STERN, SERIOUSLY: THE ARTICLE I JUDICIAL POWER, FRAUDULENT TRANSFERS, AND LEVERAGED BUYOUTS

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This paper offers a new way to understand the causes and cures of problems created by *Stern v. Marshall*, the Supreme Court's 2011 opinion constricting bankruptcy court power. *Stern* held that a bankruptcy court, created under Article I of the Constitution, may not adjudicate a "tortious interference with gift" claim. Although the *Stern* majority said its holding was "narrow," it has resulted in a significant spike in litigation over its meaning and scope. Why would such a seemingly arcane and technical opinion produce hundreds of disputes in such a short time?

We argue that litigation over *Stern* derives from indeterminacy in the rhetoric of the majority opinion, which is rooted in broad claims about the separation of powers that have little to do with bankruptcy. Because it is not possible to resolve *Stern*'s indeterminacy definitively, we look instead to its methodology, which centers on (1) the structural effects, and (2) the historical character of suits before bankruptcy courts.

We infer from the Court's muted response to Chrysler's bankruptcy that it worries little about bankruptcy courts' structural capacity to interfere with separation-of-powers values. Instead, the Court has focused on (what we call) "historical formalism" to define the scope of bankruptcy court power. The Court's historical formalism, in turn, looks to the "public" character of causes of action as they would have appeared in the framing era. While the boundary between public and private will sometimes be unclear, this suggests that we should consider the public qualities of bankruptcy disputes to decide whether bankruptcy courts have the power to adjudicate them.

We use the example of fraudulent transfer suits. Until *Stern*, bankruptcy courts regularly decided this important class of lawsuit under the Bankruptcy Code, especially as a way to redress harms caused by failed leveraged buyouts. *Stern* has left courts and observers uncertain whether bankruptcy courts may still do so. We show that before, during, and after the framing era, fraudulent transfer suits commenced in bankruptcy had important public qualities that should, today, give bankruptcy courts the power to adjudicate them in most cases.

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We make this argument because we worry about other proposals to solve the *Stern* problem that depend on defining bankruptcy court power through party "consent," a question the Court has agreed to consider in the 2013–14 term in *In re Bellingham Insurance Agency*. While we acknowledge that parties may be able to choose fora—including bankruptcy courts—to resolve their disputes, we fear that "consent" leaves too many degrees of freedom, and thus too many temptations to engage in costly litigation rather than to settle bankruptcy disputes. Recognizing the historically public character of fraudulent transfer suits, by contrast, should reduce needless litigation costs in a system ill-suited to absorb them.

INTRODUCTION

> Stern v. Marshall *has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court.*[1]
>
> *"I don't know exactly what she did."*[2]

The United States' bankruptcy system sits on a split foundation.

The Bankruptcy Power appears in Article I of the Constitution[3]—Congress's terrain—yet is largely implemented through federal courts. Because the federal judicial power is governed by Article III,[4] the rift is obvious, even as its contours are uncertain: How much "judicial power" can Article I bankruptcy courts exercise without violating Article III?

Like any structure that straddles a fault line, the bankruptcy system is vulnerable to occasional shocks. The Supreme Court's 2011 opinion in *Stern v. Marshall*[5] is the latest, some would say greatest, jolt to this system.

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1. *In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011).

2. Jocelyn Noveck, *Sexy, Tragic and Just Too Outrageous a Pop Icon to Ignore*, THE SEATTLE TIMES, Feb. 9, 2007, http://seattletimes.com/html/nationworld/2003563992_annalife09.html (quoting talk show host Joy Behar on death of Anna Nicole Smith, the debtor in *Stern v. Marshall*, 131 S. Ct. 2594 (2011)).

3. Article I, Section 8, Clause 4 of the Constitution gives Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The history, meaning, and implications of this language are discussed in Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 624–37 (2008). A recent effort appears in Stephen J. Lubben, *The Bankruptcy Clause*, 64 CASE W. RES. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243689.

4. Article III, Section 1 of the Constitution mandates that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that the judges of these constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services, a Compensation, which shall not be diminished" during their tenure. U.S. CONST. art. III, § 1.

5. 131 S. Ct. 2594 (2011). As we discuss *infra* Part I, this was the second time the Court upended the bankruptcy system on jurisdictional grounds. The first case, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87–90 (1982), led Congress to amend the Bankruptcy Code in 1984. *See* Bankruptcy Amendments and

Stern arose from two distinct, but related, disputes: (1) a contest over the will of J. Howard Marshall, reputed to be the wealthiest man in Texas;[6] and (2) the bankruptcy of former *Playboy* model Anna Nicole Smith.[7] A 5-4 majority of the Court in *Stern* concluded that Anna Nicole's bankruptcy court lacked constitutional authority to adjudicate her tortious interference with gift counterclaim against her step-son (who also happened to be a creditor).[8]

While this sounds arcane and technical—and *Stern*'s majority claimed that its holding was meant to be "narrow"[9]—observers have been incredulous, calling *Stern* everything from an "earthquake,"[10] to a

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Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11, 28 U.S.C.). This amended version failed under *Stern*.

6. *In re Estate of Marshall J. Howard II*, No. 276815 (Harris Cnty. Prob. Ct. Aug. 7, 1995); *see also Marshall v. Marshall* (*In re Marshall*), 275 B.R. 5, 18 (Bankr. C.D. Cal. 2002) ("J. Howard . . . was considered one of . . . the wealthiest [men] in the state of Texas.").

7. Smith, *née* Vickie Lynn Hogan, was *Playboy Magazine's* Miss May 1992. *See Lone Star Stunner*, 39 PLAYBOY, no. 5, May 1992, at 91, *available at* http://www.playboy.com/girls/view/anna-nicole-smith. Smith died February 8, 2007, before the *Stern* opinion issued, in a Hollywood, Florida hotel room as a result of an overdose of prescription drugs. *See* Abby Goodnough, *Model's Death Is Ruled an Accidental Drug Overdose*, N.Y. TIMES, Mar. 27, 2007, at A14; Abby Goodnough & Margalit Fox, *Anna Nicole Smith Is Found Dead at a Florida Hotel*, N.Y. TIMES, Feb. 9, 2007, at A12.

8. *Stern*, 131 S. Ct. 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."). We explore the clarity of the Court's "holding" *infra* Part II.

9. *Id.* at 2620 (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179)).

10. Jolene Tanner, Comment, Stern v. Marshall*: The Earthquake That Hit the Bankruptcy Courts and the Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 593 (2012).

"bombshell,"[11] to a "watershed" opinion.[12] It has caused a flood of litigation over whether, or to what extent, *Stern* limits bankruptcy court power in a wide range of matters. These litigations have imposed significant costs on the bankruptcy system, costs that we characterize as the "*Stern* problem."[13]

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11. *See, e.g.*, *Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp., Inc.*), 456 B.R. 318, 322 (Bankr. W.D. Mich. 2011) (stating that *Stern* "dropped a bombshell"). *See also Med. Educ. & Health Servs., Inc. v. Indep. Municipality of Mayaguez* (*In re Med. Educ. & Health Servs., Inc.*), 459 B.R. 527, 549 (Bankr. D.P.R. 2011) (stating that *Stern* is "probably the Supreme Court's most significant ruling on bankruptcy jurisdiction in recent years"); Jonathan Azoff & Thomas Szaniawski, Stern v. Marshall *and the Limits of Consent*, 30 AM. BANKR. INST. J., Sept. 2011, at 28, 28 (predicting that "the decision's effects—at least initially—may be widespread and controversial"); S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 183 (2012); David P. Leibowitz, Stern v. Marshall*: A Constitutional Conundrum*, 30 AM. BANKR. INST. J., Oct. 2011, at 36, 65 ("*Stern* will cause considerable consternation, so to speak, in bankruptcy circles for some time."); Richard Lieb, *The Supreme Court, in* Stern v. Marshall, *by Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 NORTON J. BANKR. L. & PRAC. 461, 462 (2011) (calling *Stern* "the most important decision that addresses the Article III limits on the authority of bankruptcy courts since" *Marathon*); Frank Volk, *First Impressions: Interpreting* Stern, 30 AM. BANKR. INST. J., Dec.–Jan. 2012, at 22, 76 (predicting that "the case law interpreting *Stern* will multiply rapidly, and the issues addressed will increase in complexity"); Michael St. Patrick Baxter, Elizabeth Gibson, Randal C. Picker & R. Patrick Vance, The Scope and Implications of *Stern v. Marshall*, 131 S. Ct. (2011), at 4 (Oct. 26, 2011) (unpublished manuscript) (on file with the National Bankruptcy Conference Annual Meeting), *available at* http://ssrn.com/abstract=1979503; Event Notice, Fin. Lawyers Conference, Stern v. Marshall*: Anna Nicole, Stripped of Legacy, Forces Bankruptcy System to Rerun* Marathon, Oct. 6, 2011, *available at* http://www.financiallawyers.org/2011mtgs.htm ("[T]he Supreme Court's opinion in Stern v. Marshall[] [sic] [is] undoubtedly the most important bankruptcy decision in 29 years [and] . . . this 'narrow' holding is disrupting bankruptcy litigation around the country."); Press Release, UCLA Sch. of Law, *Professor Klee Publishes Emerging Issues Analysis on* Stern v. Marshall, June 30, 2011, *available at* http://www.law.ucla.edu/news-media/Pages/News.aspx?NewsID=1868 (*Stern* is "the most important Supreme Court bankruptcy decision in 29 years, which provides important restrictions on the scope of bankruptcy court jurisdiction.").

12. *See Amegy Bank Nat'l Ass'n v. Brazos M & E, Ltd.* (*In re Bigler LP*), 458 B.R. 345, 369 (Bankr. S.D. Tex. 2011) (characterizing the *Stern* decision as a "watershed opinion"); *In re Evans*, No. 09-03763-NPO, 2011 WL 4712180, at *2 n.4 (Bankr. S.D. Miss. Oct. 7, 2011) (describing the *Stern* decision as a "watershed opinion").

13. As United States Bankruptcy Judge Feeney explains, *Stern* litigation "drains bankruptcy estate resources, delays the administration of bankruptcy cases, and reduces payment to creditors." Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of* Stern v. Marshall, 86 AM. BANKR. L.J. 357, 358–59 (2012). *See also* Tyson A. Crist, Stern v. Marshall*: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627, 627 (2012) ("The upheaval caused by the United States Supreme Court's landmark decision in *Stern v. Marshall* is beginning to subside, although the sheer mass of lower court decisions applying *Stern* continues to grow.").

To solve the *Stern* problem, we must understand *Stern*'s reasoning, which turned on two basic elements: one structural, the other historical. The structural element was that bankruptcy court adjudications of suits like Anna Nicole's threaten the separation of powers. Unlike Article III judges, Chief Justice John Roberts reasoned, Article I (bankruptcy) judges are vulnerable to political influence because they lack life tenure and protection against salary diminution.[14] Absent an exception, they cannot exercise the "federal judicial power."[15] *Stern* reasoned that adjudicating a dispute between private litigants (i.e., debtor and creditor) governed by state common law would involve an exercise of such power.[16]

Stern recognized that there are exceptions to this logic, one of which is that Article I courts may adjudicate disputes involving "public rights."[17] While the *Stern* majority did not define the scope of this exception, it drew on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[18] and *Granfinanciera, S.A. v. Nordberg*,[19] the last major Supreme Court opinions delimiting bankruptcy court power, to conclude that history is the guide: if the suit was considered "private" in England in the late eighteenth century ("Westminster in 1789"), it would have to be adjudicated by an Article III court, not a bankruptcy court.[20] Thus, *Stern*'s second element is that the Court will use history—which we characterize as "historical formalism"—to decide whether an Article I court may adjudicate a cause of action.[21]

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14. *Stern*, 131 S. Ct. at 2620 ("We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.").

15. *Id*. at 2609.

16. *Id*. at 2611 ("It is clear that the Bankruptcy Court in this case exercised the 'judicial Power of the United States' in purporting to resolve and enter final judgment on a state common law claim . . . .").

17. *Id.* at 2612 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)).

18. *Stern*, 131 S. Ct. at 2609 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)).

19. *Id.* at 2598 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43–44 (1989)).

20. *Id.* at 2609 (Only Article III courts may adjudicate "'traditional actions at common law tried by the courts at Westminster in 1789.'") (quoting *N. Pipeline Constr. Co.*, 458 U.S. at 90 (Rehnquist, J., concurring)).

21. We distinguish "historical formalism" from various strains of "originalism." *See* Lipson, *supra* note 3, at 633–35 (discussing schools of "originalist" thought). While both concern events in the past, originalism focuses on the meaning of the Constitution at the framing. *See, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, FORDHAM L. REV. (forthcoming 2013) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303980. "Historical formalism," by contrast, examines the understanding of causes of action in the past (i.e., 1789).

The bankruptcy bar and federal court watchers worry that *Stern* threatens the integrity of the bankruptcy system as well as other judicial systems Congress has created under its Article I powers.[22] Yet, surprisingly little literature explains why *Stern* has been so destabilizing or offers plausible ways to manage the litigation costs it has created. This paper helps to fill both gaps.

Stern is destabilizing because its meaning is indeterminate.[23] Its "holding" is opaque, and thus disputed. Its public-rights analysis fits poorly with the reality of the bankruptcy process, which seems best understood as a hybrid of public and private rights. And, its broad rhetoric about the separation of powers is difficult to reconcile with the technical nature of the problem at hand, and the reality that bankruptcy would seem to be a process unlikely to threaten the separation of powers. This was made manifest by the Court's indifference to the Chrysler bankruptcy, where it ignored pleas that the Obama administration was

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22. As to bankruptcy, see sources *supra* note 11. Other federal judicial actors affected by *Stern* might include federal magistrates, tax courts, and several thousand administrative law judges. *See* Erwin Chemerinsky, *Enormous Confusion: The High Court's Ruling in '*Marshall*' Could Place at Stake the Authority of Magistrate Judges to Hold Trials Involving State Law Claims*, NAT'L L.J., Aug. 29, 2011, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202512531253&slreturn=1 (suggesting that the decision has "potentially enormous implications for bankruptcy courts and litigation in the federal courts"). *But see Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 406 (5th Cir. 2012) (declining to extend the Supreme Court's decision in *Stern v. Marshall*, so as to circumscribe the authority of magistrate judges to enter final judgments, despite the "many similarities" between the statutory powers of magistrate judges and those of the bankruptcy judges at issue in *Stern*).

23. Indeed, Justice Scalia's concurrence in *Stern* counted—

> at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit: that it was one "under state common law" which was "not a matter that can be pursued only by grace of the other branches[;]" that it was "not 'completely dependent upon' adjudication of a claim created by federal law[;]" that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings[;]" that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law[;]'" that "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim[;]" that the trustee was not "asserting a right to recovery created by federal bankruptcy law[;]" and that the Bankruptcy Judge "ha[d] the power to enter 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal[.]"

Stern, 131 S. Ct. at 2621 (Scalia, J., concurring) (internal citations omitted). As we explain below, we think these "reasons" mask the Court's deeper methodology in this context, historical formalism.

overreaching by funding and structuring the automaker's reorganization.[24]

Current solutions to the *Stern* problem focus on doctrinal adjustments that would impute party "consent" to bankruptcy court adjudication or treat bankruptcy judges as magistrates appended to the district courts of which they are units. The Court has agreed to assess these solutions in the 2013–14 term, in *Executive Benefits Insurance Agency v. Arkison* (*In re Bellingham Insurance Agency, Inc.*).[25] Unfortunately, whatever their technical merits, neither seems designed to solve the *Stern* problem, i.e., reduce the frequency and expense of *Stern* litigation. They will instead likely add another layer of dispute and thus litigation cost.

We argue that a more cost-effective solution to the *Stern* problem is one that takes its methodology—in particular, historical formalism—seriously. We use this methodology to assess the adjudication of fraudulent transfer suits arising from failed leveraged buyouts (LBOs), an important class of "outbound"[26] bankruptcy-related litigation.[27] Prior to *Stern*, bankruptcy courts were generally understood to have power to adjudicate such suits, which are designed to provide a remedy to

24. *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009) (per curiam). We discuss attempts to bring the separation-of-powers problem in *Chrysler* to the Court *infra* Part II.

25. *Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 567 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013) (stating that failure to object to bankruptcy court authority timely waives constitutional objection). The Supreme Court presumably granted certiorari to resolve the circuit split created by contrary authority from the Sixth Circuit. *See Waldman v. Stone*, 698 F.3d 910, 915, 917–18 (6th Cir. 2012) (stating that a creditor did not consent to bankruptcy court authority over fraud claims against it even though jurisdictional objections were raised late in case).

26. By "outbound" we mean a suit commenced by or on behalf of the bankruptcy estate against others. Anna Nicole Smith's counterclaim in *Stern* was effectively an outbound claim because it was asserted against a creditor to recover money. An outbound claim is distinct from an "inbound" claim, which is usually just a claim asserted by a creditor against a debtor. Although not entirely free from doubt, adjudication of inbound claims seems to be less controversial than adjudicating outbound claims.

27. An LBO is a transaction in which a company is purchased with borrowed money, where the company that is purchased ("target") *is* the borrower. If the debt overwhelms the target, it may seek protection in a case under Chapter 11 of the Bankruptcy Code ("Bankruptcy Code"). Congress enacted the current Bankruptcy Code in 1978, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101–1532 and in scattered sections of 28 U.S.C. (2006)), and has amended it several times. The specific provision struck down in *Stern* was 28 U.S.C. § 157(b)(2)(C), providing that a bankruptcy court may adjudicate counterclaims asserted in response to creditors' filed proofs of claim. *Stern*, 131 S. Ct. at 2608.

corporate creditors hurt by a poorly structured, high-leverage transaction.[28]

Congress made fraudulent transfer suits "core" proceedings over which bankruptcy courts could enter final judgments.[29] This made sense given the close relationship between fraudulent transfer and bankruptcy: as explained below, the former was historically an act that triggered the latter.[30] Moreover, bankruptcy courts over time likely developed expertise in fraudulent transfer litigations. This, coupled with the fact that they were a stable choice of forum, made resolution of such suits in bankruptcy courts relatively efficient.

Lured by *Stern*'s reliance on *Granfinanciera*—which said that a fraudulent transfer suit is a "private" action for jury trial purposes[31]—this has changed. Courts and parties now do not know whether bankruptcy courts may adjudicate fraudulent transfer suits and, if they may, on what theories.[32] This is deeply problematic in a system that relies principally

28. Until *Stern*, fraudulent transfer suits arising from failed LBOs were generally adjudicated by bankruptcy courts. *See, e.g.*, *In re Best Prods. Co.*, 68 F.3d 26, 28 (2d Cir. 1995) (citing *In re Best Prods. Co.*, No. 93-Civ.-1115, No. 931149, 1994 WL 141970 (S.D.N.Y. April 20, 1994)) (discussing district court's refusal to withdraw reference); *Weiboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, (N.D. Ill. 1988); *Bay Plastics, Inc. v. BT Commercial Corp.* (*In re Bay Plastics, Inc.*), 187 B.R. 315 (Bankr. C.D. Cal. 1995); *Ferrari v. Barclay's Bus. Credit, Inc.* (*In re Morse Tool, Inc.*), 148 B.R. 97 (Bankr. D. Mass. 1992); *Murphy v. Meritor Sav. Bank* (*In re O'Day Corp.*), 126 B.R. 370 (Bankr. D. Mass. 1991); *Ohio Corrugating Co. v. DPAC, Inc.* (*In re Ohio Corrugating Co.*), 91 B.R. 430 (Bankr. N.D. Ohio 1988); *Ohio Corrugating Co. v. Sec. Pac. Bus. Credit, Inc.* (*In re Ohio Corrugating Co.*), 70 B.R. 920 (Bankr. N.D. Ohio 1987); *Anderson Indus., Inc. v. Anderson* (*In re Anderson Indus., Inc.*), 55 B.R. 922 (Bankr. W.D. Mich. 1985). *See also Kirschner v. Agoglia* (*In re Refco Inc.*), 461 B.R. 181, 189 (Bankr. S.D.N.Y. 2011) ("[C]ourts almost uniformly sustained the constitutionality of [the] grant of power to the bankruptcy courts to decide . . . fraudulent transfer claims as part of their core jurisdiction."); *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013) (reasoning "that there is no constitutional problem when a bankruptcy judge adjudicates a trustee's avoidance actions against creditors who have submitted claims").

29. 28 U.S.C. § 157(b)(2)(H) ("[P]roceedings to determine, avoid, or recover fraudulent conveyances" are "core proceedings.").

