Constitutional Gaps in Bankruptcy

S. Todd Brown

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CONSTITUTIONAL GAPS IN BANKRUPTCY

S. TODD BROWN*

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For more than a quarter century, the modern bankruptcy adjudication structure has been premised upon untested assumptions about the bankruptcy power and Article III that were rejected in, or may be subject to challenge following, the Supreme Court's recent opinion in Stern v. Marshall. Using Marshall as a focal point of the discussion, this article explores both the structural gap between the design of the bankruptcy system and its constitutional limits and the causes of the temporal gap between the adoption of the current structure and the Court's consideration of its constitutionality. Although these constitutional gaps have allowed the bankruptcy system to flourish during the last three decades, they have also increased its cost and complexity unnecessarily and, after Marshall, we may expect these effects to be far more pronounced. This article also outlines the need to bridge these gaps as a precondition to developing an informed and constitutionally sound bankruptcy system that can realize the promise of the Bankruptcy Code.
INTRODUCTION

Every few years, we are reminded of both the fragility and adaptability of American bankruptcy law. Carefully balanced rights and responsibilities or well-established practices may be forever altered with a few strokes of the pen, either through the seemingly endless parade of special interest driven amendments to the Bankruptcy Code1 ("Code") or Supreme Court opinions. At every turn, the initial uproar or delight over a particular change tends to fall predictably according to how it will weaken or strengthen a particular class of debtors or creditors rather than its wisdom (or lack thereof) across bankruptcy cases or our political system as a whole. And, time and again, bankruptcy courts and practitioners adapt and carry on as they did before.

The Supreme Court's opinion in Stern v. Marshall2 in June 2011 is the latest development in this historical trend. In Marshall, the Court limited Article I bankruptcy courts' authority to hear certain private rights counterclaims,3 rejected "consent by ambush" (whereby creditors who file a proof of claim are deemed to consent to resolution of even tangentially related disputes with the debtor in bankruptcy court),4 and, at times, appeared to question the constitutionality of the very framework of the current bankruptcy court structure.5 The Court's rationale suggests that modern bankruptcy will become less efficient and subject to greater procedural mischief, notwithstanding the majority's view that its opinion is narrow and should not result in meaningful change to the existing division of authority among bankruptcy, district and state courts.

Regardless of one's view of the outcome in Marshall, it was hardly surprising. Even a perfunctory review of bankruptcy case law and scholarship of the last three decades reveals that questions concerning the constitutionality of the adjudication of disputes under the Code predate its enactment. Less than four years after its passage, a plurality of the Supreme Court found one of the most critical features of the new law—authorizing Article I bankruptcy courts to adjudicate a broad range of matters related to a bankruptcy case—unconstitutional.6 Specifically, the plurality reasoned that although Article I courts may be authorized to resolve public rights matters (disputes between the government and other parties or matters closely intertwined with a public regulatory scheme), they may not exercise Article III judicial power over private rights matters (those concerning the "the liability of one
individual to another" under applicable law). Following "a process that reflects no credit on any branch of the federal government," the 1984 Amendments to the Code ostensibly addressed the constitutional problem by, among other things, conferring bankruptcy jurisdiction on the district courts and authorizing them to refer cases and proceedings within that jurisdiction to bankruptcy judges, who are now appointed by the applicable circuit courts.

The 1984 Amendments to the bankruptcy court system, aided by doubts about the staying power of the Northern Pipeline v. Marathon plurality and the more relaxed approach to similar questions in some subsequent Supreme Court decisions, provided sufficient comfort about the viability of the modern system to allow much of the promise of the Code's design to be realized in spite of its uncertain constitutionality. During that time, more than 29 million bankruptcy cases were filed, with the overwhelming majority long since closed. The $2 billion in projected liabilities of Johns Manville, the largest bankruptcy in American history as of 1982, now appears quaint compared to the mega-bankruptcies of the last decade. The current system may not be a model of efficiency, but it has proven remarkably resilient and adaptable to the needs of debtors and creditors alike. And at least some of the inefficiencies may be more the result of political maneuvering and Congress' incessant tinkering with its provisions at the behest of powerful special interests than inherent flaws in the Code's original design.

In reaffirming the Marathon plurality's public/private analysis and rejecting the assertion that the 1984 Amendments resolved the Article III problem, Marshall may be best viewed as an opportunity to revisit past debates, prejudices and misperceptions. The calls for procedural reform from two bankruptcy commissions, a long-range planning committee, and distinguished individual

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7 Id. at 71–72 (distinguishing restructuring of debtor-creditor relation as public right that Article I courts may be authorized to resolve, from right to recover contract damages as private right that Article I courts may not resolve).
9 See 28 U.S.C. § 157 (2006) ("[D]istrict court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 . . . shall be referred to the bankruptcy judges for the district."); 28 U.S.C. § 1334(a) (2006) ("[D]istrict courts shall have original and exclusive jurisdiction of all cases under title 11.").
CONSTITUTIONAL GAPS IN BANKRUPTCY

commentators during the last 27 years fell on deaf ears. The convenient delusion that the simplicity and efficiency envisioned in 1978 can be realized without fundamental adjustments to the bankruptcy court framework may have been understandable before *Marshall*, but even the most desirable delusions must eventually yield to reality. And the reality after *Marshall* is clear: we must either accept further well-defined restrictions on the sweeping jurisdiction of bankruptcy courts that track the public/private dichotomy or reconstitute bankruptcy courts under Article III.

To better appreciate these competing options, Part I begins by framing the historical developments and expectations that (however slowly) paved the path to *Marshall*. Although literally dozens of articles have outlined portions of this history over the years, this section demonstrates that *Marshall* is less a return to an outmoded mechanism for evaluating Article I adjudication than a reaffirmation of the unique constitutional concerns that arise due to the sweeping judicial power granted to modern bankruptcy courts.

While Part I may be read as a survey of where we have been and why, Part II envisions the future of bankruptcy practice without any legislative or administrative modifications to the current system. Although the *Marshall* majority limited its holding to the question of whether bankruptcy courts may exercise jurisdiction over "a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim," its rationale suggests that bankruptcy courts lack authority to adjudicate numerous other matters they have heard and decided previously. In the immediate future, the resulting uncertainty may fuel greater litigation, as unsatisfied litigants attempt to overturn unfavorable rulings or use the resulting delays to exact otherwise undue concessions. Over time, *Marshall*'s ambiguous standard appears likely to generate conflicting modifications to controlling law, procedure and practice across circuits and among districts within circuits. This potential may be best characterized by the late Vern Countryman's criticism of the 1984 Amendments: "a hitherto unacceptable situation has now been rendered intolerable."

Part III evaluates the potential for creating Article III bankruptcy courts and contrasts it with the only other viable alternative: uniform modifications to the delegation of authority among bankruptcy and district courts. This section

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15 See JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FED. COURTS 52 (Dec. 1995) (suggesting each district court continue to include bankruptcy court consisting of fixed-term judges having bankruptcy experience).


18 Countryman, supra note 8, at 1.
demonstrates that many of the policy concerns that derailed efforts to create Article III bankruptcy courts in 1978 and 1984 are no longer valid, but it also suggests that doing so may not be politically desirable or avoid fundamental constitutional questions concerning the reach of the Code. In the absence of structural reform of the bankruptcy courts, this section encourages a narrow reading of *Marshall*, consistent with the majority's characterization of its opinion, to promote review of the public/private dichotomy questions that, until answered, may continue to plague bankruptcy practice.

I. BANKRUPTCY COURTS PAST AND PRESENT

The bankruptcy process is a constitutional enigma. It may be fairly said that no other enumerated power, as understood at the time of the Convention and in each of the laws passed in the exercise of this power, incorporates individual matters of private right so completely as the bankruptcy power.\(^{19}\) At the same time, the Bankruptcy Code contemplates that courts lacking the protections of Article III will nonetheless exercise the judicial power of the United States and adjudicate many of these private right matters.\(^{20}\) This conflict came to a head in *Marathon* and, after nearly three decades, again in *Marshall*. This section discusses the history of bankruptcy adjudication, how this process evolved to give rise to the conflict, the efforts to resolve it following *Marathon*, and the Court's ultimate rejection of these efforts in *Marshall*.

A. Early Conceptions of Bankruptcy Administration

Although there is little historical record concerning the debate over the Bankruptcy Clause at the Convention,\(^{21}\) and the Federalist Papers suggest its addition was an obvious necessity,\(^{22}\) Anti-Federalists viewed the clause with suspicion. For example, in one passage, the Federal Farmer backed away from apparently conceding the need for the clause in an earlier letter, noting:

\[^{19}\text{See McKenzie, supra note 16, at 751 (discussing historical practice before and after the Convention).}\]
\[^{20}\text{See id. (noting bankruptcy judges confront matters sounding in almost every area of civil law, including contract, tort, property, and labor matters).}\]
\[^{21}\text{See, e.g., 3 Joseph Story, Commentaries on the Constitution of the United States § 1100, at 4 (1st ed. 1833) ("The power to pass laws on the subject of bankruptcies was not in the original draft of the constitution [sic]. . . . The brevity, with which this subject is treated by the Federalist, is quite remarkable.").}\]
\[^{22}\text{Federalist No. 42 provides little more than a conclusory argument in favor of its inclusion:}\]

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

\[^{23}\text{Although the Federal Farmer was widely considered the pseudonym for Richard Henry Lee for nearly two centuries, this attribution has been drawn into question. See, e.g., Gordon S. Wood, Note, The}\]
By giving this [bankruptcy] power to the union, we greatly extend the jurisdiction of the federal judiciary, as all questions arising on bankrupt laws, being laws of the union, even between citizens of the same state, may be tried in the federal courts; and I think it may be shewn, that by the help of these laws, actions between citizens of different states, and the laws of the federal city, aided by no overstrained judicial fictions, almost all civil causes may be drawn into those courts.24

These fears have been revisited in debates over bankruptcy policy over time and continue to inform the modern debate over the reach of bankruptcy law.25

Notwithstanding these concerns, experience with colonial-era bankruptcy systems suggested that "preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the states" required federal authority over bankruptcy matters.26 As Justice Story explained:

It is obvious, that if the [bankruptcy] power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests, and pursuits . . . . What is here stated is not purely speculative. It has occurred among the American states in the most offensive forms, without any apparent reluctance or compunction on the part of the offending state. There will always be found in every state a large mass of politicians, who will deem it more safe to consult their own temporary interests and popularity, by a narrow system of preferences, than to enlarge the boundaries, so as to give to distant creditors a fair share of the fortune of a ruined debtor. There can be no other adequate remedy than giving a power to the general government to introduce and perpetuate a uniform system.27

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24 See G. Marcus Cole, The Federalist Cost of Bankruptcy Exemption Reform, 74 AM. BANKR. L.J. 227, 241 (2000) ("By deferring to nonbankruptcy substantive law, bankruptcy preserves both the vertical and horizontal separation of powers that currently characterizes such law, and promotes the jurisdictional competition that flows from the horizontal separation of sovereigns. Bankruptcy, then, can be viewed as federalist to the extent that its rules are merely procedural and directed at solving the problem of the common pool.").

25 See id. at 54–55.
Practical necessity aside, the self-limiting nature of historical bankruptcy practice suggested that it was a poor vehicle for extensive federal intrusion into state power or individual liberty. These systems were limited to bankrupt merchants and served primarily to allocate assets among their respective creditors. Although they varied in their specific operation, an agent (usually selected by creditors) was charged with marshaling and ultimately liquidating the bankrupt's assets, including recovery of the bankrupt's property held by others and the pursuit of legal claims against others in the appropriate court. The court sitting in bankruptcy adjudicated disputes concerning distribution to creditors and the debtor's eligibility for relief under the bankruptcy law, including the discharge of debts and release from debtors' prison. Legal and equitable rights established under non-bankruptcy law were largely incorporated in the bankruptcy distribution scheme, albeit modified to the extent necessary to achieve the purposes of bankruptcy law. 

In sum, in light of the fact that bankruptcy laws had to be invoked by individual creditors of the bankrupt and the historical limits of bankruptcy practice generally, the specter of federal usurpation of almost all civil disputes may have been readily dismissed as the paranoid ruminations of an uninformed Anti-Federalist.

The first federal bankruptcy law, the Bankruptcy Act of 1800, followed this basic framework. Although the law authorized the creditor-appointed administrator to pursue civil litigation to marshal the bankrupt's assets, the act contemplated that litigation to enforce a bankrupt's rights against its own debtors would take place in other courts rather than the federal court sitting in bankruptcy. Similarly, certain claims against the bankrupt that were unliquidated as of the commencement of the

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28 See Frederick R. Corbit, The Founding Fathers' Influence on Bankruptcy Law, 26 AM. BANKR. INST. J. July/Aug. 2007 at 50, 51 (2007) ("Records of a detailed discussion of what our Founding Fathers understood to be laws with respect to bankruptcy would probably have shown that they had a more narrow view of bankruptcy law than we have today.").

29 See 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES pt. 1, app. at 260 (Philadelphia, William Young Birch & Abraham Small 1803) ("Whilst the bankrupt laws are confined to [merchants], and are resorted to, merely as a necessary regulation of commerce, their effect, in preventing frauds, especially where the parties or their property may lie, or be removed into different states, will probably be so salutary, that the expediency of this branch of the powers of congress, will cease to be drawn in question.").

30 See id. at 259 (explaining debtors must be deprived of all assets to pay off creditors).


33 See supra note 31, at 600–10 (outlining various provisions of early American bankruptcy laws).

34 Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (amended 1801, 1802 and repealed 1803) [as amended, hereinafter 1800 Act]. As noted below, the bankruptcy laws of 1841, Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (1841) (repealed 1843), and 1867, Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867) (repealed 1878), followed similar frameworks.

35 See, e.g., Plank, supra note 31, at 613 ("Under the early bankruptcy legislation, the assignees of the bankrupt's property sued in a court of record—the common law courts or the equity courts—to enforce contractual claims against third parties or to recover property that the bankrupt conveyed to third parties.").
case were omitted from any distribution, though they could be brought and pursued following the close of the case. This status was determined by reference to private rights under non-bankruptcy law, but the adjudication of rights with respect to pure tort issues did not occur in the bankruptcy forum. Ultimately, the line between final adjudication of rights arising under non-bankruptcy law and consideration of these rights in a manner that might ultimately settle them for all practical purposes in bankruptcy was hazy but nonetheless respected before, during and long after the colonial period.

In sum, the relative dearth of debate concerning the reach of the Bankruptcy Clause appears to be the product of its historical attributes as of the Convention and the need for uniformity in application, not a general consensus that bankruptcy policy somehow trumped the separation and balance of powers issues that defined much of the debate over the Constitution. At best, we can draw assumptions about the limits of legislative and judicial authority in the bankruptcy context from the historical record, but even the historical record can betray us in light of the complex range of political and social forces at work at the time of the Convention, the distinction between the laws and powers exercised by authorities of a single sovereign unrestrained by the specific devices of the Constitution, and the occasional implementation of likely unconstitutional laws to achieve desired results in the time between passage and invalidation.

