IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	
	:	No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al.,	:	Jointly Administered
Debtors	:	

SECOND SUPPLEMENTAL OBJECTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS TO CONFIRMATION OF THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

The consortium of holders of interests subject to treatment under Class 19 of the Plan (the "TPS Consortium"), by and through its undersigned counsel, hereby files this second supplemental objection (the "Objection")[1] to confirmation of the Modified Sixth Amended Joint Plan of Washington Mutual Inc. ("WMI") and WMI Investment Corp. ("WMI Investment" and, together with WMI, the "Debtors"), filed on February 7, 2011, as modified on March 16, 2011 and March 25, 2011 (the "Plan") [Docket Nos. 6696, 6964, and 7038]. In support of this Objection, the TPS Consortium respectfully represents as follows:

PRELIMINARY STATEMENT

1. Two significant recent court rulings, each occurring after the TPS Consortium's May 13, 2011 Plan objection deadline, compel the filing of this second supplemental Objection

[1] The TPS Consortium expressly incorporates by reference herein each of the arguments set forth in the *Objection Of The TPS Consortium To Confirmation Of The Sixth Amended Joint Plan Of Affiliated Debtors Pursuant To Chapter 11 Of The United States Bankruptcy Code* [Docket No. 6020] (the "Initial Objection") and the *Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 7480] (the "First Supplemental Objection").

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to confirmation. First, on June 23, 2011, the Supreme Court of the United States issued its seminal opinion in the Stern v. Marshall[2] matter, clarifying Constitutional limitations on the adjudicatory powers of Bankruptcy Courts. Second, on June 24, 2011, the United States Court of Appeals for the District of Columbia Circuit, in American National Insurance Co. v. Federal Deposit Insurance Co. (the "ANICO Decision"),[3] reversed a lower Court's dismissal, on jurisdictional grounds, of a lawsuit asserting, inter alia, numerous claims against JPMorgan Chase Bank, N.A. ("JPMC") for its actions in connection with the September 2008 seizure and sale of the Washington Mutual Bank ("WMB"), the Debtors' primary operating subsidiary. Both of the foregoing recently-delivered decisions have a direct bearing on this Court's ability to approve the "global settlement" underlying the Plan (the "Settlement"), and, ultimately, render approval of that Settlement and the Plan inappropriate.

2. In Stern, the Supreme Court issued guidance as to the restrictions imposed on a Bankruptcy Court's ability to adjudicate matters reserved under the Constitution to Article III Courts. The relief sought by the Debtors through the Plan and the Settlement (asking this Court to resolve and/or adjudicate on a final basis issues reserved to Article III Courts) exceeds the permissible bounds of the adjudicatory power of this Court, as clarified by Stern. This Court has, in the past, correctly declined to take actions beyond its adjudicatory authority (e.g.,

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[2] See Stern v. Marshall, No. 10-179 (U.S. June 23, 2011), slip opinion attached hereto at Exhibit A.

[3] See Am. Nat'l Ins. Co. v. Fed. Deposit Ins. Co., No. 10-5245 (D.C. Cir. June 24, 2011), slip opinion attached hereto at Exhibit B.

declining, on jurisdictional grounds, to grant illegal third-party releases). Given the recent guidance provided by the Supreme Court through Stern, the Court should do no less here.[4]

3. Second, in its January 7, 2011 opinion denying confirmation of the Plan, this Court discussed certain of the potential claims and actions proposed to be resolved or released pursuant to the Settlement. Among the matters proposed to be compromised are potential claims arising from serious allegations regarding misconduct by JPMC at or around the time of the FDIC's seizure and sale of WMB to JPMC (the "JPMC Business Torts"). The Court concluded the likelihood of success on such claims was "not high" because: (a) a lawsuit by third-parties asserting similar claims against JPMC had, at that time, been dismissed on the basis of limitations imposed under the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"); and (b) Debtors' counsel's possible failure to preserve the right to pursue such claims in connection with the WMB receivership proceedings. As the ANICO Decision makes clear, FIRREA does not serve to protect JPMC for wrongful conduct in connection with its purchase of WMB. Rather, to the extent JPMC acted wrongfully, direct claims against JPMC exist (making irrelevant, for purposes of estate recoveries, any failure by the Debtors to properly preserve such claims in the WMB receivership). Given the potential value to the estates of such claims, and the broad release proposed for JPMC under the Plan (going so far as to provide a release from liability for even JPMC's "gross negligence" and "willful misconduct"), the Court should carefully reconsider the propriety of the Settlement, which remains incapable of approval on the existing record before the Court.

[4] By this Objection, the TPS Consortium addresses the impact of the Supreme Court's decision in Stern only with respect to the proposed compromise of non-core claims (many of which are not pending before this Court) in the context of Plan confirmation.

4. In sum, the Supreme Court's decision in Stern underscores that the relief sought through the Plan and the Settlement Agreement is beyond this Court's ability to grant. As such, confirmation of the Plan and approval of the Settlement should be denied. But, even if the Court were to find that it had the power to adjudicate the fairness of the Settlement, the recent ANICO Decision compels reconsideration and disapproval of the Settlement in light of the potentially valuable claims against JPMC that would be sacrificed for little (or no) value thereunder.

BACKGROUND

I. Prior Proceedings Concerning The Plan And Settlement.

5. As this Court is aware, the Plan is premised upon approval and implementation of a "global" Settlement that would resolve or release, on a final basis, numerous separate issues, claims and pieces of litigation. Certain of these matters are pending before this Court in the context of adversary proceedings, counterclaims and otherwise. Certain of the matters are pending before other Courts. Certain of the matters are based on rights created under the Bankruptcy Code. Certain of the matters are based on non-bankruptcy statutes (state and federal). Certain of the matters are based entirely on state common law. Certain of the actions were commenced against the Debtors, and certain were commenced by the Debtors against non-Debtors.

6. Just as an example of the diverse and wide-ranging matters with respect to which the Debtors ask this Court to exercise jurisdiction and enter final Orders (to implement the Settlement and confirm the Plan), the Debtors would have this Court resolve or release claims by the Debtors, including, inter alia:[5]

[5] In addition to the specific multi-party litigations noted herein that are to be finally resolved under the Settlement, the Plan and Settlement also have sweeping implications on numerous other rights of third parties.