30. *See* discussion *infra* Part III.C.3.

31. *Granfinanciera v. Nordberg*, 492 U.S. 33, 36, 55–56 (1989).

32. *Compare Rosenberg v. Harvey A. Bookstein*, 479 B.R. 584, 589 (D. Nev. 2012) ("[A] plain reading of the *Stern* decision in light of *Granfinanciera* reveals that fraudulent conveyance claims must be decided by an Article III court . . . ."); *Gibson v. Tucker* (*In re G & S Livestock Co.*), 478 B.R. 906, 915–16 (S.D. Ind. 2012) ("[T]here is a constitutional right to have an Article III court enter judgment on a trustee's fraudulent conveyance claim."); *FTI Consulting, Inc. v. Merit Mgmt. Group., LP*, 476 B.R. 535, 538–39 (N.D. Ill. 2012) ("[A] bankruptcy court does not have the constitutional authority to enter a final judgment on a fraudulent transfer claim." (citations omitted)); *Messer v. Bentley Manhattan Inc.* (*In re Madison Bentley Assocs.*), 474 B.R. 430, 438–39 (S.D.N.Y. 2012) ("Courts in this district have consistently held that, after *Stern*,

on settlement rather than adjudication to resolve disputes. The uncertainty introduced by *Stern* has raised the price of settlement. This is most costly to general creditors and most beneficial to defendants whose gains harmed the estate. The stakes can be high: billion-dollar fraudulent transfer suits over failed LBOs have dominated major chapter 11 reorganizations, including those of Lyondell Chemical,[33] Dynegy Holdings,[34] and The Chicago Tribune.[35] Fraudulent transfer suits can also

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bankruptcy courts lack authority to issue final judgments on fraudulent conveyance claims brought against a person who has not submitted a claim against the estate."); *Lain v. Erickson* (*In re Erickson Ret. Cmtys., LLC*), No. 09-37010, 2012 WL 1999493, at *3 (D. Md. June 1, 2012) ("[F]raudulent conveyance claims must be finally decided by Article III courts, not Bankruptcy Courts."); *McCarthy v. Wells Fargo Bank, N.A.* (*In re El-Atari*), 2011 WL 5828013, at *2, *4–5 (E.D. Va. Nov. 18, 2011) (holding that the weight of authority in the lower courts is that post-*Stern*, bankruptcy courts "may hear but not decide fraudulent conveyance actions" and that "*Stern*, together with *Granfinanciera*, clearly supports the conclusion that the authority to issue a final decision in a fraudulent conveyance action is reserved for Article III courts"); *Paloian v. Am. Express Co.* (*In re Canopy Fin., Inc.*), 464 B.R. 770, 773 (N.D. Ill. 2011) ("Bankruptcy Court lacks constitutional authority to enter final judgment on the [fraudulent conveyance] claims presented here."), *with Andrews v. RBL, L.L.C.* (*In re Vista Bella, Inc.*), Adv. No. 12-00060, 2012 WL 3778956, at *4 (Bankr. S.D. Ala. Aug. 30, 2012) ("Fraudulent transfer actions by bankruptcy trustees are an important part of 'the adjustment and restructuring of the debtor-creditor relationship,' and, thus, are an important part of the bankruptcy system."); *Bohm v. Titus* (*In re Titus*), 467 B.R. 592, 633 (Bankr. W.D. Pa. 2012) ("This Court is inclined to agree with those authorities that construe the *Stern* decision narrowly and hold that, notwithstanding *Stern*, a bankruptcy court possesses the constitutional authority to enter a final decision regarding a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1)."); *In re Refco Inc.*, 461 B.R. at 192 (stating that given the limiting language in *Stern* and the role of fraudulent transfer claims under the Bankruptcy Code, Article III does not prohibit a bankruptcy court's determination, by final judgment, of fraudulent transfer claims).

33. *See Weisfelner v. Blavatnik* (*In re Lyondell Chem. Co.*), 467 B.R. 712, 715–17 (S.D.N.Y. 2012).

34. *In re Dynegy Holdings, LLC*, No. 11-38111 (Bankr. S.D.N.Y. Dec. 29, 2011) (Order Granting the Motion of U.S. Bank National Association, as Indenture Trustee, for Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code) (authorizing appointment of examiner to investigate allegations that leveraged buyout was a fraudulent transfer).

35. *See* Tom Hals, *Tribune Creditors Sue Ex-Shareholders for Billions*, REUTERS (June 3, 2011, 1:29 PM), http://www.reuters.com/article/2011/06/03/tribune-idUSN0315796720110603 ("'One of the industry's most highly leveraged buy-outs—lined the pockets of Tribune's former shareholders with $8.5 billion in cash at the expense of Tribune's creditors and precipitated Tribune's careen into bankruptcy,' said Deutsch Bank Trust Company, one of the plaintiffs."). *See generally* Report of Kenneth N. Klee, as Examiner, *In re Tribune Co.*, No. 08-13141 (Bankr. D. Del. 2011) (examining fraudulent conveyance claims arising out of Tribune LBO). The fraudulent transfer litigation in the *Tribune* case has not been prosecuted before the bankruptcy court, presumably because the plaintiffs understood that any attempt to do so in bankruptcy court would be bogged down in a jurisdictional dispute.

remedy Ponzi and other fraudulent schemes, as in the Madoff[36] and other scandal-driven bankruptcies.[37]

To take *Stern*'s historical methodology seriously is to see that fraudulent transfer suits in England in 1789 had many "public" attributes, and should thus come within *Stern*'s public rights exception in most cases. Among other things, the fraudulent transfer cause of action was created by Parliament, not by the common law, in the Statute of Elizabeth.[38] Although fraudulent transfer law came to permit private creditor suits, it was initially intended in large (perhaps most) part to benefit the Crown, which used it to penalize religious dissenters and to raise revenue (the Crown got half of any recovery).[39] By the framing era, a fraudulent transfer was an "act of bankruptcy," which in England carried criminal penalties.[40] Contrary to Justice William Brennan's majority opinion in *Granfinanciera*, a fraudulent transfer suit was not "quintessentially [a] suit[] at common law that more nearly resemble[d]

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36. *See, e.g.*, *Picard v. Estate of Chais* (*In re Bernard L. Madoff Inv. Sec. LLC*), 445 B.R. 206 (Bankr. S.D.N.Y. 2011).

37. *Gowan v. Patriot Group, LLC* (*In re Dreier LLP*), 452 B.R. 391, 406 (Bankr. S.D.N.Y. 2011) ("In total, the Trustee seeks disgorgement of $16,650,000 transferred . . . during the course of Dreier's fraudulent scheme."); *In re Bernard L. Madoff Inv. Sec. LLC*, 445 B.R. at 216 (trustee sought to recover over $1 billion in preferential payments and fraudulent transfers from the defendants).

In the *Madoff* bankruptcy, United States District Judge Rakoff consolidated 300 fraudulent transfer suits commenced by Madoff's bankruptcy trustee to unwind the Madoff Ponzi scheme. Perhaps realizing that he was getting more than he bargained for, Judge Rakoff concluded that the bankruptcy court should do the "heavy lifting" and issue proposed findings of fact and conclusions of law, subject to his de novo review. *See* Kathy Bazoian Phelps, *Madoff Trustee Meets* Stern v. Marshall, LEXISNEXIS LEGAL NEWSROOM BANKRUPTCY (Jan. 16, 2013, 5:21 PM), http://www.lexisnexis.com/community/bankruptcylaw/blogs/bankruptcylawblog/archive/2013/01/16/madoff-trustee-meets-stern-v-marshall.aspx (discussing *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46 (S.D.N.Y. 2013)). We explain below why this "quasi-magistrate" maneuver is unlikely to be a cost-effective solution to the *Stern* problem.

38. Statute of Elizabeth, 13 Eliz., c. 5 § 2 (1571).

39. Some (but not all) colonies (and then states) carried some of this public purpose forward, so that at or around the time of ratification (1789) Connecticut, New Jersey, and Vermont provided that the local government would receive a portion of any recovery. *See* ORLANDO F. BUMP, FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 586, 588, 591 (New York, Baker, Voorhis & Co. 1872). A more detailed discussion of this history appears *infra* Part V.

40. We discuss the development of fraudulent transfer law and its relationship to bankruptcy law in eighteenth-century England *infra* Part III.C.

state-law contract claims."[41] It was a hybrid action that had important public and private attributes.

These public qualities of fraudulent transfer suits support the collectivizing and distributional functions of bankruptcy.[42] Such suits transform pre-bankruptcy claims held by individual creditors into claims held exclusively on behalf of the estate for the benefit of all creditors.[43] Taking *Stern* seriously, as we propose, will reduce uncertainty about which courts should adjudicate fraudulent transfer actions, thus reducing their costs of resolution.

The paper has five Parts. Part I describes the development of bankruptcy court power, and the Court's use of historical formalism to constrain that power. It also summarizes common proposals to solve the *Stern* problem—including those before the Court in *Bellingham*—and explains why they are unlikely to be cost-effective. Part II explains indeterminacies in the *Stern* majority opinion, which perhaps reflect indifference to the nature of the bankruptcy system, an indifference highlighted by the Court's (non)response in *Indiana State Police Pension Trust v. Chrysler LLC*.[44] Part III explores the history of fraudulent transfer suits, and argues that they had (and have) significant public attributes, which should bring them within the public rights exception when commenced in most bankruptcy cases. Part IV applies the result to fraudulent transfer suits to avoid LBOs, and addresses likely objections and exceptions (which should be recognized when a party seeks a jury trial). Part V briefly suggests that this methodology may reduce *Stern* costs in other common bankruptcy litigations.

41. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). As explained *infra* Part III.B, we think *Granfinanciera* is either distinguishable (as being about the right to a jury, not the separation of power) or misinterprets the history it used.

42. *See, e.g.*, Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance and Its Proper Domain*, 38 VAND. L. REV. 829, 829–30 (1985); Walter J. Blum, *The Law and Language of Corporate Reorganization*, 17 U. CHI. L. REV. 565, 571–72 (1950); Robert Charles Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 509–11, 544 (1977); Jonathan C. Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1245–49 (2003).

43. *See* 11 U.S.C. § 550 (2006) (avoidance actions are property of the bankruptcy estate); *Moore v. Bay* (*In re Sassard & Kimball, Inc.*), 284 U.S. 4 (1931) (avoided transfers are preserved for the benefit of all creditors of the estate).

44. *See Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009) (per curiam).

I. BACKGROUND—BANKRUPTCY COURT POWER, *STERN*, AND HISTORICAL FORMALISM

Stern v. Marshall is about judicial power and in particular how much power Congress may give "legislative" courts created under the Bankruptcy Clause. Until *Stern*, there was little question that bankruptcy courts could adjudicate fraudulent transfer suits.[45] In order to understand how *Stern* upended this assumption, it is important first to understand the system Congress created to manage the bankruptcy system and how the Court has altered that system.

Technically, bankruptcy jurisdiction is vested in Article III district courts, not Article I bankruptcy courts.[46] Practically speaking, however, U.S. district courts refer all proceedings in such cases to the bankruptcy judges of their district.[47] This, in turn, gives bankruptcy courts the power to enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11."[48] Congress created sixteen categories of core proceedings,[49] including "counterclaims by the estate against persons filing claims against the estate,"[50] such as the one at issue in *Stern,* as well as suits to recover fraudulent transfers, [51] such as the one at issue in *Bellingham*.

A. Stern

The facts of *Stern* are well known and warrant only brief review here. *Stern* involved the bankruptcy of Vickie Lynn Marshall (better known as Anna Nicole Smith, but whom we will call "Vickie").[52] Prior

45. *See* authorities cited *supra* note 28.

46. United States District Courts have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a) (2006).

47. *See* 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 731 (1997) ("Reference of that jurisdiction to bankruptcy judges is discretionary with the district judges, pursuant to section 157(a). Automatic reference under section 157(a), however, has been accomplished nationwide either by local rule or order."). In rare cases, district courts may withdraw the reference, as happened with asbestos-related chapter 11 cases in Delaware. *See Order In re Referral of Title 11 Proceedings to the United States Bankruptcy Judges for This District* (D. Del. Jan. 23, 1997) (withdrawing standing order automatically referring Chapter 11 cases to bankruptcy court as of February 3, 1997).

48. 28 U.S.C. §§ 157(a), (b)(1). In non-core proceedings, by contrast, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." *See* 28 U.S.C. § 157(c)(1).

49. *See id.* § 157(b)(2).

50. *Id.* § 157(b)(2)(C).

51. *Id.* § 157(b)(2)(H).

52. *Stern v. Marshall*, 131 S. Ct. 2594, 2600–01 (2011).

to her bankruptcy, she had been married (for about a year) to J. Howard Marshall, II ("Marshall"), an octogenarian believed to have been among the wealthiest men in Texas.[53] Concerned that Marshall's son, E. Pierce Marshall ("Pierce"), was trying to dissuade Marshall from leaving Vickie some of Marshall's fortune, she sued Pierce in a Texas state probate court for fraudulently inducing Marshall to execute a living trust that excluded her.[54] Once in bankruptcy, Vickie asserted the same cause of action as a counterclaim against Pierce, who had filed a claim in her bankruptcy.[55]

In November 1999, after a bench trial in the bankruptcy court—but before the Texas court had ruled in *Pierce's* favor—the bankruptcy court issued judgment for *Vickie* and awarded her over $400 million in compensatory damages and $25 million in punitive damages.[56] After much appellate litigation (including two trips to the Ninth Circuit Court

53. *Id.* at 2600; David Stout, *Justices Hear a Drama Straight from Tabloids*, N.Y. TIMES, Mar. 1, 2006, at A3, *available at* http://www.nytimes.com/2006/03/01/politics/politicsspecial1/01estate.html. Papers about *Stern* often include some ironic trivia about the case or its parties. Our contribution to this ancillary effort is to note that J. Howard Marshall—the Lazarus of the case—apparently had expertise in at least one of the two subjects that underlay the basic dispute in the case—but not the one commonly assumed. Popular reports state that he taught trusts and estates at Yale Law School. *See Marshall v. Marshall* (*In re Marshall*), 275 B.R. 5, 11 n.5 (C.D. Cal. 2002) (discussing academic career of J. Howard Marshall); Stout, *supra* at A3. While it appears that he did teach at Yale Law School, his subjects did not include trusts and estates but, instead, bankruptcy. *See* William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932); *See also Anna Nicole Smith's First Husband Not the Law Prof. They Say He Was*, ZIEFBRIEF (Mar. 13, 2007), http://ziefbrief.typepad.com/ziefbrief/2007/03/anna_nicole_smi.html (discussing numerous business courses Marshall taught).

54. *Stern*, 131 S. Ct. at 2601. Whether tortious interference with gift is a valid cause of action is also a point of contention. *See* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 364 (2013) ("Underpinning the [*Stern*] Court's reasoning was the dubious but increasingly prevalent assumption that the tort is substantively well founded and detachable from specialized inheritance policy concerns.").

55. *Stern*, 131 S. Ct. at 2615–16 ("Pierce, unlike the defendants in [*Marathon* and *Granfinanciera*], had filed a proof of claim in the bankruptcy proceedings."). He also filed a complaint in her bankruptcy contending that she had defamed him by telling the press that he had engaged in fraud to gain control of his father's wealth. Under Bankruptcy Code Section 523, a debt may be excepted from discharge if it is "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (2006).

56. *Stern*, 131 S. Ct. at 2601 (citing *Marshall v. Stern* (*In re Marshall*), 600 F.3d 1037, 1045 (9th Cir. 2010); *Marshall v. Marshall* (*In re Marshall*), 257 B.R. 35, 40 (Bankr. C.D. Cal. 2000); *Marshall v. Marshall* (*In re Marshall*), 253 B.R. 550, 561–62 (Bankr. C.D. Cal. 2000)).

of Appeals and an intermediate trip to the Supreme Court[57]), the Supreme Court issued its opinion in *Stern*, holding that, while the counterclaim was a core proceeding as a statutory matter, an Article I bankruptcy judge had no constitutional power to adjudicate it.[58] As legislative actors, the *Stern* majority reasoned that bankruptcy judges lack authority to enter final judgments "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"[59]

B. Stern *and Historical Formalism*

Stern distinguished these "traditional causes of action" from suits that bankruptcy courts may (in theory) adjudicate under the so-called "public rights" exception to Article III adjudication stated by *Murray's Lessee v. Hoboken*[60]: "matters, involving public rights . . . may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[61] In other words, an Article I court may have power to adjudicate a matter of public rights, but not of private rights (absent party consent).

The Court has, loosely speaking, taken two different approaches to defining the public rights exception, one "functionalist,"[62] the other "formal" or "categorical."[63] Outside the bankruptcy context, the Court has taken a functionalist approach, looking to the expertise of decision makers, the nature of the regulatory environment in which the dispute arises, and other pragmatic matters.[64] In bankruptcy, by contrast, the

57. *See Marshall v. Marshall*, 547 U.S. 293, 304–05 (2006); *In re Marshall*, 600 F.3d at 1049; *Marshall v. Marshall* (*In re Marshall*), 392 F.3d 1118, 1131 (9th Cir. 2004).

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

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

60. 59 U.S. 272 (1856).

61. *Id.* at 284.

62. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568 (1985).

63. The distinction is generally attributed to Paul Bator. *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233, 235 (1990).

64. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 935–36 (1988) (cataloguing benefits of functionalism).

Court has focused on the historical nature of the dispute in question, which we call "historical formalism."[65]

Historical formalism in bankruptcy is rooted in *Northern Pipeline*.[66] There, chapter 11 debtor Northern sued Marathon Pipe Line in bankruptcy court for an alleged breach of contract.[67] Marathon moved to dismiss on the grounds that Congress gave bankruptcy judges Article III powers without giving them Article III protections against firing (life tenure) and salary diminution.[68] Writing for a plurality, Justice Brennan agreed, reasoning that "*only* controversies [involving public rights] may be removed from Art. III courts."[69] "Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power."[70] The bankruptcy court could not adjudicate the debtor's breach of contract claim in *Marathon*, Justice Brennan explained, because this outbound claim required a "private adjudication[,] . . . [of a] matter[] from [its] nature subject to 'a suit at [the] common law or in equity or admiralty.'"[71]

Marathon introduced historical formalism because the majority held that a bankruptcy court's power to adjudicate Northern's claim would be determined by reference to formal qualities of the cause of action as they appeared in 1789.[72] Then-Chief Justice William Rehnquist's (majority-forming) concurrence in *Marathon* boiled it down to one phrase: "Westminster in 1789."

> From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts *which are the stuff of the*

65. The formalism (if not the historical aspects) of the Court's approach to bankruptcy court power is discussed in, among others, Fallon, *supra* note 64. The term "historical formalism" is our way of describing the Court's particular type of formalism in the bankruptcy context. Others have identified similar developments in other contexts. *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1467 (2011) (discussing "historical formalism" of *Padilla v. Kentucky* and right to counsel in the context of immigration and criminal proceedings).

66. 458 U.S. at 63–67.

67. *Id.* at 56.

68. *Id.* at 56–57.

69. *Id.* at 70 (internal citations and footnote omitted).

70. *Id.*

71. *Id.* at 70–71 n.25 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)).

72. *Id.* at 90 (Rehnquist, J., concurring).

> *traditional actions at common law tried by the courts at Westminster in 1789*.[73]

The logic of *Stern* focuses on this.[74] That it did so was somewhat ironic, however, as Chief Justice Rehnquist's concerns may have been more pragmatic than formalist. His concurrence was motivated by a concern not solely about *judicial* power, but instead about the source of law. "There is apparently no federal rule of decision provided for any of the issues in the lawsuit," he observed.[75] "[T]he claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common-law mode of judge and jury."[76] Chief Justice Rehnquist's concurrence did not, therefore, view history as an end in itself, but rather as a means of finding some principled source of law where there otherwise was none. Because a breach of contract action is not what we might call the "ordinary work" of bankruptcy courts, neither the Bankruptcy Code nor the system Congress created under its Bankruptcy Power—including bankruptcy courts—could have the capacity to resolve Northern's claim against Marathon.

Marathon's formalism has been widely criticized.[77] In part, the criticism reflects the opinion's doctrinal genealogy: it would appear that its formalism derived not from the holding of *Murray's Lessee*, but instead its dicta, as *Murray's Lessee* did not involve a legislative court.[78] More generally, formalism here is problematic for the reasons formalism has otherwise been criticized: it is disconnected from the complexities

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73. *Id.* (Rehnquist, J., concurring) (emphasis added).

74. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (stating that only Article III courts may adjudicate "'traditional actions at common law tried by the courts at Westminster in 1789'") (quoting *Marathon Pipe Line Co.*, 458 U.S. at 90 (Rehnquist, J., concurring)).

75. *Marathon Pipe Line Co.*, 458 U.S. at 90.

76. *Id.* ("The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court.").

77. *See, e.g.*, Bator, *supra* note 63, at 243–53; Fallon, *supra* note 64, at 918–29; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 605–06, 625 (2007); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 665, 769–70, 775–76 (2004); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 201, 228.

78. In *Murray's Lessee*, the Court held that Congress could authorize summary distraint of property to satisfy debts owed to the United States. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284–85 (1856). Professor Pfander thus argues that *Murray's Lessee* offers no basis for Article I formalism at all. Pfander, *supra* note 77, at 733–34 ("Although one can find in *Murray's Lessee*'s most famous dictum language that explains the scholarly view that public rights disputes fall within a categorical exception to Article III, a close reading of the decision refutes that notion.").

and nuance of modern life.[79] Perhaps most confounding is that this methodology seems to be limited to bankruptcy, as the Court has elsewhere taken a decidedly functionalist approach.[80] Outside bankruptcy, the Court has preferred functionalism, focusing on pragmatic considerations, such as agency expertise, resolution efficiency, and institutional safeguards such as the availability of appellate review.[81]

After *Marathon*, scholars were quick to argue that its formalism was aberrant and likely to be short-lived.[82] In part, this was due to the fact that *Marathon* was bracketed by cases that took a functionalist approach. *Crowell v. Benson*,[83] for example, preceded it,[84] while *Thomas v. Union Carbide Agricultural Products Co.*,[85] and *Commodity Futures Trading Commission v. Schor*[86] followed it. Reports of the death of *Marathon*'s historical formalism were, however, premature. Justice Brennan returned to the methodology in *Granfinanciera, S.A. v. Nordberg*,[87] a bankruptcy

79. *See* Erwin Chemerinsky, *Formalism without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 205 [hereinafter Chemerinsky, *Stern*] ("[F]ormalism is inherently unsatisfying in constitutional law where the premises are almost always likely to be disputed and where there is a need to interpret constitutional provisions in light of modern circumstances."). *See also* Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311, 322–23 (1991) [hereinafter, "Chemerinsky, *Northern*"] (arguing that *Marathon* "is unsupported by constitutional text, history, or policy considerations" and "[t]he decision should be overruled and Congress should again have the authority to decide the nature and appropriate jurisdiction of bankruptcy courts"); Redish, *supra* note 77, at 216–19 (criticizing *Marathon*'s elevation of form over substance).

80. One of us thus argued that *Marathon*'s formalism is an example of "bankruptcy exceptionalism." *See* Lipson, *supra* note 3, at 647–50.

81. *See* Chemerinsky, *Stern*, *supra* note 79, at 205 ("The formalistic approach of *Stern* is very different from the functional approach of *Thomas* and *Schor*.").

82. *See, e.g.*, Pfander, *supra* note 77, at 646–47 (describing *Northern Pipeline* as "an ill-fated and relatively short-lived attempt to establish categorical limits to non-Article III adjudication"); Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 416–17 (arguing that *Northern Pipeline*'s formalism was "rapidly proved unsustainable").

83. 285 U.S. 22 (1932).

84. In *Crowell v. Benson*, the Court upheld Article I adjudications of disputes among private litigants under certain constraints driven by the exigencies of the types of disputes involved and the availability of appellate review. *Id.* at 51–53.

85. 473 U.S. 568 (1985). In *Thomas*, the Court distinguished *Marathon's* application of the "public rights" exception, holding that it was not limited to disputes "'arising between the Government and persons subject to its authority.'" *Id.* at 585 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982)).

86. 478 U.S. 833 (1986). In *Schor*, the Court downplayed the significance of state law in determining whether an Article III court is required between parties. *Id.* at 853 (Justice O'Connor observed that "there is no reason inherent in separation of powers principles to accord the state law character of a [private rights] claim talismanic power in Article III inquiries.").

87. 492 U.S. 33 (1989).

opinion that has catalyzed *Stern*'s effect on fraudulent transfer suits. *Granfinanciera* held that a defendant in a fraudulent transfer suit who had filed no claim in the debtor's bankruptcy had a right to a jury trial.[88] Because "actions to recover preferential or fraudulent transfers were often brought at law in late 18th-century England," Justice Brennan reasoned, they were "quintessentially suits at common law that more nearly resemble[d] state-law contract claims" forbidden to bankruptcy courts by *Marathon*.[89]

As explained below, *Stern* turned largely on the historical formalism of both *Marathon* and *Granfinanciera*.[90] While the Court has not told us *why* historical formalism is its preferred method for defining the Article I-Article III boundary in bankruptcy, it forms an important step in the decisional path to *Bellingham* and other cases in *Stern*'s wake. Thus, the important tactical question is how to make this methodology work in a way that minimizes systemic disruption.

C. *Solving* Stern—*Or Not*

Failing to make *Stern* work has created litigation costs that few would defend. Thus, observers have offered a variety of solutions, ranging from giving bankruptcy judges Article III status, to permitting parties to "consent" to bankruptcy court adjudication in some way. Unfortunately, the solutions offered thus far are either politically implausible or unlikely to reduce *Stern*'s costs.

1. ARTICLE III STATUS

Like others before her, Judge Joan Feeney has argued that Congress could solve the *Stern* problem if it conferred Article III status on bankruptcy judges.[91] "This measure would ensure the authority of bankruptcy judges to resolve all bankruptcy proceedings, including those requiring exercise of the judicial power of the United States."[92] According to Judge Feeney, "Article III status is the only solution that will decisively curtail litigation on the scope of bankruptcy court's authority."[93] While she is correct that conferring Article III status on

88. *Id.* at 55, 58–59 (Fraudulent conveyance suits were "more accurately characterized as a private rather than a public right" when the defendant had not filed a proof of claim.).

89. *Id.* at 43, 56. As explained *infra* Part III, we think this is a mistake as an historical matter.

90. *See infra* Part III.B.

91. Feeney, *supra* note 13, at 360.

92. *Id.*

93. *Id.*

bankruptcy judges would effectively solve the problem, the solution suffers from insurmountable political hurdles. This has long been a non-starter for Congress.[94]

2. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—QUASI-MAGISTRATES

Some have observed that, even if *Stern* means that bankruptcy courts may not *adjudicate* certain disputes, they may nevertheless *propose* findings of fact and conclusions of law that their affiliated district court may then review de novo.[95] Professor Ralph Brubaker, for example, argues that bankruptcy judges can "hear and submit proposed findings of fact and conclusions of law to the district court in such statutory core proceedings based on their all-encompassing authorization to 'hear and determine' the matter and enter any and all 'appropriate orders.'"[96] They could, in short, act as quasi-magistrates, serving the district courts to which they are adjuncts.

Some believe this procedure may reduce litigation costs if "bankruptcy court[s] . . . require the parties to a *Stern*-type claim to agree (*i.e.*, forfeit any objections) to" it in advance.[97] The logic is "[i]f any party does not agree, the court may avoid prolonged litigation over the court's statutory power to hear but not determine a *Stern*-type claim by simply [withdrawing the reference]."[98] This type of solution has been embraced by some courts.[99]

The Southern District of New York has gone a step further, effectively requiring bankruptcy courts to act as magistrates in any case presenting *Stern* doubts. There, the District Court amended its standing order of reference to the bankruptcy courts to provide that a Bankruptcy Court must hear "core" proceedings and either (i) issue a final order or judgment, or (ii) in the event such court determines that it lacks the constitutional authority to enter a final judgment, to issue proposed

94. *See* Lipson, *supra* note 3, at 654–55.

95. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 142–43 (2012); *see also* 28 U.S.C. § 157(c)(1) (2006).

96. Brubaker, *supra* note 95, at 142–43 (footnotes omitted) (citing 28 U.S.C. § 157(b)(1)).

97. Baxter et al., *supra* note 11, at 22.

98. *Id.*

99. *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 430 B.R. 523 (Bankr. E.D. Wis. 2010) *remanded to* 665 F.3d 906 (7th Cir. 2011); *but see Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 777 (7th Cir. 2013) (noting that when the bankruptcy court's constitutional authority is lacking in a core proceeding, the district court should withdraw the reference rather than accept proposed findings of fact).

findings of fact and conclusions of law, which the district court would review de novo.[100]

There are two problems with treating bankruptcy judges as quasi-magistrates. First, it is not clear whether, or under what circumstances, it can work. As currently written, the federal judicial code only permits bankruptcy courts to take this path for a *non-core* proceeding that is "related to" a bankruptcy case.[101] The rules do not, however, contemplate this procedure for matters that are statutorily *core*, such as fraudulent transfer suits. Absent a statutory change, bankruptcy courts have uncertain power to act as quasi-magistrates in *Stern*-type disputes (matters that are statutorily core but constitutionally forbidden to bankruptcy courts), leaving such matters in limbo between the Bankruptcy Code and the Constitution.[102] It is not clear whether bankruptcy courts can spontaneously bridge this gap, as the Supreme Court has repeatedly held that we must interpret the Bankruptcy Code strictly in accordance with its text.[103] Nor do we know whether District Courts, such as the Southern District of New York, can do so, or whether courts can require parties to "consent" to such provisional determinations.

Second, even if statutorily permissible, it does not solve the *Stern* problem, as it encourages the loser under the bankruptcy court's provisional findings to relitigate them at the district court, which reviews

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100. *See Amended Standing Order of Reference Re: Title 11*, 12 Misc. 00032 (S.D.N.Y. Jan. 31, 2012) [hereinafter *Standing Order*], *available at* http://www.nysd.uscourts.gov/rules/StandingOrder_OrderReference_12mc32.pdf.

101. 28 U.S.C. § 157(c)(1) (2006) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.").

102. The Seventh Circuit Court of Appeals recognized the same issue in a different context: that proposed findings of fact in a core proceeding can create a statutory gap in appellate court jurisdiction—one that federal courts of appeal may not be willing to overlook. *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906, 915 (7th Cir. 2011) ("For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under 28 U.S.C. § 157(c)(1), we would have to hold that the debtors' complaints were 'not a core proceeding' but are 'otherwise related to a case under title 11. As we just concluded, the debtors' claims qualify as core proceedings and therefore do not fit under § 157(c)(1). The direct appeal provision in 28 U.S.C. § 158(d)(2)(A) also does not authorize us to review on direct appeal a bankruptcy judge's proposed findings of fact and conclusions of law." (footnote omitted)).

103. *See, e.g.*, *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50–53 (2008) (textual analysis of Bankruptcy Code § 1146); *Patterson v. Shumate*, 504 U.S. 753, 757–58 (1992) (using "plain language" of § 541(c)(2) of Bankruptcy Code to determine if ERISA-qualified pension plan constitutes restriction on transfers); *Union Bank v. Wolas*, 502 U.S. 151, 156–58 (1991) (using legislative history to support "literal reading" of Bankruptcy Code); *Toibb v. Radloff*, 501 U.S. 157, 160–61 (1991) (using "plain language" of Bankruptcy Code to decide whether non-business debtor may reorganize under Chapter 11); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1990) (plain language should be used when reading statutes).

the bankruptcy court's work anew (de novo).[104] As Judge Feeney points out, the quasi-magistrate solution "would only add permanence and legitimacy to the current problem inherent in the bankruptcy system, namely that litigants need to visit both the bankruptcy court and district court to resolve their disputes."[105] The proposed findings solution may reduce litigation *over Stern*, in other words, but it would leave litigation costs permanently higher because it would create greater adjudication options for losers below. This would create more work for district courts—which appear to have little interest in bankruptcy matters generally—and no less for bankruptcy courts, a deadweight loss.

3. CONSENT

As suggested above, some have hoped that "consent" will solve the *Stern* problem: that is, if a statutory core proceeding requires the exercise of a constitutional "federal judicial power," litigants could agree that a bankruptcy judge would be the one to do so. They look for support to pre-Bankruptcy Code cases such as *MacDonald v. Plymouth County Trust Company*[106] and *Katchen v. Landy*.[107] *Katchen* held that if a creditor filed a claim in the bankruptcy case, the creditor had impliedly consented to bankruptcy court adjudication of all procedurally-related

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104. 28 U.S.C. § 157(c)(1).

105. See Feeney, *supra* note 13, at 359–60. Although practitioners seem to think this "should make *Stern* issues substantially simpler for the Bankruptcy Court and District Court to address at the outset," they acknowledge that:

> Such issues will not be eliminated [because] they are still likely to be raised in the District Court on appeal from final Bankruptcy Court orders, where there are likely to be arguments by litigants with respect to factual issues underlying rulings on which the litigants were unsuccessful, contending that the Bankruptcy Court's decision should be treated as proposed findings subject to *de novo* review, *i.e.*, from scratch.

Update: Defanging Stern v. Marshall*: The United States District Court for the Southern District of New York Modifies the Reference of Bankruptcy Matters to Address Issues Resulting from the Supreme Court's Ruling*, WINSTON & STRAWN LLP, http://www.winston.com/siteFiles/Publications/Stern_Marshall_03_05_12.pdf (last visited July 18, 2013). *Stern* also seems to have become a dominant factor in at least some decisions about whether to withdraw the reference. *See Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank*, *N.A*. (*In re Lehman Bros. Holdings Inc.*), 480 B.R. 179, 188 (S.D.N.Y. 2012) (The principle factor was now "whether the bankruptcy court has *constitutional* authority to enter a final judgment on the claims at issue.").

106. 286 U.S. 263, 268 (1932) (stating that plenary suits, such as suits to set aside voidable preferences, may not be summarily tried by a referee absent the parties' consent).

107. 382 U.S. 323 (1966).

disputes *inter se*.[108] Recognizing the efficiencies that this could create, Congress provided in the Bankruptcy Code that bankruptcy courts could adjudicate non-core matters if the parties so agreed.[109] Aside from the fact that we do not know whether consent is permissible in core matters (the statute does not provide for it), consent presents two deeper problems: (1) We do not know whether (or under what conditions) consent is permissible as a constitutional matter? and (2) If it is, what acts or omissions show consent?

This is how the issue was framed for the Supreme Court in *In re Bellingham Insurance Agency, Inc*.[110] There, the Ninth Circuit Court of Appeals held that a defendant in a fraudulent transfer suit could be deemed to have consented to bankruptcy court adjudication through waiver.[111] Although the defendant (Executive Benefits Insurance Agency, or "EBIA") filed no proof of claim, its "conduct bore considerable indicia of consent," the Court of Appeals reasoned.[112] It came to this conclusion not because the defendant affirmatively agreed, but instead because it delayed in raising the constitutional objection.[113] Reading *Granfinanciera* and *Stern* together, the *Bellingham* court

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108. *Id*. at 334–35 ("To require the trustee to commence a plenary [independent] action in such circumstances would be a meaningless gesture, and it is well within the equitable powers of the bankruptcy court to order return of the preference during the summary proceedings on allowance and disallowance of claims.").

In *Katchen*, the petitioner filed claims in the bankruptcy proceeding, one for rent due from the bankrupt corporation, and one for a payment on a note he made with personal funds. *Id.* at 325. "The trustee responded [to the claims] with a petition asserting that the payments from the trust fund to the banks were voidable preferences and demanding judgment for the amount of the preferences along with the amount of an unpaid stock subscription" that the petitioner owed the debtor-corporation. *Id.* The petitioner objected to the summary jurisdiction of the bankruptcy referee, but it was overruled "and judgment was rendered for the trustee on both the preferences and the stock subscription." *Id.* "Petitioner's claims were to be allowed only when and if the judgment was satisfied." *Id.*

109. 28 U.S.C. § 157(c)(2) (permitting bankruptcy court to enter final judgments in non-core proceedings "with the consent of all the parties to the proceeding").

110. 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013).

111. *Id.* at 566–67.

112. *Id.* at 568.

113. *Id.* ("Because EBIA waited so long to object, and in light of its litigation tactics, we have little difficulty concluding that EBIA impliedly consented to the bankruptcy court's jurisdiction."). In *Bellingham*, the defendant initially responded to the fraudulent transfer complaint by demanding its right to a jury trial under *Granfinanciera*, which the district court treated as a motion to withdraw the reference. *See id.* (citing Motion to Vacate Trial Date at 2, *In re Bellingham Ins. Agency*, No. 06-11721 (W.D. Wash. Dec. 21, 2009), ECF No. 1); Answer of Defendant Executive Benefits Insurance Agency at 14, *In re Bellingham Ins. Agency*, No. 06-11721 (Bankr. W.D. Wash. Aug. 2, 2008), ECF No. 169). Although these motions were made before 2010, *Stern* was not decided until June 2011.

reasoned that a bankruptcy trustee's fraudulent transfer claim against non-creditor defendants is not a matter of public right.[114] Absent "consent" by the defendant, the suit may only be finally adjudicated by an Article III court.[115] The Court of Appeals concluded that the defendant implicitly consented to the bankruptcy court's adjudication of the fraudulent transfer claim by failing to raise the objection in a timely fashion.[116]

The Supreme Court may have agreed to hear *Bellingham* because it conflicts with *Waldman v. Stone*,[117] which read *Stern* differently.[118] There, the Sixth Circuit Court of Appeals held that the right to an Article III adjudication of a fraudulent transfer is structural and cannot be waived at all.[119] "Article III could neither serve its purpose in the system of checks and balances," the court reasoned, "nor preserve the integrity of judicial decisionmaking if the other branches . . . could confer the Government's 'judicial Power' on entities outside Article III."[120]

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114. *Id.* at 561–62.

115. Id. at 561. ("[*Granfinanciera* and *Stern*] together point ineluctably to the conclusion that fraudulent conveyance claims . . . cannot be adjudicated by non-Article III judges.").

> [I]f a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power."

Id. at 563 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). Citing *Schor*, the *Bellingham* court reasoned that "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal, rather than structural, interests." *Id.* at 567 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986)). The court reasoned that "[i]f consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment." *Id.* (citing 28 U.S.C. § 157(c)(2) (2006), which permits bankruptcy courts to enter final judgments in non-core proceedings "with the consent of all the parties to the proceeding").

116. *Id.* at 568 ("EBIA did not raise a constitutional objection to the bankruptcy court's entry of final judgment in favor of the Trustee until after the briefing in this appeal was complete, when it filed a motion to vacate the bankruptcy court's judgment on the eve of oral argument.").

117. 698 F.3d 910 (6th Cir. 2012).

118. *Id.* at 918–19.

119. *Id.* at 918.

120. *Id.* (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011)).

Therefore, Waldman's objection implicated not only his personal rights, but also the structural principle advanced by Article III—a principle that "is not Waldman's to waive."[121]

The Seventh Circuit weighed in on the consent issue after the Supreme Court agreed to hear *Bellingham*, in *Wellness International Network, Limited v. Sharif*.[122] There, the court of appeals held that a litigant may not waive an Article III . . . objection to a bankruptcy court's entry of final judgment in a core proceeding."[123] The court sided with the Sixth Circuit as having "the better view under current law,"[124] as the statutory scheme granting bankruptcy judges authority to enter final judgments in core proceedings "*does* implicate structural concerns where the core proceeding at issue is 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"[125]

Although we are not willing to wager on the point, we suspect the Court in *Bellingham* will disagree with *Waldman* and *Sharif,* and treat the right to an Article III adjudication as waivable.[126] This will not eliminate the costs of litigating consent, however, because a wide range of acts or omissions might constitute "consent." As noted, filing a proof of claim was historically considered good evidence of consent to the bankruptcy process, but did not have this effect in *Stern*.[127] Nor does the *Stern* majority tell us what would show consent. Should a contractual analysis apply, as seems to happen with arbitration? If so, what sort of consent can be inferred absent formal promises? Should a defendant be

121. *Id.*

122. 727 F.3d 751, 777 (7th Cir. 2013).

123. *Id.* at 773.

124. *Id.* at 771.

125. *Id.* (quoting *Stern*, 131 S. Ct. at 2609 (internal quotations omitted)). Adding to, or reflecting, confusion over the role of consent here, two weeks after the *Sharif* decision, a different Seventh Circuit panel (with one judge common to *Sharif*) found "no constitutional problem when a bankruptcy judge adjudicates a trustee's avoidance actions against creditors who had submitted claims." *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013).