In those instances where Congress exercised the bankruptcy power, as understood then and throughout much of our nation's history, the law largely

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36 See In re Schuchardt, 21 F. Cas. 739, 742 (S.D.N.Y. 1876) (holding unliquidated tort claim not provable in bankruptcy). Subsequent federal bankruptcy law likewise followed this same approach. See COLLIER ON BANKRUPTCY, ¶543, at 362–63 (Matthew Bender & Co., 4th ed. 1937) (noting that under Act of 1898, like its predecessors, "liabilities for torts were not discharged unless in judgment, and then only when . . . based on a claim not within the exceptions of the statute"). For example, under the Bankruptcy Act of 1867, only debts that were due and payable as of adjudication of the case were compensable and dischargeable. Bankruptcy Act of 1867, § 19, ch. 176, 14 Stat. 525 (repealed 1878) (listing limited categories of claims subject to administration); see also In re Boston & Fairhaven Iron Works, 23 F. 880, 881 (C.D. Mass. 1885) ("A claim for damages for a tort is not a claim provable in bankruptcy, unless liquidated or reduced to judgment prior to the date of proceedings in bankruptcy."); Zimmer v. Schleehauf, 115 Mass. 52, 53 (1874) (holding unliquidated slander and malicious prosecution claims excluded from bankruptcy court). All other claims survived the bankruptcy. See Bankruptcy Act of 1867, § 21, ch. 176, 14 Stat. 526–27 (repealed 1878) (discharging only provable claims).

37 See In re Schuchardt, 21 F. Cas. at 742 (holding tort claims not claims provable in bankruptcy).

For example, section 63(a)(1) of the 1898 Act initially limited provable debts to those "evidenced by a judgment . . . absolutely owing at the time of the filing of the petition." Bankruptcy Act of 1898, § 63(a)(1), ch. 541, 30 Stat. 562–63 (superseded 1978). Although this changed slightly during the Act's eighty-year history, claims that were not reduced to judgment before or during the pendency of the case still remained excluded from the bankruptcy case and were not dischargeable. See Stephen Allen Edwards, Tort Claims Under the Present and Proposed Bankruptcy Acts, 11 U. MICH. J.L. REFORM 417, 420–22 (1978) (discussing effects of bankruptcy on tort creditors' nonprovable claims).

38 See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 19 (Harv. Univ. Press 1935) (discussing historical pattern of passing likely unconstitutional debt relief laws that largely achieve their purpose in the temporal gap between passage and Supreme Court holdings finding them unconstitutional). Although these tended to be state laws that arose long after the Convention, they are raised here merely to demonstrate that constitutional questions may take a back seat to the need to resolve an immediate crisis.
followed the historical administrative approach and, within that framework, the power was consistently recognized as complete.39 The debates of the Nineteenth and early Twentieth Centuries—its gradual expansion beyond merchants and the inclusion of supervised debtor restructuring provisions—sparked discussion over the nature of the bankruptcy power and its reach,40 but only with respect to the narrow issues at hand.

Whatever its reach,41 the bankruptcy power was rarely exercised, and then only as short-term responses to immediate financial crises, prior to the passage of the Bankruptcy Act of 1898.42 The first federal bankruptcy law plodded through Congress for more than a decade before a financial crash driven by rampant real estate speculation forced the government's hand.43 The Bankruptcy Act of 1800 was passed as a temporary measure (it expressly expired after five years) and was rescinded after just three years.44 Efforts to pass a subsequent bankruptcy law between 1822 and 1827 failed,45 and the Bankruptcy Act of 1841 was effective slightly more than a year before it was rescinded.46 The Bankruptcy Act of 1867 was the first federal bankruptcy law to remain on the books longer than three years, but it was the subject of frequent calls for rescission and amendment throughout its short history.47

By the time the Bankruptcy Act of 1898 was passed, the law applied to merchants and non-merchants and included provisions for liquidation and compositions, as well as voluntary and involuntary petitions.48 As with the 1867

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41 As one author noted, "the outer limits of Congress's Bankruptcy Power are not well defined." Brubaker, supra note 32, at 133.
42 See SKEEL, JR., supra note 40, at 24–25 (explaining history of bankruptcy law from 1800 to 1898).
43 See id. at 25 (stating depression in 1793 precipitated first federal bankruptcy law); see also G. Eric Brunstad, Jr., Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law, 55 BUS. LAW. 499, 500 n.4 (2000) (explaining that Act of 1800 was enacted partly in response to various failed land speculations).
44 See WARREN, supra note 38, at 19. As Warren explained:
The dissatisfaction with the law had been very general—based on several grounds. First there was the difficulty of travel to the distant and unpopular Federal Courts. Second, very small dividends had been paid to creditors, as most of the debtors petitioned into bankruptcy were already in jail. Third, the Act had been largely used by rich debtors and speculators, and in some cases by fraudulent debtors, to obtain discharge from their debts and start their operations afresh.

Id. at 19–20.
45 Id. at 28–45 (detailing history of proposed legislation between 1822 and 1827).
47 See WARREN, supra note 38, at 109–18 (presenting criticisms of 1867 Act).
Act, the 1898 Act was fashioned as a permanent law,\textsuperscript{49} faced almost immediate efforts to repeal it, and was amended early and often.\textsuperscript{50} Unlike the 1867 Act, however, the 1898 Act survived eight decades and began a period of more than 113 years (and counting) of uninterrupted federal bankruptcy law.

\section*{B. Referees Under the Bankruptcy Act of 1898}

Although the Federalists and Anti-federalists may have had different views concerning the bankruptcy power, they clearly assumed that the judiciary would oversee bankruptcy disputes due to the nature of the matters considered. This view has only rarely been challenged. As Remington explained in 1950:

\begin{quote}
By its very nature, the administration of insolvency cases is a judicial function, once the requisite legislation is set up, or at least a matter for judicial supervision. Adequate handling of such matters requires the determination of a series of points of law in the light of facts presented even in the simplest instance and frequently runs into numerous incidental and collateral controversies of a justiciable nature, the conclusive determination of which is essential to complete and ultimate disposition.\textsuperscript{51}
\end{quote}

The 1898 Act continued this presumption by conferring jurisdiction in bankruptcy on existing federal district courts, the supreme court of the District of Columbia and the federal territorial courts.\textsuperscript{52} When sitting in bankruptcy, these courts were considered "separate and distinct courts, and exercise[d] powers and jurisdiction separate and distinct from their powers and jurisdiction as originally constituted, to the same extent as if they were separate and distinct tribunals."\textsuperscript{53} Courts sitting in bankruptcy were authorized to appoint "referees,"\textsuperscript{54} to whom they could refer bankruptcy cases. Although referees filled a quasi-judicial role, their authority to adjudicate disputes was limited both by statute and the order referring cases to them.\textsuperscript{55} Initially, this reference was not automatic, referee orders were not final in the modern sense, and review of referee decisions was taken by

\begin{quote}
\textsuperscript{50} See \textit{Warren}, \textit{supra} note 38, at 143.
\textsuperscript{52} Bankruptcy Act 1898, ch. 541, §34, 30 Stat. 544, 555 (repealed 1979) (granting bankruptcy courts discretion to appoint referees to two year terms).
\textsuperscript{53} \textit{Collier on Bankruptcy}, \textit{supra} note 36, ¶ 845 at 619 ("The referee is an officer of the court of bankruptcy, deriving his powers from the order of reference—reading this, of course, in light of the Bankruptcy Act.").
\end{quote}
"petition for review" rather than appeal. Their limited quasi-judicial roles involved "matters relating to property over which they had direct control, matters referred to them as special masters by judges, and matters submitted by consent of the parties." Jurisdiction "of all controversies at law and in equity, as distinguished from proceedings in bankruptcy," remained in the courts in which they would have been decided outside of bankruptcy. In short, referees "originally were required to perform purely ministerial functions; their judicial role was minor."

The referees' adjudicative authority expanded gradually over the life of the 1898 Act. Referees were effectively adjudicating a broad range of questions relevant to the administration of the case by the mid-1930's, and this trend toward more of a judicial role was advanced further by the Chandler Act in 1938 adoption of a salary-based system of compensating referees in 1946, and further restrictions on referees' ability to serve in administrative roles in 1968.

Although referees became increasingly judicial in character during the 1898 Act's eighty-year history, they were hardly perceived in the same light as other judges. As Referee Daniel R. Cowans informed new referees in 1964, "Congress has charged the Referees with the task of making judicial determinations but has withheld from us virtually everything customarily associated in the minds of the bar and the public with the judiciary." Cowans' remarks ran the gamut from the absence of the formal trappings of the judicial role (their ambiguous "referee" title and fact that they did not wear robes), poor administrative support (makeshift courtrooms and lack of staff), and perceived lack of authority (lack of contempt power and the relative ease and low costs associated with the review of referee orders).

In 1973, the Supreme Court recognized that referees had evolved into a primarily judicial role, altering the title of the office in the Rules of Bankruptcy Procedure to "bankruptcy judge." Jurisdiction over disputes "was de facto expanded
by a clarification of what constituted consent to jurisdiction by an adverse party" and "more of the bankruptcy judge's administrative duties were removed from him." As noted in the House Report concerning the proposed modernization of the bankruptcy law noted in 1977, "[t]he thrust of the Bankruptcy Rules, more than any change in the preceding 40 years, was to recognize the judicial character of the office of bankruptcy judge, and the primary judicial nature of the work the bankruptcy judge performs and the contact creditors and debtor alike have with the bankruptcy judge." As noted in the 1977 House Report:

Bankruptcy judges have no control over their office space, office equipment, or furnishings, either. They do not participate in the budgeting process in the Judicial Conference and have little or no input into the budget the Conference submits to Congress. They have only limited access to legal libraries, though essential to their judicial role, and have repeatedly been denied their request that they be provided better facilities.

Moreover, bankruptcy judges do not participate in the decision-making process that affects their court. They have been excluded from Judicial Conference activities that determine administrative matters for the bankruptcy courts on the ground that they are not true judges. They have been denied membership on the Judicial Conference Bankruptcy Committee, and have been denied any opportunity to be heard before that Committee. The Judicial Conference made every effort to exclude bankruptcy judges from Commission membership as well.

To some degree, this bias against bankruptcy judges was self-fulfilling, making it "virtually impossible to attract the highest caliber judges to the bankruptcy bench." In addition to their lower standing, referees' authority remained limited in critical and time-consuming ways. The distinction between summary matters (which could be adjudicated by referees) and plenary matters (which could not

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67 Id.
68 For an excellent, thorough account of this perception, see Linda Coco, Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge’s Non-Article III Status, 16 MICH. J. RACE & L. 181 (2011) (arguing that collectively held cultural beliefs about insolvency paired with history of bankruptcy practice diminish status of bankruptcy courts).
70 Id. at 17.
fueled extensive litigation that, in some cases, devoured any efficiency gains of summary proceedings. Some of these bankruptcy proceedings had to proceed in other (and, at times, distant) courts, where they were typically a low priority. Moreover, the costs and time required to litigate in these other forums frequently led trustees to forego litigation that may have benefited the estate.

C. The Bankruptcy Code of 1978

An admitted neophyte in matters of bankruptcy law, the Federal Farmer's fears concerning the federal usurpation of civil causes may not have been widely shared at the time, but it appears prescient in light of the law's evolution during the following two centuries. Both the Bankruptcy Act of 1898 and the Code were structured to sweep most disputes into federal court, provide for estimation of complex and time-consuming unliquidated disputes, and allow debtors to commence their own bankruptcy cases. The Bankruptcy Code advanced this consolidation potential further by, among other things, expanding "claims" to include virtually any right to payment or equitable remedy and granting the federal court overseeing a case jurisdiction over substantially all disputes arising in, arising under, or related to the case. The Code also expanded the category of

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71 See Hon. Leif M. Clark, Jury Trials and Bankruptcy: Getting the Procedures Right, 20 AM. BANKR. INST. J., Apr. 2001 at 26, 26 n.1 (2001) ("The old summary/plenary distinction led to costly and time-consuming litigation over whether a given matter was one or the other. It also drove up the cost of bankruptcy reorganization, requiring counsel to conduct litigation in multiple forums at the same time. Most nefariously, it offered numerous opportunities for abuse to those intent on frustrating the bankruptcy process."); William Van DerCreek, Article III Versus Bankruptcy Judges and Magistrates—A Partial Triumph of Principles of Separation of Powers Over the Pragmatism of Docket Congestion, 10 FLA. ST. U. L. REV. 569, 574 n.25 (1982) ("Agreeing that the pre-1978 summary/plenary dichotomy resulted in wasteful litigation, undue cost and general inefficiency, there was no call for a return to this system by the witnesses appearing in the hearings before the congressional committee on the Northern Pipeline problem.").


73 Id. (noting that "it is common knowledge that trustees have often foregone litigation to recover assets of estates because of the potential expense and other difficulties of litigating in distant courts, having limited resources with which to wage such litigation").


76 11 U.S.C. § 301 (providing opportunity for debtor to file voluntary case); Bankruptcy Act of 1898, ch. 541, 30 Stat. 547, § 4(a) (repealed 1979) ("Any person who owes debts ... shall be entitled to the benefits of this Act as a voluntary bankrupt."). Prior to 1910, however, corporations could not file voluntary bankruptcies under the 1898 Act, Bankruptcy Act of 1910, ch. 412, 36 Stat. 839, § 3 (1910) (allowing corporations, except those specifically enumerated, to voluntarily file for bankruptcy).


debtors who could commence bankruptcy cases beyond those who were insolvent.  

This system suggests a potential for practically any debtor to qualify for bankruptcy, select a bankruptcy venue believed to be more favorable to her interests, and draw virtually any related dispute into that forum.

In addition to expanding the substantive breadth of the matters to be adjudicated in bankruptcy, the Commission sought to complete the transition of referees under the 1898 Act into wholly judicial officers under the Code. The numerous administrative functions of referees under the 1898 Act—including the examination at the first meeting of creditors, selection and supervision of a trustee, and possible role in directing the trustee to pursue matters over which the referee would subsequently preside—created a clear perception of bias, if not an actual conflict of interest. Accordingly, the Commission recommended that "bankruptcy judges be removed from the administration of bankrupt estates and be restricted to the performance of essentially judicial functions, that is, primarily to the resolution of disputes or issues involving adversary parties and matters appropriate for judicial determination." As such, the Commission further recommended that bankruptcy judges be appointed under Article III and enjoy the associated protections.

The recommended creation of Article III bankruptcy courts drew strong opposition. Chief Justice Warren Burger led the charge, actively lobbying members of Congress against this aspect of the proposed law. Although the criticism was frequently framed as a concern about the expansion of the Article III judiciary generally, these concerns did not preclude the creation of other Article III courts in the 1950's. Even so, the number of judges required by the growing

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79 See Brown, supra note 13, at 847 ("[T]he insolvency requirement was omitted to serve the goals of 'preserving going concerns and maximizing property available to satisfy creditors' by ensuring timely access to the bankruptcy process."). (quoting Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 453 (1999)).
83 Id. at 94.
84 Id. at 94–95 (discussing appointment, terms, and compensation of bankruptcy judges).
86 See, e.g., id. at 167 (discussing the "open warfare [that] raged within the judiciary").
volume of bankruptcy cases meant a sudden and dramatic influx of new Article III judges for the purpose of administering a novel bankruptcy scheme. And if this untested system failed spectacularly, these judges, perhaps lacking the pedigree of other Article III judges, could not be removed or demoted to referee or comparable status.

