Sixth, Fifth, and Seventh Circuits.[170] The position embraced by the Ninth Circuit is that *Stern* did not alter the statutory system of final adjudication by consent present in § 157(c)(2).[171] Because *Stern* does

165. *See, e.g.*, *In re DeLaFuente*, 2012 WL 1535848, at *3 (stating that "*Stern* did not make any rulings as to a bankruptcy court's subject matter jurisdiction"); *In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 700–01 (Bankr. N.D. Ill. 2011) ("*Stern* addressed only what a Bankruptcy Judge may do once a case is referred to it, not whether that judge has jurisdiction to hear the case at all." (citing *Stern*, 131 S. Ct. at 2620)); Liberty Mut. Ins. Co. v. Citron (*In re* Citron), Bankr. No. 08-71442, Adv. No. 09-8125, 2011 WL 4711942, at *2 (Bankr. E.D.N.Y. Oct. 6, 2011) ("*Stern* does not deprive a bankruptcy court of subject matter jurisdiction." (citing *Stern*, 131 S. Ct. at 2611, 2616)).

166. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172–73 (2014); Jolene Tanner, Stern v. Marshall*: The Earthquake that Hit the Bankruptcy Courts and the Aftershocks that Followed*, 45 LOY. L.A. L. REV. 587, 603 (2012).

167. *See Arkison*, 134 S. Ct. at 2172–73.

168. *See* Tanner, *supra* note 166.

169. *See supra* text accompanying notes 5–7.

170. Kazemba, *supra* note 154; *see infra* note 178 and accompanying text; *see also* Brown, *supra* note 47, at 583 ("In *Stern*, the Court also left mixed signals as to the role of consent in bankruptcy proceedings.").

171. Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 569–70 (9th Cir. 2012), *aff'd sub nom.*, Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014); *see also* Crawford v. Zambrano (*In re* Zambrano Corp.), 478 B.R. 670, 677 (Bankr. W.D. Pa. 2012) (finding consent sufficient to allow the court to hear

not impact subject matter jurisdiction, the ability to consent is a personal, not a structural, right and does not implicate constitutional protections.[172] Furthermore, an adverse ruling on parties' ability to consent would call into question the entire framework of consensual adjudication used by Article I magistrate judges.[173] Given that the Supreme Court "has upheld exercise of the Article III judicial power by a magistrate judge . . . with the consent of the parties,"[174] a contrary standard for bankruptcy judges would be arbitrary and unjustified. Thus, the Ninth Circuit reasons that adjudication by consent does not offend Article III.

In contrast, the Fifth, Sixth, and Seventh Circuits have found consent insufficient to confer jurisdiction on bankruptcy courts.[175] According to these opinions, consent implicates separation of powers, and "notions of consent and waiver cannot be dispositive because the [Article III] limitations serve institutional interests that the parties cannot be expected to protect."[176] In this manner, Article III adjudication is perceived as a structural requirement, not a private right.[177] Consent cannot, therefore, be invoked to waive this foundational principle "unless the claim falls within the so-called 'public rights' exception to Article III."[178] It was this precise dispute between the Ninth, Fifth, Sixth, and Seventh Circuits that bankruptcy practitioners and

and enter final judgment on both core and noncore claims); Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (*In re* GB Herndon & Assocs., Inc.), 459 B.R. 148, 160 (Bankr. D.C. 2011) ("[A] bankruptcy judge's hearing and determining a matter by the consent of the parties does not offend Article III.").

172. *In re Bellingham*, 702 F.3d at 567; Clouse, *supra* note 65, at 914 (explaining that Article III adjudication is a procedural right that can be waived by the parties to avoid a separation of powers issue); *see* Shaia v. Taylor (*In re* Connelly), 476 B.R. 223, 233–34 (Bankr. E.D. Va. 2012) (claiming that the ability to consent was explicitly recognized in *Stern* when the Court stated it was not adjudicating the subject matter jurisdiction of bankruptcy courts).

173. Brown, *supra* note 47, at 584.

174. *In re GB Herndon & Assocs., Inc.*, 459 B.R. at 159; *accord* Peretz v. United States, 501 U.S. 923, 936 (1991).

175. *See, e.g.*, Frazin v. Haynes & Boone, LLP (*In re* Frazin), 732 F.3d 313, 320 n.3 (5th Cir. 2013) (quoting *Stern*, 131 S. Ct. at 2620; CFTC. v. Schor, 478 U.S. 833, 850–51 (1986)); Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 773 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (July 1, 2014); Waldman v. Stone, 698 F.3d 910, 918 (6th Cir. 2012).

176. *In re Frazin*, 732 F.3d at 320 n.3 (quoting *Schor*, 478 U.S. at 850–51) (internal quotation marks omitted).

177. *See Waldman*, 698 F.3d at 918 (quoting *Stern*, 131 S. Ct. at 2612).

178. *Id.* (citing *Stern*, 131 S. Ct. at 2610).

judges hoped would be resolved in *Arkison*.[179]

IV. MUCH ADO ABOUT NOTHING: *EXECUTIVE BENEFITS INSURANCE AGENCY V. ARKISON*

A. *The Facts and Nothing but the Facts*

"Nicolas Paleveda and his wife owned and operated two companies—Aegis Retirement Income Services, Inc. (ARIS), and Bellingham Insurance Agency, Inc. (BIA)."[180] These corporations were closely related, and ARIS "routed all of its income and expenses through BIA."[181] In early 2006, however, BIA became insolvent and ceased operations.[182] The following day, Paleveda "incorporate[d] Executive Benefits Insurance Agency, Inc. (EBIA)," using BIA funds.[183] Thereafter, EBIA deposited $250,157.70 of commission income into a joint account held by ARIS and EBIA.[184] Approximately two weeks after closing its doors, BIA had "irrevocably assigned [all] the insurance commissions from . . . the American National Insurance Company, to Peter Pearce, a long-time BIA and ARIS employee."[185] Pearce retained $123,133.58 of these funds and deposited them into the joint account held by ARIS and EBIA, after which all of the funds ($373,291.28) were credited to EBIA as an intercompany transfer.[186]

"On June 1, 2006, BIA filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington."[187] In response, Peter Arkison, the Chapter 7 trustee, initiated a complaint alleging 18 causes of action against EBIA and ARIS, including fraudulent conveyance.[188] According to the complaint, "EBIA was a successor corporation of BIA and therefore liable for its debts."[189] Following disagreement over the proper forum for Arkison's claims, the bankruptcy

179. *See supra* text accompanying notes 5–7.

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

181. Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 556 (2012), *aff'd sub nom.*, 134 S. Ct. at 2165.

182. *Arkison*, 134 S. Ct. at 2168–69.

183. *Id.* at 2169.

184. *See In re Bellingham*, 702 F.3d at 557.

185. *Id.* at 556.

186. *Id.* at 557.

187. *Arkison*, 134 S. Ct. at 2169.

188. *Id.*; *In re Bellingham*, 702 F.3d at 557.