- Litigation in the District Court for the District of Columbia seeking review of WMI's claim in the WMB receivership pursuant to 12 U.S.C. § 1821(d)(6)(A);
- Litigation in the District Court for the District of Columbia, pursuant to 12 U.S.C. § 1821(d)(13)(E)(i), seeking recovery from the FDIC for a breach of its statutory duty to maximize the value received for WMB;
- Litigation in the District Court for the District of Columbia seeking compensation from the FDIC pursuant to the Takings Clause of the United States Constitution;
- Litigation in the District Court for the District of Columbia regarding claims sounding in conversion against the FDIC pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80;
- Claims against JPMC for recovery of fraudulent transfers of approximately $6.5 billion and Trust Preferred Securities with a value of $4 billion, pursuant to Washington state law and 11 U.S.C. §§ 544 and 548;
- Claims against JPMC for recovery of preferential transfers, pursuant to Washington state law and 11 U.S.C. §§ 544 and 547;
- Claims for avoidance of the sale of WMB to JPMC, pursuant to Washington and Nevada state avoidance laws;
- Claims for unjust enrichment, constructive trust and equitable liens, presumably under state law;
- Claims for trademark infringement, pursuant to 15 U.S.C. § 1114;
- Claims for common law trademark infringement;
- Claims against JPMC for patent infringement, pursuant to 35 U.S.C. § 271; and
- Claims against JPMC for copyright infringement, pursuant to 17 U.S.C. § 501.[6]

7. On December 2, 2010, this Court began a four-day contested evidentiary hearing on confirmation of a prior iteration of the Plan. In response to the TPS Consortium's objections that the Debtors were incapable of proving the reasonableness of the Settlement, the Debtors at the last minute scrambled to introduce numerous pleadings related to the issues, claims and litigations to be compromised pursuant to the Settlement. But, the Debtors continued to expressly refuse to provide any legal analysis performed as to the merits of the estates' rights

[6] The table attached hereto at Exhibit C sets forth a more detailed description of the various claims and causes of action the Debtors ask the Court to release or resolve through the Plan and Settlement.

with respect to any of the underlying claims or why the Debtors chose to compromise estate claims and rights. That record is now closed, and the Debtors must live with the evidence (or lack thereof) they chose to provide.

8. On January 7, 2011, this Court issued its Order and Opinion denying confirmation of that version of the Plan (the "Confirmation Opinion"). [Docket Nos. 6528 and 6529]. Among the bases cited in the confirmation Opinion for the proposition that the matters decided thereby were within the Court's "core" jurisdiction was 28 U.S.C. § 157(b)(2)(C) (dealing with "counterclaims by the estate against persons filing claims against the estate"). The Constitutionality of this subsection was, in particular, the primary focus of the Stern decision.[7]

9. In the Confirmation Opinion, the Court indicated it was favorably inclined to approve the Settlement, if certain other critical defects in the Plan were remedied. As set forth in the TPS Consortium's First Supplemental Objection, numerous of those defects remain extant, leaving the Plan still incapable of confirmation.

10. Following the Court's delivery of the Confirmation Opinion, the Official Committee of Equity Security Holders (the "Equity Committee") appealed and sought direct certification to the Third Circuit Court of Appeals of the portion of the Confirmation Opinion finding the Settlement to be "fair and reasonable." [Docket No. 6575]. In opposing the Equity Committee's efforts to obtain appellate review of the portion of the Confirmation Opinion dealing with the Settlement, the Debtors and JPMC argued there was not a final confirmation Order or a final Order approving the Settlement capable of appellate review. See JPMC's Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 4 [Docket No. 6656] ("As of now, there is no confirmation order, no final plan … and no final settlement

[7] See Slip Op. at 4-5.

for an appellate court to review …. the Equity Committee's appeal therefore is premature"); see also Debtors' Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 2 [Docket No. 6653] ("Any appeal of the Court's findings regarding the Global Settlement Agreement must await entry of an order confirming a plan."). The Debtors, through the revised Plan, now ask this Court to grant final approval of the Settlement and confirmation of the Plan.

II. The Confirmation Opinion's Treatment Of Business Tort Claims Against JPMC.

11. In the Confirmation Opinion, the Court spent considerable time discussing certain pieces of litigation that were proposed to be resolved pursuant to the Settlement. Among them was litigation commenced by the ANICO Plaintiffs (as defined in the Confirmation Opinion, p. 53) against JPMC. Through that litigation, the ANICO Plaintiffs seek recovery from JPMC for alleged misconduct in connection with the FDIC's September 2008 seizure and sale to JPMC of the Debtor's primary operating subsidiary, WMB. That alleged misconduct included misuse of access to government regulators to gain non-public information about WMB, misuse of confidential information obtained from WMB during "sham" negotiations, efforts to distort market and regulatory perceptions of WMB's financial condition, and exertion of improper influence over government regulators to force the premature seizure and sale of WMB to JPMC. See ANICO Decision, at 4.

12. Early in these cases, the Debtors themselves commenced an investigation into estate claims against JPMC for much of this same alleged misconduct. See Confirmation Opinion, at 54. Indeed, in seeking authority to conduct discovery into these claims, the Debtors claimed a fiduciary duty to the estates to determine whether "myriad meritorious and highly valuable claims" existed. See Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of JPMorgan Chase Bank, N.A., at 2, 3

[Docket No. 974] (emphasis added). By the requested discovery, the Debtors claimed to be seeking to uncover facts that would allow them to assess the merit of various allegations against JPMC, including unfair competition, tortious interference, interference with prospective economic advantage, breach of contract, misappropriation of confidential information and trade secrets, and conversion, among others. Id. at 8, 10. Upon information and belief, that discovery was not conducted before the Debtors decided to compromise the JPMC Business Torts, and has not been conducted since.

13. At the time the Confirmation Opinion was issued, the ANICO Plaintiffs' lawsuit against JPMC had been dismissed on the basis that, under FIRREA, the WMB receivership was the exclusive claims process for claims relating to the sale of WMB. See Confirmation Opinion, at 54. The Court went on to note, inter alia, that JPMC and FDIC contended FIRREA similarly prevented the estates from pursuing the JPMC Business Torts as well (in the Confirmation Opinion, the Court also noted the possibility that Debtors' counsel had failed to properly preserve such rights in connection with the WMB receivership). See id. at 54-55. Ultimately, the Court concluded that, at the time of the Confirmation Opinion, "the Debtors' likelihood of success on the Business Tort Claims [was] not high" first citing to the then-current status of the ANICO litigation. Id. at 56.

14. On June 24, 2011, United States Court of Appeals for the District of Columbia entered the ANICO Decision, which reversed and remanded the lower Court's dismissal of the ANICO litigation on FIRREA grounds. In ruling, the ANICO appellate Court held that FIRREA did not deprive an appropriate Court of jurisdiction to consider claims against JPMC for its wrongdoing. See ANICO Decision, at 8. More specifically, claims against JPMC for its role in WMB's collapse were determined not to constitute "claims" subject to FIRREA. See id.