Ultimately, the opponents of Article III status prevailed. The Code eliminated referees and replaced them with bankruptcy judges appointed by the President with the advice and consent of the Senate. Unlike Article III judges, bankruptcy judges would serve 14-year terms (as opposed to enjoying life tenure); could be removed by the judicial council of the relevant circuit due to incompetence, misconduct, neglect of duty, or mental or physical disability (as opposed to Article III judges, who may be removed involuntarily only by impeachment); and could have their salaries reduced at will (Article III judges' salaries may not be reduced while in office).

Although they lacked Article III status and protection, the transformation of referees filling both administrative and judicial functions into bankruptcy judges serving in an exclusively judicial capacity was complete under the Code. Substantially all of their remaining case administration tasks under the 1898 Act were transferred to others, including the appointment of trustees (now overseen by the Office of the United States Trustee). They enjoyed sweeping authority over matters arising in, arising under, and related to the cases before them. They could hold litigants in contempt and possessed considerable other equitable authority pursuant to section 105(a) of the Code. In sum, bankruptcy judges under the Code carried the formal trappings, court management authority, and judicial powers ordinarily associated with Article III judges, notwithstanding the manner in which they were appointed, paid or subject to removal.

D. Northern Pipeline v. Marathon

The Supreme Court considered the novel structure of the bankruptcy courts under the Code a mere four years after its passage. Marathon involved the debtor's breach of contract action against Marathon Pipe Line Co. in bankruptcy court.

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89 See id. at 53 (highlighting distinctions between bankruptcy judges and Article III judges after Bankruptcy Act of 1978).
91 Marathon, 458 U.S. at 54 (noting that "jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system").
92 11 U.S.C. § 105(a) (2006) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.").
93 Marathon, 458 U.S. at 56.
Marathon filed a motion to dismiss on the grounds that the new Article I bankruptcy judges could not constitutionally exercise Article III judicial power over the dispute. The bankruptcy court denied the motion, and the district court reversed. Although five justices agreed that the bankruptcy court could not decide the dispute, Justice Brennan's plurality opinion (joined by Justices Marshall, Blackmun and Stevens) offered a far more sweeping condemnation of the new bankruptcy structure than Justice Rehnquist's concurring opinion (joined by Justice O'Connor).

The plurality opinion in Marathon began by stressing the importance of an "independent judiciary":

[O]ur Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

These institutional protections simply did not exist with respect to bankruptcy courts; indeed, none of the parties argued otherwise.

The focal point of the plurality opinion was the debtor's contention that the bankruptcy court structure did not "impermissibly encroach upon the judicial power" because Congress could have established bankruptcy courts as specialized legislative courts. Justice Brennan, however, reasoned that these courts had been limited to adjudication of public rights, which the Court characterized as "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments, and only to matters that historically could have been determined exclusively by those departments." By contrast, private rights—"the liability of one individual to another under the law as defined"—"lie at the core of the historically recognized judicial power" and may not be removed from Article III courts.

When evaluating the propriety of Article I adjudication of rights, the plurality stressed the "critical difference between rights created by federal statute and rights recognized by the Constitution." In electing to create rights in a federal statute, Congress "clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to

94 Id. at 56–57.
95 Id. at 57.
96 Id. at 60.
97 Id. (noting bankruptcy judges do not have same constitutional protections as Article III judges).
98 Id. at 63.
99 Id. at 67–68 (internal citations and quotation marks omitted).
100 Id. at 69–70.
101 Id. at 83.
perform the specialized adjudicative tasks related to that right."\textsuperscript{102} The power to delegate this role to an Article I decision maker is merely "incidental" to the right itself; it is part and parcel of the exercise of the legislative power to create the right.\textsuperscript{103} By contrast, if the right exists independent of congressional action, Congress' decision to assign its adjudication to an Article I tribunal is not, by definition, an extension of the legislative authority that created the right. Rather, "such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Article III courts."\textsuperscript{104}

Within this framework, the plurality easily concluded that the contract dispute at issue was not a public right matter subject to Article I adjudication:

Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined."\textsuperscript{105}

In short, the transformation of referees into bankruptcy judges fulfilling "essentially judicial functions" only may have been complete under the Code, but the absence of Article III protections for these judges precluded their adjudication over a substantial number of disputes necessary to carry out the Code's streamlined adjudication scheme.

\textit{E. Marathon's Perceived Demise}

1. The 1984 Amendments

The \textit{Marathon} plurality's broad rejection of the Code's original bankruptcy court structure demanded prompt action, but the process to amend the structure bore an eerie similarity to a number of failed bankruptcy cases: advocates with veiled interests drawing lines in the sand, representations that the key issues were being resolved even as the discussions lingered for months and then years, and, finally, a

\begin{footnotesize}
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\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} at 83–84.
\item \textsuperscript{104} \textit{Id.} at 84.
\item \textsuperscript{105} \textit{Id.} at 71–72.
\end{itemize}
\end{footnotesize}
compromise based on a dubious reading of the law and creating at least as many problems as it solved.\textsuperscript{106} Congress appeared in no great rush to respond to the problem, and Chief Justice Burger, one of the three dissenting justices in \textit{Marathon}, continued to lobby against the most obvious solution: elevation of bankruptcy courts under the Code to Article III status.\textsuperscript{107} In the interim, the bankruptcy system operated under the Emergency Rule, which effectively allowed the lower courts to continue accepting and administering bankruptcy cases through the provisions that were arguably not invalidated by \textit{Marathon}.\textsuperscript{108} Ultimately, the hazy nature of the public and private rights dichotomy in the bankruptcy context left considerable room to argue that Article III status was not required, yielding an uneasy compromise that was virtually certain to draw subsequent challenges.\textsuperscript{109}

The proverbial sausage made by this process, the Bankruptcy Amendments and Federal Judgeship Act of 1984,\textsuperscript{110} included mostly patchwork modifications to the court structure that tracked the Emergency Rule.\textsuperscript{111} Under the Act, the authority to appoint or remove bankruptcy judges was transferred to the judicial council for the applicable circuit.\textsuperscript{112} Bankruptcy judgeships remained term appointments (14 years), and bankruptcy courts were structured as "adjuncts" to the applicable federal district court.\textsuperscript{113} Under this framework, the 1984 Amendments conferred jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11" on district courts, who were authorized to refer any or all of these proceedings to bankruptcy judges.\textsuperscript{114}

With respect to the substantive matters that may be decided by Article I bankruptcy courts, the 1984 Amendments did not track the \textit{Marathon} plurality's public and private dichotomy. Rather, bankruptcy courts were authorized to adjudicate core proceedings under \textit{28 U.S.C.} § 157 or noncore proceedings with the consent of the parties.\textsuperscript{115} Proceedings that "arise under" or "arise in" a bankruptcy case were core, while those that are merely "related to" the bankruptcy case were

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\item Cf. Vern Countryman, \textit{Emergency Rule Compounds Emergency}, 57 AM. BANKR. L.J. 1, 3 (1983) (arguing emergency rule will bring about "chaos" and is "wholly unworkable").
\item See Countryman, \textit{supra} note 8, at 8–9 (discussing judicial committee's reluctance to give bankruptcy judges Article III status).
\item As explained in Part II.D, however, the 1984 Amendments also made it likely that few of these challenges would return to the Supreme Court.
\item At the time, this was a perplexing decision given the widespread view among the Justice Department and many leading scholars that the Emergency Rule was "unworkable and of doubtful constitutionality." Stuart Taylor Jr., \textit{Fate of Bankruptcy System in Doubt}, N.Y. TIMES, Dec. 20, 1982, at D1.
\item Id.
\item Id. at § 1334.
\item Id. at §§ 157(b)(1), (c)(2). The statute does not clearly outline the parameters of what constitutes "consent" for these purposes.
\end{enumerate}
\end{footnotesize}
not. If one or more parties did not consent to bankruptcy court adjudication of a noncore dispute, the amendments nonetheless permitted the court to hear the proceeding and make proposed findings of fact and conclusions of law, but only the district court could enter a final order after reviewing the bankruptcy court's recommendations de novo.

2. Subsequent Article I Adjudication Cases: Thomas and Schor

In the two years following the 1984 Amendments, the Supreme Court issued a pair of opinions that appeared to supplant the Marathon plurality's reasoning or, at the very least, limit its effect. In Thomas v. Union Carbide Agricultural Products Co., for example, the Court characterized the Marathon plurality as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." The following term, the Court stressed that "the absence of consent to an initial adjudication before a non-Article III tribunal" was a "significant factor" in Marathon, a factor that might be uncommon given the "core" and "non-core" distinction under the 1984 Amendments and the historically broad conception of "consent" in bankruptcy. Thomas focused on Congress' power to require registrants under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to submit data-sharing compensation disputes to binding arbitration. Under FIFRA, registrants must submit research data concerning a pesticide's health, safety, and environmental effects to the EPA. To protect the proprietary interests of first submitters in this data, Congress adopted a provision requiring subsequent registrants to compensate original data submitters for the use of this data in the registration process. If the parties could not agree on the amount of compensation, FIFRA provided that either party could invoke binding arbitration.

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116 Id. at § 157(a) (noting that "proceedings arising under . . . arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district"). This determination does not rely on the federal or state law basis of the dispute. See id. at § 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.").

117 Id. at § 157(c)(1).


119 Id. at 584.


121 Thomas, 473 U.S. at 571–75 (analyzing whether Congress is prohibited from "selecting binding arbitration" under Article III "as a mechanism for resolving disputes among participants in FIFRA's pesticide registration scheme").

122 Id. at 571.

123 See id. at 571–72 (noting that mandatory data-licensing scheme was instituted to "streamline pesticide registration procedures, increase competition, . . . avoid unnecessary duplication of data-generation costs," and protect proprietary interests of preliminary registrants of data).

124 See id. at 573 (indicating that binding arbitration may be requested by either party if parties fail to resolve compensation disputes).
Rather than follow the Marathon plurality's rigid limits on legislative courts, the Thomas majority embraced a functional analysis, noting that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." Instead of drawing a bright line for constitutionally permissible assignment of adjudication to a non-Article III forum, the Court reasoned that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced."

Under this approach, the majority concluded that Congress could create "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." This was clearly the case in Thomas because "it is the 'mandatory licensing provision' that creates the relationship between the data submitter and the follow-on registrant, and federal law supplies the rule of decision" concerning the original data submitter's compensation rights. As the court expounded later in the opinion:

> [T]he right created by FIFRA is not a purely "private" right, but bears many of the characteristics of a "public" right. Use of a registrant's data to support a follow-on registration serves a public purpose as an integral part of a program safeguarding the public health. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication. It also has the power to condition issuance of registrations or licenses on compliance with agency procedures. Article III is not so inflexible that it bars Congress from shifting the task of data valuation from the agency to the interested parties."

For much the same reason, Justice Brennan concluded that the data-sharing compensation structure withstood scrutiny under the Marathon standard as well.

With respect to the perceived intrusion into the judiciary's role, the Court reasoned that the "danger of Congress or the Executive encroaching on the Article

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125 Id. at 587.
126 Id. at 589.
127 Id. at 594.
128 Id. at 585.
129 Id. at 589.
130 Id. at 600-01 (Brennan, J., concurring) ("Although a compensation dispute under FIFRA ultimately involves a determination of the duty owed one private party by another, at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA’s comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication.").
III judicial powers is at a minimum when no unwilling defendant is subjected to judicial enforcement power as a result of the agency 'adjudication.' To that end, any perceived intrusion was minor because, "under FIFRA, the only potential object of judicial enforcement power is the follow-on registrant who explicitly consents to have his rights determined by arbitration." To that end, any perceived intrusion was minor because, "under FIFRA, the only potential object of judicial enforcement power is the follow-on registrant who explicitly consents to have his rights determined by arbitration."  

A year later, the majority in Commodity Futures Trading Commission v. Schor followed the Thomas approach when evaluating the CFTC's ability to exercise jurisdiction over state law counterclaims to a former client's claims against a broker. Although the adjudication of common law counterclaims broke from the traditional agency model, this single deviation was minor, and the majority was reluctant "to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical 'slippery slope' may deposit us." Moreover, the Court expressly noted that plaintiff consented to the CFTC's jurisdiction by pursuing an administrative resolution of his claim against the broker and expressly demanding that the broker litigate the counterclaim in the administrative proceeding. This was consistent with Katchen v. Landry, a case under the Bankruptcy Act, in which the Court "upheld a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction."  

3. Granfinanciera v. Nordberg  

The public/private dichotomy under the Bankruptcy Code arose yet again in Granfinanciera v. Nordberg. In that case, the Chase & Sanborn Corporation commenced chapter 11 proceedings that ultimately led to an approved plan of reorganization. The trustee, who was authorized to pursue fraudulent conveyance actions under the plan, filed a fraudulent transfer action against Granfinanciera, S.A. pursuant to sections 548(a)(1), (a)(2) and 550(a)(1) of the Bankruptcy Code. The district court referred the matter to the bankruptcy court, after which the defendant requested and was denied a jury trial. The trustee prevailed at trial, and

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131 Id. at 591.
132 Id. at 592.
134 Id. at 854 (finding Thomas approach applies to state law character of claim).
135 Id. at 852.
136 Id. at 849 (acknowledging plaintiff waived any possible right to trial of counterclaim by demanding to proceed in reparations proceeding).
137 382 U.S. 323, 335 (1966) (upholding idea that by presenting counterclaim, parties subject themselves to consequences).
138 Schor, 478 U.S. at 852.
139 492 U.S. 33, 55 (1989) (discussing whether trustee's right to recover fraudulent conveyance is public or private).
140 Id. at 36.
142 Granfinanciera, 492 U.S. at 36–37.
the district court and Eleventh Circuit Court of Appeals affirmed. The Supreme Court reversed.

In reaching its decision, the majority once again distinguished public and private rights. Specifically, although acknowledging Congress may create new public rights and assign their adjudication to an Article I decision maker, the Court reasoned that it "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." More pointedly, the majority rejected the suggestion that the incorporation of existing private rights into the statutory framework was sufficient to transform them into public rights:

The decisive point is that in neither the 1978 Act nor the 1984 Amendments did Congress "create a new cause of action, and remedies therefor, unknown to the common law," because traditional rights and remedies were inadequate to cope with a manifest public problem. *Atlas Roofing*, 430 U.S., at 461. Rather, Congress simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations and that apparently did not suffer from any grave deficiencies. This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Justice Scalia's concurrence suggested that he would have gone further, limiting public rights to those disputes arising between the government and others.

4. The Constitutional Gap

Where the Marathon plurality took a wrecking ball to the constitutional foundations of the bankruptcy court structure, the 1984 Amendments merely spackled and painted over the resulting hole. The 1984 Amendments did little to alter the day-to-day operation of the bankruptcy courts and the breadth of the matters over which they preside. District courts rarely retain or withdraw the

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143 Nordberg v. Granfinanciera, S.A. (*In re Chase & Sanborn Corp*.), 835 F.2d 1341 (11th Cir. 1988).
144 *Granfinanciera*, 492 U.S. 33.
145 *Id.* at 51–52.
146 *Id.* at 60–61 (internal citations omitted).
147 *Id.* at 67 (Scalia, J., concurring) ("The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine.").
reference in bankruptcy cases, and then only due to extreme circumstances. 149

Bankruptcy courts exercise full authority over substantially all core matters, 150 and they preside over a broad range of non-core matters subject to de novo review. 151

The net result was a constitutionally uneasy framework for bankruptcy adjudication in the years following the amendments. Neither Thomas nor Schor expressly overruled the public/private dichotomy, and Granfinanciera relied upon it heavily. The Court has not provided significant guidance as to the parameters of public law in the bankruptcy context, although most of the Justices appear open to the possibility that it is broader than Justice Scalia’s Granfinanciera concurrence suggests. Moreover, each of the cases drew upon the effective consent (Thomas and Schor) or utter absence of consent (Marathon and Granfinanciera) in reaching their conclusions, regardless of the test applied, but none of the cases addressed the varying ranges of implied consent between the extremes.