189. *In re Bellingham*, 702 F.3d at 557.

court granted summary judgment in favor of Arkison and entered a final judgment for $373,291.28.[190] EBIA appealed to the district court.[191] Upon conducting a de novo review, the district court affirmed the bankruptcy court's grant of summary judgment and similarly entered judgment in favor of Arkison.[192] Unsatisfied, EBIA appealed to the Ninth Circuit.[193]

Although the Ninth Circuit determined that the bankruptcy court lacked constitutional authority to adjudicate the fraudulent conveyance claim, its decision was "no reprieve" because the court found that EBIA consented to the bankruptcy court's jurisdiction.[194] In reaching this conclusion, the Ninth Circuit reiterated that "[t]he waivable nature of the allocation of adjudicative authority between bankruptcy courts and Article III courts is well established."[195] Specifically, the court noted that Article III serves to protect personal interests, and any personal right is subject to either express or implied waiver.[196] Additionally, the court referred to the permissible jurisdictional waiver for noncore proceedings and reasoned that the same logic "surely permits" adjudication of core proceedings by consent.[197] Thus, under the Ninth Circuit's reasoning, any litigant who fails to timely object to non-Article III jurisdiction has impliedly consented to adjudication in that forum.[198] Unsurprisingly, EBIA appealed from this determination of consent.[199]

B. *Bridge over Troubled Water: The Supreme Court's Reasoning*

Following the grant of certiorari and oral argument, the Supreme Court affirmed the Ninth Circuit's judgment on narrow grounds.[200] Focusing solely on the question of whether a bankruptcy court could issue proposed findings of fact and conclusions of law in core claims, the Court sought to

190. *Id.*; *Arkison*, 134 S. Ct. at 2169.
191. *Arkison*, 134 S. Ct. at 2169.
192. *Id.*
193. *Id.*
194. *In re Bellingham*, 703 F.3d at 556.
195. *Id.* at 566.
196. *Id.* at 567 (quoting CFTC v. Schor, 478 U.S. 843, 848 (1986)).
197. *Id.*
198. *See id.*
199. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014).
200. *See id.* at 2175 (holding that "EBIA . . . received the same review from the District Court that it would have received if the Bankruptcy Court had treated the fraudulent conveyance claims as non-core proceedings").

remedy the gap created by *Stern*.[201] However, despite the fact that the parties briefed and argued the issue of consent, the Court refused to address consent in its opinion.[202]

In bridging the *Stern* gap, the Supreme Court interpreted § 157(c) as authorizing bankruptcy courts to submit proposed findings and conclusions to the district court for de novo review on statutorily noncore claims.[203] According to the Court, "[t]he statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)."[204] In arriving at this conclusion, the Court referenced the severability provision in 28 U.S.C. § 151, which prevents decisions like *Stern* from invalidating particular applications of the statute.[205] Specifically, when one portion of the statute is deemed unconstitutional, the remainder of the statute is unaffected, thus leaving open additional avenues for adjudication.[206] The existence of this severability clause closed the *Stern* gap by invalidating the core category but leaving open the noncore option.[207] The Court explained,

> With the "core" category no longer available for the *Stern* claim at issue, we look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim—specifically, whether it is "not a core proceeding" but is "otherwise related to a case under title 11." If the claim satisfies the criteria of § 157(c)(1), the bankruptcy court simply treats the claims as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.
>
> The conclusion that the remainder of the statute may continue to apply to *Stern* claims accords with our general approach to severability. We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it "remains 'fully operative as a law,'"

201. *See id.* at 2168, 2172–73.

202. *Id.* at 2170 n.4. ("Because we conclude that EBIA received the *de novo* review and entry of judgment to which it claims constitutional entitlement, this case does not require us to address whether EBIA in fact consented to the Bankruptcy Court's adjudication of a *Stern* claim and whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim. We reserve that question for another day." (citation omitted)).

203. *Id.* at 2168, 2173.

204. *Id.* at 2173.

205. *Id.*

206. *See id.*

207. *See id.*

> and so long as it is not "evident" from the statutory text and context that Congress would have preferred no statute at all. Neither of those concerns applies here. Thus, § 157(c) may be applied naturally to *Stern* claims.[208]

Employing this framework, the Court next determined whether § 157(c)(1) was applicable to Arkison's fraudulent conveyance claim.[209] The Court assumed, for the purposes of the opinion, that the fraudulent conveyance claims at issue were *Stern* causes of action and noted that the claim was to be treated as noncore.[210] Nonetheless, the Court found fraudulent conveyance actions to be "self-evidently" related to bankruptcy proceedings under Title 11.[211] In particular, the fraudulent conveyance claim could have had a potential effect on the bankruptcy estate and therefore fell within the outer bounds of the bankruptcy court's subject matter jurisdiction.[212] As a noncore claim, the bankruptcy court was thus empowered to issue proposed findings of fact and conclusions of law for the district court's review.[213]

Having concluded that the bankruptcy court could constitutionally propose findings of fact and conclusions of law on the fraudulent conveyance claim, the Court analyzed the district court's interpretation of the bankruptcy court's judgment.[214] Because EBIA did not argue on appeal to the district court that the bankruptcy court lacked constitutional authority to hear the claim, the district court did not review the bankruptcy court's judgment under *Stern*.[215] However, the district court engaged in a de novo review of the bankruptcy court's grant of summary judgment and issued a well-reasoned opinion affirming that holding.[216] In a separately entered order, the district court granted judgment in favor of Arkison.[217] Thus, while

208. *Id.* (citation omitted).
209. *Id.* at 2174.
210. *Id.*
211. *Id.*
212. *See id.* ("At bottom, a fraudulent conveyance claim asserts that property that should have been part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 was improperly removed. That sort of claim is 'related to a case under title 11' under any plausible construction of the statutory text, and no party contends otherwise.").
213. *Id.* at 2168, 2170.
214. *Id.* at 2174–75.
215. *Id.* at 2174.
216. *Id.*
217. *Id.*

the district court did not expressly invoke *Stern*, EBIA received de novo review of the bankruptcy court's judgment.[218] This de novo review is all EBIA would have been entitled to under a *Stern* analysis with proposed findings and conclusions.[219] Therefore, the district court's de novo review cured any error committed by the bankruptcy court.[220]

V. READY, SET, DODGE: THE IMPLIED AUTHORIZATION OF CONSENT IN *ARKISON*

Although the Supreme Court expressly reserved the question of consent for another time, another case, and another day, Justice Clarence Thomas's own words impliedly authorize parties to consent to the bankruptcy court's jurisdiction. According to the Court, *Stern* claims are permitted "to proceed as non-core within the meaning of § 157(c)."[221] However, § 157(c) includes two subsections, with § 157(c)(2) granting bankruptcy courts jurisdiction by consent in noncore claims.[222] The Supreme Court did not limit its analysis to § 157(c)(1) alone but rather cited the broader, all-inclusive category of § 157(c).[223] This overarching reference thus subsumed consent within the Court's ruling. By neglecting to specifically refer to § 157(c)(1) alone, the Court's own language contradicts its refusal to decide the consent issue.[224] The plain language of the Court's holding is expansive enough to decide the issue it punted.