ARGUMENT

I. The Court Is Prohibited From Entering Final Orders Approving The Settlement Incorporated Into The Plan.

A. The Objection Is Timely.

15. A Bankruptcy Court's Constitutional authority to adjudicate a particular matter is of paramount importance, and can be raised/challenged at any time. See Lindsey v. Ipock, 732 F.2d 619, 622 n.2 (8th Cir. 1984) ("The challenge of the bankruptcy court's contempt power is in essence a challenge to the court's subject matter jurisdiction for contempt. We find [Appellant] is not estopped from challenging the constitutionality of this jurisdiction."); accord Int'l. Longshoremen's Assoc. v. Davis, 476 U.S. 380, 399 (1986) (challenge to Court's power to adjudicate matter on preemption grounds was jurisdictional, and amenable to challenge at any time); B & P Holdings I, LLC v. Grand Sasso Inc., 114 Fed. Appx. 461, 465 (3d Cir. 2004) (citing Kontrick v. Ryan, 540 U.S. 443 (2004) (holding that a court's jurisdiction may be raised initially by either party, or sua sponte by the Court, at any stage of litigation, including appeal) (citations omitted)). Where a question exists as to whether a Court has the power to act with respect to particular matter, the burden lies with the party seeking relief or with the Court itself. See Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995) ("A party who invokes the jurisdiction of the federal courts has the burden of demonstrating the court's jurisdiction."); Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5th Cir. 2001) ("Federal courts are courts of limited jurisdiction. We must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum."); see also In re Geauga Trenching Corp., 110 B.R. 638, 642-43 (Bankr. E.D.N.Y. 1990) ("[A] Bankruptcy Court has the independent responsibility to make a 28 USC § 157(b)(3)

determination that this proceeding is or is not a 'core' matter or otherwise 'related to' the pending Title 11 case.").

16. This Court previously recognized the critical importance of honoring the limits of its power to grant requested relief. See In re Coram Healthcare Corp., 315 B.R. 321, 335-36 (Bankr. D. Del. 2004) (citing In re Digital Impact, Inc., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998) (Bankruptcy Court does not have jurisdiction to approve non-debtor releases by third parties) and In re Davis Broad., 176 B.R. 290, 292 (M.D. Ga. 1994) (holding that Bankruptcy Court erred in not vacating confirmation order because Court did not have jurisdiction to grant releases of third party claims, even though no creditor had objected).

17. Since the TPS Consortium is entitled to raise objections predicated on this Court's Constitutional authority to act at any time (including at the appellate level), this Objection is timely as a matter of law. The Court must, therefore, closely consider the arguments raised herein.

B. In *Stern*, The Supreme Court Announced Principles Of Law That Render Approval Of The Settlement (And, In Turn, The Plan) Beyond This Court's Constitutional Authority.

1. *Stern*'s Holding As To Whether An Estate Cause Of Action May Be Resolved By A Non-Article III Court.

18. Since the enactment of the Bankruptcy Act of 1978, courts and scholars have wrestled with the permissible scope of matters that may be adjudicated on a final basis by Bankruptcy Courts – Courts created under Article I of the Constitution – versus those matters that must be reserved for final adjudication by Courts created under Article III of the Constitution. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Halper v. Halper, 164 F.3d 830, 835 (3d Cir. 1999) ("Bankruptcy Court jurisdiction has been the subject of heated controversy in

recent decades."); In re Guild & Gallery Plus, Inc., 72 F.3d 1171, 1176-79 (3d Cir. 1996) (discussing Bankruptcy Courts' history); Radha A. Pathak, Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction, 85 Or. L. Rev. 59 (2006); Frank J. Kennedy, The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction, 55 Am. Bankr. L.J. 63 (1981). On June 23, 2011, the Supreme Court issued its decision clarifying which matters a Bankruptcy Court is empowered to adjudicate and which matters must be reserved for adjudication by Article III Courts. See Stern v. Marshall, Slip Op. No. 10-179 (June 23, 2011).

19. Initially, the Supreme Court's decision in Stern makes clear that the determination of whether a Bankruptcy Court can adjudicate a particular matter requires two inquiries: first, whether the matter falls within the authority ***granted*** to Bankruptcy Courts by statute in 28 U.S.C. 157; and second, whether the matter falls within the exercise of jurisdiction ***allowed*** non-Article III Courts under the Constitution. See Stern, Slip Op. at 16. And, it is on this second inquiry – what is allowed under the Constitution – that this Court must focus when considering the relief sought by the Debtors through the Plan and Settlement.

20. This second inquiry is critical here because Congress may not, through this Court's actions, "'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" Stern, Slip Op. at 18 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)). "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." Id. (quoting Northern Pipeline, 458 U.S. at 90 (Rehnquist, J. concurring)) (emphasis added).

21. In Northern Pipeline, a plurality of the Supreme Court did recognize an exception to the foregoing general rule where the matter at issue implicated "public rights" that Congress could Constitutionally assign to non-Article III Courts or agencies for final resolution. See Northern Pipeline, 458 U.S. at 67-68 (plurality determining the "public rights" exception applied to matters arising between individuals and the government in connection with the performance of Constitutional functions of the Executive and Legislative branches that, historically, could have been determined exclusively by those branches). While the Supreme Court has since clarified the "public rights" exception is not limited just to suits to which the government is a party, the exception is still limited only to claims deriving from a federal regulatory scheme or for which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within that agency's authority. See Stern, Slip Op. at 25.

22. In determining whether a particular action or claim not involving the government should nonetheless fall within the "public rights" exception to Article III adjudication, inquiry must be made as to whether: (a) the claim and some related matter within an agency's proper exercise of authority concern a single "dispute"; (b) the non-Article III tribunal's assertion of authority would involve only a "narrow class of common law claims" in a "particularized area of law"; (c) the area of law in question is governed by "a specific and limited federal regulatory scheme" as to which the non-Article III tribunal has "obvious expertise"; (d) the decision rendered by the non-Article III tribunal would be enforceable only by order of an Article III Court; and[8] (e) the parties had freely consented to resolution of their differences before the non-

[8] Use of the conjunction "and" (rather than the disjunctive "or") indicates the inquiries are to be made conjunctively, rather than disjunctively. See Condrey v. Suntrust Bank of Ga., 431 F.3d 191, 201 (5th Cir. 2005) (statute's use of the conjunctive "and" requires that evidence on *all* elements be presented); In re Grantsville Hotel Assocs., L.P., 103 B.R. 509, 510 (Bankr. D. Del. 1989) (same).

Article III tribunal.[9] See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844, 852-855 (1986) (quoting Northern Pipeline, 458 U.S., at 85). Another consideration is whether "Congress devised an 'expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.'" Stern, Slip Op. at 28 (citation omitted) (holding that "[t]he 'experts' in the federal system at resolving common law counterclaims such as [debtor's] are the Article III courts, and it is with those courts that [debtor's] claim must stay").