After the relatively rapid succession of public/private rights cases decided by the Court in the 1980′s, more than two decades would pass before the Court revisited the bankruptcy court structure in Marshall. As with other constitutional gaps in bankruptcy history, the Code’s structure largely served its intended purpose in more than 29 million bankruptcy cases filed since Marathon. 152 Bankruptcy courts hear a substantial majority of the matters relevant to any given bankruptcy case, leaving district courts free to manage their own growing dockets. In many respects, the bankruptcy process follows the original statutory design and, for the most part, operates as intended by the authors of the Code.

This temporal constitutional gap may be explained by several complimentary factors. The expansive conception of consent in bankruptcy cases and proceedings, including the widely embraced view that a creditor’s decision to file a proof of claim waives the right to Article III adjudication of the claim and any counterclaims, 153 has effectively swept many private right matters into bankruptcy core jurisdiction. Even in the absence of consent, the ability to frame appellate review as de novo (even if the proceeding ultimately does not strike the unhappy litigant as such) has largely allowed district courts to refer numerous non-core matters to bankruptcy courts that might otherwise remain at the district court under

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149 See George A. Martinez, The Res Judicata Effect of Bankruptcy Judgments: The Procedural and Constitutional Concerns, 62 Mo. L. Rev. 9, 17 (1997) ("Although district courts have jurisdiction over bankruptcy matters, they rarely exercise that jurisdiction.").

150 Bankruptcy judges are required to determine whether a matter is core or non-core. 28 U.S.C. § 157(b)(3) (2006) ("The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding."). Nonetheless, many orders simply assert that a matter is core without further analysis or resolve matters that are core and non-core collectively. For example, an order confirming a plan of reorganization is core, but some of the specific findings of fact and conclusions of law within the order relate only to non-core matters.

151 Id. at § 157(c)(1).

152 A detailed table of bankruptcy filings per year may be found at Annual Business and Non-business Filings by Year (1980-2008), supra note 11.

153 See, e.g., Bankr. Servs. v. Ernst & Young (In re CBI Holding Co.), 529 F.3d 432, 466–67 (2d Cir. 2008) (stating that, by filing proof of claim, creditors subject themselves to bankruptcy court’s jurisdiction).
Perhaps most significant is the fact that financial self-interest serves as an intrinsic limitation on bankruptcy appeals generally; the lengthy appellate process in bankruptcy will often cost more to see to conclusion than the litigants stand to gain if they ultimately prevail.155

F. Stern v. Marshall

The majority's comparison of the dispute at the center of Stern v. Marshall to Dicken's Bleak House was fitting, even if some observers understandably found it cliché.157 The case involved an expansive but widely embraced view of consent, a procedural history that effectively precluded de novo review, and a series of appeals driven by both the high stakes of the litigation and a degree of personal animus that was severe enough to survive the passing of the original litigants. Even so, in the absence of several discrete events occurring as they did, it seems unlikely that the case would have wound its way to the Court.

1. Background

Although Marshall stemmed from an appeal of an order from the court overseeing the Vickie Lynn Marshall (better known by her stage name, Anna Nicole Smith) bankruptcy, the proceeding in question was little more than a probate dispute. Prior to the death of her husband, J. Howard Marshall, Vickie commenced litigation in Texas probate court to invalidate his estate plan, orchestrated by J. Howard's son, Pierce Marshall, on the grounds of fraud and undue influence.158 Pierce commenced a separate defamation proceeding against Vickie and her attorneys in Texas court based on her attorneys' representations to the press that Pierce obtained J. Howard's approval of the estate plan by fraud.159

Ostensibly due to an $884,607.98 default judgment on a sexual misconduct claim filed against her by a former housekeeper,160 Vickie commenced a voluntary chapter 11 case in the Central District of California a few months after J. Howard's death.161 In May 1996, Pierce initiated an adversary proceeding in Vickie's chapter

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157 See, e.g., Bob Lawless, Anna Nicole Smith May Be More Than Just the Only Loser on This One, CREDIT SLIPS (June 23, 2011), http://www.creditslips.org/creditslips/2011/06/anna-nicole-smith-may-be-more-than-just-the-only-loser-on-this-one.html (remarking on cliché reference).
159 Id. at 8–9.
160 Id. at 9 n.3. The sexual harassment claim was settled shortly after the bankruptcy case was filed. Id.
11 case seeking a determination that her liability on any future defamation suit was not dischargeable pursuant to section 523(a) of the Code.\(^{162}\) Two months later, Pierce filed a proof of claim in the bankruptcy case, to which he attached a copy of the complaint from the adversary proceeding.\(^{163}\) Vickie objected to the proof of claim and asserted several counterclaims, including fraud and tortious interference with an inter-vivos gift.\(^{164}\) The district court initially withdrew the reference with respect to the adversary proceeding but subsequently reversed course and referred the matter to the bankruptcy court for adjudication.\(^{165}\)

Notwithstanding Pierce's occasional protests that the bankruptcy court lacked jurisdiction over the claim and counterclaim,\(^{166}\) the matter remained with the bankruptcy court. Citing Ninth Circuit and Supreme Court precedent, the bankruptcy court concluded that, "by filing a claim, a claimant voluntarily submits to the equity jurisdiction of the bankruptcy court for the allowance and disallowance of all claims made by the claimant against the bankruptcy estate or made against the claimant by the bankruptcy estate's representative."\(^{167}\) As a result, Pierce "voluntarily submitted himself to the bankruptcy court's equity jurisdiction as to all claims by the estate against him," including the Vickie's fraud and undue influence counterclaim.\(^{168}\)

On November 5, 1999, the bankruptcy court granted Vickie summary judgment with respect to Pierce's defamation claim.\(^{169}\) Specifically, the bankruptcy court concluded that "Vickie had published no statements about Pierce, had not ratified any statements about Pierce made by her attorneys, and was not otherwise vicariously liable for any statements her attorneys had made about Pierce."\(^{170}\) Roughly eleven months later, the bankruptcy court ruled in Vickie's favor on her probate counterclaims, awarding her nearly $450 million in damages.\(^{171}\)

On appeal, Pierce argued that the probate counterclaims were non-core matters requiring Article III adjudication under Marathon. In its order dated June 19, 2001, the district court agreed.\(^{172}\) Accordingly, the district court explained that it would "engage in a comprehensive, complete, and independent review of the bankruptcy

\(^{163}\) Id.
\(^{164}\) Id. These counterclaims are collectively referred to hereafter as the "probate counterclaims."
\(^{165}\) Id.
\(^{166}\) In re Marshall, 257 B.R. 35, 36 (Bankr. C.D. Cal. 2000) ("E. Pierce Marshall continues to complain that this court lacks jurisdiction over this adversary proceeding because this claim belongs in the probate case now in trial in Texas. Notably, however, he has never brought a motion on this subject on proper notice pursuant to this court's motion rules. For this reason alone this issue has never been properly brought before this court, and E. Pierce Marshall is entitled to no relief on this subject.") [hereinafter, Bankruptcy Opinion].
\(^{167}\) Id. at 37 (emphasis in original).
\(^{168}\) Id.
\(^{169}\) In re Marshall, 275 B.R. 5, 9 (C.D. Cal. 2002).
\(^{170}\) Marshall, 264 B.R. at 616.
\(^{171}\) Id. at 616–17.
\(^{172}\) See id. at 626.
court's record and may, if warranted, hear additional testimony from the parties and witnesses."

At the same time, proceedings continued in the Texas probate court overseeing the matters initiated by Vickie in 1995. Following the bankruptcy court's order concerning the probate counterclaims but prior to the district court's review of that order, the jury in the five-week trial in the probate proceedings returned a verdict in favor of Pierce. The jury's findings conflicted with the bankruptcy court's prior determination of a number of critical facts, including: (1) the Living Trust and will were valid and had not been forged or altered; (2) J. Howard Marshall II had not been the victim of fraud or undue influence; (3) he had the requisite mental capacity when he executed his Living Trust and will; and (4) he did not have an agreement with Vickie Lynn Marshall that he would give her one-half of all his property. In August 2001, the probate court entered judgment in accordance with the jury's findings.

Following the entry of judgment in probate court, Pierce moved for summary judgment in the district court based on claim and issue preclusion. The district court denied the motion. Among other reasons, the district court concluded that summary judgment was inappropriate given that the matter had already been litigated in bankruptcy court and was merely subject to de novo review. Although the court remained open to consideration of new evidence, it was not bound to do so; it could have merely reviewed the record in accordance with prevailing practice when de novo review is required. And given the practical operation of the process, the court reasoned that de novo review "is more akin to an appeal" than an initial adjudication. Thus, the district court concluded:

Granting Pierce's motion at this stage, after a full trial had been conducted, would do nothing to further those interests. Once a trial has been conducted, there is no judicial economy to applying res judicata or collateral estoppel, no needless litigation has been prevented, few, if any judicial resources have been saved, and the parties have in no way spared themselves (or the courts in three states) of the vexation of multiple lawsuits. A motion to dismiss or to grant summary judgment must therefore be brought before a case has proceeded to trial. Pierce cannot now short-circuit the

173 Id. at 633.
175 See id.
176 Id.
177 Id.
179 Id. at 860.
180 See id. at 864.
181 See id. at 865.
proceedings under the guise of res judicata or collateral estoppel, more than two years after it would be appropriate.182

On March 7, 2002, the district court entered a final judgment against Pierce Marshall, which awarded Vickie $88,585,534.66 for compensatory and punitive damages, plus costs of suit.183

On appeal, the Ninth Circuit initially focused on Pierce's argument that the bankruptcy court lacked subject matter jurisdiction over the counterclaim due to the probate exception.184 In light of the court's conclusion in Pierce's favor on this issue, the panel decided that it did not need to address the core/non-core question.185 The Supreme Court ultimately found in Vickie's favor with respect to this issue in 2006 and remanded for further proceedings.186

On remand, the Ninth Circuit determined that the bankruptcy court "exceeded its statutory grant of power and the constitutional limitations on that power when it purported to enter a final judgment" and, accordingly, concluded that "the findings of the Texas probate court should be afforded preclusive effect because it is the earliest final judgment on matters relevant to this proceeding."187 The focus of the court's analysis was 28 U.S.C. § 157(b)(2)(C), which provides that "[c]ore proceedings include . . . counterclaims by the estate against persons filing claims against the estate."188 Although the plain language of the statute suggests that any counterclaim falls within the bankruptcy court's core jurisdiction, the panel reasoned that such a reading "would permit the bankruptcy court to consider under section 157(b)(2)(C) counterclaims that are factually and legally unrelated to the claim being asserted against the bankruptcy estate" and, accordingly, "would certainly run afoul of the Court's holding in Marathon."189 The panel further concluded that Vickie's suggestion that the language be read to include only compulsory counterclaims remained broader than the public/private dichotomy allowed.190 Thus, in order to avoid interpreting the statute in a manner that would raise constitutional problems, the panel interpreted the section to apply only to a counterclaim that is "so closely related to the proof of claim that the resolution of

182 See id. at 866.
185 Cf. id. at 1130 (explaining that district court concluded that Vickie Lynn Marshall's claim was not "core" bankruptcy claim); id. at 1137 (reversing all judgments awarded to Vickie Lynn Marshall against E. Pierce Marshall).
189 Marshall, 600 F.3d at 1057.
190 See id. at 1058 (holding that all compulsory counterclaims are not necessarily core proceedings).
the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." Vickie's tortious interference counterclaims did not satisfy this test.

2. The Supreme Court Opinion

Vickie's estate petitioned for certiorari, presenting the following questions for review:

1. Whether the Ninth Circuit opinion, which renders section 157(b)(2)(C) surplusage in light of section 157(b)(2)(B), contravenes Congress' intent in enacting section 157(b)(2)(C).

2. Whether Congress may, under Articles I and III, constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim.

3. Whether the Ninth Circuit misapplied Marathon and Katchen and contravened this Court's post-Marathon precedent, creating a circuit split in the process, by holding that Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim.

The petition was granted on September 28, 2010.

In an opinion issued June 23, 2011, a majority of the Court agreed with Vickie's argument that 28 U.S.C. § 157(b)(2)(C) authorized bankruptcy courts to enter final orders on all counterclaims (Question 1); however, the Court further concluded that this grant of authority was unconstitutional (Question 2) and that Pierce did not consent to bankruptcy court jurisdiction over Vickie's counterclaim by filing a proof of claim (Question 3).

Drawing upon the plurality and concurring opinions in Marathon, the majority distinguished matters of public right "that Congress could constitutionally assign to 'legislative' courts for resolution" and state law claims, which Congress could not.

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191 Id.
192 See id. at 1059 (stating that Vickie's answer, objection and tortious interference claim did not satisfy test).
195 See Stern v. Marshall, 131 S. Ct. 2594, 2604–08 (2011) (discussing reasons that bankruptcy court is able to enter final order).
196 See id. at 2608 ("Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.").
197 See id. at 2616.
198 Id. at 2610.
The relevant questions, then, were whether the matter at issue was a private rights matter and, if so, whether its adjudication was improperly assigned to a non-Article III forum.

The bankruptcy court was not acting as a mere adjunct of the district court.

The Court's analysis of these questions began by rejecting the argument that the 1984 Amendments rendered bankruptcy courts as Article III adjuncts for constitutional purposes. Because the bankruptcy court was adjudicating a core matter, section 157(b)(2)(C) expressly authorizes bankruptcy courts to enter final orders over those matters, and 28 U.S.C. § 158(a) requires "marked deference to" bankruptcy judges' findings on appeal; bankruptcy courts exercise the same statutory authority under the 1984 Amendments as the Court found unconstitutional in *Marathon*. Accordingly, the court concluded that bankruptcy courts under the 1984 Act could not "be dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone."

The counterclaim was not a "public right" matter.

The majority next surveyed the various formulations of public right over time and concluded that "Vickie's counterclaim cannot be deemed a matter of 'public right' that can be decided outside the Judicial Branch." Although neither confirming nor rejecting the premise that even the "restructuring of debtor-creditor relations" might qualify as a public right, the majority reasoned that the counterclaim:

is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, or one that "historically could have been determined exclusively by" those branches. The claim is instead one under state common law between two private parties. It does not "depend on the will of congress;" Congress has nothing to do with it.