Specifically, the Court stated in its analysis that *Stern* claims are to be treated as noncore actions.[225] Citing the severability clause, the Justices noted that the remainder of the statute was to remain intact even though § 157(b) could no longer be applied to *Stern* claims.[226] The remaining applicable provisions of the statute include both subsections in § 157(c). Both subsections implicate noncore claims that are related to the bankruptcy

218. *See id.*
219. *See id.* at 2175.
220. *Id.*
221. *Id.* at 2173.
222. *See generally* 28 U.S.C. § 157(c) (2012).
223. *Arkison*, 134 S. Ct. at 2173 ("The statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)."); *id.* ("[Section] 157(c) may be applied naturally to *Stern* claims.").
224. *Compare id.* at 2173, *with id.* at 2170 n.4.
225. *Id.* at 2173.
226. *Id.*

proceeding.[227] In its direct language, the Supreme Court held that *Stern* claims are comparable to noncore claims under the inclusive statutory framework of § 157(c).[228] This conclusion was not restricted in any manner solely to the submission of proposed findings of fact and conclusions of law under § 157(c)(1).[229] Using the Court's own "general approach to severability"[230] and the plain language command to treat *Stern* claims as noncore under § 157(c) in its entirety,[231] it is impossible to reconcile the Court's assertion that it did not decide the consent issue.

Furthermore, the Court referenced the applicability of § 157(c) to *Stern* claims multiple times in the opinion—it was not merely an oversight.[232] In particular, the Court stated, (1) the remainder of the statute, which includes § 157(c), is not affected by determining that *Stern* claims fall outside § 157(b) and "may continue to apply to *Stern* claims"; (2) "§ 157(c) may be applied naturally to *Stern* claims"; and (3) "[t]he statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)."[233] Thus, the Court directly discussed the general applicability of § 157(c), in its entirety, to *Stern* claims at least three times in the opinion.[234] By applying § 157(c) to *Stern* claims, subsection (c)(2) is thus included in this application and approved of by the Court. The Court's failure to carefully limit its statutory reference has impliedly resolved the consent question.

Indeed, the weight of authority supports a finding of jurisdiction by consent.[235] As previously noted, *Stern* did not implicate subject matter jurisdiction but rather referenced a waivable private right.[236] Nothing in

227. *See* § 157(c).

228. *See Arkison*, 134 S. Ct. at 2173.

229. *See id.* at 2173–74.

230. *Id.* at 2173.

231. *See id.* at 2173.

232. *See id.* (noting the general applicability of § 157(c) three times).

233. *Id.*

234. *See id.*

235. Canal Corp. v. Finnman (*In re* Johnson), 960 F.2d 396, 403 (4th Cir. 1992) ("The substantial weight of authority, indicates that a party can impliedly consent to entry of judgment by the bankruptcy court in a non-core related matter."); Yellow Sign, Inc. v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 466 B.R. 750, 770 (Bankr. M.D.N.C. 2012) ("The Supreme Court has repeatedly recognized that parties can agree to be bound by a decision of a court that may lack specific constitutional authority to make a final decision without their consent.").

236. *See* Jonathan Azoff & Thomas Szaniawski, Stern v. Marshall *and the Limits of Consent*, AM. BANKR. INST. J., Sept. 2011, at 77 ("The linchpin of the Court's rationale

Stern expressly or impliedly prohibited the parties from consenting to the bankruptcy court's jurisdiction, and final judgments entered pursuant to consent are still reviewable on appeal by an Article III tribunal.[237] Moreover, it is arguable that *Stern* itself even recognized the constitutionality of consent.[238] According to the Bankruptcy Court for the Eastern District of Virginia,

> This ability of parties to consent to adjudication by a non-Article III tribunal was explicitly recognized in *Stern*:
>
> > [The allocation of] authority to enter final judgment between the bankruptcy court and the district court . . . does not implicate questions of subject matter jurisdiction. By the same token, § 157(b)(5) simply specifies where a particular category of cases should be tried.[239]

Thus, there is nothing in *Stern* to justify the proposition that a bankruptcy court's ability to adjudicate claims by consent has been tarnished.[240]

In fact, stripping bankruptcy courts of their right to adjudication by consent would represent a drastic departure from the power bankruptcy courts have historically exercised.[241] Specifically, eliminating consent as an avenue for claim resolution not only challenges the foundation of the magistrate consent system, but it also represents a broader structural limitation on the power of Article I courts.[242] Given that *Stern* was a narrow

was that § 157(b)(5) *is not jurisdictional*.").

237. *See* Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (*In re* GB Herndon & Assocs., Inc.), 459 B.R. 148, 160 (Bankr. D.C. 2011).

238. *See* Shaia v. Taylor (*In re* Connelly), 476 B.R. 223, 233 (Bankr. E.D. Va. 2012) (stating that "*Stern* . . . recognized that such consent can be express or implied" (italics added)).

239. *Id.* (alterations in original) (citation omitted) (quoting Stern v. Marshall, 131 S. Ct. 2594, 2607 (2011)).

240. *See* Roberta A. Colton & Stephanie C. Lieb, *Is Bankruptcy Court Jurisdiction in Flux Because of Anna Nicole Smith?*, 86 FLA. B.J., Jan. 2012, at 36, 40 (citing *In re* Safety Harbor Resort & Spa, 456 B.R. 703, 717 (Bankr. M.D. Fla. 2011)); *see also* Brown, *supra* note 47, at 584 (explaining that "the commonsensical conclusion is that *Stern* has left the role of consent intact").

241. *See In re GB Herndon*, 459 B.R. at 161.

242. *See In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 701 (Bankr. N.D. Ill. 2011) ("If *Stern* had destroyed the power of Bankruptcy Judges to enter final judgments by consent in non-core but otherwise related proceedings, that would have called into question the power of Magistrate Judges and other Article I judicial officers to make final adjudication by consent . . . .").

holding that supposedly did not change all that much, it is difficult to foresee the Supreme Court drastically undermining the bankruptcy foundation by disposing of consent. Rather, both *Stern* and *Arkison* had the opportunity to declare consent unconstitutional and expressly refrained from doing so. Instead, *Stern* and *Arkison* cited § 157(c) with approval, "without suggesting it was constitutionally infirm."[243] Through *Arkison*'s application of § 157(c) to *Stern* claims, it logically follows that consent is a permissible avenue for acquiring jurisdiction over claims related to a bankruptcy proceeding. Thus, the law regarding consent is not in a state of flux, as argued by some courts.[244] It has instead been approved for application to *Stern* claims through the Court's express language and insistence that bankruptcy jurisdiction will remain fundamentally unchanged by its decision in *Stern*.