23. Where a claim or action is based on statute, if the "statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." Stern, Slip Op. at 26; Northern Pipeline, 492 U.S. at 54-55 (rejecting argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a non-creditor fell within the "public rights" exception).

24. And, in considering the bounds of its authority to approve the Settlement, the Court should be mindful of the Supreme Court's decision in Celotex Corp. v. Edwards, where it was

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[9] While a party may consent to personal jurisdiction, it is not possible for parties to bestow on the Bankruptcy Court by agreement (e.g., the Settlement) the authority to adjudicate on a final basis matters reserved to Article III Courts under the Constitution. Accord Stern, Slip Op. at 30 (rejecting the filing of a claim in bankruptcy as a basis for ignoring Constitutional limitations on the Bankruptcy Court's power to act, noting "it is hard to see why [Respondent]'s decision to file a claim should make any difference with respect to the characterization of [Petitioner]'s counterclaim"); see also Okereke v. United States, 307 F.3d 117, 120 n.1 (3d Cir. 2002) (citing Pa. v. Union Gas Co., 491 U.S. 1, 26, (1989) (Stevens, J., concurring) ("[T]he cases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent.")); Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998) ("[I]t is axiomatic that a party may not confer or defeat jurisdiction by mere pleading."). Moreover, given the coercive nature of bankruptcy law's centralization of disputes in the Bankruptcy Court, the concept of "consent" should be viewed differently in applying this test to questions of a Bankruptcy Court's Constitutional authority to act. See Stern, Slip Op. at 28 and n. 8; Granfinanciera, 492 U.S. at 59 n. 14.

noted that a Bankruptcy Court's authority is even more circumscribed in the context of a liquidation (in that case, under chapter 7) than when the Court has before it a bona fide reorganization. See 514 U.S. 300, 310 (1995). Here, while the Plan has been presented as "reorganization," it simply effects a liquidation under Chapter 11.

25. In sum, the Court does not have the Constitutional authority to resolve on a final basis non-core estate causes of action based on non-bankruptcy law. Such matters fall outside of the "public rights" doctrine and, therefore, must be left for adjudication by Article III Courts.

2. Settlement Approval Is Claims Resolution That Must Be Reserved For Article III Courts.

a. Approval Of A Settlement Is Dispositive Adjudication, As A Matter Of Law.

26. A Bankruptcy Court's approval of a settlement is, in effect, a final adjudication of the compromised claims. See Rosenberg v. XO Commc'ns., Inc. (In re XO Commc'ns., Inc.), 330 B.R. 394, 450 (Bankr. S.D.N.Y. 2005) (citing Adam v. Itech Oil Co. (In re Gibraltar Res., Inc.), 210 F.3d 573, 576 (5th Cir. 2000) ("A bankruptcy court's approval of a settlement order that brings to an end litigation between parties is a 'final' order.")); Martin v. Pahiakos (In re Martin), 490 F.3d 1272, 1276-77 (11th Cir. 2007) (noting that a "bankruptcy court's order approving the settlement agreement is sufficiently final such that it is entitled to preclusive effect . . . [and] [f]or purposes of res judicata, the order approving the settlement agreement provides a final determination on the merits"); Beaulac v. Tomsic (In re Beaulac), 294 B.R. 815, 818 (1st Cir. B.A.P 2003) (noting that a bankruptcy order approving the stipulation of a settlement is a final Order from which jurisdiction exists to hear an appeal); In re Drexel Burnham Lambert Grp., 960 F.2d 285 (2d Cir. 1992) (finding a District Court's Order approving a settlement agreement as final for purposes of appeal).

27. When a Court issues a ruling on a settlement agreement, it has the same effect as adjudicating the settled claims at trial. See In re XO Commc'ns., Inc., 330 B.R. at 451 (quoting In re Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991), vacated on other grounds by 982 F.2d 721 (2d Cir. 1992) ("Once approved by the Bankruptcy Court, a compromise takes the form of an order of the court and has the effect of a final judgment.")); In re Dominelli, 820 F.2d 313, 316 (9th Cir. 1987) (Order approving settlement considered final judgment for res judicata purposes); 10 Collier on Bankruptcy ¶ 9019.01[3] (15th ed. rev. 2004) ("An order approving a settlement will be reversed only if the lower court has been guilty of an abuse of discretion. Once it has become final, an order approving a settlement has the same res judicata effect as any other order of a court"); In re Pac. Gas & Elec. Co., 304 B.R. 395, 414-15 (Bankr. N.D. Ca. 2004) (explaining that a party's "rights under the Settlement Agreement will vest pursuant to applicable state and federal law, and this court's determinations will become binding under principles of res judicata, law of the case, etc. . . . Thereafter, any attempt to alter (other than by mutual consent) or obtain a determination contrary to this court's present determinations will be barred by those same principles") (citations omitted); In re Mal Dun Assocs., Inc., 406 B.R. 622 (Bankr. S.D.N.Y. 2009) (finding releases of causes of action against the debtor in the settlement agreement, plan, and confirmation order to enjoin creditors from pursuing claims in state Court); United States v. Kellogg (In re West Texas Mktg. Corp.), 12 F.3d 497, 499 (5th Cir. 1994) ("[S]ettlement agreement approved and embodied in a judgment by a Court is 'entitled to full res judicata effect,' . . . . preclud[ing] subsequent litigation of issues which arise out of claims which were conclusively decided in the prior decision.") (citations omitted).

28. Clearly, once a Bankruptcy Court resolves litigation through the approval of a settlement, the matter has been "withdraw[n] from judicial cognizance" of Article III Courts with only the limited appellate review from an Article III Court available thereafter. See Stern, Slip Op. at 21-22 (noting the Northern Pipeline Court's concern with the "marked deference" to be afforded a Bankruptcy Court's findings of fact pursuant to 28 U.S.C. § 158(a) and Fed. R. Bankr. P. 8013).

29. For this reason, final Settlement approval (to the extent involving non-core estate claims) is beyond the Constitutional authority of the non-Article III Bankruptcy Courts. Accord 28 U.S.C. § 636(b)(1)(A) & (B) (magistrate judges may not adjudicate dispositive motions, such as involuntary case dismissal or class action settlements, but may submit proposed findings of fact and recommendations to the District Court pursuant to Federal Rule of Civil Procedure 72(b)(1)); see also Beazer East, Inc. v. The Mead Corp., 412 F.3d 429, 437 (3d Cir. 2005) (referral to non-Article III court of determination of liability allocations exceeded Constitutional bounds of that Court's authority); Prudential Ins. Co. of Am. V. U.S. Gypsum Co., 991 F.2d 1080, 1088 (3d Cir. 1993) (same). This Court, therefore, may not make the necessary final determinations and/or adjudications underlying approval of the Settlement or, in turn, the Plan.

b. Settlement Approval Requires Final Factual And Legal Determinations Exceeding The Constitutional Authority Of Bankruptcy Courts.