126. In *Bond v. United States*, for example, the Court—in the same term as *Stern*—held that an individual has standing to challenge a federal law on grounds that it interferes with states' Tenth Amendment protections, suggesting that individuals may assert (or waive) seemingly structural protections. 131 S. Ct. 2355, 2358–59, 2363–64 (2011). The Court in a similar vein has enthusiastically upheld arbitration clauses, whereby consumers contract out of an Article III adjudication. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

127. As one court recently explained: "The only way to harmonize *Stern* with earlier decisions like *Granfinanciera* and *Langenkamp* is to conclude that the filing of a proof of claim does not automatically authorize the bankruptcy court to enter a final judgment against that creditor." *Bachrach Clothing, Inc. v. Bachrach* (*In re Bachrach Clothing, Inc.*), 480 B.R. 820, 827 (Bankr. N.D. Ill. 2012).

forced into bankruptcy court due solely to a lawyer's failure to object, as happened in *Bellingham*? If so, how much delay is enough? To avoid the risk of waiver, should defendants always raise the *Stern* objection at the outset, no matter how far-fetched? If so, do we then inevitably move many bankruptcy litigations to district courts or to the quasi-magistrate structure, which is problematic for the reasons described above?

Thus, "consent" and other proposed solutions to *Stern* are unlikely to solve what we believe to be *Stern*'s central problem: the litigation costs it creates. Parts III and IV of this paper offer a better way to solve this problem. Before doing so, however, we first explain why *Stern* has created the problem.

II. EXPLAINING *STERN*: INDETERMINACY AND INDIFFERENCE

The chief cause of litigation following *Stern* is, as in other contexts, indeterminacy[128]: *Stern* could have several different (sometimes conflicting) meanings.[129] Litigation is the mechanism by which parties try to exploit or make sense of these possible meanings.[130] In order to

128. We do not use that term in a fancy way. The claim that law was "indeterminate" was central to many scholars working in a critical vein in the 1970s and '80s. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700 (1976) (characterizing as indeterminate situations in which "a 'rule' that appears to dispose cleanly of a fact situation is nullified by a counterrule whose scope of application seems to be almost identical"). Professor Solum has criticized various strains of the indeterminacy thesis, in particular what he calls its "strong" form: "in every case any result can be derived from the preexisting legal doctrine." Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470 (1987). Indeterminacy has nevertheless been a common criticism of Supreme Court precedent. *See* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 503 (1989) ("[O]ne cannot find historical or geographical agreement among those articulating the doctrine about what the terms 'legislative,' 'executive,' and 'judicial' power mean, let alone how much of an 'intrusion' one branch of the government can make into the power of another without violating the prescribed separation."); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1521 (1990) (observing that the "mid-century obsession with the countermajoritarian difficulty seems a little quaint, if not peculiar").

129. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

130. Most litigation models suggest a higher litigation rate when the law is uncertain. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1092–93 (1989); George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193, 197–200 (1987); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 LEGAL STUD. 1, 4 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56–58 (1982). For criticism of the thesis that uncertainty fuels litigation, see, for example, Theodore Eisenberg, *Commentary on "On the Nature of Bankruptcy": Bankruptcy and Bargaining*, 75 VA. L. REV. 205, 209–11 (1989); Peter H. Schuck, *The Role of Judges in*

resolve the confusion *Stern* has created—and thus to reduce its costs—this Part explores major aspects of *Stern*'s indeterminacy. We also explain why the majority likely wrote *Stern* as it did, which is that the Court may have been insensible to the impact it would have in the bankruptcy system. The indeterminacy and indifference embodied in *Stern* make the proposed "solutions" described above unlikely to solve the *Stern* problem.

A. Indeterminacy

Stern's indeterminacy has three aspects: (1) the disparity between its rhetoric and its result; (2) the ambiguity of its "rule;" and (3) the mismatch between the public rights doctrine and the hybrid nature of bankruptcy as a process that involves both public and private rights.

1. RHETORIC VS. RESULT

The most obvious indeterminacy in *Stern* reflects the disconnect between its rhetoric and its result. Following Dean Erwin Chemerinsky, we do not "use rhetoric . . . in the popular pejorative sense, but in the classical meaning of the word. The Supreme Court's opinions are rhetoric in that they are reasoned arguments intended to persuade."[131] The problem is that persuasion is complicated where, as in *Stern*, the Court's language sends mixed signals. *Stern*'s principal rhetorical effect has thus far been to persuade parties to litigate its meaning, an expressive effect of dubious value.

On one hand, Chief Justice Roberts characterized *Stern'*s holding as "narrow."[132] "We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute," he wrote.[133] "[O]ur decision," according to the Chief Justice, "does not change all that much" because "in one isolated respect" Congress exceeded Article III.[134]

Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337, 346 n.30 (1986).

131. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2008 (2002).

132. *Stern*, 131 S. Ct. at 2620 (citing Brief for United States as Amicus Curiae Supporting Petitioners at 23, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179)).

133. *Id.*

134. *Id.* at 2620.

On the other hand, *Stern* rests on strong claims about the separation of powers, which in turn suggests that it requires broad application.[135]

> Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes. A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely . . . . We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.[136]

The Bankruptcy Code "chipped away" at Article III, according to the majority, by attempting to give Article I actors "the judicial power of the United States."[137] "The colonists," Chief Justice Roberts explained, "had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'"[138] The judicial power must reside with Article III judges, however, and not so-called "legislative" judges because, the Chief Justice opined, Article III judges enjoy life tenure and salary protection that other judges do not.[139]

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135. Permitting a bankruptcy court to adjudicate Pierce's claim against Vickie would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system," the Chief Justice wrote. *Id.*

136. *Id.*

137. *Id.* "It is clear," Chief Justice Roberts opined, "that the Bankruptcy Court in [*Stern*] exercised the 'judicial Power of the United States' in purporting to resolve and enter final judgments on a state common law claim, just as the court did in [*Marathon*]." *Id.* at 2611.

138. *Id.* at 2609 (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)). English superior court judges held office during "good behaviour," but their compensation was complex. The 1701 Act of Settlement provided for tenure during good behavior for the twelve judges of the three superior courts of common law, King's Bench, Common Pleas, and Exchequer, and required that their salaries be "ascertained and established." Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.). "The required 'establish[ment]' of salaries did not foreclose the continued receipt of litigant fees. Indeed, fees for English superior court judges were not abolished until 1799." *See* James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 8 n.30 (2008).

139. "The Framers undertook in Article III," the majority reasoned,

> to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor

The problem is that the Court does not tell us what the "judicial power" is. The majority seems to define it by reference to the Court's 1932 opinion in *Crowell v. Benson*, where the Court characterized the Article III power as determining "the liability of one individual to another under the law as defined."[140] But the Court did not say what "the law as defined" means. Given the emphasis of *Marathon*, *Granfinanciera*, and *Stern* on the common law of England in 1789, it would seem that history *is* "the law as defined," at least for lawsuits in bankruptcy court.[141]

Moreover, the Court's broad rhetoric about the separation of powers makes unclear how far the opinion reaches. Bankruptcy courts routinely adjudicate many state-law disputes, and it is difficult to say those adjudications are not some sort of "exercise of federal judicial power." Unless the Court intends to eliminate the bankruptcy judiciary entirely, we do not know how broadly to read its rhetoric about the separation of powers. To have claimed his majority opinion was "narrow"[142] seems only to have heightened the confusion; perhaps Chief Justice Roberts was protesting too much?

2. THE "RULE" OF *STERN*

There are also more practical indeterminacies: What, exactly, is *Stern's* "rule?" This difficulty has, we suspect, led to much *Stern* litigation because there are several inconsistent answers.[143]

> with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges."

Stern, 131 S. Ct. at 2609 (quoting 1 THE WORKS OF JAMES WILSON 363 (James DeWitt Andrews ed., 1896)). The quotation is perhaps a display of subtle humor. James Wilson spent two weeks in debtors' prison 1796. He was one of several framers to do so, and for whom, therefore, bankruptcy relief would appear to have been an especially important feature of the new Constitution. *See* Lipson, *supra* note 3, at 627.

140. *Stern*, 131 S. Ct. at 2612 (quoting *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932)).

141. *See infra* Part III.

142. *Stern*, 131 S. Ct. at 2620 (citing Brief for United States as Amicus Curiae Supporting Petitioners at 23, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179)).

143. The problem, as Judge Feeney observes, "is the inconsistency in case law applying *Stern*'s holding, which disrupts the uniformity essential to the bankruptcy system." *See* Feeney, *supra* note 13, at 359. *See also Manning v. Methodist Hosp., Inc.* (*In re Merrillville Surgery Ctr., LLC*), 474 B.R. 618, 620 (Bankr. N.D. Ind. 2012) (stating "*Stern* has been viewed as incredibly ambiguous by nearly every bankruptcy professional—scholars, counsel for parties, and judges—who has reviewed it and attempted to apply its determination to address a bankruptcy court's final judgment authority in a number of different circumstances").

To state the "rule" of *Stern*, one must first determine its holding. Interestingly, the majority never says explicitly what this is.[144] Most plausibly, it appears in the penultimate sentence of the majority opinion: "The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[145] Unfortunately, if this is the holding, it is ambiguous for at least two reasons.

First, by turning on "state law," the majority suggests that the source of law matters. This is not surprising but is problematic. It is not surprising because it carries forward the historical formalism embodied in *Marathon*'s reference to "Westminster in 1789," which may be shorthand for traditional common law causes of action. As explained above, this appears to have been the rationale of Chief Justice Rehnquist, whose concurrence in *Marathon* produced the phrase ("Westminster in 1789").[146] In pure contract (*Marathon*) or tort (*Stern*) disputes, the Bankruptcy Code provides no rule of decision, and so another body of law—and another court versed in that law—must make the decision.

And yet, if this is an important part of the *Stern* rule, there is a problem. The Supreme Court has long held that, absent some important countervailing federal interest, distributive rights in bankruptcy are in the first instance determined by state law.[147] Many leading scholars would say that most, perhaps all, important rules of decision in bankruptcy are provided by state common law.[148] On this theory, bankruptcy law is nothing more than a variant of civil procedure.[149]

144. According to the Court's syllabus of the opinion, the holding was as follows: "Although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so." *Stern*, 131 S. Ct. at 2596. Of course, the syllabus is not part of the case. *Id.* at 2595 n.* ("The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader." (citing *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906))).

145. *Id.* at 2620. The Court also held that the bankruptcy court did have authority to adjudicate Pierce's claim against Vickie. *Id.* at 2606–07.

146. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring). Of course, a federal rule of decision would be appropriate if one existed.

147. *See, e.g.*, *Butner v. United States*, 440 U.S. 48, 55 (1979) (asserting that "[p]roperty interests are created and defined by state law"); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) (noting that "[t]he 'basic federal rule' in bankruptcy is that state law governs the substance of claims").

148. *See, e.g.*, Lipson, *supra* note 3, at 617–22 (citations omitted).

149. Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 933 n.2 (2004); Charles W. Mooney, Jr., *Hosing Down Senior Claims with a Quicker and Dirtier Chapter 11*, 72 WASH U. L.Q. 1153, 1158 (1994).

Would *Stern* then mean that bankruptcy courts have no authority to adjudicate *any* disputes determined by state law? Unless we wish to gut the entire system, the answer has to be "no." Bankruptcy courts can and do routinely adjudicate inbound disputes on many matters governed by state law, including on the validity, priority, and extent of liens and claims.[150] Few believe that *Stern* would alter this. Yet confirming this has required litigation.[151]

This then leads to the second ambiguity in *Stern*'s rule: that bankruptcy courts may adjudicate (state-law-based?) outbound suits only if "resolved in the claims allowance process."[152] The problem here is that the terms "resolved" and "claims allowance process" are not self-defining. Nor do we know how important either (or both) are to determining the boundaries of bankruptcy court authority.

It helps to start by recognizing that the timing in *Stern* could have been different: Pierce's defamation claim and Vickie's tortious interference with gift claim could have been decided simultaneously in the "claims resolution process" in its purest form. This did not happen because Pierce's claim was disallowed about a year before Vickie's outbound claim against Pierce was adjudicated.[153] Yet, adjudicating both in the claims resolution process would have asked the court to perform an offset analysis, something bankruptcy courts routinely do.[154] In that case, and holding all else constant, Pierce would have been the net obligor because his claim against Vickie had been disallowed, whereas her claim against him was held valid by the bankruptcy court.

Would this adjustment in the process really have altered the result? In other words, would the Court have upheld the bankruptcy court's adjudication against Pierce merely because it was forced into the claims resolution process? Given the majority's concern for protecting the integrity of the Article III judiciary based on the formal (and historical) qualities of the claim, this seems implausible. The separation of powers

150. *See Porst v. Deutsche Bank Nat'l Trust Co.* (*In re Porst*), 480 B.R. 97, 103 (Bankr. D. Mass. 2012) ("[A] determination of the nature and extent of Deutsche Bank's lien is integral to determining the validity of its proof of claim as well as its pending objection to confirmation of the debtor's chapter 13 plan filed in the main case. This places this adversary proceeding beyond the narrow scope of *Stern*."); *see also Pulaski v. Dakota Fin., LLC* (*In re Pulaski*), 475 B.R. 681, 688 (Bankr. W.D. Wis. 2012) (holding that "[b]ecause the defendant seeks to have the claim treated as a secured claim and paid through the debtors' plan, the issues raised by the debtors are now 'integral to the restructuring of the debtor-creditor relationship'" (citing *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906, 914 (7th Cir. 2011))).

151. *See Pulaski*, 475 B.R. 681.

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

153. *See* Brubaker, *supra* note 95, at 177.

154. Bankruptcy Code Section 553 provides specific rules on the treatment of offset. 11 U.S.C. § 553 (2006).

analysis that forms much of *Stern's* rhetoric should not turn on accidents of timing.[155]

Perhaps anticipating such problems, some courts have interpreted the rule of *Stern* to mean that bankruptcy courts may adjudicate outbound state law claims only if "necessary" to the claims resolution process.[156] This "perfect match" requirement is nevertheless problematic because it is not what *Stern* says and may not even be what it does: some would argue that Pierce and Vickie's mutual claims *did* arise from the same occurrence—allegations and counter-allegations regarding Pierce's interference with Vickie's expectancy.[157] "Necessity" merely shifts the uncertainty one analytic degree.

Fueling further confusion is the possibility that there will be no claims resolution process at all, either because the defendant will not have filed a claim to be resolved or will not be a creditor. In *Waldman v. Stone*, for example, the court recognized that it was irrelevant whether the defendant had filed a proof of claim.[158] This makes sense, given the broad definition of "claim" under the Bankruptcy Code[159] and the fact that chapter 11 debtors presumptively prepare the schedules that identify

155. The answer may be that the *Stern* majority found that even if the timing in *Stern* had been different—the mutual claims had been adjudicated at the same time—resolving Vickie's claims would not have disposed of Pierce's because they had different elements. *Stern*, 131 S. Ct. at 2617. This, however, suggests that the "claims resolution" element may not be so important after all. Instead, the important part of the *Stern* analysis would involve the source and nature of the claims involved.

156. *Bachrach Clothing, Inc. v. Bachrach* (*In re Bachrach Clothing, Inc.*), 480 B.R. 820, 827 (Bankr. N.D. Ill. 2012) ("[T]he bankruptcy judge's authority hinges on an analysis of whether resolution of the debtor's independent claim *is necessary* to determine the creditor's proof of claim." (emphasis in original) (citing *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906, 914–15 (7th Cir. 2011))).

157. *See* Brubaker, *supra* note 95, at 176–78 (discussing "compulsory" nature of counterclaim in *Stern*).

158. *See, e.g.*, *Waldman v. Stone*, 698 F.3d 910, 920 (6th Cir. 2012) (noting that even though the creditor, Waldman, had not filed a proof of claim, "Waldman was Stone's principal creditor and surely would have filed a proof of claim if Stone had not beat him to the courthouse with an adversarial proceeding"). *See also* FED. R. BANKR. P. 3003(b)(1) (regarding the filing of proofs of claim).

159. Under Section 101(5), a claim is defined to include the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). Congress intended this to be the "broadest possible definition" of the term. *See* H.R. REP. NO. 95-595, at 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6266 ("By this broadest possible definition . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case."). *See also Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (acknowledging broad definition of "claim" under Bankruptcy Code).

creditors and the amounts owed, which, in turn, forms the basis for claim allowance or disallowance.[160]

Prior to *Stern*, *Marathon* had made fairly clear that non-bankruptcy-law-related outbound causes of action (e.g., a contract claim) could not be adjudicated by a bankruptcy court against a person who was not a creditor.[161] This presented Congress and the courts with the task of deciding what was then "core" for this purpose, with the assumption that bankruptcy courts would have power to adjudicate such matters even against non-creditors. But *Stern* has made this unclear, the uncertainty felt acutely in fraudulent transfer litigations, where those who received property of the debtor in an allegedly fraudulent transfer may never have been creditors (e.g., they may only have been shareholders, as in the case of leveraged buyouts).

Some have decomposed the "rule" of *Stern* into a "two-pronged" test: (1) does "the action at issue stem[] from the bankruptcy itself," or (2) would the outbound suit "'necessarily be resolved in the claims allowance process'"?[162] On this view, if either test is satisfied, the bankruptcy court has the power to adjudicate the suit on a final basis.[163] If neither is true, it will not.

But this test presents several problems that confound the analysis. First, it is not clear what it means to say that an action "stems from" the bankruptcy process. Every outbound cause of action created or incorporated by the Bankruptcy Code (for example, fraudulent transfer)

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160. *See* 11 U.S.C. §§ 521 (schedules), 1111(a) (claims deemed filed for allowance purposes if scheduled) (1994); 11 U.S.C. app. at 988–1006 Official Bankruptcy Form 6 (Schedules) (1994); 11 U.S.C. app. at 1007–16 Official Bankruptcy Form 7 (Statement of Financial Affairs) (1994); *see also* FED. R. BANKR. P. 1007.

161. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

162. *See* Crist, *supra* note 13, at 636–37 (citing *Burns v. Dennis* (*In re Se. Materials, Inc.*), 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012) (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011))); *see also TP, Inc. v. Bank of Am., N.A.* (*In re TP, Inc.*), 479 B.R. 373, 384 (Bankr. E.D.N.C. 2012); *Somerset Props. SPE, LLC v. LNR Partners, Inc.* (*In re Somerset Props. SPE, LLC*), 2012 WL 3877791, at *4 (Bankr. E.D.N.C. Sept. 6, 2012); *Steinle v. Fall River Vill. Cmtys., LLC* (*In re CCI Funding I, LLC*), 2012 WL 3070093, at *10 (Bankr. D. Colo. July 30, 2012); *Parks v. Consumer Law Assocs., LLC* (*In re Stahl*), 2012 WL 3758833, at *4 (Bankr. D. Kan. July 19, 2012); *Yellow Sign, Inc. v. Freeway Foods, Inc.* (*In re Freeway Foods of Greensboro, Inc.*), 466 B.R. 750, 768 (Bankr. M.D.N.C. 2012).

163. *In re CCI Funding I, LLC*, 2012 WL 3421173, at *6 (Bankr. D. Colo. Aug. 15, 2012) ("The Supreme Court propounded the following two-pronged test to determine whether a bankruptcy court has constitutional authority to adjudicate an action . . . '*the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process*.'" (quoting *Stern*, 131 S. Ct. at 2618 (emphasis added)); *see also In re Somerset Props. SPE, LLC*, 2012 WL 3877791, at *4 ("If the issue is statutorily core and meets one of the two prongs of the *Stern* test, then the court may enter a final order on the issue.").

could reasonably be said to "stem from" the bankruptcy process. Second, it would seem to be redundant, as claims allowance involves an action that "stems from" the bankruptcy. Indeed, as noted above, this seemed to be central to the *Stern* majority's understanding of what bankruptcy is about.

Third, it appears inconsistent with the penultimate sentence of the majority opinion. It does not, for example, appear concerned with the source of law (state law). Nor could it because, as also noted above, many adjudications in the "bankruptcy process" depend upon state law. This is not only true for inbound claims against the estate, but also for outbound claims by the estate. If, for example, Vickie's counterclaim and Pierce's claim were adjudicated at the same time (i.e., as claim and counterclaim), they would "necessarily" be resolved in the claims process. But to permit this would be to gut the separation-of-powers values that animate *Stern*.

In short, *Stern*'s indeterminacy reflects the fact that it is difficult to make sense of its "holding" and any "rule" that would follow from it. *Stern* is litigated in order to capitalize on, or to stabilize, its meaning. Unfortunately, the litigation process is expensive and seems unlikely to clarify *Stern*'s meaning soon.