Furthermore, this acceptance of consent is necessary to ensure judicial efficiency and promote swift resolution of pending claims.[245] By statute, a bankruptcy court may only adjudicate claims that are at least related to the underlying bankruptcy proceeding.[246] The phrase "related to" denotes, at a minimum, factual similarity between the bankruptcy case and the pending counterclaim such that the counterclaim may affect the property available for distribution among creditors.[247] Having presided over the bankruptcy case from its inception, the bankruptcy judge is familiar with the facts and procedural history of the case and thus is more appropriately able to

243. *In re GB Herndon*, 459 B.R. at 161; *accord* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014).

244. *See, e.g.*, Paloian v. LaSalle Bank Nat'l Ass'n (*In re* Doctors Hosp. of Hyde Park, Inc.), 507 B.R. 558, 591 (Bankr. N.D. Ill. 2013); *see also* Kazemba, *supra* note 154, at 387 (citing Jeremy Fogel & G. Eric Brunstad, Jr., *Implications of* Stern v. Marshall *for Article III and Magistrate Judges*, at 0:27:30-0:30:09, 0:55:12-1:01:36 (Federal Judicial Center June 22, 2012)).

245. *See* Gerber, *supra* note 29, at 1029.

246. *See* Tolliver v. Bank of Am. (*In re* Tolliver), 464 B.R. 720, 732 (Bankr. E.D. Ky. 2012); Burns v. Dennis (*In re* Se. Materials, Inc.), 467 B.R. 337, 346 (Bankr. M.D.N.C. 2012) ("If the proceeding in question is not 'related to' the bankruptcy, then the bankruptcy court has no jurisdiction to hear the matter at all.").

247. *See* German Am. Capital Corp. v. Oxley Dev. Co. (*In re* Oxley Dev. Co.), 493 B.R. 275, 286 (Bankr. N.D. Ga. 2013); *In re Tolliver*, 464 B.R. at 732 (quoting Michigan Empl't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.3d 1132, 1141–42 (6th Cir. 1991)). "The 'related to' test is obviously very broad; indeed, the proceeding need not necessarily be against the debtor or the debtor's property." PNC Bank v. Rolsafe Int'l, LLC (*In re* Rolsafe Int'l, LLC), 477 B.R. 884, 894 (Bankr. M.D. Fla. 2012).

adjudicate the counterclaim without wasting judicial resources.[248] Forcing an Article III judge to hear and decide a state law cause of action premised on the same facts as the bankruptcy case is not only duplicative but also clogs the court system and stalls the bankruptcy proceeding.[249] Such a system increases the caseload of district court judges while simultaneously putting bankruptcy cases on hold until the district court enters a final order.[250] District courts already face "bulging docket[s]," and removing consent as an avenue for adjudication would have a profoundly negative impact on the judicial system as a whole.[251] Entry of judgment by consent is therefore a rational decision by parties who wish to adjudicate their claims quickly, efficiently, and cost-effectively before Article I judges.[252]

Moreover, permitting a bankruptcy judge to enter final judgment by consent instead of proposing findings of fact and conclusions of law reduces the district court's work load on appeal.[253] When a litigant appeals a bankruptcy court's final judgment, the district court "reviews the Bankruptcy Judge's legal conclusions *de novo* and its findings of fact for clear error."[254] However, when the bankruptcy judge merely proposes findings of fact and legal conclusions, the district court must review *all* findings and conclusions objected to by the parties under the de novo standard.[255] This heightened standard increases the amount of time a district court judge spends on the case and slows the adjudication of other claims within the court system.[256] Additionally, when the bankruptcy court only issues proposed findings and conclusions, no final judgment can be entered until the district court has engaged in a de novo review and prepared the

248. *See* Gerber, *supra* note 29, at 1029.

249. *See* Heller Ehrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), Bankr. No. 08-32514, Adv. No. 10-3203, 2011 WL 4542512, at *6 (Bankr. N.D. Cal. Sept. 28, 2011) (arguing that *Stern* "thrusts unnecessary burdens on already overworked district courts, especially when bankruptcy courts have a particular expertise in and familiarity with" bankruptcy actions).

250. *See generally In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 701 (Bankr. N.D. Ill. 2011) (noting that destroying the power of consent for Article I judges would result in "a vast increased burden on the District Judges").

251. Gerber, *supra* note 29, at 1029.

252. *In re Olde Prairie Block Owner*, 457 B.R. at 700.

253. *See id.*

254. *Id.* (citing Follett Higher Educ. Grp., Inc. v. Berman (*In re* Berman), 629 F.3d 761, 766 (7th Cir. 2011)).

255. *Id.* (citing 28 U.S.C. § 157(c)(1) (2012)).

256. *See id.*

final order.[257] However, allowing bankruptcy courts to issue final judgments by consent limits the number of bankruptcy cases that district court judges must review to those that are appealed. Thus, authorizing adjudication by consent enables the entire judicial framework to run efficiently and mitigates overcrowding at the district court level.

VI. THE TIMES THEY ARE A-CHANGIN': PROPOSED AMENDMENTS TO § 157(b)

"Sometimes the questions are complicated and the answers are simple."[258]

Although the Supreme Court impliedly authorized the use of consent to adjudicate *Stern* claims in *Arkison*, statutory authority for consent remains elusive.[259] According to the plain text of § 157(c), consent is only permissible in noncore proceedings.[260] The statute itself is silent on the use of consent in core actions that cannot constitutionally be adjudicated by Article I judges.[261] Moreover, while the Court judicially closed the *Stern* gap by treating *Stern* claims as noncore proceedings,[262] this closure has not yet been reflected in the statutory scheme. Therefore, to enhance the clarity of § 157 in light of *Stern* and statutorily legitimize consent in core proceedings in accordance with *Arkison*, legislative amendments must be implemented. These amendments should target § 157(b) to redress the confusion over treating certain core claims as noncore in particular instances. In other words, although the Court permitted *Stern* claims to proceed as noncore, the cleaner, simpler solution is to resolve *Stern* claims under the core umbrella because *Stern* claims are, by definition, core proceedings related to the bankruptcy case.[263] Addressing *Stern* claims under § 157(b) negates the need to invoke the severability clause and simplifies the statutory scheme in accordance with the Court's ruling. Thus, this Part proposes two simple and effective changes to § 157(b): first, revise subsection (b)(1) to expressly permit bankruptcy courts to enter proposed findings and conclusions in core proceedings; second, create an additional subsection, presumably (b)(4),

257. § 157(c)(1) (providing that the bankruptcy court can propose findings of fact and conclusions of law in noncore proceedings, "and any final order or judgment shall be entered by the district judge").

258. THE LUCKY ONE (Village Roadshow Pictures 2012).

259. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173–74 (2014).

260. *See* § 157(c)(2).

261. *See id.*

262. *See Arkison*, 134 S. Ct. at 2172–73.

263. *See* Stern v. Marshall, 131 S. Ct. 2594, 2605 (2011).

that authorizes consent in core actions related to the bankruptcy proceeding.