30. The Supreme Court, in a decision pre-dating Stern, Northern Pipeline and even the enactment of 28 U.S.C. § 157, provided the following admonishment to Courts considering whether to approve settlements:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success

> should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968); see also Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996) (recognizing four criteria a Bankruptcy Court should consider in making the judicial determinations called for under TMT Trailer: (a) the probability of success in litigation; (b) the likely difficulties in collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors).

31. The Court's affirmative decision to enter a final Order to approve and enforce a compromise is not to be a thoughtless, fait accompli upon the filing of a request for such approval. Rather, the caselaw mandates careful consideration and determinations by the approving Court. While a "mini-trial" on each component of the proposed settlement is not required, the approving Court's conclusions must still be "well-reasoned" and supported by its own determination as to the facts and an analysis of the law. See TMT Trailer, 390 U.S. at 434. The opinions of the parties that a settlement is fair and equitable may be considered; but it is the approving Court that must ultimately make its own, independent, determination before approving a settlement. See In re Millennium Multiple Emp'r. Welfare Benefit Plan, No. 10-13528, 2011 Bankr. LEXIS 1973 (Bankr. W.D. Okla. Feb. 18, 2011); In re Albrecht, 245 B.R. 666 (B.A.P. 10th Cir. 2000); see also In re WorldCom, Inc., 347 B.R. 123 (Bankr. S.D.N.Y. 2006) (citing TMT Trailer, 390 U.S. at 424 ("While the bankruptcy court may consider the objections lodged by parties in interest, such objections are not controlling. Similarly, although weight should be

given to the opinions of counsel for the debtors and any creditors' committees on the reasonableness of the proposed settlement, the bankruptcy court must still make an informed and independent judgment. The Court must consider whether the proposed compromise is fair and equitable by apprising itself of all the factors relevant to an assessment of the wisdom of the proposed compromise.")). It is not necessary to be convinced the compromise is the best possible result; but it is the approving Court that must nonetheless make the final determination the settlement is within the reasonable range of litigation outcomes on the claims to be compromised. See In re Spansion, Inc., No. 09-10690, 2009 LEXIS.Bankr. 1283, at *13-14 (Bankr. D. Del. June 2, 2009). Finally, the determination as to whether the compromise is preferable to continued litigation must be based on the approving court's "reasoned judgment as to the probable outcome of [such] litigation." TMT Trailer, 390 U.S. at 434; In re Boston & Providence R.R. Corp., 673 F.2d 11, 12 (1st Cir. 1982) ("Bankruptcy proceedings, by definition, coerce the bankrupt's creditors into a compromise of their interests. Therefore [in "approving a compromise in reorganization"]… the supervising court must play a quasi-inquisitorial role, ensuring that all aspects of the reorganization are 'fair and equitable'") (citation omitted).

32. Making the foregoing determinations with respect to each claim the Court is being asked to resolve or release pursuant to the Settlement and/or Plan (as the Court must do), it appears, in light of Stern, that a significant portion of the matters proposed to be resolved or released fall outside of this Court's Constitutional authority to adjudicate on a final basis. The Supreme Court's decision in Stern instructs that it is beyond the Constitutional authority of this Court to make "final" determinations with respect to, and Order resolution or release of, any of: a) the common law claims asserted by WMI; b) the claims asserted by WMI under the statutes of the States of Washington and/or Nevada; c) the claims asserted by WMI under Title 12 of the

United States Code; d) the claims asserted by WMI under the Federal Tort Claims Act; e) the claims asserted by WMI under Title 15 of the United States Code; f) the claims asserted by WMI under Title 17 of the United States Code; and g) the claims asserted by WMI under Title 35 of the United States Code. Each of the foregoing claims is capable of final adjudication in the federal Court system only by an Article III Court, and none of the various "public rights" exceptions apply.

33. Approval of a settlement (particularly one, such as in this case, that would result in final determinations as to the ultimate allocation of billions of dollars in estate value and the extinguishment of litigation claims that could otherwise result in estate recoveries of many more billions of dollars) is not a matter to be taken lightly. Indeed, this Court presided over a four-day evidentiary hearing on confirmation in December 2010. A significant portion of those proceedings consisted of the Debtors' attempts to present sufficient bases for this Court to make the requisite determinations concerning the numerous claims and causes of action subsumed in the Settlement to support a final Order approving the compromise of such claims. Not only did the Plan proponents fail, as a matter of fact, to provide sufficient evidence of the Settlement's fairness and reasonableness, this Court is nonetheless precluded, as a matter of law, from making the final determinations with respect to, and Ordering the resolution or release of, the majority of the various litigations (as discussed herein).

3. Expected Cries For Expediency And Efficiency Are Not Relevant To The Paramount Issue Of Whether This Court Has The Constitutional Authority To Approve The Settlement.

34. As discussed above, the Settlement and Plan are contingent on this Court's Ordered final resolution or release of claims and litigation – an act in excess of this Court's Constitutional authority. Accordingly, the Settlement and Plan must fail. The TPS Consortium understands

this Court's inability to Order final resolutions and/or releases of claims in excess of its Constitutional authority will be inconvenient to the Debtors, JPMC and others who would ask this Court to ignore the Stern Court's guidance.[10] The fact that Stern was issued only days ago is of no moment. It is the law of the land, and it must be followed by this Court. Nor is the anticipated response that it would be more efficient for this Court to adjudicate the proposed Settlement an appropriate response. Indeed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution." Stern, Slip Op. at 36; INS v. Chadha, 462 U.S. 919, 944 (1983).

II. The Court Must Deny The Settlement In Light Of The ANICO Decision.

35. Because the Debtors have withheld any analysis of the various estate claims against third-parties, such as JPMC, it is unclear why the Debtors have not more vigorously pursued a recovery from JPMC on the JPMC Business Torts.[11] Assuming the Debtors have taken steps

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[10] Although even Debtors' counsel concedes that, because of the Supreme Court's decision in Stern, "the jurisdictional issue will, in some instances, be difficult for the bankruptcy court to determine at the outset of a case, and there may be cases where it becomes apparent that jurisdiction is lacking after substantial investment in the litigation by the parties." Sara Coelho, Stern Views on Bankruptcy Court Jurisdiction – United States Supreme Court Addresses Bankruptcy Court Jurisdiction in the Anna Nicole Smith Case, Weil Bankr. Blog (July 6, 2011), http://business-finance-restructuring.weil.com/claims/stern-views-on-bankruptcy-court-jurisdiction-%e2%80%93-united-states-supreme-court-addresses-bankruptcy-court-jurisdiction-in-the-anna-nicole-smith-case/, attached hereto as Exhibit D.