3. PUBLIC RIGHTS, HYBRID RIGHTS

A third, perhaps more theoretical, indeterminacy in *Stern* reflects the poor fit between the public rights model the Court uses to determine the limits of bankruptcy court power and the complex realities of the bankruptcy process. While the public rights analysis asks us to classify causes of action as wholly private or public, the modern bankruptcy process—especially corporate reorganization—cannot be so simply pigeonholed.

The problem stems in part from the fact that the public rights doctrine is a muddle.[164] And yet, a central assumption of historical formalism is that adjudicatory power is determined by the "public" or "private" character of a cause of action. Because contract and tort claims have all been determined to be "private" for this purpose, the assumption seems to be that *Stern* requires courts such as the Ninth Circuit Court of Appeals in *Bellingham* to conclude that bankruptcy courts may not adjudicate fraudulent transfers.

164. Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 295 n.24 (1990) (discussing "emptiness" of public rights doctrine); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 503 (1987).

But this ignores the hybrid public/private qualities of the context in which the cause of action is brought. As developed more fully in the historical analysis below, bankruptcy has long been a process where "public" and "private" meet. No one would dispute that most rights asserted *against* a debtor are private, in the sense that they probably arise from a private-ordering transaction (e.g., a contract). We thus have little trouble concluding that bankruptcy courts can adjudicate those rights in bankruptcy.

And yet, the Court has carefully avoided telling us whether any aspect of the bankruptcy process—in particular the "restructuring of the debtor-creditor relationship"—is within the public rights doctrine.[165] Moreover, and perhaps more fundamentally, even those most likely to view bankruptcy as a problem of private ordering admit that bankruptcy's chief function is to manage the collective action problem presented when a debtor encounters general default.[166] If conventional adjudication exists to resolve private collection disputes, then there must be some important public attribute to a process that adjusts the rights of hundreds, perhaps thousands, of stakeholders at once.

The question then becomes whether, or under what circumstances, the Court will tolerate public-private hybrids. Not surprisingly, the Court has given mixed signals on the question. On one hand, in at least some cases (takings, for example), the Court seems committed to a fairly rigid distinction between public and private.[167] And yet in others, it seems to recognize that the duality of rights is inevitable.[168] In matters involving

165. *Stern*, 131 S. Ct. at 2614 n.7 ("Because neither party asks [the court] to reconsider the public rights framework for bankruptcy," it declined to do so there.); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55, 56 n.11 (1989) (stating that the Court did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right").

166. *See, e.g.*, Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

167. Thus, for example, the Court does not recognize "partial takings." *See* U.S. CONST. amend. V; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992); *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

168. For example, the rights created by the National Labor Relations Act and administered by the National Labor Relations Board have been characterized as a hybrid of public and private rights. *See Int'l Union v. Scofield*, 382 U.S. 205, 218, 220 (1965).

speech,[169] standing,[170] and "state action,"[171] for example, the Court seems untroubled by the hybrid, public-private nature of rights in question.

Interestingly, *Stern* seems to have anticipated but then ignored the possibility of hybrid rights. The *Stern* majority relied in part on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*[172]—a case involving jury trial rights—to note that only "[w]holly private tort, contract, and property cases" are outside the adjudicatory power of Article I courts.[173] The inference from this language is that suits that are not "wholly" private are adjudicable by Article I courts. While neither *Stern* nor *Atlas* defined "wholly" for this purpose, it seems to contemplate another category of suits which are partially public. It may be, for example, that the contract and tort actions at issue in *Marathon* and *Stern* are "wholly" private, but fraudulent transfer suits are not.

While duality may create other problems, it is for these more limited purposes simply a way to recognize the reality that the context in which a suit is brought should matter as much as the character of the suit itself. The bankruptcy context—and the process it creates—has long contained important public features, even as it may involve the creation or destruction of private rights. Debtors are subject to public examination,[174] as are the work and fees of their professionals;[175] bankruptcy courts have the power under certain circumstances to impair

169. *See* Transcript of Oral Argument at 10–11, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2008) (No. 07-665) ("Justice Souter: . . . Isn't the tough issue here the claim that there is -- is in fact a mixture, that it is both Government and private[?]"); *id.* at 23–24 ("Justice Breyer: . . . [T]he problem I have is that we seem to be applying these subcategories in a very absolute way. Why can't we call this what it is -- it's a mixture of private speech with Government decisionmaking . . . ?").

170. Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1151–53 (1993); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988).

171. Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

172. 430 U.S. 442 (1977).

173. *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011) (quoting *Atlas*, 430 U.S. at 458). Oddly, the *Stern* majority simultaneously claims that "what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." Stern, 131 S. Ct. at 2613 (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011)). While it is not clear what "federal government action" means, this would seem to leave a gap between "federal interest" and "wholly private" that contributes to *Stern*'s indeterminacy.

174. 11 U.S.C. §§ 341, 1104 (2006). *See also* Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 19 (2010).

175. 11 U.S.C. §§ 327, 330.

liens, whether by "priming,"[176] "cramdown,"[177] or selling property free of them;[178] and debtors who successfully complete the process will have their unsecured debts discharged.[179] None of these things happen without public power as expressed through Congressional legislation and bankruptcy court implementation.

But the Court's commitment to historical formalism in bankruptcy seems insensible to this complexity. Even if fraudulent transfer is "wholly" private —a claim we dispute below—the process in which such suits are asserted is not. That the Court seems unaware of this complexity may be evidence of a larger indifference to the nature and challenges of bankruptcy.

B. Indifference

Deconstructing *Stern* helps to explain why it has been heavily litigated, but does not explain why we have the opinion in the first place.[180] One answer may be that the majority did not appreciate the consequences of its rhetoric.

1. BANKRUPTCY CLAUSE

First, and perhaps most obviously, the *Stern* majority opinion makes no reference to Congress's Bankruptcy Power created by the Bankruptcy Clause, even though that would seem to be half of the equation here. As noted in the Introduction, the Bankruptcy Clause gives Congress the power to make "uniform laws on the subject of bankruptcies."[181] The *Stern* majority did quote *Marathon*'s oblique reference to the Bankruptcy

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176. *See* 11 U.S.C. § 364.

177. *See* 11 U.S.C. § 1129(b).

178. *See* 11 U.S.C. § 363(f).

179. *See* 11 U.S.C. § 524.

180. Although the majority may have claimed it meant only to produce a "narrow" opinion, it was warned about the potential consequences of altering the existing division of judicial labor: "Vickie and her *amici* predict as a practical matter that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process," the Chief Justice wrote. *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (citing Brief of Petitioner at 34–36, 57–58, *Stern*, 131 S. Ct. 2594 (No. 10-179)); Brief for United States as Amicus Curiae Supporting Petitioners at 29–30, *Stern*, 131 S. Ct. 2594 (No. 10-179). The majority was unmoved, however. "'[T]he 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.'" *Id.* (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983)).

181. U.S. CONST. art. I, § 8, cl. 4.

Power as the source of the dictum about bankruptcy's "core."[182] But it did not quote or discuss the Clause itself or the boundaries of the power. Nor was *Stern* alone in its indifference to the Bankruptcy Clause. The *Granfinanciera* majority also ignored it.[183] These Court majorities may have said nothing about the Bankruptcy Clause because they did not care about it.

Why would conscious consideration of the Bankruptcy Clause matter? Because it may have forced the majority to take seriously the reality, alluded to in Justice Byron White's *Granfinanciera* dissent, that Congress has radically expanded the Bankruptcy Power since the framing.[184] Whatever else one might say about the role of "original" understanding in Constitutional interpretation, the Framers' likely view of the Bankruptcy Power does not constrain Congress's implementation of that power today. If that power informs the ability to create legislative courts, and courts were historically the institution through which bankruptcy law was implemented, it is curious that the Court majorities in these cases have said virtually nothing about the limits of that power in relation to Article III. Perhaps they say nothing about it because bankruptcy is simply unimportant to the Court.

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182. *Stern*, 131 S. Ct. at 2605 (distinguishing "'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, . . . from the adjudication of state-created private rights'" (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion))).

183. Justice White's dissent, however, did not. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 88 (1989) (White, J., dissenting) (criticizing the *Granfinanciera* majority's "cramped view of Congress' power under the Bankruptcy Clause to enlarge the scope of bankruptcy proceedings, ignoring that changing times dictate changes in these proceedings").

In support of his more expansive view, Justice White quoted the rather optimistic statement from the 1935 *Continental Illinois* case:

> The fundamental and radically progressive nature of [congressional] extensions [in the scope of bankruptcy laws] becomes apparent upon their mere statement . . . . Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they may be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

Id. at 88–89 (quoting *Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 671 (1935)).

184. *See id.* at 88 (White, J., dissenting).

2. *CHRYSLER*

Given how much the majority in *Stern*—a case involving a fairly obscure tort claim—had to say about separation of powers, one might have expected the Court to be concerned about political meddling in what were among the most important, and political, bankruptcies of recent memory: those of the automakers.[185] The Court's response to *Chrysler*, however, shows that was not the case.

Chrysler and its affiliated companies, each of which had filed jointly administered cases under chapter 11, moved for authority to sell their assets outside the ordinary course of business and outside the plan confirmation context.[186] Bondholders with liens on these assets objected[187] and filed a motion to withdraw the reference of the bankruptcy case.[188] The bondholders argued that the Emergency Economic Stabilization Act of 2008 (EESA) and the Troubled Asset Relief Program (TARP) created thereby did not give the federal government authority to structure the debtor's 363 sale and that the sale of collateral constituted a taking in violation of the Constitution.[189] After the district court declined to withdraw the reference, the bankruptcy court approved the sale.[190]

The bondholders then sought a stay of the sale, which the Second Circuit Court of Appeals granted temporarily.[191] In their brief in support of the stay, the bondholders expressed concern about political overreach: "The Executive Branch cannot spend funds, take over corporations or control bankruptcy proceedings without Congressional authority."[192] The court of appeals was unmoved, as it concluded that the bondholders

185. Perhaps the most important, similar cases in which the Court seemed equally unconcerned about the separation of powers were the so-called "Railroad Reorganization Cases" that grew out of the collapse of the Penn Central and other railroads. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).

186. *In re Chrysler LLC*, 405 B.R. 84, 87–88 (Bankr. S.D.N.Y. 2009).

187. *Id.* at 93.

188. Motion to Withdraw the Reference, *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (No. 09-50002), 2009 WL 9095398.

189. *Id*. at 20, 24.

190. *In re Chrysler LLC*, 405 B.R. at 113.

191. *In re Chrysler LLC*, No. 09-2311-mb, 2009 WL 1532959, at *1 (2d Cir. June 2, 2009).

192. Brief for Appellants Indiana State Police Pension Trust, *et al*. at 1–2, *Ind. State Police Pension Trust v. Chrysler LLC* (*In re Chrysler LLC*), 576 F.3d 108 (2d Cir. 2010) (No. 09-2311-bk) ("Treasury claims authority under the Emergency Economic Stabilization Act of 2008 ('EESA'), but that Act provides for the purchase of troubled assets from 'financial institutions'—not automobile manufacturers—and also does not provide Treasury with the authority to control and restructure any entity, even a bank.").

lacked standing.[193] On June 7, 2009, the bondholders filed a petition for an emergency stay with the Supreme Court, again raising the separation of powers issue: "[T]he United States Department of the Treasury ("Treasury"), purporting to utilize powers conferred upon it by [TARP and EESA], will have been permitted to structure and finance the reorganization of Chrysler without any judicial review of its authority to do so . . . ."[194] The Court should stay the closing, the bondholders argued, in order to ask the Court "to review whether the law permits such wholesale alteration of bankruptcy law, not to mention the American capital markets, by the Executive Branch of the U.S. Government acting beyond the color of Congressional authority."[195]

Although Justice Ruth Bader Ginsburg did stay the sale temporarily, to give the full Court time to review the case,[196] the Court soon let the sale close.[197] In a per curiam opinion, the Court vacated the temporary stay and denied the bondholders' request for a permanent injunction.[198] The Court offered no opinion on the merits of the appeal.[199] Instead, the Court simply ruled that while a stay was "an exercise of judicial discretion," the bondholders had not established that "'the circumstances justify an exercise of that discretion.'"[200] On June 10, 2009, the sale of Chrysler's assets closed.[201]

Unbowed, the bondholders several months later (in September 2009) filed a petition for a writ of certiorari asking the Supreme Court to address the limits of the Chrysler sale.[202] Among other things, the bondholders argued that the Secretary of the Treasury exceeded his

193. *In re Chrysler LLC*, 576 F.3d at 121 ("We do not decide whether the Secretary's actions were constitutional or permitted by statute, because we conclude that the Indiana [Funds] lack standing to raise the TARP issue.").

194. Application for Immediate Stay of Sale Orders Issued by the Bankruptcy Court at 2, *Ind. State Police Pension Trust v. Chrysler LLC* (*In re Chrysler LLC*), 129 S. Ct. 2275 (2009) (No. 08-A1096).

195. *Id.* at 11.

196. *Ind. State Police Pension Trust v. Chrysler LLC* (*In re Chrysler LLC*), 129 S. Ct. 2275, 2275 (2009).

197. *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam), *vacated*, 558 U.S. 1087 (2009), *remanded sub nom. to In re Chrysler LLC*, 592 F.3d 370 (2d Cir. 2010).

198. *Id.*

199. *Id.* at 960–61.

200. *Id.* at 960.

201. *See* Michael J. de la Merced & Micheline Maynard, *Fiat Deal with Chrysler Seals Swift 42-Day Overhaul*, N.Y. TIMES, June 11, 2009, at B4, *available at* http://www.nytimes.com/2009/06/11/business/global/11chrysler.html.

202. Petition for Writ of Certiorari at 17, 30, 41–42, *Ind. State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009) (No. 09-285).

statutory authority and violated the Constitution by using TARP money to finance the sale of Chrysler's assets.[203]

> This appeal raises novel issues of bankruptcy law with far reaching consequences. The resolution of these issues will impact capital markets, bankruptcy cases and the way the Executive Branch addresses troubled companies, particularly given how Treasury stretched TARP's definition of "financial institution" to include giving bailout funds to automobile manufacturers. This case presents a test of whether the economic Zeitgeist discerned by the current Administration may supplant the order of economic rights to the assets of a bankrupt company as set by Congress and relied upon by the market.[204]

In December 2009 (six months after the Court permitted the sale), the Supreme Court issued a short opinion granting the bondholders' petition:

> On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Motion of Washington Legal Foundation, et al. for leave to file a brief as *amici curiae* granted. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit with instructions to dismiss the

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203. *Id.* at 16–17.

204. *Id.* at 16 (citation omitted). In support, the Washington Legal Foundation (WLF) sought to file an amicus brief in support of the bondholders' petition. *See* Motion for Leave to File Brief of Washington Legal Foundation, Allied Educational Foundation, The Cato Institute, and Todd J. Zywicki as Amici Curiae in Support of Petitioners at 1, *Ind. State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009) (No. 09-285). WLF echoed the bondholders' concern over the government's intrusion, and usurping of, the bankruptcy plan process:

> [T]he government's conduct in this case goes well beyond what Congress contemplated when authorizing the limited use of TARP monies to assist America's financial institutions. By financing a deal that eroded first-priority liens in Chrysler, the Treasury exceeded the scope of its statutory authority in a way that significantly injured Petitioners. Under these circumstances, the Executive's blatant disregard of the limits of its statutory authority smacks of improper self-dealing. *Youngstown Sheet & Tube Co.*, 343 U.S. at 585 ("There is no statute that expressly authorizes the President to take possession of property as he did here."). Review is warranted to determine whether, in this case, the government's self-dealing impermissibly exceeded the important protections of the Bankruptcy Code in violation of Petitioners' vested property rights.

Id. at 17–18.

appeal as moot. See *United States v. Munsingwear, Inc.,* 340 U.S. 36, 71 S.Ct. [sic] 104, 95 L.Ed. 36 (1950).[205]

Without explanation, the Court vacated the Second Circuit's and bankruptcy court's opinions granting Chrysler's motion to sell its assets.[206] The decision voiced no opinion on the bondholders' standing to challenge the Treasury's use of TARP funds to finance the sale (the Second Circuit's original basis for denying relief), though the bondholders effectively lost, as the Court ordered the Second Circuit to dismiss the appeal as moot.[207]

Some argue that the Court's decision to grant certiorari and "vacate was aimed at diminishing the precedential value of the Second Circuit's opinion."[208] That is, the Court did not want to impede the sale, but also chose affirmatively to say nothing about its merits, including the separation-of-powers problems the case presented. If so, this suggests that the Court does not worry about separation-of-powers issues in bankruptcy. Even in extreme cases, the Court may not believe the bankruptcy process (and bankruptcy judges) is susceptible to political distortions.[209]

3. INFERIORITY

Indifference may also have a more prosaic aspect: Article III actors, such as Supreme Court Justices, may dismiss the bankruptcy system because they have little respect for it. When today's Bankruptcy Code

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205. *Ind. State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087, 1087 (2009).

206. *Id.*

207. The Second Circuit followed the direction of the Supreme Court: "The Supreme Court of the United States vacated the judgment of this court, recorded at *In re Chrysler LLC*, 576 F.3d 108 (2d Cir.2009 [sic]), and remanded 'with instructions to dismiss the appeal as moot.' *Ind. State Police Pension Trust, et al., v. Chrysler LLC, et al.,* — U.S. —, —, 130 S.Ct. [sic] 1015, 1015, — L.Ed.2d —, 2009 WL 2844364, at *1 (2009). Accordingly, the judgment of this court is vacated and this appeal is dismissed as moot." *In re Chrysler LLC*, 592 F.3d 370, 372 (2d Cir. 2010).

208. *See, e.g.*, Fred N. David, *Interpreting the Supreme Court's Treatment of the Chrysler Bankruptcy and Its Impact on Future Business Reorganizations*, 27 EMORY BANKR. DEV. J. 25, 41 (2010).

209. One could distinguish this analysis. *Chrysler*, some may argue, involved an *inbound* claim against the debtor, not an outbound suit by the estate, and the political intrusion came from the executive, not Congress. The distinctions have little merit, however, because the hypothetical Article I judge that concerns the Court will certainly not challenge the executive or (to the extent it enacted TARP) Congress in a case as politically important as *Chrysler*. Such a judge will curry favor with the political branches, regardless of the damage he or she does to private state law rights. Yet, this is not how the Court responded when, as in *Chrysler*, the threat was real.

was being developed in the 1970s, a number of observers—in particular, bankruptcy referees and professionals—argued that Congress should create bankruptcy judgeships with Article III status.[210] This effort failed, due largely to the intercession of Chief Justice Warren Burger and resistance from other federal judges, who viewed bankruptcy judges as "inferior."[211] As Bankruptcy Judge Geraldine Mund has explained:

> There was a certain stigma attached to bankruptcy practice and practitioners. The district court appointed referees-in-bankruptcy, who were paid a portion of the assets that passed through their administration. The referees dealt with the mundane business affairs of the cases, even signing the disbursement checks. They handled neither the significant constitutional issues nor the high profile civil and criminal ones that drew politically well-connected attorneys to the Article III bench.[212]

The Court may not have worried about the instability created by *Stern* because the *Stern* majority may believe that Article I judges in general—and perhaps bankruptcy judges in particular—solve relatively unimportant problems, or at least bear a legacy of stigma that has been difficult to shake. It may be that bankruptcy is technical, complex, and dreary. If so, it is especially ironic that *Stern* begins with a quote from *Bleak House*: Dickens's tale of a legal dystopia involved not only a seemingly endless testamentary dispute, but also an ancillary bankruptcy.[213] The *Stern* majority, like other Article III actors in the past, may have shared Dickens's dim view of both.

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210. *See* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 157–58 (2001).

211. *See id.* at 158 ("Chief Justice Burger shared the district judges' concerns about diluting the federal bench and about the inferior quality of many bankruptcy judges."). Judge Mund quotes the following letter from Chief Justice Burger to President Carter:

> To put it bluntly, [giving bankruptcy judges Article III status] stems from the desire of those officers who were initially appointed to office as bankruptcy referees and who serve as adjunct aides to District Judges to achieve a higher status, with virtually all but the status of "life tenure" judges -- almost like promoting all the Army's Sergeants Major to Captain rank!

Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 2 (2007) (quoting Letter from Chief Justice Warren Burger to President Jimmy Carter (Oct. 27, 1978)).

212. *Id.* at 3.

213. *Stern*, 131 S. Ct. 2594, 2600 (2011) (quoting CHARLES DICKENS, BLEAK HOUSE, *in* 1 WORKS OF CHARLES DICKENS 1, 4–5 (1891)).