A. *Making Lemonade Out of Lemons: Amending § 157(b)(1)*

The most straightforward amendment Congress can introduce to statutorily eliminate the *Stern* gap in light of *Arkison* is a textual revision to § 157(b)(1). Currently, it reads,

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.[264]

Arkison, however, has made clear that not only may bankruptcy judges enter final judgments in constitutionally and statutorily core proceedings, but they may also propose findings of fact and conclusions of law in statutorily core claims that cannot constitutionally be heard by Article I tribunals.[265] As it currently reads, § 157(b)(1) ignores the *Arkison* holding completely and leaves *Stern* claims statutorily in limbo.[266] While *Arkison* judicially remedied this gap by resorting to the procedures set forth in § 157(c),[267] Congress should nonetheless amend § 157(b)(1) to promote internal consistency in bankruptcy interpretation and express that it is unnecessary to label a certain category of core claims as noncore.

Faced with the need for uniform bankruptcy policies and statutory clarity—particularly following years of *Stern* confusion—Congress can clear the murky waters with the addition of one simple sentence to subsection (b)(1). Specifically, Congress should include the following language at the end of subsection (b)(1):

> In the event that a core claim cannot constitutionally be adjudicated by a bankruptcy judge, the bankruptcy judge is authorized to issue proposed findings of fact and conclusions of law to the district court, which will then enter a final order or judgment after considering the bankruptcy court's findings and conclusions and after conducting a de novo review of all matters to which any party specifically objected.[268]

264. § 157(b)(1).
265. *Arkison*, 134 S. Ct. at 2170, 2173.
266. *See* § 157(b)(1).
267. *Arkison*, 134 S. Ct. at 2173.
268. *Cf.* § 157(c)(1).

This language tracks the phraseology of subsection (c)(1), which permits bankruptcy courts to issue proposed findings and conclusions in noncore claims.[269] The internal consistency between these two subsections is paramount, given the Supreme Court's assertion that *Stern* claims should be treated as noncore.[270] Through this simple textual addition, Congress not only statutorily eliminates the *Stern* gap, but it also promotes similarity between bankruptcy caselaw and statutory authority. It is this predictability and clarity that bankruptcy practitioners and judges have desperately sought since *Stern*'s release in 2011.

B. *I'm Just a Bill: Creating Subsection (b)(4) to Authorize Consent*

In addition to amending subsection (b)(1) to statutorily close the *Stern* gap, Congress should also authorize consent to core claims through creation of subsection (b)(4). Given the implied authorization of consent in *Arkison* and the necessity of consent for efficient judicial administration of claims, it is extremely unlikely the Supreme Court will declare consent unconstitutional in the future. The implications on the magistrate system of consent, which have been consistently upheld by the Court, further guard against the possibility of consent becoming an unconstitutional avenue for adjudication.[271] Thus, congressional acceptance of consent for core claims is warranted in light of *Arkison* and would resolve the circuit split in favor of the Ninth Circuit.[272]

Particularly, the language of subsection (b)(4) should mirror that of subsection (c)(2), given the desirability for uniform consent procedures in both core and noncore claims. For efficiency purposes, it does not make sense to alter the consent procedures for core claims simply because they arise under Title 11 or in a Title 11 case. Rather, core and noncore proceedings should be treated identically in their requirements for consent.[273] Thus, subsection (b)(4) should be implemented with the

269. *Id.*

270. *See Arkison*, 134 S. Ct. at 2170, 2173.

271. *See, e.g.*, *In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 701 (Bankr. N.D. Ill. 2011) (discussing the implications of invalidating consent); Heller Ehrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), Bankr. No. 08-32514, Adv. No. 10-3203, 2011 WL 4542512, at *6 (Bankr. N.D. Cal. Sept. 28, 2011).

272. *See supra* Part III.C.

273. *See* Bayonne Med. Ctr. v. Bayonne/Omni Devs. (*In re* Bayonne Med. Ctr.), Bankr. No. 07-15195, Adv. No. 09-1689, 2011 WL 5900960, at *7 (Bankr. D.N.J. Nov. 1, 2011) (noting that the "gap" in consent "would logically and appropriately be filled by judicial extension of § 157(c)(2)" to include core claims).

following language:

> Notwithstanding the provisions of subsection (b)(1), the district court, with the consent of all the parties to a proceeding, may refer a core proceeding related to a bankruptcy case to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

The addition of this subsection with language mirroring subsection (c)(1) is critical for bankruptcy judges to statutorily adjudicate core proceedings falling outside their constitutional authority. Because the Supreme Court has not declared consent in noncore proceedings unconstitutional, it is unlikely that this same language would create a constitutional question for core claims. Moreover, provided that the Court expressly stated that all of the provisions of § 157(c) apply to *Stern* claims,[274] it is a logical progression to amend subsection (b)(1) and create subsection (b)(4) to directly address *Stern* claims, instead of muddying the waters by applying § 157(c) to certain statutorily core claims. By implementing two simple amendments to § 157(b), Congress can clarify the jurisdiction of bankruptcy courts and resolve the *Stern* gap without having to apply statutory authority that is not directly on point.

C. *If It's So Simple, Why Hasn't It Been Done?*

Although amendment of § 157(b) appears to be an obvious solution in the aftermath of *Stern*, the undeniable question arises as to why Congress did not take legislative action in the three years leading up to *Arkison*. Section 157 has remained unchanged despite the Supreme Court's division of core claims into constitutional and unconstitutional categories. Moreover, there appears to be no congressional movement on an amendment and no proposed legislative changes in the works. Why has Congress been complacent in ignoring the self-evident solution of a statutory amendment?

The primary argument against statutory reformation appears to be the historical fact that Congress has already struck out twice with the Bankruptcy Act.[275] Congress's first longstanding comprehensive attempt to codify bankruptcy rules was the 1978 Act.[276] However, the Supreme Court quickly declared the 1978 Act's grant of authority to bankruptcy courts

274. *See Arkison*, 134 S. Ct. at 2173.
275. *See supra* Part II.
276. Gerber, *supra* note 29, at 999.

unconstitutional.[277] In an attempt to remedy this defect, Congress divided bankruptcy jurisdiction into core versus noncore claims with the 1984 Act.[278] While the 1984 Act went unchallenged for two decades, the Supreme Court eventually distinguished between constitutionally and unconstitutionally core claims.[279] Requiring that claims be both statutorily and constitutionally core to invoke Article I jurisdiction, the Court disrupted the jurisdictional homeostasis that Congress desperately sought to achieve with the 1984 Act. Thus, in light of the Court's recent holdings in *Stern* and *Arkison*, it is unsurprising that Congress has refused to step up to the plate and strike out a third time.

Additionally, practitioners aptly highlight that legislative change is a deliberately slow process, particularly when trying to resolve a conflict on which so many courts have differed.[280] Even the Justices themselves could not unanimously agree in *Stern* to follow the formalist analysis of *Northern Pipeline* and differentiate between two classes of core claims.[281] It is arguable that Congress is waiting for more pointed and express guidance from the Supreme Court before attempting to reform § 157. Furthermore, because the Court judicially closed the *Stern* gap and impliedly authorized consent,[282] Congress may not perceive any benefit in amending § 157. With the continued development of caselaw on the subject, Congress may feel that it gains nothing by proposing an amendment and may see bankruptcy authority as a litigation puzzle the Supreme Court will eventually decipher.