Moreover, the counterclaim was not sufficiently tied to a public right to justify delegation to a non-Article III forum. It did not "flow from a federal statutory

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199 *Id.* at 2610–11 (explaining authority given to new courts in core proceedings).
200 *Id.* at 2611.
201 *Id.*
202 *Id.* at 2614 n.7 (noting neither party requested Court reconsider public rights framework for bankruptcy).
scheme" as in Thomas. Unlike Schor, its resolution was not "completely
dependent upon adjudication of a claim created by federal law." Because
creditors "have no choice but to file their claims in bankruptcy proceedings if they
want to pursue the claims at all," the court reiterated its belief that "the notion of
'consent' does not apply in bankruptcy proceedings as it might in other contexts." Finally, the authority delegated under section 157(b) was not limited to a
"particularized area of law" within the special expertise of the agency addressing
the dispute, as was the case in Thomas and Schor; rather, it involved a court "with
substantive jurisdiction reaching any area of the corpus juris." Thus, as the court
summarized:

What is plain here is that this case involves the most prototypical
exercise of judicial power: the entry of a final, binding judgment by
a court with broad substantive jurisdiction, on a common law cause
of action, when the action neither derives from nor depends upon
any agency regulatory regime. If such an exercise of judicial power
may nonetheless be taken from the Article III Judiciary simply by
deeming it part of some amorphous "public right," then Article III
would be transformed from the guardian of individual liberty and
separation of powers we have long recognized into mere wishful
thinking.

A proof of claim establishes consent only to hear matters necessarily disposed of in
deciding the claim itself.

Even if the filing of the proof of claim did not establish consent to bankruptcy
court adjudication of the counterclaim, Vickie's estate asserted that it sufficiently
altered the nature of the counterclaim to justify bankruptcy court adjudication.
Indeed, the bankruptcy court's primary argument in support of jurisdiction hinged
upon the fact that, unlike the defendants in Marathon and Granfinanciera, Pierce
filed a proof of claim. In Katchen v. Landry, an opinion cited favorably in
Granfinanciera, the court stated, "he who invokes the aid of the bankruptcy court
by offering a proof of claim and demanding its allowance must abide the
consequences of that procedure." Similarly, in Lagenkamp v. Culp, the Court
allowed a preference claim to be heard when a creditor filed a proof of claim

\[204\] Id.
\[205\] Id.
\[206\] Id. at 2615 n.8.
\[207\] Id. at 2615.
\[208\] Id.
\[210\] Id. at 36, 37.
\[211\] 382 U.S. 323 (1966).
\[212\] Id. at 333 n.9.
because the action thus becomes "integral to the restructuring of the debtor-creditor relationship." In the time since, several courts, including the bankruptcy court in Marshall, have interpreted this language to support the proposition that "[b]y filing a claim, a claimant voluntarily submits to the equity jurisdiction of the bankruptcy court for the allowance and disallowance of all claims made by the claimant against the bankruptcy estate or made against the claimant by the bankruptcy estate's representative."\footnote{Id. at 44 (holding that by filing claim creditor is subject to equitable jurisdiction of bankruptcy court).}

The Court's treatment of this argument reveals the danger in reading the language of an opinion broadly, particularly where its context may suggest far narrower alternatives. Katchen and Lagenkamp involved the bankruptcy courts' authority to decide avoidance actions where the defendant filed a proof of claim. Both the 1898 Act\footnote{Bankruptcy Act of 1898, ch. 541, § 57(g), 30 Stat. 544, 560 (disallowing claims of creditors paid preferentially until preferential payments are surrendered).} and the Code,\footnote{11 U.S.C. §§ 502(d), 547(b) (2006) (instructing court to disallow claims of creditors with property recoverable under specified sections or from avoidable transfers until property is returned).} however, expressly conditioned allowance of any claim on the determination that the creditor asserting it was not the recipient of an avoidable preference or fraudulent conveyance. Thus, by seeking allowance and payment of the claim, the claimant accepted the court's adjudication of matters necessary to determine the claimant's right to payment, including the question of whether the claimant was the recipient of an avoidable transfer.\footnote{See Stern v. Marshall, 131 S. Ct. 2594, 2616–17 (2011) (discussing necessity of deciding preferential transfer claim in order to decide allowance or disallowance of bankruptcy claim).} Moreover, the right of recovery of a preferential transfer is entirely a creation of federal bankruptcy law and properly brought only in connection with the bankruptcy case.\footnote{See id. at 2618 (noting trustee's right to recover for preferential transfers is provided for in current Code and also was provided for in former Bankruptcy Act).}

By contrast, the Marshall majority noted, "Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in Marathon and Granfinanciera must be decided by an Article III court."\footnote{Id. at 2616.} As the Court explained:

In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory or at least in an "attenuated" sense related to Pierce's claim. But there was
never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim.\textsuperscript{221}

Moreover, unlike \textit{Katchen} and \textit{Lagenkamp}, the Court explained that the probate counterclaim at issue "is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding."\textsuperscript{222}

\section*{II. \textit{Marshall}'s Ramifications for Bankruptcy Practice}

Regardless of the long-term significance of the Court's opinion in \textit{Marshall}, it has certainly generated a lot of attention. As Lyle Denniston observed immediately following \textit{Marshall}, "for bankruptcy lawyers, and for the specialized courts in which they ply their craft, the decision was as momentous a constitutional ruling on those courts' authority as was the Justices' decision in the 1982 case of \textit{Northern Pipeline Construction v. Marathon Pipe Line} nullifying an earlier congressional law against those courts' powers."\textsuperscript{223} As a matter of law, \textit{Marshall} highlights the structural constitutional gap between jurisdiction under the Code and the constitutional authority of bankruptcy courts to exercise that jurisdiction. As a matter of bankruptcy practice, the case demonstrates how an unconstitutional provision of a law may nonetheless achieve its purpose during a temporal gap between its passage and ultimate rejection by the Court. Still, although \textit{Marshall} will require bankruptcy courts to focus on matters that are central to their oversight of bankruptcy cases, it remains unclear that the opinion will necessarily lead to a substantial alteration of day-to-day bankruptcy practice across cases and proceedings once the dust clears. This section focuses on the questions that were answered in \textit{Marshall}, the manner in which they were addressed, and how the remaining gaps in the Court's treatment of the public right exception and consent may influence the future direction of bankruptcy practice.

\textit{A. Marshall's "Narrow" Reach}

Although \textit{Marshall} repeats the admonition that "the three branches are not hermetically sealed from one another,"\textsuperscript{224} it also reminds us that the there are limits to how far the other branches may venture into the judicial realm:

\begin{quote}
Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{221} Id. at 2617 (citations omitted).
\item \textsuperscript{222} Id. at 2618.
\item \textsuperscript{224} \textit{Marshall}, 131 S. Ct. at 2609 (acknowledging overlap between judiciary, legislature, executive branches of government).
\end{itemize}
if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary.\(^{225}\)

These limitations serve not only to preserve the institutional role of an independent judiciary as a safeguard against tyranny but also the individual's interest in adjudicating certain matters before an impartial and independent judge even where tyranny may arise, at most, at the distant end of an extended slippery slope.\(^{226}\)

This reminder, together with the Court's apparent discomfort with the broad reach of bankruptcy court jurisdiction under the Code, may be read to suggest that the Article I bankruptcy structure will not survive scrutiny if the question comes before the Court. From Chief Justice Marshall's assessment of the constitutionality of non-Article III courts in *American Insurance Co. v. Canter*,\(^{227}\) the Court has frequently stressed the importance of distinguishing courts that exercise the "judicial power of the United States" from those that do not, even if the latter perform functions that appear to be judicial.\(^{228}\) Notwithstanding the Court's longstanding acceptance of Article I courts, and the "virtually unthinkable" return to a literal interpretation of Article III,\(^{229}\) the distinction between Article I and Article III courts must have some constitutional significance. In recent years, gauging the extent to which these features have been assigned to Article I courts has been a significant factor in distinguishing bankruptcy from other non-Article III courts.\(^{230}\)

\(^{225}\) *Id.* (citation omitted).

\(^{226}\) *Id.* (highlighting Framers intent to ensure independence of Judiciary from Congress and Executive).

\(^{227}\) *Am. Ins. Co. v. Canter*, 26 U.S. 511, 546 (1828) (differentiating legislative courts "created in virtue of the general right of sovereignty which exists in the government" from constitutional courts "in which the judicial power conferred by the Constitution on the general government, can be deposited").


\(^{229}\) Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916–17 (1988) (discussing Court's rejection of "view that all federal adjudicative tribunals must be article III courts").

\(^{230}\) *Marshall*, 131 S. Ct. at 2615 (contrasting bankruptcy courts with agency adjudication over particularized matters).
And it is difficult to imagine a broader delegation of apparent judicial power to Article I courts than that found in the Code.

Moreover, this distinction cannot be glossed over by careful legislative framing of the substantive rights swept into the bankruptcy process. Marathon suggested a distinction between the legislative power to create federal rights and the power to relabel rights into an Article I scheme in manner that renders Article III protection meaningless. Granfinanciera further clarifies that the mere repackaging of existing private rights does not transform them into public rights, and Marshall confirms that bankruptcy courts lack constitutional authority to enter final judgment with respect to these matters. Even fraudulent transfer litigation, the centerpiece the first modern bankruptcy law, falls prey to this exclusion from bankruptcy court authority under Marshall. And though the Bankruptcy Code may be said to create certain rights as part of the restructuring of debtor-creditor relations, much of the business of bankruptcy courts centers on the initial determination of matters that are commonly perceived as private.

Barring the Court's unlikely abandonment of the public/private right dichotomy in the bankruptcy context or a more definitive statement of what constitutes a public right in bankruptcy, we are left with a framework that tells us only that specific delegations of authority are or are not permissible. Thus, even if the question resolved in Marshall is a "narrow one" and will not significantly change the division of responsibility among bankruptcy and district courts, the Court's collective jurisprudence in this area—Marathon, Granfinanciera and now Marshall—carries potentially sweeping implications for the constitutional status of the modern bankruptcy system. This ambiguity concerning a critical feature of the modern bankruptcy structure invites further strategic, piecemeal litigation and ensures that a cloud of uncertainty will hang over bankruptcy practice until it is finally resolved.

B. The Public Right Exception in Bankruptcy?

1. Created and Existing Rights

Although expansive interpretations of Marshall, Granfinanciera and Marathon would effectively foreclose bankruptcy court adjudication over virtually any dispute

231 See Statute of 13 Eliz., ch 5 (1571) (codifying transactions intended to defraud creditors as void).
233 See supra Section II.B.1 (discussing rights created by Code).
234 Marshall, 131 S. Ct. at 2620 (agreeing with United States that question presented is narrow).
involving private rights, including many core matters, the Court appears reluctant to embrace such a sweeping conclusion. While many rights that might be framed as "created" in bankruptcy are premised on or qualified by pre-existing non-bankruptcy rights, this reluctance suggests that incorporation may be less offensive to separation of powers than the relabeling criticized in Granfinanciera. Thus, rights that are incorporated into the framework for evaluating legislatively created rights may be decided by the Article I court, but only to the extent necessary to reach a determination on the created right. Adjudication of matters that are merely related to these created or incorporated rights in bankruptcy court may be expedient, but nonconsensual delegation of these matters is not consistent with Article III regardless of whether they are designated as core.

In sum, Marshall may be read to continue the Court's effort to distinguish between rights that are (a) created by the legislative scheme to restructure debtor-creditor relations; (b) necessarily incorporated as part of the substantive design of that scheme; and (c) private matters, regardless of whether they are relabeled under the Code. For example, a debtor's right to the automatic stay during the pendency of a case and a discharge thereafter appear to fall in the first category because they are creations of bankruptcy law that are central to the restructuring scheme. The claim allowance mechanisms for restructuring debtor-creditor relations upon the debtor's bankruptcy supplant existing recovery rights with new bankruptcy-specific rights that are largely premised upon pre-bankruptcy rights, which may be reviewed to the extent necessary to determine a creditor's distribution rights under the

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235 Indeed, this has been a common reading of Marshall in the relatively short time since the opinion was handed down. See, e.g., In re Am. Bus. Fin. Servs., 457 B.R. 314, 320 (Bankr. D. Del. 2011) (concluding bankruptcy court has jurisdiction to hear adversary proceeding as it directly stems from bankruptcy case); see also In re Salander O'Reilly Galleries, 453 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) ("Nowhere in Marathon, Granfinanciera, or Stern does the Supreme Court rule that the bankruptcy court may not rule with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy. As noted, Stern repeatedly emphasizes that it addresses only the constitutionality of the bankruptcy court making a final ruling on a state-law counterclaim that would not be finally resolved in the process of allowing or disallowing a proof of claim. The Granfinanciera Court interpreted previous cases as holding that the creditor's right to a jury trial turned on whether it submitted a claim against the estate. The Marathon plurality emphasized the difference between restructuring of debtor-creditor relations and enforcement of a purely private right. The thread that binds these cases is the concept that when the jurisdiction of the bankruptcy court is at issue, the adjudication of a state law claim is of paramount concern.") (internal citations omitted).

236 See In re Soo Bin Kim, No. 10-54472, 2011 WL 2708985, at *2 (Bankr. W.D. Tex. July 11, 2011) (stating need to reach determinations that may be preclusive in subsequent state court proceedings does not preclude bankruptcy court from doing so in order to decide core bankruptcy matters).

237 See JustMed, Inc. v. Bye (In re Bye), No. 11-00378, 2011 WL 6210938, at *3 (D. Idaho Dec. 14, 2011) ("[I]t was not the mere presence of state law issues that drove the Stern decision; it was that the state-law claim had no other connection to the bankruptcy matter and would not be resolved in the claims allowance process.").

On the other hand, Marshall re-affirms that Congress lacks authority to sweep private rights litigation into bankruptcy court merely because it may lead to more efficient administration of a case.\textsuperscript{240}  

2. The Restructuring of Debtor-Creditor Relations Focus

The Court's jurisprudence in this area may be easier to distinguish from other areas of law if we view the plurality and majority opinions as embracing a narrower conception of the bankruptcy power to regulate debtor-creditor relations, at least through a non-Article III rights adjudication framework, than has been widely assumed. At one point, the Marshall court suggested that claims brought "to augment the estate" must be characterized as a matter of private right, while "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res" might be considered public right matters.\textsuperscript{241} If the bankruptcy power to create or incorporate private rights is limited to the restructuring of the debtor's relations with its creditors (as opposed to the restructuring of the debtor's relations with its creditors and debtors), then the Bankruptcy Clause authorizes exclusive determination over only these matters to the other branches. The inclusion of other private matters—such as the contract, tort and fraudulent transfer actions against the estates' debtors in Marathon, Marshall, and Granfinanciera—into the legislative scheme may be an appropriate exercise of legislative authority, but only to the

\textsuperscript{239} See supra Section II.B.2. Likewise, the bankruptcy court has authority to approve or reject the trustee's settlement of a non-bankruptcy dispute because the act of settlement is at the heart of the review; it is not a final determination of the merits of the matters being settled. In re Washington Mut., Inc., 461 BR. 200, 214 (Bankr. D. Del. 2011). The determination of whether property qualifies as "property of the estate" falls within the bankruptcy court's authority for much the same reason. Id.; see also Factory Mut. Ins. Co. v. Panda Energy Intl. Inc. (In re Herefid Biofuels, L.P.), No. 10-03341, 2012 WL 10298, at *2 (Bankr. N.D. Tex. Jan. 3, 2012) (providing post-confirmation interpretation of bankruptcy asset sale order and determination of what qualified as "property of the estate" under section 541 of the Bankruptcy Code remains subject to final adjudication in bankruptcy court); In re Hill, No. 08-36267, 2011 WL 6936357, at *7 (Bankr. S.D. Tex. Dec. 30, 2011) (determining whether property is exempt or property of the estate "is central to the public bankruptcy scheme, as it relates to both the exercise of exclusive jurisdiction over the debtor's property (because before property can become exempt, it is property of the estate) and the equitable distribution of that property among a debtor's creditors"); In re Blakely, No. 11-13674, 2011 WL 4458830, at *2 (Bankr. D. Colo. Sept. 23, 2011).