III. *STERN*, SERIOUSLY: METHODOLOGY

We now understand how and why *Stern* has been so heavily litigated, and that the major solutions on offer—"quasi-magistrate" and "consent"—are unlikely to reduce the frequency and cost of *Stern* litigation. This Part offers a more cost-effective solution that reflects the Court's apparent preference for historical formalism in bankruptcy and the complex, hybrid nature of fraudulent transfer suits when brought in a bankruptcy case, by assessing the structural effects and historical character of such suits.

A. Structure

Stern's structural concern involved the separation of powers: the majority feared that, because bankruptcy judges serve fourteen-year terms and have no salary protection, they lack independence.[214] Yet, the structure of the bankruptcy system and the Court's own indifference to politicized bankruptcies suggests that no one seriously worries that the ordinary work of bankruptcy courts—including adjudicating fraudulent transfer suits—threatens separation-of-powers values.

Although the *Stern* majority expressed great concern for judicial autonomy, it overlooked the many structural protections Congress introduced in 1984 in response to *Marathon* to ensure bankruptcy judges' independence. This revised jurisdictional scheme is still in place today.[215] For example, district courts can, at any time, withdraw the reference of some or all aspects of the bankruptcy case "for cause shown,"[216] including concerns about political meddling.[217] The Court also ignored the fact that bankruptcy judges are no longer selected by legislators, but instead by Article III judges themselves (a panel of U.S. Court of Appeals judges in the resident circuit). Nor did it suggest that bankruptcy judges were, in fact, politicized in their decision making.[218] The Court's

214. *Id.* at 2601 ("The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so.").

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

216. 28 U.S.C. § 157(d) (2006).

217. *See King v. Fla. Dep't of Revenue* (*In re King*), 280 B.R. 767, 777 (Bankr. S.D. Ga. 2002) (withdrawing the reference for "cause" due to separation-of-powers concerns).

218. To be sure, there are competing claims about the influence of "politics" on bankruptcy judges. *Compare* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1236, 1247–48, 1257–58

seeming indifference to the politicized nature of the Chrysler bankruptcy, discussed above, further suggests that the *Stern* majority did not genuinely worry that the bankruptcy process presents a major threat to the separation of powers.

Instead, the historical formalism described above seems to be the key: How was an outbound cause of action understood in England in 1789? The structural question is, in other words, answered by history.

B. History—The Granfinanciera *Problem*

If history is the answer, then *Granfinanciera, S.A. v. Nordberg* presents a problem. There, a majority of the Court reasoned that a fraudulent transfer suit in 1789 was a "private" action, no different than the breach of contract suit at issue in *Marathon*.[219] We believe that *Granfinanciera* is either distinguishable, or misinterprets the history it uses, or both.

Granfinanciera involved not the separation of powers, as was the case in *Stern*, but instead whether the defendant in a fraudulent transfer suit who had not filed a proof of claim in the debtor's bankruptcy case was entitled to a jury trial.[220] Justice Brennan, writing for the majority, concluded that the defendant in that case was entitled to a jury trial because the fraudulent transfer suit was "legal" (not "equitable") in character and because it involved a "private" (not a "public") right.[221]

"There is no dispute," Justice Brennan observed, "that actions to recover . . . fraudulent transfers were often brought at law in late 18th-century England."[222] The trustee in *Granfinanciera* had argued that fraudulent transfer suits were historically adjudicated by both courts of law and equity.[223] The majority dismissed this because the important

(2006) (claiming to have found that debtor-creditor bias runs along liberal-conservative party affiliations), *with* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 747–48, 793–95 (2010) (arguing that bankruptcy judges are insulated from political pressure by, among other things, a nonideological bar "that holds in highest esteem professionalism, creativity, and nonideological adjudication"). We offer no opinion as to which is more persuasive, in part because we think the question presented is difficult to fathom: while bankruptcy writ large may be an important political question, the adjudication of individual cases is highly unlikely to be influenced by political actors, except in extreme cases, such as the automaker bankruptcies, where the Supreme Court apparently believed there was no invasion of the judicial process, despite massive executive branch spending and political pressure. *See supra* Part II.B.

219. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989).

220. *Id.* at 36.

221. *See id.* at 45–47, 56, 64–65.

222. *Id.* at 43.

223. *Id.*

question was the form of relief sought: an "action for *monetary* relief would not have sounded in equity 200 years ago in England," Justice Brennan noted.[224] While equity courts may have exercised "concurrent" jurisdiction with courts of law in fraudulent transfer suits, the trustee had cited no "cases that sought the recovery of a fixed sum of money without the need for an accounting or other equitable relief."[225]

In an extended footnote, Justice Brennan defended his interpretation of eighteenth-century English practice.[226] Older authorities cited by the trustee in support of the view that fraudulent transfers were equitable actions were not persuasive because they "limit[ed] their citations to state-court decisions, refusing to analyze earlier English cases."[227] These were inapposite, he reasoned, because they also sought equitable relief, such as an attachment or levy.[228] Here, the trustee sought only a money judgment, and not an additional remedy, such as attachment.[229]

If *Granfinanciera* said no more than that a non-creditor defendant in a fraudulent transfer suit seeking money damages was entitled to a jury trial, it would not likely have been important to *Stern* or to fraudulent transfer litigations following *Stern*. First, and as others have observed, it answered a different question—the right to a jury trial—based on different criteria: the legal or equitable character of the cause of action.[230] While the two questions (the jury trial right and separation of powers) may be "highly analogous," as Justice Stephen Breyer observed in his *Stern* dissent,[231] they are not institutionally coextensive. The right to a jury trial is meant, in part, to provide a peer check on direct or indirect

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224. *Id.* (emphasis in original).

225. *Id.* at 45–46 (quoting *Hobbs v. Hull*, 1 Cox 445, 446, 29 Eng. Rep. 1242 (Ch. 1788)).

226. *See id.* at 47 n.6.

227. *Id.* (citing ORLANDO F. BUMP, A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS § 532 (4th ed., Washington, D.C., W.H. Lowdermilk & Co. 1896); FREDERICK S. WAIT, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' BILLS, WITH A DISCUSSION OF VOID AND VOIDABLE ACTS §§ 56–60 (1884)).

228. *Id.* (citing *Drake v. Rice*, 130 Mass. 410, 413 (1881)) ("But the reason why suits to recover fraudulent transfers of choses in action had to be brought in equity . . . is that they could not be attached or levied upon.").

229. "The nature of the relief [the trustee] seeks strongly supports our preliminary finding that the right he invokes should be denominated legal rather than equitable," Justice Brennan explained. *Id.* at 47.

230. *See* Brubaker, *supra* note 95, at 151 ("Chief Justice Roberts' majority opinion, though, relied directly (and without qualification) upon Seventh Amendment jury trial decisions (in *Granfinanciera*, *Katchen v. Landy*, and *Langenkamp v. Culp*) as if they were binding precedent for purposes of the Article III decision in *Stern v. Marshall*—systematically describing, paraphrasing, or recasting language, analysis, conclusions, and holdings from those decisions in Article III terms." (footnotes omitted)).

231. *Stern v. Marshall*, 131 S. Ct. 2594, 2628 (2011) (Breyer, J., dissenting).

state coercion of the individual.[232] The separation of powers, by contrast, ensures that different segments of government maintain reasonable degrees of autonomy.

Second, the conclusion that a cause of action is equitable, not legal, is only indirectly related to the division of labor between Article I and Article III courts, and the *Granfinanciera* majority took pains to avoid answering that question. Thus, the *Granfinanciera* majority declined to decide whether a bankruptcy court could conduct a jury trial,[233] and at least until *Stern* there was little question that Bankruptcy Courts could (and would) do so, at least with party consent.[234] If empaneling a jury is an important feature of the Article III judicial power, the *Granfinanciera* majority could easily have stated whether (or to what extent) that power should devolve to bankruptcy courts. That it did not suggests that *Granfinanciera* is about the right to a jury trial generally, not bankruptcy court power, as such.

Third, the distinction between "legal" and "equitable" remedies is notoriously vague. Justice Brennan's majority opinion admitted as much, and observers have criticized it for this reason.[235] While the suit in *Granfinanciera* may have been styled as one at law for damages, it could

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232. *See, e.g.*, *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (citation omitted) (stating that the jury trial right in criminal and civil cases is meant to "prevent government oppression").

233. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 50 (1989) ("We are not obliged to decide today whether bankruptcy courts may conduct jury trials in fraudulent conveyance suits brought by a trustee against a person who has not entered a claim against the estate . . . ."). *See also* Douglas G. Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 1989 SUP. CT. REV. 261, 269–71 (discussing bankruptcy court power to adjudicate fraudulent transfers).

234. *See, e.g.*, *Boss-Linco Lines, Inc. v. Laidlaw Transp. Ltd.* (*In re Boss-Linco Lines, Inc.*), 55 B.R. 299, 308 (Bankr. W.D.N.Y. 1985) ("[T]he trial of these [fraudulent transfer] issues must be to a jury, in this [Bankruptcy] Court."). There is a long history of bankruptcy courts conducting jury trials, and many matters related to bankruptcy—indeed, the commencement of an involuntary bankruptcy case—were at different points in the past questions a jury could answer. *See* Bankruptcy Act of 1898, ch. 541, § 19, 30 Stat. 544 (repealed 1978) (preserving right to jury trial); J. ADRIANCE BUSH, THE NATIONAL BANKRUPTCY ACT OF 1898, at 170–71 (New York, The Banks Law Publishing Co. 1899) (discussing bankruptcy cases that invoked the right to jury trial under the Bankruptcy Act of 1841 and Bankruptcy Act of 1867). Today, the right to a jury trial in bankruptcy appears at 28 U.S.C. § 157(e):

> If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

235. Baird, *supra* note 233, at 267 ("Moreover, the boundaries between Chancery and the courts of law were not clearly drawn in the 18th century and were frequently overlapping, especially in a bankruptcy case, which by its nature gives rise to multiple disputes.").

have been styled in equity for restitution of moneys had and received.[236] In any case, the relief sought would seem to vary with respect to the type of defendant, not the type of claim: the shareholder who received proceeds of a fraudulent transfer may be liable for money damages (an action at law), whereas the bank that took liens securing the loan financing the transaction may be exposed to an avoidance action sounding in equity. It is not clear what end is served by splitting the action in this way, or how it maps onto the Article I-Article III boundary.

The law-equity distinction is not, however, the most serious *Granfinanciera* problem. Rather, the problem comes from its conclusion that fraudulent transfer suits were "private" and not "public."[237] This analysis was driven largely by the majority's reliance on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, where the Court added a public rights gloss to the Seventh Amendment jury trial analysis.[238] *Atlas* held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[239] Although the *Atlas* Court did not define "public rights"[240] for jury trial purposes, it did make clear that only "[w]holly private tort, contract, and property cases" are outside the adjudicatory power of Article I courts.[241]

Whether or not "wholly" so, many believe that *Granfinanciera* means that fraudulent transfer suits are "private rights" that can be adjudicated only by Article III (or state) courts.[242] The view derives from this passage:

236. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (2011) ("The status of restitution as belonging to law or to equity has been ambiguous from the outset. The answer is that restitution may be either or both."); Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 931 (2012) (describing the new *Restatement (Third) of Restitution and Unjust Enrichment* as "correcting the common misconception that restitution is necessarily equitable"). *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–13 (2002) (When "property [sought to be recovered] or its proceeds have been dissipated so that no product remains," the claim may sound in restitution at law because "not all relief falling under the rubric of restitution is available in equity.").

237. *Granfinanciera*, 492 U.S. at 36, 55–56 (stating that fraudulent conveyance suits were "more accurately characterized as a private rather than a public right" when the defendant had not filed a proof of claim).

238. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454–55 (1977).

239. *Id.* at 455.

240. *Id.* at 458.

241. *Id.*

242. *See, e.g.*, *Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 561 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (June 24,

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees . . . are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res . . . . They therefore appear matters of private rather than public right.[243]

This passage was central to the historical formalism of *Stern*, which equated the fraudulent transfer suit at issue in *Granfinanciera* to Vickie's tort counterclaim in *Stern*.[244] It is, however, problematic given what we know of the historical development of fraudulent transfer law, which we discuss in the next subpart.

C. A History of Fraudulent Transfer Suits as a Quasi-Public Right

The history of fraudulent transfer law reveals a more complex story than the one Justice Brennan told in *Granfinanciera* and on which *Stern* (and for that matter *Bellingham*) relied.[245] In Westminster in 1789, a fraudulent conveyance would have been seen as a cause of action for the Crown (the "public") or creditors (the "private"), or both.[246] Through the framing period, England (and some colonies and states) understood a fraudulent transfer as a criminal act, an act which in England would

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2013); *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 476 B.R. 535, 538–39 (N.D. Ill. 2012) ("[G]iven that *Granfinanciera* explicitly found that fraudulent transfer actions are 'private rights,' *Stern* instructs that a bankruptcy court does not have the constitutional authority to enter a final judgment on a fraudulent transfer claim."); *Adelphia Recovery Trust v. FLP Grp., Inc.*, No. 11-Civ.-6847 (PAC), 2012 WL 264180, at *4–5 (S.D.N.Y. Jan. 30, 2012) (reasoning that a "Bankruptcy Court lacks the constitutional power to issue a final judgment" in a fraudulent transfer action because "Supreme Court precedents demonstrate that a fraudulent transfer claim involves a private right").

243. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989) (citation omitted).

244. *Stern v. Marshall*, 131 S. Ct. 2594, 2614 (2011) (quoting *Granfinanciera*, 492 U.S. at 56).

245. The full history of fraudulent conveyance law has occupied many volumes. Important sources include, MELVILLE MADISON BIGELOW, THE LAW OF FRAUDULENT CONVEYANCES 9–121 (1911); GARRARD GLENN, 1 FRAUDULENT CONVEYANCES AND PREFERENCES §§ 58–62b (rev. ed. 1940); WILLIAM ROBERTS, A TREATISE ON THE CONSTRUCTION OF THE STATUTES 13 ELIZ. C. 5 AND 27 ELIZ. C. 4 RELATING TO VOLUNTARY AND FRAUDULENT CONVEYANCES 366–435 (2d Am. ed., Hartford, Oliver D. Cooke & Co. 1825); S.W. WORTHINGTON, A TREATISE ON THE STATUTES OF ELIZABETH AGAINST FRAUDULENT CONVEYANCES 1–60 (2d Eng. ed., Philadelphia, Blackstone Publishing Co. 1887).

246. *See, e.g.*, BIGELOW, *supra* note 245, at 17 (discussing fraudulent conveyance cases involving private creditor suits and an "information . . . filed on behalf of the Crown"); GLENN, *supra* note 245, § 61.

trigger the bankruptcy process.[247] This process itself was (and remains) public in ways that differentiate a fraudulent transfer suit in bankruptcy from a simple contract claim. It is thus difficult to characterize fraudulent transfer in the framing era as "wholly private."[248]

1. EARLY HISTORY OF FRAUDULENT TRANSFER LAW

Early fraudulent transfer law would have had at least three features that we would likely today view as "public." First, it was a statute enacted by Parliament for the benefit of the Crown—the Statute of Elizabeth of 1571[249]—and not indisputably a part of the common law that might have been crafted by the common law courts ("Westminster"). The goal of the Statute, as with other debtor-control efforts, was to use state power to maintain both public and private order.[250]

Even before the Statute of Elizabeth, the Crown used its power to capture defaulting debtors. English debtors in the past sometimes sought sanctuary in religious asylums because "[o]fficials who followed the debtor into the asylums were excommunicated by the Church and otherwise punished."[251] In keeping with the recurring role of "Westminster,"

> Richard II . . . decreed that Westminster Abbey should be an asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault and who simply sought to protect themselves from imprisonment. Fraudulent debtors, on the other hand, could be compelled to appear before Court even if they had fled to asylums.[252]

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247. *See* GLENN, *supra* note 245, §§ 61e, 65.

248. *Stern*, 131 S. Ct. at 2613 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977) (The public rights exception excludes "[w]holly private tort, contract, and property cases.").

249. The 1571 Statute of Fraudulent Conveyance is 13 Eliz., c. 7 § 2 (1571). GLENN, *supra* note 245, at § 61b n.24. It was made perpetual by 29 Eliz., c. 5, §§ 1–2. WORTHINGTON, *supra* note 245, at 565.

250. *See* GLENN, *supra* note 245, at §§ 61, 61d.

251. Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 10 (1919).

252. *Id*. at 10 (footnote omitted). The Statute of 50 Edward III chapter 6 (1376) provided that:

> Because divers people inheriting divers tenements, and borrowing divers goods in money or in merchandize, do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of Westminster . . . or other such privileged places, and

This proto-fraudulent transfer law—affecting the debtor, not his property—was a mechanism by which the state retained control over debtors.

The Statute of Elizabeth built on this, making clear that the Crown could pursue the debtor's property, as well as the debtor, and could use the Statute's penal power to stifle Catholicism. "'Papist recusants' who refused to attend the religious services which had been set up by the Act of Uniformity of 1559 . . . suffered a fine, and the total would run into large amounts."[253] The 1559 Act of Uniformity had, among other things, required Catholics to worship publicly at an Anglican Church in order to show their loyalty to the Crown rather than the Vatican.[254] Those who did not comply would forfeit their property to the Crown—unless they had already conveyed it in secret to a trusted friend or relative.[255] Because refusing to worship in the Anglican Church was considered treasonous, absent the Statute of Elizabeth, it remained possible "for a person who contemplated treason to save his goods from the Crown by transferring them in trust for the convict's family or creditors."[256] The Statute itself provided that those "lawfully convicted[] shall suffer imprisonment for one-half year without bail or mainprise."[257] Although the Statute underwent a number of changes and was ultimately incorporated into the Bankruptcy Act of 1623, it nevertheless continued to provide that offenders should suffer the pillory and the loss of an ear.[258]

Third, the Statute was a source of revenue for the Crown. The Statute provided that the Crown would receive half of any recovery, a distribution which it characterized as a "penalty and forfeiture."[259] This

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> there do live a great time with an high countenance of another man's goods and profits . . . until the said creditors shall be bound to take a small parcel of their debt . . . [i]t is ordained and asserted, that if it be found that such gifts be so made by collusions, that the said creditors shall have execution of the said tenements and chattels, as if no such gift had been made.

Levinthal, *supra* note 251, at 11–12 (quoting 50 Edw. 3, c. 6 (1376)).

253. GLENN, *supra* note 245, § 61b.

254. CHARLES ROSS, ELIZABETHAN LITERATURE AND THE LAW OF FRAUDULENT CONVEYANCE 29–30 (2003).

255. *Id.*

256. GLENN, *supra* note 245, § 61b.

257. BIGELOW, *supra* note 245, at 618 (quoting 27 Eliz., c. 4, § 3 (1584)).

258. 21 Jac. 1 c. 19, § 6 (1623).

259. Section 2 of the Statute provided in part that anyone found to have engaged in a fraudulent transfer:

> shall incurre the Penaltie and Forfayture of one yeres value of the said Landes, Tenements, & Heredytamentes [so purchased or charged . . . the one Moitie whereof to be to the Queen's Ma[jesty], her Heyres and Successors, and thother Moitye to the [party] or [parties] greeved by suche fayned and

fiscal interest was consonant with the reality that "a substantial part of the Crown's revenue had always flowed from convictions of treason and felony."[260]

That the Crown was more concerned with Mammon than God is evidenced by the most famous early fraudulent conveyance case, *Twyne's Case*,[261] an opinion not of a common law court, but instead "that most formidable of courts, the Star Chamber."[262] *Twyne's Case* involved a farmer, Pierce (not the one in *Stern*), who in secret sold his sheep to Twyne, but retained possession himself.[263] After Pierce's creditor sought to execute on the sheep, Pierce pointed out they were not his, but Twyne's.[264] A ruckus ensued.[265] The Star Chamber was concerned. "[B]y the judgment of the whole court," fraudulent conveyance expert Professor Garrard Glenn wrote, "Twyne was convicted of fraud, and he and all the others of a riot."[266]

The important question, Glenn observed, was simple: "[W]hy make a State trial out of private knavery?"[267] Glenn's answer was that the fraudulent conveyance cause of action "was intended as a State measure, for the uses of the Crown."[268] Reviewing a "very rare" parliamentary history written by Sir Simon D'Ewes,[269] Glenn concluded that the Statute of Elizabeth "ha[d] all the stigmata of politics as connected with

> fraudulent . . . Gyfte[,] Graunt[,] Alyenation[,] Bargayne[,] Conveyance[,] . . . Lease[] . . . , [incumbrance, or limitation of use,] to be recovered in any of the Queenes Courtes of Record by [an] [a]ction of [d]ebt[,] [bi]ll[,] [p]laynt[,] or [i]nformation, wherein no[] [e]ssoyne, [pro]tection, or [w]ager of [l]awe shalbe admitted for the [d]efendaunt or [d]efendauntes . . . .