The problem with these arguments, however, is that they neglect the reality that the current status of bankruptcy jurisdiction is marked by chaos, confusion, and misunderstanding.[283] The Supreme Court's division of core

277. *Id.* (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 50 (1982)).

278. *See* Leta, *supra* note 29, at 35; *see also* 28 U.S.C. § 157 (2012).

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

280. *See* Brianne J. Gorod, *The Collateral Consequences of Ex Post Judicial Review*, 88 WASH. L. REV. 903, 955 (2013) ("Significantly, though, much of the reason that legislative and regulatory action is generally slow in coming is a function not of constitutional imperative, but of Congress's own making . . . ."); *see also* Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1, 40 n.243 (1999) (referring "to bicameralism as a 'stalling' mechanism" that "simply slow[s] down the progress of a legislative proposal").

281. The vote in *Stern* was 5-4. *See Stern*, 131 S. Ct. at 2599; McElwee v. Scarff Bros., Inc. (*In re* McElwee), 469 B.R. 566, 572 (Bankr. M.D. Pa. 2012).

282. *See supra* Part V.

283. *See* Kazemba, *supra* note 154, at 387; Erwin Chemerinsky, Stern v. Marshall:

claims into two camps does not mirror the congressionally approved statutory framework.[284] These differing standards have resulted in conflicting interpretations and implementation among the courts, and thus the unified system of bankruptcy law is beginning to fall apart piece by piece. By adding a commonsensical interpretation of *Stern* and *Arkison* to § 157, Congress can mitigate judicial confusion and provide informative guidance to the courts. Given that Congress is responsible for the division of core and noncore claims, it should take responsibility and modify the statute in accordance with Supreme Court precedent.

Furthermore, the Supreme Court has provided Congress with ample guidance to reform § 157. With the *Arkison* decision, the Court clarified how unconstitutionally core claims should be adjudicated and arguably approved consent for *Stern* claims.[285] Given these rulings, it is unlikely Congress would strike out a third time by amending § 157. Rather, the necessity for revision and clarity outweighs any potential backlash by the Court. Congress should therefore step up to the plate again and bring cohesion and uniformity back to the Bankruptcy Act.

D. *Not Good Enough: Why Amending Local Bankruptcy Rules Fails to Solve the Problem*

While Congress never took action to amend § 157 in the wake of *Stern*, local bankruptcy courts and the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the U. S. (the Committee) issued proposed rules to resolve the *Stern* gap and consent question.[286] The most commonly implemented resolution involved disintegration of the core and noncore categories and required parties to "expressly state in their pleadings whether they consent[ed] to a final judgment by the bankruptcy court."[287] Although only noncore proceedings previously required these express recitations of consent, the uncertainty created by *Stern* prompted bankruptcy courts to use

Uncertain Reach & Implications, RECEIVERSHIP NEWS (Spring 2012), http://www.receivers.org/recnews/ArticlePage.php?id=192 (stating that *Stern* "creat[ed] great confusion in bankruptcy proceedings across the country").

284. *Compare* 28 U.S.C. § 157 (2012), *with Stern*, 131 S. Ct. at 2603–04.

285. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170, 2173 (2014).

286. Lori Yount, *Litigant Consent as a Constitutional Threat: Reconsidering the Jurisdiction of Magistrate Courts After* Stern v. Marshall, 55 S. TEX. L. REV. 197, 216–17 (2013).

287. *Id.* at 216.

extra caution and mandate a statement of consent in all proceedings.[288] The jurisdictions adopting this proposed framework almost unanimously incorporated the language used by the District Court for the Southern District of New York.[289] Specifically,

> In the local rules passed in April 2012, the southern district of New York required that any "complaint, counterclaim, cross-claim, or third-party complaint [that] contains a statement that the proceeding or any part of it is core . . . shall contain a statement that the pleader does or does not consent to the entry of final orders or judgment by the bankruptcy judge." This same rule applies to any responsive pleadings asserting that the proceedings are core. If a party files a notice of removal, it also must state whether it consents to a final judgment by a bankruptcy court.[290]

By implementing this terminology, bankruptcy courts sought to address the consent issue to avoid appeals based on jurisdictional deficiencies.

Additionally, in light of New York's blueprint for local rule amendments, the Committee took New York's rules a step further and "eliminat[ed] the distinction between core and noncore issues in adversary proceedings."[291] The Committee's proposed amendments intended to alter the Bankruptcy Rules in three ways:

> First, the terms core and non-core will be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) will be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, will be amended to direct bankruptcy courts to decide the proper treatment of proceedings.[292]

In this manner, the Committee perceived its amendments as adding clarity to the jurisdictional framework of bankruptcy courts and believed eliminating the arbitrary core–noncore distinction would resolve the *Stern*

288. *See id.* at 216–17.

289. *See id.* at 217.

290. *Id.* (alterations in original) (footnotes omitted).

291. *Id.* (citing COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U. S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 28, 40–41 (2012), *available at* http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf [hereinafter PRELIMINARY DRAFT]).

292. PRELIMINARY DRAFT, *supra* note 291, at 28.

gap.[293]

Although the Committee's amendments were well-intentioned, they were never officially adopted. Given that the Supreme Court resolved the *Stern* gap within the current dichotomous framework of core–noncore claims, eliminating these categories through proposed rules is unnecessary and can only add further confusion to an already complex subject. In other words, because the Court has affirmed that there are two statutory categories of bankruptcy claims (i.e., *Stern* claims do not represent a third category of proceedings stuck in judicial limbo), proposed amendments that discard these labels do so in the face of Supreme Court precedent that has upheld the constitutionality of this division. Such an action strays from the Court's holding in *Arkison* and would make it impossible for bankruptcy courts to decipher which system to follow. Provided that *Arkison* dictates how to close the *Stern* gap, it is likely that the Committee will eliminate the proposed amendments and return to the drawing board. Given that the Committee's proposed amendments are likely unnecessary and irrelevant, the timing is right for Congress to enact a comprehensive amendment to § 157 that negates the need for piecemeal local rule revisions. Such overarching congressional action is the only way to ensure uniformity in the bankruptcy system. Therefore, it is time to amend § 157 in accordance with Supreme Court precedent.

VII. THE UPCOMING SEQUEL: *WELLNESS INTERNATIONAL NETWORK, LTD. V. SHARIF*

Although the Supreme Court impliedly settled the consent issue in *Arkison*,[294] and Congress possesses sufficient guidance to amend § 157(b), the Court nonetheless granted certiorari in *Wellness International Network, Ltd. v. Sharif* to resolve the circuit split over consent and waiver.[295] By granting certiorari on the final day of the Court's term, the Court has set the stage for another highly anticipated bankruptcy decision during the October 2014 session.[296] However, given that the plain language of the Court's

293. *See id.*

294. *See supra* Part V.