\textsuperscript{240} Marshall, 131 S. Ct. at 2619 ("It goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" (quoting INS v. Chadha, 462 U.S. 919, 944 (1983))). To that end, even though it may be more efficient for a bankruptcy court to hear and determine a state law cause of action premised on conduct in the bankruptcy proceeding, the bankruptcy court may lack Constitutional authority to do so. See Ortiz v. Aurora Health Care, Inc., 2011 U.S. App. LEXIS 26009 (7th Cir. Dec. 30, 2011) (holding bankruptcy court lacked authority to enter final judgment concerning proof of claim forms that allegedly violated Wisconsin medical record disclosure law).

\textsuperscript{241} Id. at 2614 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989)). Thus, as Judge Schmetterer properly noted, "Stern left intact the authority of a bankruptcy judge to fully adjudicate a creditor's claim." Dragisic v. Boricich (In re Boricich), No. 08 B 15248, 2011 WL 5579062, at *1 (Bankr. N.D. Ill. Nov. 15, 2011).
extent that it is related to the restructuring of the debtor's relations with its creditors and does not withdraw these ancillary matters from Article III courts.

As discussed previously, historical practice may support this narrower view of the bankruptcy power. Although bankruptcy liquidation necessarily involves the ability to marshal the bankrupt's res for distribution to its creditors, the bankruptcy power does not require any legislative alteration of the bankrupt's substantive state law rights against its own debtors.\(^{242}\) Rather, bankruptcy laws have primarily charged one or more individuals with the power and responsibility of marshaling the bankrupt's assets and, if necessary, pursuing litigation in the place of the debtor in an appropriate state or Article III federal court. Such a limitation likewise addresses the federalism concerns that are implicated by bankruptcy law.\(^{243}\)

To be clear, this characterization is illustrative of the limits of Congress' power to frame the structural mechanisms for administering bankruptcy cases under Article III; not a definitive characterization of the actual limits of Congress' substantive authority over bankruptcy under Article I.\(^{244}\) Notwithstanding the occasional early American bankruptcy law that granted some modest additional judicial power to quasi-judicial officers, none of these forays occurred within a structure with the collective breadth and depth of the modern bankruptcy system. Thus, even if an isolated expansion of judicial power may survive scrutiny under a traditional bankruptcy administration structure, it will be viewed as part of the whole modern bankruptcy structure, which exercises a degree of judicial power that is largely indistinguishable from that reserved to Article III judges under the Constitution. Put simply, when these provisions are reviewed in the context of the bankruptcy court structure as a whole, there are not enough other limitations on bankruptcy courts' judicial power to avoid separation of powers concerns. Accordingly, this suggests that only those structural elements that fall within the basic traditional bankruptcy framework are likely to survive Article III scrutiny.

C. The Limits of Consent

1. The Proof of Claim as Consent

The most obvious impact of *Marshall* is the demise of the theory that a creditor's pursuit of payment on a discrete claim qualifies as consent to Article I adjudication of any and all disputes between the parties. Filing a proof of claim

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\(^{243}\) See Cole, *supra* note 25, at 241 ("By deferring to nonbankruptcy substantive law, bankruptcy preserves both the vertical and horizontal separation of powers that currently characterizes such law, and promotes the jurisdictional competition that flows from the horizontal separation of sovereigns. Bankruptcy, then, can be viewed as federalist to the extent that its rules are merely procedural and directed at solving the problem of the common pool.").

\(^{244}\) For a discussion of the case for limiting the substantive power of Congress under the Bankruptcy Clause in this way, see Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 490–92 (1996).
qualifies as consent to bankruptcy court adjudication of the underlying non-bankruptcy rights because this adjudication is necessary to determine whether a claim should be allowed and its relative priority. Fraudulent transfers are private matters in the absence of a proof of claim, but they are necessarily incorporated after a proof of claim is filed because 11 U.S.C. § 502(d) reflects a clear substantive prohibition on allowing claims that are held by those who are the recipients of fraudulent or preferential transfers.

Even under this limited interpretation of the majority's holding, the dissent suggested that the impact on bankruptcy administration would be far greater than the majority predicted. Although filing a proof of claim may qualify as consent to jurisdiction over counterclaims that may be fully resolved without inquiry beyond that required by the claim allowance process, many counterclaims require consideration of additional facts and law. As Justice Breyer noted in his dissent, the resulting "constitutionally required game of jurisdictional ping-pong between courts" raises the specter of "inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy." With respect to these matters, bankruptcy courts frequently defer to the appropriate state courts or enter proposed findings of facts and conclusions of law with the final decision rendered by the district court.

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245 Marshall, 131 S. Ct. at 2629–30 (Breyer, J., dissenting) (hypothesizing burdensome change in authority able to hear counterclaim).

246 For example, Justice Breyer's dissent notes the situation in which a tenant files for bankruptcy, the landlord files a claim for unpaid rent, and the tenant raises a variety of counterclaims for damages arising from the landlord's pre-petition conduct. Id. (Breyer, J., dissenting).

247 Id. at 2630 (Breyer, J., dissenting).

248 Id. at 2619.

Moreover, the broader consent by ambush approach was not accepted universally prior to Marshall, although courts generally agreed that bankruptcy courts could not adjudicate private matters against parties who did not file a proof of claim. Indeed, the petitioner did not attempt to defend universal consent; instead, he suggested that 28 U.S.C. § 157(b)(2)(C)'s reach should be limited to compulsory counterclaims.

The net impact on bankruptcy administration may be difficult to predict for another reason: parties that might have had viable claims against debtors' estates have, at times, elected against filing a proof of claim to avoid bankruptcy court adjudication of other, more important disputes among the parties. Indeed, a common practitioner question concerning the Marshall case is why Pierce filed the proof of claim given the limited likelihood of collection and the risk that the bankruptcy court would assert jurisdiction over all of the related disputes. The degree to which potential claims have not been filed is difficult to quantify, but it highlights the fact that strategic avoidance of bankruptcy court adjudication would occur even under the dissent's approach.

Finally, as a matter of policy, it is not clear that shoehorning all related disputes, or even the narrower group of all compulsory counterclaims, into a single, streamlined Article I bankruptcy forum is desirable across the universe of actions that would be implicated. Bankruptcy policy analysis is frequently premised on the assumptions that such matters are primarily pecuniary and that creditors and debtors tend to be haves and have-nots, respectively. If we begin from these starting points, then it may be easy to rationalize the idea of sweeping all actions into the debtor's bankruptcy forum of choice as doing little more than leveling the playing field to expedite case administration. These generalizations, however, do not hold true across bankruptcy cases and proceedings. Few would characterize the mega-bankruptcy debtors of the last decade as being at the mercy of their mom-and-pop vendors and individual customers in the absence of this power. Likewise, although damages are pecuniary by definition, the rights vindicated in tort and civil rights cases are difficult to characterize as primarily financial. Indeed, the National Board of Trial Advocates and the National Black Chamber of Commerce filed a bipartisan

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250 See, e.g., Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1102 (2d Cir. 1993) (holding breach of contract action against party that did not file a proof of claim was non-core); Bank of Lafayette v. Baudoin (In re Baudoin), 981 F.2d 736, 741 (5th Cir. 1993) (finding tort and contract claims against secured lender qualified as core because the lender filed a proof of claim); In re Depo, 40 B.R. 537, 542 (N.D.N.Y 1984) ("[A] review of the cases and authorities indicates that, while the matter is not uniformly settled, the filing of a proof of claim is generally considered to constitute implied consent to Bankruptcy Court jurisdiction over at least any compulsory counterclaims asserted by the trustee.").

251 See Brief of Petitioner, supra note 193, at 50–64 (arguing bankruptcy court's jurisdiction over compulsory counterclaims as Constitutional under Thomas/Schor analysis and Crowell adjunct-court theory).


253 Although purely anecdotal, this question has been among the first to come up in every discussion that I have had with practicing bankruptcy lawyers concerning the Marshall case since 2009.
amicus brief in Marshall, in which they questioned the quality of justice such cases would receive before Article I bankruptcy courts.

2. Broader Implications

Beyond the proof of claim as consent question, it may be tempting to read Marshall as having far broader implications for consent in bankruptcy generally; suggesting substantial potential litigation over what, exactly, suffices when consent is the only apparent basis for judicial authority. Even if all parties appear to consent to Article I adjudication, litigants may subsequently argue that they did not, in fact, consent. This uncertainty may provide litigants with an opportunity to take a second bite at the apple if they are unhappy with the result in bankruptcy court. As Judge Gerber reasoned following Marshall:

[It may now be, and it's fair to assume that it will now be argued, that consent, no matter how uncoerced and unequivocal, will never again be sufficient for bankruptcy judges ever to issue final judgments on non-core matters. That huge uncertainty presages litigation over that issue with the potential to tie up this case, and countless others, in knots. It also would at least seemingly invite litigants to consent, see how they like the outcome, and then, if they lose, say their consents were invalid.]

Given the circumstances in which these comments were made—the court's authority to require non-core claims against the reorganized debtor's current and former officers and directors be filed in the bankruptcy court—courts facing less expansive assertions of authority may not be inclined to follow Judge Gerber's lead. For example, in a tax dispute related to the IndyMac receivership, the district court rejected a motion to withdraw the reference notwithstanding the conclusion that the matter was a noncore "dispute between private parties." There, the district court

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256 See id. at 492 (stating bankruptcy court has no authority to enter final judgment on non-core matters).

As the court further explained:

this action will be tied in procedural knots by motion practice, here and in the District Court, exploiting asserted or actual inabilities on my part, as an Article I bankruptcy judge, to issue findings and orders. Here, I fear, the additional litigation resulting from my inability to fully rule will have its own Bleak House implications, not unlike the Bleak House litigation referred to by the Stern v. Marshall court itself.

Id. at 488.

reasoned that leaving the initial adjudication in bankruptcy court, subject to de novo review, would be a more efficient use of judicial resources given its "greater familiarity with the facts" and "unique vantage point from the center of the overall bankruptcy proceeding." 258

Of course, *Marshall* does not suggest any modification to the general rule that parties may expressly consent to adjudication in a non-Article III forum or, for that matter, that knowing and voluntary waivers may not be implied from a party's conduct. Although it might be more expeditious to view the mere act of filing a proof of claim as implying consent to wholesale adjudication of all related matters in bankruptcy court, it does not necessarily imply that the party knowingly and, given the absence of a viable alternative, voluntarily did so. By that same rationale, however, commencing a case or proceeding in bankruptcy court may be properly viewed as waiving Article III adjudication with respect to the issues that necessarily arise as a result. Likewise, submitting a voluntary settlement of disputed matters for approval pursuant to Bankruptcy Rule 9019 does not appear to run contrary to *Marshall*. 259

To avoid any ambiguity and the procedural difficulties of the parties' uncertain intent, at least one court has required parties that may raise *Marshall* to expressly note their consent (or refusal to consent) to bankruptcy court jurisdiction. 260 This is already required by the Federal Rules of Bankruptcy Procedure with respect to non-core adversary proceedings, 261 even if litigants generally recycle sweeping statements of jurisdiction and authority from one brief to the next. Of course, unhappy litigants may later argue that any express consent was not truly voluntary because, among other things, they feared that withholding consent would weigh against them in core matters pending before the bankruptcy court. It is difficult to imagine, however, that such an argument would prevail, and nothing in *Marshall* suggests that specific, express consent is an insufficient basis for bankruptcy court authority. And while this approach may not be sufficient to resolve all of the jurisdictional complexities that may follow *Marshall* (particularly where a party consents to jurisdiction over only select issues or none at all), it should effectively deny litigants more than one bite at the apple.

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261 See FED. R. BANKR. P. 7008(a) (stating parties are required to state their consent or non-consent to bankruptcy judge's entering of final judgment); see also FED. R. BANKR. P. 7012(b) (stating lack of parties' express consent to final judgment in non-core proceedings disallows bankruptcy judges from entering final judgments).
D. The Shifting Risk Calculus in Bankruptcy Administration and Appeals

The confluence of unusual factors contributing to the procedural posture of the case at each stage—and the fact that a change to any one of which may have foreclosed or ended the litigation years earlier—suggests that it is no accident that more than two decades passed between Granfinanciera and Marshall. Pierce could have avoided the issue by foregoing the proof of claim, and the appeal might have been curtailed had the bankruptcy court adopted the narrower reading of consent embraced by some other courts or abstained from proceeding with the probate counterclaims in light of the fact that they were simultaneously proceeding in the Texas probate court. The district court could have withdrawn the reference early in the case or entered a final order following a less searching de novo review prior to the entry of the probate court’s judgment. Moreover, as a practical matter, few bankruptcy disputes involve such high stakes to justify the additional time and expense associated with bankruptcy appeals, and even fewer also involve the degree of personal animosity between the litigants found in Marshall.

That Marshall required such a perfect storm of events reflects the genius of the 1984 Amendments: while they did not fully resolve the constitutional questions raised in Marathon, they effectively reduced the prospects that the remaining questions would find their way to the Supreme Court. Although sweeping jurisdiction over disputes remained under the amendments, district courts effectively exercised their authority to withdraw the reference or review certain matters de novo when challenges to bankruptcy court authority arose. Indeed, this is precisely what happened in Marshall and would have ended the public/private question at that stage but for the timing of the entry of the Texas probate judgment.

The flood of attention to the limits of bankruptcy court authority in Marshall’s aftermath stands in stark contrast to the frequently overlooked absence of a constitutional foundation for the exercise of at least some of that authority prior to Marshall. As one judge observed following Marshall, "in exercising my delegated authority, I have entered countless orders as final without a second thought about the legitimacy of what I was doing." This is understandable in many cases; 28 U.S.C. § 157(b), which was crafted expressly to address Marathon, created a fairly straightforward division of authority between bankruptcy and district courts. Even expansive conceptions of consent drew support from long-standing precedent and practice. And if the issue was not raised early in the proceedings, it typically fell by the wayside while the substantive issues were resolved.

Much of this attention focuses less on what Marshall says than on the numerous questions that it and its predecessors leave unresolved. The mere fact that the core/non-core dichotomy does not precisely mirror the public/private dichotomy

\[ ^{263} \text{Id. at 320–21 (stating previously clear constitutional division of powers between bankruptcy judges and district court judges).} \]
can hardly be called surprising, but the Court's decision establishes that mere core status will be insufficient to establish constitutional authority without providing an alternative framework for guidance. As Judge Hughes noted,

> My frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy so that I can again proceed with at least some assurance that I will not be making the same constitutional blunder with respect to some other aspect of...

Section 157(b)(2).

And as previously noted, *Marshall*'s silence "as to how much further this constitutional protection extends into the bankruptcy process" also leaves open the possibility that issues central to the restructuring of a debtor's relations with its creditors are not subject to the public rights exception, if the exception even applies in the bankruptcy setting. Even if such an exception can be found, either along the lines discussed previously or otherwise, "this is not a situation where those who labor in the fields can wait until the next fistfight between an expectant heir and his stepmom finds its way to the Court."