13 Eliz. c., 5 § 2 (1571).

260. GLENN, *supra* note 245, § 61b.

261. 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601).

262. GLENN, *supra* note 245, § 61a. Although commonly thought of as a fraudulent transfer case, it would today have been characterized as a preference, since Pierce owed Twyne money and conveyed the sheep in satisfaction of that debt. *See* Clark, *supra* note 42, at 513 ("[O]ne of the great ironies of legal history is that *Twyne's Case*, which is widely regarded as the fountainhead of the modern Anglo-American law of fraudulent conveyances, does not, as presented in the reports, clearly involve anything more than a preference." (footnotes omitted)).

263. *Twyne's Case*, 76 Eng. Rep. at 811.

264. *Id.*

265. *Id.*

266. GLENN, *supra* note 245, § 61a (citing Lord Coke's summary of *Twyne's Case*, 76 Eng. Rep. at 823 (Star Chamber 1601)).

267. *Id.*

268. *Id.*

269. *Id.* § 61b n.25 ("Published in 1682, and very rare.").

governmental measures."[270] If "politics" and "governmental measures" are not "public," it is not clear what is.

2. FRAUDULENT TRANSFER AT WESTMINSTER, 1789

Fraudulent transfer litigation did not, of course, remain the sole province of the Crown (the "public"). Nor could it have because as written it would have remained useless to private creditors, who would not want to share half of their recovery with the Crown where the Crown had no other claim to the debtor's assets.[271] Thus, according to Glenn, "the courts of England handled the situation correctly when they held . . . that the judgment creditor could take advantage of the Statute by ignoring the fraudulent transfer and levying execution on the property involved."[272]

It appears that, thereafter, fraudulent transfer law lived a dual life. In England it was available to the Crown as and when it was convenient, at least through Victoria's reign, long after Westminster, 1789.[273] It was also available to private creditors to pursue as a post-judgment remedy, or to assert as an "act of bankruptcy."[274] As to private creditors, it was in essence ancillary to the underlying contract (or other debt-creating) claim, the mechanism by which the successful plaintiff would empower the judicial system to exercise control over the judgment-debtor's property. If treated as an act of bankruptcy, it was evidence of a crime.[275] In any case, fraudulent conveyance retained a significantly public purpose in England through the framing period. It was quite different from a simple breach of contract suit.

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270. *Id.* § 61b. As Glenn emphasized, "[t]he Crown favoured the Statute of [Elizabeth] . . . because, owing to the penal laws of the time, the Act was a revenue measure and was so intended." *Id.* § 61c.

271. *Id.* § 61d ("As to private right, the Statute [of Elizabeth] seemed inapplicable on its face. If the 'party aggrieved' was the defrauded creditor, why should the Crown get half of his due?").

272. *Id.* § 61e.

273. *See, e.g.*, *Giles v. Grover*, 9 Bing. 128, 139 (1832) (Eng.) (The crown cannot avoid any assignment made "when the debtor has legal power and authority to create them, and attach upon the goods before the process of the crown, and the crown can only take the goods subject to such liabilities as the debtor has legally created."); *Darvill v. Terry*, 6 Hurlstone & Norman 807 (1861) (Eng.) (applying 13 Eliz., c. 5 in 1861).

274. *See* GLENN, *supra* note 245, §§ 61e, 65.

275. *See, e.g.*, *Fowler v. Padget*, 7 T.R. 509, 513–14 (1798) (Eng.) (Kenyon, C.J.) ("Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender . . . .").

3. FRAUDULENT TRANSFER AND BANKRUPTCY

To understand the "public" character of fraudulent transfer suits in late eighteenth-century England, it also helps to know something about bankruptcy at that time, for bankruptcy and fraudulent transfer were intimately connected. As noted, the power to avoid fraudulent transfers was initially under a separate statute, but became part of England's bankruptcy law in the early seventeenth century and remained so in 1789.[276]

English bankruptcy at the time of the Framing was organized around three themes: a case could be commenced (1) only by and for the benefit of a creditor, not a debtor;[277] (2) only against an insolvent "trader";[278] and (3) only if the trader was "honest but unfortunate."[279] A case could be commenced if a debtor committed an "act of bankruptcy."[280] In 1604, Parliament provided that "a fraudulent grant or conveyance of lands, tenements, goods, and chattels constituted an act of bankruptcy."[281] If a jury concluded that the debtor had committed such an act, the issue became whether it was made with requisite intent, or whether the debtor "cooperated" in recovering assets and assuring payment of creditors. Debtors who "in all things conform[ed]" (cooperated) with the bankruptcy process would have their debts discharged.[282] Debtors that failed to cooperate could be put to death.[283]

Bankruptcy then (as now) was a complex mix of "public" and "private" processes. It was private in that individual creditors used

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276. The 1571 statute "specified punishment for those who fraudulently acquired the debtor's assets before or after the act of bankruptcy." W.J. JONES, THE FOUNDATIONS OF ENGLISH BANKRUPTCY: STATUTES AND COMMISSIONS IN THE EARLY MODERN PERIOD 24 (1979).

277. 13 Eliz., c. 7, § 1 (1571).

278. *See id.*; *see also* Charles Jordan Tabb, *History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 9–10 (1995) (noting that "bankruptcy remained an involuntary remedy to be used . . . only against debtors who were merchant traders").

279. Blackstone explained that England's bankruptcy law would not "confine an honest bankrupt after his effects [were] delivered up" to creditors. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAW OF ENGLAND 473 (Philadelphia, William Young Birch & Abraham Small 1803). Interestingly, the "dishonest" debtor was known to the English as a "politic bankrupt." *See* JONES, *supra* note 276, at 9.

280. *See* JONES, *supra* note 276, at 48.

281. *Id.* at 24.

282. 4 Ann., c. 4, § 8 (1705) ("[A]ll and every Person and Persons so becoming bankrupt . . . who shall . . . in all things conform . . . shall be discharged from all Debts by him her or them due and owing at the time that he she or they did become Bankrupt . . . .").

283. *See The King v. James Bullock*, 1 Taunt. 71, 72 (1807) ("The prisoner was found guilty [of acts of bankruptcy] and received sentence of death.").

bankruptcy to maximize recoveries. Like the Statute of Elizabeth (and its predecessors), bankruptcy would prevent debtors from absconding or fraudulently conveying assets.[284] It would make more likely the pro rata distribution of a greater pot of assets to "legitimate" (likely senior) claimants at lower transaction costs than would happen in individual collection actions.[285] An examination of the debtor in bankruptcy would be conducted by a public official (a commissioner or judge).[286] If the debtor did cooperate, the state would use its power to permanently stay collection of debts.[287] If not, the state would use its power to punish the debtor.[288]

But the key, of course, was state—public—intervention. Like fraudulent conveyance law at the time, it would seem most accurate to view bankruptcy itself as a dual process, one with both public and private features. This duality makes it difficult to characterize the fraudulent conveyance suit—when commenced in a bankruptcy case—as a wholly private cause of action, *Granfinanciera* and *Stern* (and *Bellingham*) notwithstanding.

4. FRAUDULENT TRANSFER IN THE COLONIES

The colonies maintained the dual character of fraudulent transfer law. At least three—Connecticut, New Jersey and Vermont—imported the Statute of Elizabeth's penal and/or fiscal uses of fraudulent conveyance law.[289] Until 1911, for example, Connecticut law provided that:

> Any party to any [fraudulent transfer] . . . shall forfeit one year's value of any real estate, and the whole value of any personal estate conveyed . . . half to the party aggrieved who shall sue for the same, and half to the State.[290]

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284. *See, e.g.*, *Thoyts v. Hobbs*, 155 Eng. Rep. 1177–78 (1852) (providing that fraudulent transfers are void if made before or after a bankruptcy petition).

285. *See* GLENN, *supra* note 245, § 65 (noting that fraudulent conveyance law served creditors' rights because judgment creditors could execute on fraudulently conveyed property); WORTHINGTON, *supra* note 245, at 11 ("The one great object of [the Statute of Elizabeth] is to prevent debtors from dealing with their property in any way to the prejudice of their creditors.").

286. *See* JONES, *supra* note 276, at 5, 9.

287. Lipson, *supra* note 3, at 628–29.

288. *Id.* at 647 n.223.

289. *See infra* notes 290, 291, 298.

290. Conn. Gen. Stats. § 1092 (1902); BIGELOW, *supra* note 245, at 28. A helpful discussion of framing-period fraudulent transfer cases appears in *Benton v. Jones*, 8

From and after the framing, Vermont provided that a fraudulent conveyance was avoidable and that the losing parties would pay a penalty, which "shall be equally divided between the party aggrieved and the county in which such offence is committed."[291] Under the original draft of Vermont's fraudulent conveyance statute, as under the Statute of Elizabeth, the aggrieved party could void a conveyance and recover the penalty in one statutory section.[292] Upon revision in 1839, the statute was broken into two sections. One section entitled the aggrieved party to void the transfer; the other entitled the aggrieved party to bring a civil suit to recover a penalty.[293] Half of any penalty went to the plaintiff, and half continued to go to the county.[294] Thus, it was possible for an aggrieved party to set aside the conveyance and not recover the penalty,[295] or to recover the penalty in a *qui tam* action but not the property itself.[296] In construing the statute in 1853, the Supreme Court of Vermont observed that "[t]his statute must undoubtedly be regarded as a penal statute, so far as the present action is concerned, for any recovery had will be strictly a penalty."[297]

The law of New Jersey in 1794 provided that "[a]ll parties" to a fraudulent conveyance

> shall incur the penalty of one year's value of the [conveyed] lands, tenements, and hereditaments, leases, rents, commons or other profits . . . the one moiety whereof to be to the State, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant . . . .[298]

Even without specific versions of the Statute of Elizabeth, "reception clauses" that incorporated English "common law" during or

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Conn. 186, 189 (1830); Edward A. Weiss, *Connecticut Fraudulent Conveyance Law*, 11 U. BRIDGEPORT L. REV. 489, 492–94 (1991).

291. VT. STAT. ANN. ch. 113, § 33 (1862).

292. *Beach v. Boynton*, 26 Vt. 725, 736–37 (1853).

293. VT. STAT. ANN. ch. 95 §§ 19–20 (1840).

294. *Id.*; *see also* VT. STAT. ANN. tit. 9, §§ 2281, 2282.18 (repealed 1995).

295. *Boynton*, 26 Vt. at 734; *Brooks v. Clayes*, 10 Vt. 37, 50–51 (1838).

296. *Boynton*, 26 Vt. at 725, 732–33.

297. *Id.* at 732.

298. BUMP, *supra* note 39, at 59–91 (quoting LUCAS Q.C. ELMER, A DIGEST OF THE LAWS OF NEW JERSEY 305 (Philadelphia, J.B. Lippincott & Co. 1855)).

Justice Brennan's majority opinion in *Granfinanciera* was unconcerned with the nature of fraudulent transfer law in the colonies. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 42, 46–47 n.6 (1989) (dismissing trustee's arguments because they are "limit[ed] . . . to state court decisions"). He does not explain why the laws of the colonies and states at the time were of no value.

just after the Revolutionary War would likely have imported it.[299] These acts adopted both judge-made and legislative law as it then existed. It is entirely possible that the Statute of Elizabeth would have been understood as one of the statutes "received" by the colonies, with its "public" attributes intact.

* * *

This history has two important implications for *Stern*'s effect on fraudulent transfer litigations. First, it is difficult to characterize a fraudulent transfer action in England in 1789 as equivalent to a "private" breach of contract action, as Justice Brennan did in *Granfinanciera*.[300] The breach of contract claim would have been a matter between private parties, resolved by a court of law.[301] The breach of contract claim was unlikely to result in imprisonment, the loss of an ear, or death. The Crown did not use breach of contract as the basis for religious persecution or as a source of revenue. While claims arising in connection with contracts could be brought in equity (e.g., specific performance), they were more generally associated with courts of law, as one of the basic elements of the common law.

Second, the public functions of fraudulent conveyance and bankruptcy law worked reciprocally, one reinforcing the other. Both were mechanisms by which the state (the Crown) exerted control over debtors for its benefit, as well as for the benefit of private creditors. A fraudulent conveyance suit commenced by a single creditor to collect on his judgment may well have been a private action. But once bankruptcy was added to the equation, its public features could not be ignored. Both had significantly "public" attributes before, in, and after 1789, which made fraudulent conveyance in bankruptcy quite different from a private contract cause of action.

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299. For examples of reception statutes, see, e.g., Virginia General Convention Ordinance of May 6, 1776, ch. 5, § 6, 1776 Va. Colony Laws 33, 37 ("*AND be it further ordained*, that the common law of *England*, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King *James* the first [1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the Legislative power of this colony."). For a detailed history of debt collection and financial distress in the framing era, see BRUCE H. MANN, REPUBLIC OF DEBTORS 78–108 (2002).

300. *Granfinanciera*, 492 U.S. at 56.

301. *See generally* A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1996).

IV. LEVERAGED BUYOUTS, FRAUDULENT TRANSFERS, AND ARTICLE I JUDICIAL POWER

If *Stern*'s methodology requires an historical assessment of the public and private characteristics of a cause of action, then the foregoing shows that fraudulent transfer in 1789 had public features that make *Granfinanciera*'s conclusion about the private nature of fraudulent transfer suits distinguishable for separation-of-powers purposes, or inaccurate, or both. This Part applies that reasoning to fraudulent transfer suits arising from failed leveraged buyouts and explains why such lawsuits should be adjudicated by bankruptcy courts in most cases (i.e., absent a jury request). It also anticipates and responds to likely objections.

A. Modern Fraudulent Transfer Law

Notwithstanding the Court's preference for historical formalism, the law of fraudulent transfer, like the law of bankruptcy generally, has developed considerably in the 225 years since the framing. Today, the Bankruptcy Code incorporates state fraudulent transfer law[302] and contains its own independent provisions, in Section 548.[303] Both reflect the two basic types of fraudulent transfer, one "intentional,"[304] the other "constructive."[305] While the former more nearly conforms to the historical understanding of fraudulent transfer, litigation over both types is often central to the bankruptcy process, especially when a debtor has collapsed due to a leveraged buyout. Indeed, in leveraged buyout cases, the resolution of fraudulent transfer claims often ties into the negotiation and confirmation of a chapter 11 plan.[306]

The power to challenge a fraudulent transfer is a "core" power in both a statutory and a normative sense. Technically, it is a "core" proceeding which Congress said bankruptcy judges can adjudicate on a final basis.[307] As a normative matter, it can be seen as a foundational concept in bankruptcy. It was not only an historic trigger of the process, but was also the mechanism by which property could be recovered from those lower in priority (e.g., debtor's donees or shareholders) and

302. 11 U.S.C. § 544(b)(1) (2006). This provision empowers the bankruptcy trustee to avoid a transaction "voidable under applicable law," which would include applicable state fraudulent transfer law. *Id.*

303. 11 U.S.C. § 548(a).

304. 11 U.S.C. § 548(a)(1)(A).

305. 11 U.S.C. § 548(a)(1)(B).

306. *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 174 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

307. 28 U.S.C. § 157(b)(2)(H) (2006).

redistributed to those higher in priority (e.g., the debtor's unsecured creditors), according to their rights against the debtor.[308] It deters those seeking to defy priority norms and remedies transactions harmful for this reason.

The policy goals of bankruptcy and fraudulent transfer are deeply intertwined. As Glenn noted, "The real test of a fraudulent conveyance . . . is the unjust diminution of the debtor's estate."[309] In the words of Robert Clark, formerly dean of Harvard Law School, "the law of fraudulent conveyances contains a few simple but potent moral principles governing the conduct of debtors toward their creditors."[310] It "embodies a general ideal, in connection with a debtor's transfers of property rights and incurrences of new obligations, of Nonhindrance of creditors."[311] It is, in the words of David Skeel and George Krause-Vilmar, "[t]he Ur-doctrine, the doctrine from which . . . other" bankruptcy-related doctrines—such as equitable subordination and recharacterization— must "flow."[312]

While historical formalism may be indifferent to the normative aspirations of fraudulent transfer law, the aspirations are likely to matter to courts seeking to sort out how to reorganize a debtor or oversee the distribution of the debtor's property to creditors. Few powers are more important to our understanding of the nature and goals of bankruptcy than fraudulent transfer.

Stern does not, of course, eliminate fraudulent transfer suits. Rather, it makes them more expensive because its indeterminacy makes it unclear whether (or under what conditions) bankruptcy courts will have the power to adjudicate them. The next Part shows how this problem plays out in suits to avoid failed leveraged buyouts, and the work that historical formalism can do to help manage *Stern* costs.

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308. 11 U.S.C. § 550, 551 provide the mechanisms by which fraudulent transfers may be captured by the bankruptcy estate.

309. GLENN, *supra* note 245, § 195.

310. Clark, *supra* note 42, at 505.

311. *Id.* at 513.

312. David A. Skeel, Jr. & Georg Krause-Vilmar, *Recharacterization and the Nonhindrance of Creditors*, 7 EUR. BUS. ORG. L. REV. 259, 259–61 (2006). Ken Kettering calls the policy of fraudulent transfer law "primordial" to the effectuation of bankruptcy policy. Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1562 (2008).

B. Leveraged Buyouts

Leveraged buyouts (LBOs) may be attacked as fraudulent transfers if the subject of the buyout goes into bankruptcy.[313] For example, an acquirer may form a wholly owned subsidiary to buy the stock of the debtor (D) from D's pre-acquisition shareholders. The acquirer finances the acquisition by borrowing a significant portion of the purchase price, liability which it causes D to assume after closing, secured by D's assets. The (borrowed) purchase price is then remitted to D's pre-acquisition shareholders. This has the effect of giving D's selling shareholders the benefit of using D's assets to gain priority over D's pre-bankruptcy unsecured creditors, who will be junior in right to LBO lenders with liens encumbering D's assets.

In bankruptcy, LBOs may be challenged as "actual" or "constructive" fraudulent transfers. Some courts have found that "[a] general scheme or plan to strip the debtor of its assets with no regard to the needs of the creditors can support a finding of actual fraudulent intent,"[314] which is enough to unwind the LBO as an intentional fraudulent transfer.[315] A trustee may instead seek to invalidate an LBO as a constructive fraudulent transfer by showing that the transfer was made for less than reasonably equivalent value while D was insolvent.[316] When the company receives nothing but debt in the LBO, it is not difficult to establish that it received inadequate value.

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313. The application of fraudulent transfer law to LBOs has generated considerable debate among courts and commentators for normative reasons having nothing to do with the structural questions addressed by *Stern*. Authors such as Douglas Baird and Thomas Jackson questioned whether fraudulent transfer law should apply to modern transactions such as fraudulent transfers. Baird & Jackson, *supra* note 42, at 829–33. Others viewed it as an important mechanism for policing excessive borrowing. James F. Queenan, Jr., *The Collapsed Leveraged Buyout and the Trustee in Bankruptcy*, 11 CARDOZO L. REV. 1, 6–8 (1989). Although some courts appeared initially persuaded by the Baird and Jackson argument., *see, e.g.*, *Kupetz v. Wolf*, 845 F.2d 842, 847 (9th Cir. 1988) (citing Baird & Jackson, *supra* note 42) (questioning whether "above board" LBOs should be voidable as fraudulent transfers), *aff'g sub nom. Kupetz v. Continental Ill. Nat'l Bank & Trust Co.*, 77 B.R. 754 (C.D. Cal. 1987), courts over twenty years ago became comfortable applying the statutes as written to determine whether or not an LBO was intentionally or constructively fraudulent. *See, e.g.*, *Lippi v. City Bank*, 955 F.2d 599, 605, 608, 609–10 (9th Cir. 1992); *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 645–46 (3d Cir. 1991), *cert. denied sub nom. Comm. of Unsecured Creditors v. Mellon Bank*, 112 S. Ct. 1476 (1992); *Kupetz*, 845 F.2d at 847; *Aluminum Mills Corp. v. Citicorp N. Am., Inc.* (*In re Aluminum Mills Corp.*), 132 B.R. 869, 885 (Bankr. N.D. Ill. 1991).

314. *Freehling v. Nielson* (*In re F & C Servs., Inc.*), 44 B.R. 863, 872 (Bankr. S.D. Fla. 1984).