[11] In the Initial Objection, and during the December 2010 confirmation hearing, the TPS Consortium objected to approval of the Settlement on numerous bases, including, inter alia, that its propriety could not be established given the lack of evidence presented by its proponents and that pleadings alone could not support approval of the Settlement. See also Will v. Northwestern Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 645 (3d Cir. N.J. 2006) (citing In re Boston & Providence R.R. Corp., 673 F.2d 11, 13 (1st Cir. 1982) (noting that a court cannot rely on the objections, or the absence thereof, in evaluating a proposed settlement, but rather "the court must act independently, out of its own initiative, for the benefit of all creditors. This obligation prevails even where the creditors

necessary to preserve the estate's rights in this regard (as the Confirmation Opinion noted, it has been alleged that the Debtors failed to properly preserve the estates' ability to pursue such claims in connection with the WMB receivership), with the FIRREA bar removed, unconflicted counsel for the Debtors could commence such litigation directly against JPMC. To the extent the Court's favorable view of the Settlement Agreement was based on the assumption that FIRREA would stand in the way of such direct litigation by the estates,[12] the Court must reconsider the Debtors' continuing attempt to compromise this potentially significant source of estate value in light of the D.C. Circuit Court's ruling in the ANICO Decision (particularly in light of JPMC's insistence that, before it will return billions of dollars in estate value it has been holding for nearly three years, it receive a sweeping release of all liability – even for acts that would constitute "gross negligence" or "willful misconduct" such as those comprising the JPMC Business Torts). Given the potential value to the estates of even a partial recovery on the JPMC Business Torts, the Settlement must be rejected.

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are silent . . . .")); In re WorldCom, Inc., 347 B.R. 123 (Bankr. S.D.N.Y. 2006) (citing TMT Trailer, 390 U.S. at 424 ("While the bankruptcy court may consider the objections lodged by parties in interest, such objections are not controlling. Similarly, although weight should be given to the opinions of counsel for the debtors and any creditors' committees on the reasonableness of the proposed settlement, the bankruptcy court must still make informed and independent judgment.")). As such, this is not a new objection to confirmation; but rather intended to apprise the Court of certain developments pertinent to the Court's consideration of the Settlement underlying the Plan.

[12] In Myers v. Martin, the Third Circuit set out four factors to be considered in connection with a request to approve a settlement of litigation. See 91 F.3d 389, 393 (3d Cir. 1996). At least two of these (the probability of success in the litigation and the likely difficulties in collection) must be reevaluated in light of the ANICO Decision.

WHEREFORE, the TPS Consortium respectfully requests that the Court (a) deny confirmation of the Plan, and (b) grant such other and further relief as it deems just and proper.

Dated: Wilmington, Delaware
July 7, 2011

Respectfully submitted,

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EXHIBIT A

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. 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. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

STERN, EXECUTOR OF THE ESTATE OF MARSHALL *v.* MARSHALL, EXECUTRIX OF THE ESTATE OF MARSHALL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10–179. Argued January 18, 2011—Decided June 23, 2011

Article III, §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 those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure. The questions presented in this case are whether a bankruptcy court judge who did not enjoy such tenure and salary protections had the authority under 28 U. S. C. §157 and Article III to enter final judgment on a counterclaim filed by Vickie Lynn Marshall (whose estate is the petitioner) against Pierce Marshall (whose estate is the respondent) in Vickie's bankruptcy proceedings.

Vickie married J. Howard Marshall II, Pierce's father, approximately a year before his death. Shortly before J. Howard died, Vickie filed a suit against Pierce in Texas state court, asserting that J. Howard meant to provide for Vickie through a trust, and Pierce tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy in federal court. Pierce filed a proof of claim in that proceeding, asserting that he should be able to recover damages from Vickie's bankruptcy estate because Vickie had defamed him by inducing her lawyers to tell the press that he had engaged in fraud in controlling his father's assets. Vickie responded by filing a counterclaim for tortious interference with the gift she expected from J. Howard.

The Bankruptcy Court granted Vickie summary judgment on the defamation claim and eventually awarded her hundreds of millions of dollars in damages on her counterclaim. Pierce objected that the

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Bankruptcy Court lacked jurisdiction to enter a final judgment on that counterclaim because it was not a "core proceeding" as defined by 28 U. S. C. §157(b)(2)(C). As set forth in §157(a), Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." District courts may refer all such proceedings to the bankruptcy judges of their district, and bankruptcy courts may enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." §§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." §157(c)(1). Section 157(b)(2) lists 16 categories of core proceedings, including "counterclaims by the estate against persons filing claims against the estate." §157(b)(2)(C).

The Bankruptcy Court concluded that Vickie's counterclaim was a core proceeding. The District Court reversed, reading this Court's precedent in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, to "suggest[ ] that it would be unconstitutional to hold that any and all counterclaims are core." The court held that Vickie's counterclaim was not core because it was only somewhat related to Pierce's claim, and it accordingly treated the Bankruptcy Court's judgment as proposed, not final. Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court went on to decide the matter itself, in Vickie's favor. The Court of Appeals ultimately reversed. It held that the Bankruptcy Court lacked authority to enter final judgment on Vickie's counterclaim because the claim was not "so closely related to [Pierce's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." Because that holding made the Texas probate court's judgment the earliest final judgment on matters relevant to the case, the Court of Appeals held that the District Court should have given the state judgment preclusive effect.

Held: Although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so. Pp. 6–38.

1. Section 157(b) authorized the Bankruptcy Court to enter final judgment on Vickie's counterclaim. Pp. 8–16.

(a) The Bankruptcy Court had the statutory authority to enter final judgment on Vickie's counterclaim as a core proceeding under §157(b)(2)(C). Pierce argues that §157(b) authorizes bankruptcy courts to enter final judgments only in those proceedings that are both core and either arise in a Title 11 case or arise under Title 11 it-

self. But that reading necessarily assumes that there is a category of core proceedings that do not arise in a bankruptcy case or under bankruptcy law, and the structure of §157 makes clear that no such category exists. Pp. 8–11.

(b) In the alternative, Pierce argues that the Bankruptcy Court lacked jurisdiction to resolve Vickie's counterclaim because his defamation claim is a "personal injury tort" that the Bankruptcy Court lacked jurisdiction to hear under §157(b)(5). The Court agrees with Vickie that §157(b)(5) is not jurisdictional, and Pierce consented to the Bankruptcy Court's resolution of the defamation claim. The Court is not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Henderson* v. *Shinseki*, 562 U. S. ___; *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500. Section 157(b)(5) does not have the hallmarks of a jurisdictional decree, and the statutory context belies Pierce's claim that it is jurisdictional. Pierce consented to the Bankruptcy Court's resolution of the defamation claim by repeatedly advising that court that he was happy to litigate his claim there. Pp. 12–16.