295. *See generally* Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (July 1, 2014).

296. *See* Steven Neuner, *Supreme Court Now Decides to Answer the Questions it Ducked in* Arkison*—What Can a Bankruptcy Court Decide, When and How?*, NEUNER & VENTURA LLP (July 2, 2014), http://www.nv-njlaw.com/supreme-court-now-decides-to-answer-the-questions-it-ducked-in-arkison-what-can-a-bankruptcy-court-decide-an

Arkison opinion authorized parties to consent to adjudication of *Stern* claims in bankruptcy court, it is unlikely that this appeal will materially impact the bankruptcy system.

A. *Previously on* Sharif . . .

With a factual history that is almost as contentious as *Stern*, *Sharif* is "a decade-long saga spanning two circuits."[297] Revolving around a dispute between Richard Sharif and his three "judgment creditors, Wellness International Network, Ltd., Ralph Oats, and Cathy Oats (collectively, "WIN"),"[298] the case poses two questions: first, is a constitutional objection based on *Stern* waivable;[299] and second, does a bankruptcy judge have constitutional authority to enter final judgment on an alter ego claim?[300] The Seventh Circuit answered both questions in the negative.[301]

The events precipitating this appeal "began when Sharif entered into distributorship contracts with WIN for the sale of health and wellness products."[302] Subsequent to executing this agreement, Sharif sued WIN in the U.S. District Court for the Northern District of Illinois for running an alleged pyramid scheme.[303] Although this suit was dismissed, Sharif refiled his complaint in the U.S. District Court for the Northern District of Texas and proceeded to ignore all of WIN's discovery requests.[304] In light of Sharif's noncompliance, the court "granted summary judgment for WIN, and the Fifth Circuit affirmed."[305] On remand, WIN received a judgment for $655,596.13 in attorney's fees as a sanction against Sharif.[306]

d-how/; *see also* M. Jonathan Hayes, Bellingham-Stern *Issues Continue at the Supreme Court*, CENT. DIST. INSIDER (July 1, 2014), http://www.centraldistrictinsider.com/2014/07/01/bellingham-stern-issues-continue-at-the-supreme-court/.

297. *Sharif*, 727 F.3d at 754.

298. *Id.*

299. *See id.* at 767–73.

300. *See id.* at 773–76.

301. *Id.* at 773, 775–76. Given that the focus of this Article is on consent, this Part will not address the Seventh Circuit's reasoning regarding whether a bankruptcy court can enter final judgment on an alter ego claim. For an analysis of this issue, see *id.* at 773–76.

302. *Id.* at 755.

303. *Id.*

304. *Id.*

305. *Id.* at 755–56.

306. *Id.* at 756.

In an attempt to collect on this award, "WIN served Sharif with post-judgment discovery requests," which went unanswered.[307] Following Sharif's repeated refusal to comply with discovery orders, he was arrested and held in civil contempt.[308] Two weeks later, Sharif filed a voluntary Chapter 7 petition for bankruptcy in the U.S. District Court for the Northern District of Illinois and listed WIN as a creditor.[309] At the § 341 creditors' meeting, Sharif admitted that he lied on a loan application to Washington Mutual, on which he claimed he owned multimillion-dollar assets.[310] Sharif proceeded to inform WIN and the trustee "that he never had owned the Loan Assets; rather, those assets were owned by the Soad Wattar Trust, of which [he] was trustee."[311]

"WIN subsequently initiated an adversary proceeding in the bankruptcy court," asserting five causes of action against Sharif, including a claim that Soad Wattar Trust was Sharif's alter ego.[312] Unsurprisingly, Sharif violated numerous discovery orders and failed to appear for his initial deposition.[313] In response to Sharif's disobedient behavior, the bankruptcy court entered default judgment in favor of WIN on all five counts of the complaint.[314] Sharif appealed to the district court, which affirmed the bankruptcy court's judgment.[315] In affirming, the court "concluded that objections based on the bankruptcy court's authority to enter a final judgment are waivable because they do not implicate subject-matter jurisdiction" and that these claims had been waived in this case.[316] Sharif appealed this determination to the Seventh Circuit.[317]

B. *Can't Touch This: The Seventh Circuit Says "No" to Consent*

In a decision that sided with the Sixth Circuit instead of the Ninth Circuit, the Seventh Circuit held that bankruptcy courts did not have

307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 756–57.
311. *Id.* at 757.
312. *Id.*
313. *See id.*
314. *Id.* at 758.
315. *Id.* at 759–60.
316. *Id.* at 760.
317. *See id.*

authority to adjudicate *Stern* claims by consent.[318] Mirroring the analysis in *Stern*, the court first determined that the bankruptcy court had statutory authority under § 157(b) to enter a final judgment on all five claims in WIN's complaint.[319] However, after reiterating that "*Stern* does not implicate subject-matter jurisdiction, the circuit court nonetheless found Sharif could not waive the objection to the bankruptcy court's constitutional authority to enter final judgment because the objection was not his alone to waive."[320] Specifically, the court distinguished between two separate interests protected by the judicial system; namely, a litigant's personal right to adjudication by an Article III judge and the systemic guarantee of an independent and impartial judiciary.[321] Because the provisions of Article III, Section One were designed to ensure the separation of powers, these requirements are not subject to waiver.[322]

While the court conceded that § 157(c)(2) permits parties to consent to a final judgment in noncore proceedings, the court did "not think that this inexorably leads to the conclusion that parties may consent to final adjudication of a core proceeding by a bankruptcy judge or waive a *Stern* objection."[323] According to the Seventh Circuit, the Supreme Court has not yet ruled on the constitutionality of § 157(c), and the statutory framework for noncore proceedings fundamentally differs from that of core proceedings.[324] In particular, the court noted that the district court enters final judgment in noncore proceedings whereas the bankruptcy court enters final judgment in core actions.[325] Thus, because of this structural difference between the two subsections, the court determined that Article III interests are not as fundamentally implicated with consent in noncore proceedings as they are for consent in core proceedings.[326] In light of this reasoning, the

318. *See id.* at 771, 773 ("We think the Sixth Circuit has the better view under current law."); Yount, *supra* note 286, at 213 ("[T]he Seventh Circuit Court of Appeals found that the Sixth Circuit's *Waldman* opinion contains the more persuasive argument." (citing *Sharif*, 727 F.3d at 761)).

319. *See Sharif*, 727 F.3d at 766 (recognizing that all of the claims are core proceedings). Because Sharif only objected to the core categorization of the alter ego claim on appeal, the Seventh Circuit presumed the claim was core. *See id.* at 762.

320. Yount, *supra* note 286, at 214–15 (citing *Sharif*, 727 F.3d at 769).

321. *See Sharif*, 727 F.3d at 768.

322. *Id.* at 769 (quoting CFTC v. Schor, 478 U.S. 833, 850–51 (1986)).