315. 11 U.S.C. § 548(a)(1)(A) (2006). Trustees may also pursue state analogues (e.g., the Uniform Fraudulent Transfer Act) as incorporated by 11 U.S.C. § 544(a).

316. 11 U.S.C. § 548(a)(1)(B).

Prior to *Stern*, bankruptcy courts regularly adjudicated fraudulent transfer suits against all parties to the transaction, including its selling shareholders.[317] *Stern*, however, has changed that. Consider the example of *Weisfelner v. NAC Investments LLC* (*In re Lyondell Chemical Co*.),[318] a spectacularly failed LBO. In *Lyondell*, the Lyondell Chemical Company merged with Basell to create Lyondell Basell Industries AF S.C.A. ("LBI").[319] Soon thereafter, Lyondell and certain affiliates filed for relief under chapter 11 of the Bankruptcy Code.[320] The litigation trustee brought numerous preference and fraudulent transfer actions against the parties involved in the LBO, asserting that senior executives at Lyondell, Basell, and other companies exaggerated the earnings potential of the two companies for personal gain.[321]

The defendants moved to dismiss, and in later proceedings filed motions to withdraw the reference.[322] United States District Judge Denise Cote interpreted *Stern* to mean that when a core claim does not fall within the public rights exception, cannot be resolved in ruling on a creditor's proof of claim, and is not unanimously consented to by the parties for final adjudication by a non-Article III tribunal, the bankruptcy court lacks authority to finally adjudicate the claim.[323] Since none of these conditions were met for most of the fraudulent transfer claims

317. *See, e.g.*, *Resolution Trust Corp. v. Best Prods. Co.* (*In re Best Prods. Co., Inc.*), 68 F.3d 26, 28, 33 (2d Cir. 1995) (citing *In re Best Prods. Co., Inc*., No. 93-Civ.-1115, No. 93-Civ.-1149, 1994 WL 141970 (S.D.N.Y. Apr. 20, 1994)) (discussing district court's refusal to withdraw reference); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 492–93, 496, 513 (N.D. Ill. 1988); *Fid. Bond & Mortg. Co. v. Brand* (*In re Fid. Bond & Mortg. Co.*), 340 B.R. 266, 270–71, 303 (Bankr. E.D. Pa. 2006) *aff'd sub nom. Fid. Bond & Mortg. Co. v. Brand*, 371 B.R. 708, 729 (Bankr. E.D. Pa. 2007); *Daley v. Chang* (*In re Joy Recovery Tech. Corp.*), 286 B.R. 54, 61, 83–84 (Bankr. N.D. Ill. 2002); *Bay Plastics, Inc. v. BT Commercial Corp.* (*In re Bay Plastics, Inc.*), 187 B.R. 315, 320 (Bankr. C.D. Cal. 1995); *Ferrari v. Barclays Bus. Credit, Inc.* (*In re Morse Tool, Inc.*), 148 B.R. 97, 102–03, 141–42 (Bankr. D. Mass. 1992); *Murphy v. Meritor Sav. Bank* (*In re O'Day Corp.*), 126 B.R. 370, 372–73, 394–95, 413 (Bankr. D. Mass. 1991); *Ohio Corrugating Co. v. DPAC, Inc.* (*In re Ohio Corrugating Co.*), 91 B.R. 430, 432–33, 441 (Bankr. N.D. Ohio 1988); *Ohio Corrugating Co. v. Sec. Pac. Bus. Credit, Inc*. (*In re Ohio Corrugating Co.*), 70 B.R. 920, 927–28 (Bankr. N.D. Ohio 1987); *Anderson Indus., Inc. v. Anderson* (*In re Anderson Indus., Inc.*), 55 B.R. 922, 923–24, 927–28 (Bankr. W.D. Mich. 1985).

Of course, when a party requested a jury trial in the district court, that would automatically preclude the bankruptcy court from conducting the trial. *See, e.g.*, *Brandt v. Hicks, Muse & Co.*, 213 B.R. 784, 788–89, 790–91 (D. Mass. 1997) *aff'd sub nom. Brandt v. Wand Partners*, 242 F.3d 6 (1st Cir. 2001).

318. 467 B.R. 712 (S.D.N.Y. 2012).

319. *Id.* at 715.

320. *Id.*

321. *Id.* at 715–16.

322. *Id.* at 717.

323. *Id.* at 719–20.

before the court, Judge Cote concluded that the bankruptcy court lacked final adjudicative authority over all but a few of the claims.[324]

"Under both *Stern* and *Granfinanciera*," she reasoned, "it is axiomatic that a fraudulent conveyance claim against a person who has not submitted a claim against a bankruptcy estate, brought solely to augment the bankruptcy estate, is a matter of private right."[325] Judge Cote determined that most of the fraudulent transfer claims would not necessarily be resolved in ruling on any defendant's proof of claim, as only two defendants filed proofs of claim.[326] And since the defendants expressly stated that they had not consented to adjudication of the proceedings by the bankruptcy court, she held that *Stern* barred the bankruptcy court from entering final judgments on the fraudulent transfer claims.[327]

Lyondell shows *Stern*'s costs. It aids well-resourced defendants in LBO-fraudulent transfer litigations because they will rarely consent to bankruptcy court adjudication, and so either there will be a fight over whether there was consent (akin to the fights in *Bellingham* and *Waldman*) or the trustee will be resigned to litigating in the district court. The problem with litigating before the district court is that district courts are unlikely to be as familiar with fraudulent transfer law and the complex factual and legal determinations involved in such suits.

Nor is the district court likely to be familiar with the dynamics of the rest of the chapter 11 case, which will remain with the bankruptcy court. These dynamics may matter because, for example, the promulgation and confirmation of a reorganization plan—the ultimate goal of the chapter 11 process—may depend on the outcome of the fraudulent transfer suit. While these concerns can presumably be conveyed to a district court, it is unlikely that a district judge will fully appreciate a bankruptcy court's overall sense of the case and how the fraudulent transfer litigation fits into it.

It is thus not surprising that the District Court for the Southern District of New York recently amended its standing orders to keep *Stern* matters in its bankruptcy courts—among the most important in the nation—to the maximum extent permissible under *Stern*.[328] It would rather have the bankruptcy court do this work, to be reviewed de novo. The problem, however, is that this standard of review encourages losers

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324. *Id.* at 719–20, 723.

325. *Id.* at 720.

326. *Id.*

327. *Id.* at 720–23.

328. *See Standing Order*, *supra* note 100. This order requires bankruptcy courts either to adjudicate cases involving *Stern* questions or to propose findings of fact and conclusions of law where *Stern* would strip them of such power.

below to relitigate in the district court rather than settle. This, in turn, locks in added layers of cost to these litigations in a system ill-suited to absorb them.

C. Application and Objections—Historical Formalism in Action

How should courts treat LBO-fraudulent transfer suits? A more cost-effective solution than those on offer—consent and quasi-magistrate—would use historical formalism to recognize the public attributes of fraudulent transfer suits. Historical formalism would, as explained above, recognize that fraudulent transfer suits are not like private, common-law causes of action, such as the contract and tort suits forbidden to the bankruptcy courts in *Marathon* and *Stern*. Rather, they have long had important public purposes and effects. The hybrid public-private nature of bankruptcy complements these public purposes. Together, they should bring such suits within the public rights exception, rendering them adjudicable by bankruptcy courts in most cases.

As a matter of resource allocation, historical formalism is likely the least costly available approach to restabilizing the bankruptcy system's response to fraudulent transfer suits in the wake of *Stern*. Unlike treating bankruptcy courts as "quasi-magistrates," it does not permit (or encourage) repeat de novo litigation at the district court level. Unlike "consent," it does not require a costly inquiry into facts about the many possible acts or omissions that may show consent. It requires only that a court determine the historical characteristics of the cause of action as they would likely have appeared in the framing era. Once the determination is made—and we have marshaled some evidence in support of that determination in the case of fraudulent transfer suits—there need be no further litigation over bankruptcy court authority as to that cause of action at all. Historical formalism is more efficient than available alternatives because the litigable unit of measurement is the type of suit, not the behavior of the parties (or their counsel).

An obvious objection is that judges (and presumably lawyers) are poor historians.[329] Judge Richard Posner has argued that we should not

329. *See, e.g.*, CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 68–69, 195–96 (1969) (explicating examples of the Court's "misuse" of history); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 130–31, 202–03 (2007); Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 301–02, 307 (contending that John Marshall "misused" governing precedent in his ruling); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us about the Second*, 122 YALE L.J. 852, 935 (2013) ("Judges are not historians, and so, in addition to the risk that they will not understand the materials they are charged to consult, there is the additional risk that they

care much about history because "[t]he legal profession's use of history is a disguise that allows the profession to innovate without breaching judicial etiquette."[330] Courts themselves have sometimes been suspicious of the rigidity of historical analysis.[331]

There are two responses. First, the Court appears deeply committed to it as a way to define the boundary between bankruptcy and Article III courts. As explained in Part I, the Court's bankruptcy court jurisdiction jurisprudence shows a deliberate and marked tendency toward historical formalism—one that has appealed to both "liberal" (e.g., Brennan) and "conservative" (e.g., Roberts) Justices. It is not only a driving feature of *Marathon*, *Granfinanciera*, and *Stern*, but is also important to the methodology of the Court in other contexts, including religious liberty[332] and the right to bear arms.[333] While we may prefer a more functionalist approach to bounding the Article I judicial power, that is not the method the Court has chosen.

Second, the history the Court seems to care about is not the "real" history of social science, but instead the history reported in lawsuits and treatises. While creating such histories can be costly and contentious, we think the availability of treatises, reporters, and other secondary materials on the nature of bankruptcy-related causes of action in the framing era should provide ready guidance. The Court's reliance on such authority is evidence of its accessibility. While hardly perfect, the use of this kind of

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will not conduct a dispassionate examination of the historical evidence and will simply marshal historical anecdotes to achieve what they have already decided is the preferred outcome."). These claims appear to be especially strong in matters involving high normative valence, such as the meaning of the Fourteenth Amendment, *see, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 310–21 (1988), and the Second Amendment, *see, e.g.*, David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1298, 1303, 1306–07, 1331 (2009) (criticizing the Court's use of history in *D.C. v. Heller*, 554 U.S. 570 (2008)); Sanford Levinson, *For Whom is the* Heller *Decision Important and Why*?, 13 LEWIS & CLARK L. REV. 315, 327 (2009) (criticizing the use of history in *D.C. v. Heller*). Even *Granfinanciera* is not immune. *See also* Baird, *supra* note 233, at 262 ("Reconstructing the past is an uncertain task, however, and the picture is not as simple as it appears to be. *Granfinanciera v. Nordberg*, the case the Court decided this Term, and its use of history illustrate the point."); Balkin, *supra* note 21.

330. Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 581 (2000) (discussing the Court's use of historical arguments).

331. *Damsky v. Zavatt*, 289 F.2d 46, 48 (2d Cir. 1961) (noting that its historical analysis "reek[s] unduly of the study").

332. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 702–04 (2012).

333. *See D.C. v. Heller*, 554 U.S. 570, 593, 628 (2008). *See also* Miller, *supra* note 329, at 893 (discussing Court's "history-centered methodology").

"law-office history" is likely to be less costly and more predictable than other alternatives.[334]

At least in the case of fraudulent transfer, this approach also produces a normatively preferable result. One lesson from the history of fraudulent transfer is that it is about the state's ability to maintain power over the property of transgressors. While the legitimate functions of the state have changed over time, this remains a central goal of both fraudulent transfer and bankruptcy law. Unlike the first-order causes of action that give rise to liability—e.g., contract and tort suits that may well be the "traditional stuff of Westminster, 1789"—fraudulent transfer suits in bankruptcy are a mechanism through which the state maintains order in the face of financial failure. This was true in late eighteenth century England, when fraudulent transfer was a cause of action that would trigger a bankruptcy and remains so today.

To accept the alternative—that fraudulent transfer is a private cause of action—is to give defendants in such suits the upper hand. This may be because it actually empowers them to have a less expert court (a district court) adjudicate their liability. Or, more plausibly, it may be because they will be able to use the indeterminacy introduced by *Stern* to impose collateral litigation costs that reduce recoveries for creditors. Either way, for fraudulent transfer law to achieve its normative goals—ex ante deterrence and ex post remediation in the service of priority norms—it should be clear which court decides whether there was a fraudulent transfer, and that same court should have the power to do so on a final, not provisional, basis.

The chief evil of *Stern* has been to throw this into doubt. While *Bellingham* may attempt to address the problem, it is likely to do so through the lens of consent, and so leave many uncertainties outstanding. Taking *Stern*'s methodology seriously, unvarnished by rhetoric, would help to fix this.

To be sure, we do not claim that distinguishing "public" from "private" is inherently more "determinate" than other approaches one could take, most notably inquiries into "consent." We acknowledge that the public rights exception—like debates about the boundaries between public and private generally—is poorly understood and susceptible to judicial manipulation. Yet, we do not have to solve the "public rights" puzzle to show that the fraudulent transfer cause of action in the framing era had important public dimensions that should take it out of the "private rights" category in which we find suits such as breach of contract and tort. Once we recognize these historically public qualities,

334. *See* Miller, *supra* note 329, at 935–36 (discussing Court's "law-office history").

we can acknowledge that Article I courts can—and, if Congress so chooses, should—adjudicate such suits.

A second, and more practical objection would note that historical formalism would not solve all problems involving the judicial division of labor in LBO-fraudulent transfer suits because at least one class of defendants, shareholders, may well be able to remove the suit from the bankruptcy court by demanding a jury trial. As explained above, *Granfinanciera* held that non-creditor defendants in such suits should have the benefit of a jury trial;[335] Congress has provided that only Article III courts may empanel juries in such suits, absent consent of all parties.[336] Not being creditors, shareholders would not be part of the "restructuring of the debtor-creditor relationship" that historical formalism treats as "core." They could thus add cost and delay by requesting a jury trial, which would have to be held by a district court.

There are two responses. First, solving all problems with the division of labor between Articles I and III is not the goal of this paper. Rather, it is to reduce costs added by *Stern*. Prior to *Stern*, courts wrestled with whether, or under what circumstances, a shareholder would be entitled to a jury trial in a fraudulent transfer suit. *Granfinanciera* would appear to have answered that question decisively. Thus, if the *Stern* problem is one of uncertainty, then a rule that predictably gives shareholders the right to a jury trial in a district court is not especially problematic. Without question, it is not optimal because we suspect bankruptcy courts can address such suits in their entirety more effectively than can district courts. But, this was not a problem *Stern* created; only one that it made worse.

Second, and more practically, we suspect that in the largest cases, public shareholders will enjoy the benefit of special defenses that will make them unappealing targets in such suits. In particular, the "securities settlement" defense may well protect many shareholders.[337] Such suits

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335. *See supra* Part III.B.

336. 28 U.S.C. § 157(e).

337. Section 546(e) of the Bankruptcy Code limits a trustee's avoidance powers under Sections 544, 545, 547, and 548 of the Bankruptcy Code by providing, in pertinent part, as follows:

> [A] trustee may not avoid a transfer that is a . . . settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7).

11 U.S.C. § 546(e) (2006). It has been applied to protect shareholder defendants in LBO-fraudulent transfer suits. *See Lowenschuss v. Resorts Int'l, Inc.* (*In re Resorts Int'l,*

would never proceed to trial, and bankruptcy trustees may wish to focus on more plausible targets, such as those who structured and financed the transaction.

Thus, we have been careful to say that fraudulent transfer suits should be adjudicable by bankruptcy courts within the public rights exception "in most cases." Congress has the power to provide greater Article III protections for certain classes of defendants or under certain circumstances, and has effectively done so to the extent that defendants have and assert a right to a jury trial. While *Granfinanciera* may not have adequately addressed the division-of-labor problem, it certainly answered the jury trial question. Defendants in a fraudulent transfer suit who have the right to a jury trial and refuse to permit the bankruptcy court to empanel the jury will retain the right to go to district court instead. Our recommendation would not change that.

V. BEYOND FRAUDULENT TRANSFER—THE ORDINARY WORK OF BANKRUPTCY COURTS

A 1932 *Columbia Law Review* article began with the following observation:

> [T]here is a suspicion that things have changed in respect to bankruptcy or at least that various assumptions basic to the system have been disproved or need to be qualified. Further, it is felt that the system has acquired or inherited from older times a rigidity that prevents it from adequately adjusting itself to the exigencies of the life with which it deals.[338]

That these words were written by J. Howard Marshall (along with William O. Douglas) is but one of many ironies in the convoluted story of *Stern v. Marshall*. *Stern* has thrown basic systemic assumptions into doubt; the cost of solving them is the *Stern* problem as we see it. The *Stern* problem has, in part, been caused by the Court's apparent need to "acquire" or "inherit from older times a rigidity that prevents it from adequately adjusting" to the modern nature of corporate bankruptcy.

If the Court had not committed so strongly to historical formalism, we would take a realist page from Douglas's work, and argue for a more "functionalist" approach to defining bankruptcy court power. But that seems doctrinally implausible in the near term. In the meantime,

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Inc.), 181 F.3d 505, 515 (3d Cir. 1999); *Kaiser Steel Corp. v. Pearl Brewing Co.* (*In re Kaiser Steel Corp.*), 952 F.2d 1230, 1240 (10th Cir. 1991).

338. *See* Douglas & Marshall, *supra* note 53, at 25.

bankruptcy courts need to get on with their ordinary work, unburdened by questions *Stern* has imposed on them.

Can bankruptcy trustees pursue traditional causes of action such as the "turnover" suit under Section 542 to recover property of the estate in the hands of others?[339] What about "strong-arm" suits to avoid unperfected security interests in property of the estate under Section 544?[340] Or preference suits under Section 547?[341]

Like the fraudulent transfer suit, these may involve claims against "private" defendants unlikely to consent to bankruptcy court authority. Except for preference actions, which are governed largely by federal law, most suits that a trustee could commence to enlarge the estate will involve state law as the rule of decision. Does that mean all should be taken from bankruptcy courts, except perhaps for purposes of proposing findings of fact and conclusions of law subject to de novo review?

We think that *Stern*'s methodology would help to assure that such causes of action remain the business of bankruptcy courts in most cases. As with fraudulent transfer, we believe the structural concerns are unlikely to be significant, which leaves only historical formalism and whether, in 1789, the cause of action in question would have been viewed as "public" in nature. We have made the case that fraudulent transfer suits had important public attributes and therefore should be adjudicable by Article I bankruptcy courts in most cases. While we suspect this analysis would produce a similar result for these other causes of action, such determinations will have to await future consideration, whether in litigation or commentary.

CONCLUSION

To take *Stern* seriously is to recognize that its methodology—structure and history—matters more than its indeterminate rhetoric. Given the nature of bankruptcy cases—and the Court's indifference to truly political bankruptcies, such as Chrysler's—we doubt the Court has

339. *See Moyer v. Koloseik* (*In re Sutton*), 470 B.R. 462, 475–78 (Bankr. W.D. Mich. 2012) (holding *Stern* prevents bankruptcy courts from adjudicating turnover of accounts receivable).

340. *See DeGiacomo v. Traverse*, 485 B.R. 815, 817–19 (B.A.P. 1st Cir. 2013) (holding that bankruptcy court may adjudicate suit to avoid unperfected mortgage).

341. *Compare Tabor v. Kelley* (*In re Davis*), No. 05-15794-GWE, 2011 WL 5429095, at *1 (Bankr. W.D. Tenn. Oct. 5, 2011) (holding *Stern* prevents bankruptcy court adjudicating suit to avoid preferential transfers), *with Samson v. Blixseth* (*In re Blixseth*), No. 09-60452-7, 2011 WL 3274042, at *11 (Bankr. D. Mont. Aug. 1, 2011) (stating that equitable subordination and preference actions arose from the Bankruptcy Code and claims allowance process and therefore court's "jurisdiction" over the claims was constitutionally acceptable under *Stern*).

meaningful structural concerns about the bankruptcy system Congress has created. Rather, the Court (and lower courts) have been burdened by a poor understanding (or use) of the history of fraudulent transfer suits. Such suits had important public attributes that distinguish them from common law contract or tort actions not (generally) adjudicable by bankruptcy courts.

Stern's methodology thus suggests that bankruptcy courts should adjudicate fraudulent transfer suits in most cases, subject to ordinary appellate review. If we are right about this, then taking the Court's commitment to historical formalism seriously in this context should bring greater stability and efficiency to the chapter 11 system. It will, perhaps ironically, make credible Chief Justice Roberts's claim that *Stern* was "narrow," after all.

Seriously.