The immediate post-*Marshall* surge of litigation suggests that the case has effectively brought the relative lull in litigation over public and private rights to an abrupt end. The breadth and depth of the structural constitutional gap may have been concealed by uncertainty and the risks and costs associated with litigation, but the Court's express rejection of core status as sufficient has clearly emboldened parties to bring these issues front and center. We may expect more claims to be filed and difficult questions concerning the degree to which related matters may be adjudicated in bankruptcy court to consume already stretched judicial resources. Indeed, given the fact that some justices appear reluctant to accept any conception of a public right in bankruptcy, we may expect some dissatisfied litigants to press challenges to bankruptcy court adjudication of even matters limited to the restructuring of a debtor's relations with its creditors to the Supreme Court.

That said, it is not entirely clear that this increase will yield definitive answers. Although we may expect a flurry of battles over these issues in the future, the institutional mechanisms for resolving them early in the litigation (withdrawal of the reference or remand to state court) or glossing over them on review (for example, by styling an appeal as *de novo* consideration of a report and recommendation) should continue to be effective in all but the most extreme cases (such as *Marshall*). This dual result—more challenges at the early stages but

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264 *Id.* at 323 (highlighting confusion between core/non-core and public/private dichotomies).
265 *Id.*
266 *Id.* (indicating judicial confusion of extent of public right exception).
267 *Id.*
269 *Teleservices*, 456 B.R. at 323 (showing reluctance to accept "public rights" exception as given).
limited prospects for seeing the many questions that remain addressed by the higher courts—may be the worst possible outcome for the long-term efficiency of the bankruptcy process.

III. FILLING THE STRUCTURAL CONSTITUTIONAL GAP AFTER STERN V. MArtHALL

After Marshall, we are once again left to ask where we go from here. The most obvious response to Marshall is a return to the original structural design of the legislation that ultimately became the Bankruptcy Code: the establishment of Article III bankruptcy courts. Although this proposal was ultimately rejected and has been discussed frequently over the years, the temporal constitutional gap made possible by the 1984 Amendments appears to have altered some of the key assumptions about bankruptcy judges and practice that guided much of the early debate. To that end, this section begins with an assessment of these basic arguments (and some new ones) in light of the bankruptcy system that has evolved during the last three decades. Barring the adoption of the Article III proposal, this section also suggests a modest structural change to the Bankruptcy Code and Title 28 of the U.S. Code that may alleviate the chaos anticipated in some circles following Marshall. Finally, this section suggests that courts should adopt a narrow reading of Marshall, as suggested by the majority, to improve the long-term efficiency of the bankruptcy process.

A. Article III Bankruptcy Courts

1. The Policy Arguments for Article III Status

One of the central objectives of the Bankruptcy Code and its predecessors has been to make the restructuring of a bankrupt's relations with its creditors as efficient as possible. A common and persistent criticism of the various federal bankruptcy laws has been the degree to which the costs and delays associated bankruptcy strip creditors of their rightful recoveries. And perhaps no other aspect of the 1898 Act embodied this criticism so much as the summary/plenary division of authority between referees and district court judges, which generated much of the waste and delay that plagued bankruptcy cases under the Act. Thus, a key component of

270 See supra notes 14–16.
271 See Block-Lieb, supra note 16, at 541 (highlighting main objective of Code is efficient resolution of bankruptcy cases).
272 See S. Todd Brown, Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy, 59 BAYLOR L. REV. 569, 585–86 (2007) (noting bias and that strict adherence to bankruptcy laws is often sacrificed to avoid delay).
273 See, e.g., Block-Lieb, supra note 16, at 532 ("The division of summary and plenary jurisdiction over bankruptcy matters was severely criticized because, in some cases, litigants were able to dispute the bankruptcy court's jurisdiction for years before any court ever reached the merits of the suit. This undesirable jurisdictional litigation and the attendant cost and delay to the participants was a major factor in the drafting of the jurisdictional provisions of the Bankruptcy Code.").
achieving this objective in the original Code was the centralization of substantially all relevant matters in a single forum—the bankruptcy court—with broad authority to enter final orders promptly.

The curious series of events that stripped Article III status from the original Code and preserved the strained Article I structure through the 1984 Amendments have largely undermined this objective. The structure initially invited constitutional challenge and delay, and, in addition to dividing final adjudicative authority according to core or non-core status generally, the 1984 Amendments made resolution of certain of the most difficult claims exceedingly complex and time-consuming.274 As one author noted more than a decade ago:

Every time courts narrowly construe the scope of the core proceedings over which bankruptcy courts are authorized by statute to exercise jurisdiction, every time they limit the judicial functions of bankruptcy courts, and every time they broadly construe the withdrawal, abstention and remand provisions, they create opportunities for delaying the administration of a bankruptcy case. And, every time courts broadly construe the authority of bankruptcy courts to hear and determine litigation that arises in a bankruptcy context and every time they expand upon their judicial functions or narrowly confine the powers of a district court to withdraw the reference of a proceeding, they instead raise the specter of unconstitutionality over the determination—a specter which hangs, like the sword of Damocles, until resolved with finality by the Supreme Court of the United States.275

As noted previously, these obstacles to efficiency appear all the more likely to plague bankruptcy practice going forward following Marshall.

Beyond administrative efficiency, the public/private dichotomy yields the perverse result of precluding bankruptcy courts from entering final orders on matters that fall well within their expertise in favor of Article III generalists. For example, fraudulent transfers, complex contract disputes (particularly those that hinge upon timing questions) and many questions concerning secured status under non-bankruptcy law are far more common in bankruptcy than in other forums, and bankruptcy courts and practitioners have developed considerable expertise in the murky outer fringes of these areas of law. Even if we were to accept the assumption that bankruptcy judges are less capable than their Article III counterparts generally,276 this familiarity should suggest that bankruptcy courts are

274 Id. at 542–44 (noting fractionalization of bankruptcy jurisdiction pursuant to 1984 Amendments causes delay, which contradicts bankruptcy policy favoring expedition).
275 Id. at 544–45.
276 As discussed infra Section III.A.4, this assumption ignores the qualifications and experience of modern bankruptcy judges even with respect to matters that fall outside of the core of bankruptcy practice.
CONSTITUTIONAL GAPS IN BANKRUPTCY

at least as sophisticated in these areas as judges who must squeeze them into court calendars between criminal trials, disputes over various government programs and Title VII litigation.

In sum, if the Code is to realize the potential of its original structural design, bankruptcy judges should be appointed pursuant to Article III.\textsuperscript{277} In one fell swoop, this adjustment to the bankruptcy structure will resolve the unnecessarily cumbersome questions associated with dividing initial adjudication among bankruptcy and district courts, the higher costs and confusion associated with the additional layer of bankruptcy appeals, and the time and expense associated with bringing district courts up to speed on the facts and law that are already familiar to bankruptcy judges.

2. The Policy Argument for Division of Authority

Although the case for Article III status is obvious and compelling on efficiency grounds, many involuntary participants in bankruptcy understandably prefer to preserve their ability to vindicate their rights in another forum. Of course, some creditors and others may relish the ability to exploit this potential for strategic advantage in negotiations, but those who are convinced that the bankruptcy forum is stacked against them are not entirely off base.\textsuperscript{278} Everything that happens in bankruptcy takes place in the shadow of the bankruptcy case, and a thumb on the scale in favor of moving case forward may always be present where a court is responsible for all proceedings related to a case, even if it undermines individual rights. For example, assume that the court is confronted with a question concerning unsettled state law. A judgment in favor of debtor will move the case toward finality, while the court is told that judgment in favor of non-debtor takes plan negotiations back to the drawing board, if not dooms the case.\textsuperscript{279} If the non-debtor's claim is sufficiently small, she lacks sufficient resources to appeal or is unlikely to have standing to appeal, the court can effectively end the dispute and advance the case toward conclusion with a judgment in favor of the debtor. Even if an appeal seems likely, a judgment in favor of the debtor may be viewed as providing the estate with leverage that may bring a recalcitrant non-debtor to the table. In sum,

\textsuperscript{277} Jeffrey T. Ferriell, The Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 63 AM. BANKR. L.J. 109, 197 (1989) (concluding that affording bankruptcy courts Article III status is the "only rational solution" to constitutional questions arising from bankruptcy court structure); Jonathan L. Flaxer, Bankruptcy Court Power to Adjudicate Contract Disputes, 2 AM. BANKR. INST. L. REV. 369, 399 (1994) ("[U]ltimately these problems and inefficiencies will continue until Congress does what it should have done in 1978 and 1984, which is to create an Article III bankruptcy court.").

\textsuperscript{278} As Cole and Zywicki noted in discussing the Marshall case, "the incentive structure associated with Article I might dramatically affect the outcome of a dispute rooted in state law." Cole & Zywicki, supra note 80, at 540.

\textsuperscript{279} Even if the debtor and other parties are willing and able to make the concessions necessary to move forward in the event of an unfavorable judgment, they tend to argue that an unfavorable outcome will be the bankruptcy equivalent of Armageddon. For an example of this from practice, see Brown, supra note 13, at 912 n.190.
what passes for the quirky unpredictability of bankruptcy can be readily understood by appreciating the degree to which bankruptcy courts seek efficient and timely resolution of a case and the manner in which they may employ their judicial role to achieve it.

Article III status does not resolve this "thumb on the scales of justice" concern. Nothing in the Article III confirmation process removes or ensures that a judge is immune to the interpretive and perceptive biases that plague people generally, and it is not at all clear how life tenure would alter the institutional pressure to encourage parties to move toward resolution of a bankruptcy case or proceeding. If these parties who seek non-bankruptcy resolution of private matters are correct in assuming that the cards are stacked against them in the bankruptcy forum, Article III status will merely gloss over the degree to which they are denied impartial adjudication of their rights. Even if these concerns are overblown, Article III status will do little to preserve the appearance of impartiality that is critical to the perceived legitimacy of the judicial process.

Moreover, it seems unlikely that the special interests that have consistently and successfully lobbied to reduce bankruptcy courts' discretion would sit idly by as Article III bankruptcy courts assumed final authority over the universe of matters related to a bankruptcy case. Although these amendments have largely targeted the interstitial discretion afforded bankruptcy judges over core bankruptcy matters, the implicit distrust of bankruptcy judges' capacity for objectivity and fairness—regardless of whether this distrust is justified—suggests that any effort to expand their direct control over related matters would meet substantial political resistance.

To that end, while Marshall clearly suggests Article III status is the most sensible solution to the constitutional issues that plague the modern framework, it remains politically unlikely barring a more direct and urgent threat to the viability of the bankruptcy system.

3. Comparative Efficiency of the Article III Appointment Process

Although Article III status may ultimately promise greater efficiency in theory, the practical short- and long-term realities of Article III appointments suggest that the political process will undermine at least some this efficiency. In the short-term, it is difficult to imagine a sudden wave of Article III judicial appointments unless the sitting President's party also has a sufficient majority in the Senate to overcome

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280 Contra 1997 NBRC Report, supra note 14, at 724 (highlighting Article III status will "promote the goal of achieving a high quality judicial system" since critics of current system argue bankruptcy judges are biased towards debtors).

a filibuster. Indeed, among Democrats, the specter of Ronald Reagan making hundreds of new lifetime Article III bankruptcy judge appointments was a compelling argument against creating Article III bankruptcy courts during the debates concerning the 1984 Amendments.282

To address this concern, the National Bankruptcy Review Commission's 1997 report proposed allowing current bankruptcy judges to finish their 14-year terms and replace them with Article III appointments as they retired.283 During this transition period, jurisdiction over bankruptcy matters would transfer from district courts to the new Article III bankruptcy courts as they were appointed, and these new Article III courts would retain the power to refer bankruptcy matters to existing Article I judges until, ultimately, all of the Article I judges are replaced through attrition.284

Even if the NBRC transition proposal resolves the wholesale appointment objection without raising equally daunting problems of its own, the Article III confirmation process carries considerable baggage. If anything, this process has become more bitterly divided in the years since the 1984 Amendments,285 which raises the troubling prospect of an increasing number of vacant bankruptcy judgeships far beyond that seen under the current system. Today, bankruptcy vacancies are most often announced, applications evaluated, candidates interviewed and appointments made in advance of the retirement of sitting judges.286 By contrast, Article III seats may remain unfilled for years while the President and Senate perform the confirmation dance.287 And though senior Article III judges may still preside over discrete matters in other situations, it is unclear whether senior bankruptcy judges would continue to oversee a sufficient number of bankruptcy cases to make up the slack. This could be particularly problematic in the short term if 28 U.S.C. § 155(b), which provides for the recall of Article I bankruptcy judges to manage case overflow, is not left intact.

283 See 1997 NBRC Report, supra note 14, at 35–36 (proposing transition to an Article III bankruptcy court).
284 See id. (discussing replacing Article I judges as vacancies are created by attrition or other means).
285 See, e.g., Brannon P. Denning, Reforming the New Confirmation Process: Replacing "Despise and Resent" With "Advice and Consent", 53 ADMIN. L. REV. 1, 10 (2001) (discussing delays in Article III appointments); Michael J. Gerhardt, Judicial Selection as War, 36 U.C. DAVIS L. REV. 667, 679 (2003) ("The Senate confirmed 93% of President Reagan's first-year judicial nominations in 1981. In contrast, the Senate confirmed 44% of President George W. Bush's nominations in 2001. Additionally, the Senate took longer to confirm judges (an average of 112 days) in the first year of President George W. Bush's administration than it had taken during comparable periods of earlier administrations, with the exception of the first year of President Clinton's second term (an average of 133 days"); Brian C. Kalt, Politics and the Federal Appointments Process, HARV. L & POL. REV. ONLINE (Apr. 5, 2011), http://hlpronline.com/2011/04/politics-and-the-federal-appointments-process/ (positing presidential appointment and Senate confirmation process will remain dysfunctional unless there is better, more aggressive dialogue);
286 See McKenzie, supra note 16, at 794 (discussing process of filling vacancy in bankruptcy judgeship).
287 See, e.g., Carl Tobias, Filling Federal Appellate Vacancies, 41 ARIZ. ST. L.J. 829, 829 (2009) ("Many judgeships remain empty for long periods, while one position has been vacant since 1994.").
It may be hoped that the confirmation of specialized bankruptcy judges will be less politicized and more efficient than it is for the generalists that fill district and circuit courts, but there is little reason for optimism. Indeed, in those jurisdictions where bankruptcy cases may have profound consequences on the economy or other social implications, we may expect the same special interests that have obtained sufficient congressional support to fundamentally alter the balancing of interests struck in the original Code to play a similar role in blocking the appointment of those nominees who do not share their ideological preferences. The irony in this may be that those jurisdictions that require a full slate of bankruptcy judges to handle their extensive caseloads may also be the jurisdictions where prompt appointments are most difficult to achieve.

In this sense, the Delaware experience in the early part of the last decade is instructive. Beginning in the early 1990's, Delaware rose to prominence as the preferred venue for many of the largest bankruptcy filings in the country. 288 Unfortunately, the court had just two sitting judges, and Congress repeatedly ignored pleas to expand the number of authorized bankruptcy judges in the district. 289 By the time Congress expanded the number of judges in Delaware in 2005, Delaware had lost much of its luster, in large part due to questions about its relative capacity to handle the number of cases filed efficiently. 290

This experience demonstrates that the current process is far from immune to congressional inaction on critical matters of bankruptcy court administration, but it also highlights the degree to which individual courts may be (or at least be perceived) as far less efficient when there are few sitting judges to manage the volume of cases filed. This sort of problem can only become more pronounced when the other branches are responsible not only for fixing the number of judges within a district but also the regular appointment and confirmation of these judges.