323. *Id.* at 772.

324. *Id.*

325. *Id.*

326. *See id.*

court "h[e]ld that under current law a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding."[327]

C. *Lolly, Lolly, Lolly, Get Your Logic Here: How* Sharif *Should Be Decided in Light of* Arkison

The Supreme Court's decision in *Arkison* has negated the need to address consent in *Sharif*. While the Court vigorously maintained that it did not adjudicate the consent question,[328] the broad reference to § 157(c) in its entirety suggests otherwise.[329] The Supreme Court cannot write in its opinion that everything above us is blue and then claim it did not determine the color of the sky. The blunt reality is that the Court has already concluded the consent issue, even if unintentionally.

Provided the ruling in *Arkison*, the most logical course of action is for the Supreme Court to hold that litigants may waive their right to adjudication by an Article III judge and consent to the bankruptcy court's authority. The necessity for this holding cannot be overstated. First, if the Court finds that consent violates Article III and is unconstitutional, it would be impossible to implement the holding of *Arkison*—specifically, that all provisions of § 157(c) are to be applied to *Stern* claims.[330] If consent is deemed unconstitutional, clearly § 157(c)(2) cannot be enforced for core actions related to bankruptcy proceedings. Thus, a contrary ruling would invalidate the plain language of *Arkison*.

Second, as discussed above,[331] an adverse decision on consent would greatly impact the magistrate system, which functions largely on consent and waiver.[332] Current caselaw expressly permits parties to consent to adjudication before a magistrate judge, and consent can even be implied.[333]

327. *Id.* at 773.

328. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 n.4 (2014).

329. *See id.* at 2173.

330. *See id.*

331. *See supra* Part IV.

332. *See* 28 U.S.C. § 636(c)(1) (2012) ("Upon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court . . . ."); *see also In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 701 (Bankr. N.D. Ill. 2011).

333. Katherine Riley, *The Constitutionality of Consent After* Stern v. Marshall*: Splitting the Circuits*, 32 CAL. BANKR. J. 551, 559 (2013) ("Final adjudication via consent

This consent permits the magistrate judge to enter a final judgment on the case and is subject to appeal to the district court—in certain circumstances—and the court of appeals.[334] Invalidating consent in the context of bankruptcy courts would implicitly call into question the magistrate framework.[335] A logical extension of the Court's decision would be to remove consent as an avenue of adjudication for magistrate judges as well. Such an action would flood the district courts not only with bankruptcy cases but with cases from magistrate courts. The increased caseload would subsequently delay the resolution of claims, strain judicial resources, and overwhelm the district courts.[336] These consequences cannot be the rational result of *Stern*, which was meant to be a narrow holding.[337]

Finally, refusing to allow parties to consent to bankruptcy authority opens the floodgate for "every losing litigant . . . to appeal any judgment in a state law-based core proceeding on the grounds that the bankruptcy court lacked constitutional authority to enter judgment."[338] The fact that a challenge to bankruptcy authority cannot be waived means that the issue can be raised at any point in the litigation, even for the first time on appeal.[339] While this structure is necessary to ensure constitutional safeguards for subject matter jurisdiction, *Stern* made perfectly clear that a bankruptcy court's constitutional authority to adjudicate a claim does not invoke subject matter jurisdiction.[340] Therefore, giving parties an unlimited ability to appeal

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of the parties is a well-established practice among bankruptcy courts, magistrates, and arbitrators."); *see* Roell v. Withrow, 538 U.S. 580, 583–84 (2003).

334. *See* § 636(b)(1)(A)–(C) (describing two circumstances for district court review).

> Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court.

Id. § 636(c)(3).

335. *See In re Olde Prairie Block Owner*, 457 B.R. at 701.

336. *See* Gerber, *supra* note 29, at 1029 ("If consent were found unconstitutional, it could have profound consequences on the efficiency of the federal judicial system.").

337. Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011) ("[W]e agree with the United States that the question presented here is a 'narrow' one.").

338. Francis J. Higgins & John S. Delnero, Stern v. Marshall*, Act III—Will the Supreme Court Follow the Seventh Circuit's Lead in* Wellness Int'l Network, Ltd. v. Sharif *or Go Even Further in Limiting Bankruptcy Court Power?*, 12 PRATT'S J. BANKR. L. 679, 694 (2013).

339. *See id.* at 695.

340. *See Stern*, 131 S. Ct. at 2607.

the bankruptcy court's authority is not only unnecessary but also risks substantially increasing the number of appeals to the district courts. The reality is that the judicial system cannot handle such an influx of cases. Thus, the only logical avenue for the Supreme Court is to affirm the plain language of *Arkison* and allow parties to consent to the bankruptcy court's authority.

VIII. CONCLUSION

In the wake of *Stern*, few topics have been as heavily litigated as that of bankruptcy jurisdiction. Spawning countless appeals, thousands of citations, and repeated headaches, *Stern* represented every bankruptcy judge's nightmare. By delineating two categories of core claims, *Stern* unintentionally created a gap in which unconstitutionally core proceedings were left hanging in judicial limbo with no guidance on their adjudication. However, the fog created by *Stern* has recently begun to dissipate with the Supreme Court's most recent jurisdictional decision in *Arkison*. Holding that *Stern* claims should be treated as noncore for purposes of adjudication, *Arkison* bridged the *Stern* gap and reaffirmed the validity of the core–noncore dichotomy.[341] Yet, despite this resolution, the Court expressly declined to answer the hotly anticipated question of whether parties can consent to bankruptcy jurisdiction in *Stern* claims.[342]

Although the Supreme Court plainly stated its refusal to address consent, the broad language used throughout the *Arkison* opinion paints a different story. The Court's repeated reference to the applicability of § 157(c) in its entirety to *Stern* claims arguably resolves the consent question. Specifically, by failing to limit its holding and analysis to § 157(c)(1), the Court impliedly authorized the use of consent—present in § 157(c)(2)—to *Stern* claims. The careless drafting of the opinion has resulted in the Court losing at its own attempted game of dodge ball; the plain language of the decision is broad enough to solve the very issue the Court declined to address.

Given this implied authorization of consent and resolution of the *Stern* gap, it is time Congress amended § 157 to reflect these changes in the law and clarify the statutory jurisdiction of bankruptcy courts. The debate over *Stern* claims and the constitutionality of consent has plagued bankruptcy judges long enough. The decision in *Arkison* not only provides guidance to Congress in implementing these amendments but also mandates statutory revision to ensure uniformity in jurisdictional determinations. As it currently

341. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172–73 (2014).
342. *Id.* at 2170 n.4.

stands, the statutory framework does not reflect the division between constitutional and unconstitutional core claims and thus continues to place these causes of action in judicial limbo. It is time for Congress to revise the statutory structure of bankruptcy jurisdiction to conform to Supreme Court precedent. Only then will the circuit split regarding consent be fully resolved and the confusion over *Stern* substantially mitigated. It is therefore unwise to afford Congress the same opportunity to dodge the ball on consent.