2. Although §157 allowed the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution did not. Pp. 16–38.

(a) Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline*, 458 U. S., at 58 (plurality opinion). Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges to protect the integrity of judicial decisionmaking.

This is not the first time the Court has faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline,* the Court considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—who also lacked the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Id.,* at 53, 87, n. 40 (plurality opinion). The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. A full majority of the Court, while not agreeing on the scope of that exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case, and rejected the debtor's argument that the Bankruptcy Court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals.

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Id., at 69–72; see *id.,* at 90–91 (Rehnquist, J., concurring in judgment). After the decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. With respect to the "core" proceedings listed in §157(b)(2), however, the bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984 exercise the same powers they wielded under the 1978 Act. The authority exercised by the newly constituted courts over a counterclaim such as Vickie's exceeds the bounds of Article III. Pp. 16–22.

(b) Vickie's counterclaim does not fall within the public rights exception, however defined. The Court has long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284. The Court has also recognized that "[a]t the same time there are matters, involving public rights, . . . 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." *Ibid.* Several previous decisions have contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that are instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S. 22, 50, 51.

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular Federal Government action. See *United States* v. *Jicarilla Apache Nation*, 564 U. S. ___, ___–___ (slip op., at 10–11); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 584; *Commodity Futures Trading Commission* v. *Schor*, 478 U. S. 833, 844, 856.

In *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, the most recent case considering the public rights exception, the Court rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the exception. Vickie's counter-

claim is similar. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, 18 How., at 284; it does not flow from a federal statutory scheme, as in *Thomas*, 473 U. S., at 584–585; and it is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, 478 U. S., at 856. This case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking. Pp. 22–29.

(c) The fact that Pierce filed a proof of claim in the bankruptcy proceedings did not give the Bankruptcy Court the authority to adjudicate Vickie's counterclaim. Initially, Pierce's defamation claim does not affect the nature of Vickie's tortious interference counterclaim as one at common law that simply attempts to augment the bankruptcy estate—the type of claim that, under *Northern Pipeline* and *Granfinanciera*, must be decided by an Article III court. The cases on which Vickie relies, *Katchen* v. *Landy*, 382 U. S. 323, and *Langenkamp* v. *Culp*, 498 U. S. 42 (*per curiam*), are inapposite. *Katchen* permitted a bankruptcy referee to exercise jurisdiction over a trustee's voidable preference claim against a creditor only where there was no question that the referee was required to decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. The *Katchen* Court "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." 382 U. S., at 333, n. 9. The *per curiam* opinion in *Langenkamp* is to the same effect. In this case, by contrast, the Bankruptcy Court—in order to resolve Vickie's counterclaim—was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim. In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. Vickie's claim is instead a state tort action that exists without regard to any bankruptcy proceeding. Pp. 29–34.

(d) The bankruptcy courts under the 1984 Act are not "adjuncts" of the district courts. The new bankruptcy courts, like the courts

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considered in *Northern Pipeline*, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." 458 U. S., at 85 (plurality opinion). Whereas the adjunct agency in *Crowell* v. *Benson* "possessed only a limited power to issue compensation orders . . . [that] could be enforced only by order of the district court," *ibid.*, a bankruptcy court resolving a counterclaim under §157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§157(b)(1), 158(a)–(b). Such a court is an adjunct of no one. Pp. 34–36.

(e) Finally, Vickie and her *amici* predict 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. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944. In addition, the Court is not convinced that the practical consequences of such limitations are as significant as Vickie suggests. The framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by state courts and district courts, see §§157(c), 1334(c), and the Court does not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute. Pp. 36–38.

600 F. 3d 1037, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 10–179

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL, PETITIONER *v.* ELAINE T. MARSHALL, EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2011]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This "suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."

Those words were not written about this case, see C. Dickens, Bleak House, in 1 Works of Charles Dickens 4–5 (1891), but they could have been. This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way

through state and federal courts in Louisiana, Texas, and California, and two of those courts—a Texas state probate court and the Bankruptcy Court for the Central District of California—have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding.[1] To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory authority under 28 U. S. C. §157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, §1, of the Constitution commands 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." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. *Ibid.* Those requirements of Article III were not honored here. 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.

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[1] Because both Vickie and Pierce passed away during this litigation, the parties in this case are Vickie's estate and Pierce's estate. We continue to refer to them as "Vickie" and "Pierce."

I

Because we have already recounted the facts and procedural history of this case in detail, see *Marshall* v. *Marshall*, 547 U. S. 293, 300–305 (2006), we do not repeat them in full here. Of current relevance are two claims Vickie filed in an attempt to secure half of J. Howard's fortune. Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death. *Id.,* at 300; see *In re Marshall*, 392 F. 3d 1118, 1122 (CA9 2004). Although J. Howard bestowed on Vickie many monetary and other gifts during their courtship and marriage, he did not include her in his will. 547 U. S., at 300. Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce—J. Howard's younger son—fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. Pierce denied any fraudulent activity and defended the validity of J. Howard's trust and, eventually, his will. 392 F. 3d, at 1122–1123, 1125.

After J. Howard's death, Vickie filed a petition for bankruptcy in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. 547 U. S., at 300–301; *In re Marshall*, 600 F. 3d 1037, 1043–1044 (CA9 2010). The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. *Ibid.*; see 11 U. S. C. §523(a). Pierce subsequently filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from Vickie's bankruptcy estate. See §501(a). Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J.

Howard. As she had in state court, Vickie alleged that Pierce had wrongfully prevented J. Howard from taking the legal steps necessary to provide her with half his property. 547 U. S., at 301.

On November 5, 1999, the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation. On September 27, 2000, after a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages. 600 F. 3d, at 1045; see 253 B. R. 550, 561–562 (Bkrtcy. Ct. CD Cal. 2000); 257 B. R. 35, 39–40 (Bkrtcy. Ct. CD Cal. 2000).

In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U. S. C. §157(b)(2)(C). See 257 B. R., at 39. As explained below, bankruptcy courts may hear and enter final judgments in "core proceedings" in a bankruptcy case. In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. The Bankruptcy Court in this case concluded that Vickie's counterclaim was "a core proceeding" under §157(b)(2)(C), and the court therefore had the "power to enter judgment" on the counterclaim under §157(b)(1). *Id.*, at 40.

The District Court disagreed. It recognized that "Vickie's counterclaim for tortious interference falls within the literal language" of the statute designating certain proceedings as "core," see §157(b)(2)(C), but understood this Court's precedent to "suggest[] that it would be unconstitutional to hold that any and all counterclaims are

core." 264 B. R. 609, 629–630 (CD Cal. 2001) (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 79, n. 31 (1982) (plurality opinion)). The District Court accordingly concluded that a "counterclaim should not be characterized as core" when it "is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise." 264 B. R., at 632.