289 Id. at 1994 (stating chapter 11 cases in Delaware could be assigned to one of two judges until 1997). Delaware was afforded a second bankruptcy judge in 1993. James L. Patton Jr. et al., A Modern History of Bankruptcy in Delaware, 24 DEL. LAW. 12, 14 (Winter 2006/2007). Congress later added four additional bankruptcy judges to Delaware in the 2005 Amendments, which were filled by the end of 2005. Id. at 16.
290 See Patton Jr. et al., supra note 289, at 16 ("[P]ractitioners were becoming concerned about the crowded dockets in Delaware and began to investigate alternative forums. Beginning with Enron's bankruptcy, large and complex chapter 11s started filing in other jurisdictions. Decisionmakers, including Enron's legal team, were concerned that the very busy Delaware court could not give their clients the kind of attention and responsiveness that such a complex case required."); see also Legislative Update: Testimony: Court Competition for Large Ch. 11 Cases, 23 AM. BANKR. INST. J., Sept. 2004 at 6, 54 (2004) ("By 2000, an unprecedented rise in the number of big case bankruptcy filings nationally had overwhelmed the resources of the Delaware Bankruptcy Court. The Delaware court had been awarded its second bankruptcy judge on the basis of six big cases in 1992. In 2000, the Delaware court attracted 45 big cases. The effect of the overload was to make Delaware a less-attractive venue. Most of the overflow went to New York."); Miller, supra note 288, at 1996 (discussing risk that case would not receive "proper attention" due to overwhelming number of cases pending in Delaware).
4. The Specialization of the Article III Judiciary

A persistent concern with embracing specialized Article III courts has been the fear that they dilute the prestige of sitting federal district and circuit judges. Although this may be the case with respect to individual judges whose prestige is premised on their position rather than their personal reputations for fairness and quality of judgment, it is difficult to fathom how the many district and circuit judges that I have known would be viewed as any less distinguished by the mere addition of a specialized Article III bankruptcy court structure. Nor would carving out these discrete matters from overburdened district courts suggest that those courts should be held in any less esteem. Indeed, freedom from responsibility for these matters may make district court appointments more desirable for the many practitioners and other judicial candidates who are uncomfortable presiding over bankruptcy-related matters.

As noted previously, another initial concern with Article III bankruptcy courts was the degree to which future developments would render bankruptcy judges unnecessary. However sincere these concerns may have been in 1978, we have now crossed more than a century of uninterrupted federal bankruptcy law, including three decades of the Code. The wholesale rescission of federal bankruptcy law is, at best, highly unlikely given the extensive role of private and corporate credit and the need for some sort of uniform nationwide bankruptcy system. During the last three decades, bankruptcy filings have increased dramatically notwithstanding amendments designed to make bankruptcy less beneficial to debtors. And should the need for bankruptcy judges defy this history and decline sharply, Congress could reduce the number of authorized bankruptcy judges as sitting judges retire.

As also noted, a strong undercurrent in the objection to Article III status prior to the enactment of the Bankruptcy Code was their perception as less competent or qualified than the generalist district and circuit judges of the time. Today, any lingering conception of bankruptcy judges as somehow less qualified to address the issues they will confront simply overlooks the reality concerning modern bankruptcy judges and the pool of candidates from which they are selected.

292 See supra Part I.B.
294 See supra Part I.C.
295 See McKenzie, supra note 16, at 751 ("Bankruptcy may be a specialized process, with its own rhythms that differ from litigation in other forums, but the substance of bankruptcy cases is not specialized. Bankruptcy judges hear disputes from across the legal spectrum, confronting matters sounding in contract, tort, property, labor, and almost every other area of civil law. It makes little sense to talk of 'specialized' or 'technical' bankruptcy adjudication when the matters decided by a typical bankruptcy judge are often indistinguishable from the civil disputes on the docket of a federal district judge.").
Given the expansive nature of bankruptcy jurisdiction under the 1984 Amendments and the central role that bankruptcy plays in our society, it should come as no surprise that modern bankruptcy practitioners are, in many respects, more akin to the generalists of previous generations than most modern practitioners, especially when contrasted with those holding the most coveted law firm and government positions, which have become increasingly specialized in their own right. Bankruptcy lawyers—particularly those representing debtors—must have a strong working understanding of several areas of non-bankruptcy law in order to serve their clients effectively, and they have the added benefit of knowing far more about their clients' respective big picture practices and concerns than most pure litigators and corporate lawyers because, once again, they must develop this understanding to be effective.

That said, that fact that Article III bankruptcy courts would no longer be confined by any constitutional limits on their judicial power could be detrimental to the efficient administration of bankruptcy cases. Even as bankruptcy courts have gradually assumed broader judicial authority over related matters, they have been reluctant to press the boundaries of that authority too far as long as Marathon's limits remained unsettled. One could easily envision a far more rapid expansion of the bankruptcy courts' responsibility for non-bankruptcy matters that are, at best, tangentially related to (or, at worst, wholly unrelated to) bankruptcy cases once relieved of the limitations of Article I status. In short, the transformation of bankruptcy courts into Article III courts for the purpose of improving their capacity to hear all matters relevant to a bankruptcy case may appear to promote efficiency, but these gains could be easily offset by their increased responsibility for matters that are currently left to Article III judges.

Although the arguments have changed with the transformation of bankruptcy law and practice, Article III status seems as unlikely and undesirable today as it was four decades ago. Modern bankruptcy judges tend to be exceptionally qualified, both in terms of understanding the law and addressing the complex array of interests that appear before them. The dramatic shifts in the Article III appointments process and growth of special interests that focus on bankruptcy matters, however, suggests that opposition to Article III status will remain high and, if adopted, will suffer from the same politicization that has weakened the Article III judiciary generally. Although we may gain a more constitutionally sound bankruptcy court structure in such a transition, this same appointments process seems unlikely to produce a bankruptcy bench that matches the sophistication, talent and capacity to handle the high volume of bankruptcy cases we see in Article I bankruptcy courts today.
B. Other Alternatives

1. Closing the Structural Gap Between Core and Constitutional Authority

Although some delays are intrinsic to the current system, others that may arise following *Marshall* can be attributed to provisions in Title 28 and the Federal Rules of Bankruptcy Procedure. The Federal Rules of Bankruptcy Procedure clearly assume that the bankruptcy court has constitutional authority to hear all core matters, but 28 U.S.C. § 157(b)(2) provides a non-exclusive list of core matters that appear unlikely to pass muster under *Marshall* and its predecessors. The designation of all counterclaims (C), preferences (F), fraudulent conveyances (H), and determinations of the validity, extent and priority of liens (K) as core captures a wide range of matters that are inconsistent with the public/private dichotomy or otherwise fails to account for the need for voluntary and knowing consent before the bankruptcy court may enter a final order. This adds unnecessary confusion to the process and may encourage litigation that can be avoided through modest changes to Title 28, the Bankruptcy Rules, or both.

For example, given the focus of Bankruptcy Rules 7008 and 7012 on non-core status as a precondition to the requirement that parties clearly express whether they consent to adjudication, a party could simply plead that it agrees the matter is core, therefore avoiding the obligation to expressly note whether the party consents to bankruptcy court adjudication, and subsequently challenging the bankruptcy court's authority to enter a final order. And where disputes do not require an adversary proceeding, there is no comparable provision requiring a party to expressly note its consent or lack thereof with respect to bankruptcy court adjudication of private rights that are not clearly subject to any recognized exception to Article III adjudication.

This concern may be addressed by either narrowing the matters that qualify as core under 28 U.S.C. § 157 to better track the Court's precedent or requiring express consent to adjudication of non-bankruptcy law rights in bankruptcy court. Although some courts have adopted *ad hoc* pleading requirements that effectively serve this purpose, direct action to fill this gap by the Judicial Conference or Congress will ensure the development of a consistent, uniform solution to the strategic pleading problem.

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296 *Cf. Fed. R. Bankr. P.* 9005.1 (stating that one may challenge constitutionality of any statute pursuant to *Fed. R. Civ. P.* 5.1, implying that statutes are assumed valid unless challenged via this rule).


298 *Fed. R. Bankr. P.* 7008(a) (requiring as general rule of pleading in non-core proceeding statement pleader does or does not consent to entry of final orders or judgment by bankruptcy judge); *Fed. R. Bankr. P.* 7012(b) (requiring in responsive pleading in non-core proceeding statement pleader does or does not consent to entry of final orders or judgment by bankruptcy judge).

299 *Fed. R. Bankr. P.* 7001 (delineating which proceedings are adversary proceedings requiring party to expressly note its consent or lack thereof with respect to bankruptcy court adjudication).

300 See supra section II.C.2.
2. Closing the Temporal Constitutional Gap

As demonstrated, a convenient feature of the 1984 Amendments is the flexibility it affords a district court to reframe an ostensibly final order issued by a bankruptcy court as a report and recommendation. This feature helps explain why so few of the questions about the margins of any public right exception in bankruptcy have made their way beyond the federal district courts. Indeed, but for the unique procedural posture and timing of events in Marshall, the public/private question would have been largely resolved before the dispute reached the Ninth Circuit for this very reason.\(^{301}\)

The problem with this administrative convenience is that we are only marginally closer to having a workable framework for evaluating the constitutionally permissible options in bankruptcy structure today than we were in 1982, and these questions appear more likely to be litigated in the lower courts after Marshall. The ability to render these questions moot by shifting the form of the review, however, works against the recognized need to promote consistency and long-term efficiency of bankruptcy law by limiting the prospects for clear, binding authority on these critical questions.\(^{302}\) The risk following Marshall is that de novo review becomes too convenient a fallback where binding precedent does not provide clear authority that such review is required, particularly where de novo review may not entail more than a modest additional review of the record.\(^{303}\)

While de novo review may effectively render the private right question moot, defaulting to this standard where bankruptcy court authority is unsettled unnecessarily interferes with the design of the bankruptcy court structure. Like its predecessors, Marshall is a limited holding premised upon rationale that are subject to multiple competing interpretations. Scholars and practitioners could formulate an endless array of tests for evaluating the constitutionality of bankruptcy court authority over the other matters they may be assigned under bankruptcy law, but developing a definitive test given modern precedent would be a bit like extrapolating an entire puzzle from only a handful of pieces. Until the Court adopts a unified theory of public right in bankruptcy, the sporadic application of these theories in ways that effectively limit review on appeal may only add to the existing confusion. Thus, interpreting Marshall narrowly is not only consistent with the

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\(^{301}\) See supra section I.F.1.

\(^{302}\) See Brown, Non-Pecuniary Interests, supra note 272, at 587 (“[S]ubstantive appeals not only serve to benefit the appellant; they play a vital role in preserving public confidence in the system, promoting consistency among lower courts, and ensuring that non-bankruptcy law and interests are given proper consideration.”).

\(^{303}\) See In re Marshall, 271 B.R. 858, 865 (2001) (discussing the expeditious approach to de novo review that prevails in bankruptcy).
"presumption of constitutionality"\textsuperscript{304} that attaches to the exercise of Congress' power under Article I but also promotes long-term consistency in application.

To be clear, the use of \textit{de novo} review of ostensibly final orders where required need not—and should not—be abandoned, but it does caution against the overuse of this option where the answer to the public/private distinction is unsettled. A pattern of erring on the side of \textit{de novo} review in response to \textit{Marshall} and institutional pressures to expedite resolution of individual disputes is contrary to the express language of \textit{Stern} and may create future inefficiencies by encouraging requests for withdrawal of the reference or other challenges to bankruptcy adjudication. In sum, district courts should continue to evaluate private right questions with a presumption that bankruptcy courts have the power to enter final orders where provided in the statute and not expressly prohibited by binding authority.

More aggressive judicial attention among the higher courts will have its drawbacks. Courts tend to focus on the concerns that underlie specific cases rather than the long-term stability of the law, and the piecemeal evolution of a private rights framework may prove more confusing and unmanageable than one lacking any clear guidance whatsoever. Bankruptcy experts may have an understandable aversion to more active judicial review in this area, particularly given the perception that the Supreme Court's recent bankruptcy opinions have been disruptive as a matter of bankruptcy policy, misguided with respect to bankruptcy history or how the bankruptcy system actually functions,\textsuperscript{305} and conceptually inconsistent.\textsuperscript{306} And, this more active role could be particularly disruptive if matters that are central to bankruptcy administration (for example, claim allowance and distribution) are ultimately found to require Article III adjudication.

Without discounting these potential drawbacks, the perceived reach of \textit{Marshall} and the resulting concerns about the viability of the modern bankruptcy framework provide some cause for optimism. The circuit courts are likely to have strong judicial incentives to fashion clear guidelines in these early stages following \textit{Marshall}, and bankruptcy experts have equally strong incentives to be engaged in the development of these guidelines. Indeed, early appeals in \textit{Marshall}'s wake suggest that the higher courts are keenly aware of the threat to systemic efficiency

\textsuperscript{304} See United States v. Morrison, 529 U.S. 598, 669 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); United States v. Harris, 106 U.S. 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated.").

\textsuperscript{305} See, e.g., Plank, supra note 31 (challenging the Court's assertions concerning bankruptcy history); Eric R. Sender, Comment, The Constitutionality of Section 106: A Historical Solution to a Modern Debate, 18 BANK. DEV. J. 131, 140 (2001) (discussing the Supreme Court's basic misunderstanding of bankruptcy court practice with respect to state involvement in bankruptcy cases).

and stability and have engaged in careful consideration of the questions raised by Marshall.

CONCLUSION

Marshall alters some facets of modern bankruptcy adjudication by, for the most part, building only slightly upon longstanding precedent. Although it is fair to characterize its holding as "narrow" standing alone, the collective lesson of Marathon, Granfinanciera and Marshall is that the statutory allocation of responsibility to bankruptcy courts requires them to exercise too much of the judicial power of the United States without preserving in them the Article III assurances of judicial independence.

Under the circumstances, the most obvious way to efficiently and fully advance the efficiency objectives of the Bankruptcy Code is to adopt wholesale Article III protections and status to Bankruptcy Courts, but this carries costs of its own. Bankruptcy judges are arguably better qualified to resolve some of the matters that must be passed along to district courts following Marshall, in large part due to the dramatic transformation of bankruptcy practice made possible by the temporal constitutional gap generated by the 1984 Amendments and lingering doubts about the staying power of Marathon. Supplanting the merit-focused appointment process for modern bankruptcy judges with politically driven Article III appointments, however, would have an equally significant impact on the bankruptcy system. The increasingly contentious Article III appointment process and the degree to which special interests have controlled bankruptcy policy debates in recent years suggest that Article III appointments will yield inefficiencies that would overwhelm the perceived benefits of the shift. At the same time, it is far from clear that the gradual expansion of matters adjudicated in bankruptcy court prior to Marshall was a positive development for litigants or the efficient administration of bankruptcy cases overall, though the common presumption is that it was, and this expansion is certain to be far greater without the constraints of Article I status.

Ultimately, the prospects for improving the long-term efficiency of the bankruptcy process will hinge upon the development of clear guidelines concerning the remaining public/private right questions and procedures that foreclose potential gamesmanship by litigants. And though developing the answers to these questions may yield further short-term instability and disruption, they should promote the development of a better framework for bankruptcy administration that will avoid much of the waste and delay that continue to keep the Bankruptcy Code from living up to its potential.