Because the District Court concluded that Vickie's counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court's judgment as "proposed[,] rather than final," and engage in an "independent review" of the record. *Id.,* at 633; see 28 U. S. C. §157(c)(1). Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court declined to give that judgment preclusive effect and went on to decide the matter itself. 271 B. R. 858, 862–867 (CD Cal. 2001); see 275 B. R. 5, 56–58 (CD Cal. 2002). Like the Bankruptcy Court, the District Court found that Pierce had tortiously interfered with Vickie's expectancy of a gift from J. Howard. The District Court awarded Vickie compensatory and punitive damages, each in the amount of $44,292,767.33. *Id.,* at 58.

The Court of Appeals reversed the District Court on a different ground, 392 F. 3d, at 1137, and we—in the first visit of the case to this Court—reversed the Court of Appeals on that issue. 547 U. S., at 314–315. On remand from this Court, the Court of Appeals held that §157 mandated "a two-step approach" under which a bankruptcy judge may issue a final judgment in a proceeding only if the matter both "meets Congress' definition of a core proceeding *and* arises under or arises in title 11," the Bankruptcy Code. 600 F. 3d, at 1055. The court also

reasoned that allowing a bankruptcy judge to enter final judgments on all counterclaims raised in bankruptcy proceedings "would certainly run afoul" of this Court's decision in *Northern Pipeline*. 600 F. 3d, at 1057. With those concerns in mind, the court concluded that "a counterclaim under §157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the [Bankruptcy] Code only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." *Id.,* at 1058 (internal quotation marks omitted; second brackets added). The court ruled that Vickie's counterclaim did not meet that test. *Id.,* at 1059. That holding made "the Texas probate court's judgment . . . the earliest final judgment entered on matters relevant to this proceeding," and therefore the Court of Appeals concluded that the District Court should have "afford[ed] preclusive effect" to the Texas "court's determination of relevant legal and factual issues." *Id.,* at 1064–1065.[2]

We again granted certiorari. 561 U. S. __ (2010).

II

A

With certain exceptions not relevant here, the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U. S. C. §1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are

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[2] One judge wrote a separate concurring opinion. He concluded that "Vickie's counterclaim . . . [wa]s not a core proceeding, so the Texas probate court judgment preceded the district court judgment and controls." 600 F. 3d, at 1065 (Kleinfeld, J.). The concurring judge also "offer[ed] additional grounds" that he believed required judgment in Pierce's favor. *Ibid.* Pierce presses only one of those additional grounds here; it is discussed below, in Part II–C.

"related to a case under title 11." §157(a). District courts may refer any or all such proceedings to the bankruptcy judges of their district, *ibid.*, which is how the Bankruptcy Court in this case came to preside over Vickie's bankruptcy proceedings. District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." §157(d). Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act), bankruptcy judges for each district have been appointed to 14-year terms by the courts of appeals for the circuits in which their district is located. §152(a)(1).

The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." §157(b)(1). "Core proceedings include, but are not limited to" 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." §157(b)(2)(C).[3] Parties may appeal final judgments of a

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[3] In full, §§157(b)(1)–(2) provides:

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

"(2) Core proceedings include, but are not limited to—

"(A) matters concerning the administration of the estate;

"(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

"(C) counterclaims by the estate against persons filing claims against the estate;

"(D) orders in respect to obtaining credit;

bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. See §158(a); Fed. Rule Bkrtcy. Proc. 8013.

When a bankruptcy judge determines that a referred "proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." §157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects. *Ibid.*

B

Vickie's counterclaim against Pierce for tortious interference is a "core proceeding" under the plain text of §157(b)(2)(C). That provision specifies that core proceedings include "counterclaims by the estate against persons filing claims against the estate." In past cases, we have suggested that a proceeding's "core" status alone authorizes a bankruptcy judge, as a statutory matter, to enter

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"(E) orders to turn over property of the estate;

"(F) proceedings to determine, avoid, or recover preferences;

"(G) motions to terminate, annul, or modify the automatic stay;

"(H) proceedings to determine, avoid, or recover fraudulent conveyances;

"(I) determinations as to the dischargeability of particular debts;

"(J) objections to discharges;

"(K) determinations of the validity, extent, or priority of liens;

"(L) confirmations of plans;

"(M) orders approving the use or lease of property, including the use of cash collateral;

"(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

"(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11."

final judgment in the proceeding. See, *e.g., Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 50 (1989) (explaining that Congress had designated certain actions as "'core proceedings,' which bankruptcy judges may adjudicate and in which they may issue final judgments, if a district court has referred the matter to them" (citations omitted)). We have not directly addressed the question, however, and Pierce argues that a bankruptcy judge may enter final judgment on a core proceeding only if that proceeding also "aris[es] in" a Title 11 case or "aris[es] under" Title 11 itself. Brief for Respondent 51 (internal quotation marks omitted).

Section 157(b)(1) authorizes bankruptcy courts to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." As written, §157(b)(1) is ambiguous. The "arising under" and "arising in" phrases might, as Pierce suggests, be read as referring to a limited category of those core proceedings that are addressed in that section. On the other hand, the phrases might be read as simply describing what core proceedings are: matters arising under Title 11 or in a Title 11 case. In this case the structure and context of §157 contradict Pierce's interpretation of §157(b)(1).

As an initial matter, Pierce's reading of the statute necessarily assumes that there is a category of core proceedings that neither arise under Title 11 nor arise in a Title 11 case. The manner in which the statute delineates the bankruptcy courts' authority, however, makes plain that no such category exists. Section 157(b)(1) authorizes bankruptcy judges to enter final judgments in "core proceedings arising under title 11, or arising in a case under title 11." Section 157(c)(1) instructs bankruptcy judges to instead submit proposed findings in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." Nowhere does §157 specify what

bankruptcy courts are to do with respect to the category of matters that Pierce posits—core proceedings that do *not* arise under Title 11 or in a Title 11 case. To the contrary, §157(b)(3) only instructs a bankruptcy judge to "determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11." Two options. The statute does not suggest that any other distinctions need be made.

Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11. The detailed list of core proceedings in §157(b)(2) provides courts with ready examples of such matters. Pierce's reading of §157, in contrast, supposes that some core proceedings will arise in a Title 11 case or under Title 11 and some will not. Under that reading, the statute provides no guidance on how to tell which are which.

We think it significant that Congress failed to provide any framework for identifying or adjudicating the asserted category of core but not "arising" proceedings, given the otherwise detailed provisions governing bankruptcy court authority. It is hard to believe that Congress would go to the trouble of cataloging 16 different types of proceedings that should receive "core" treatment, but then fail to specify how to determine whether those matters arise under Title 11 or in a bankruptcy case if—as Pierce asserts—the latter inquiry is determinative of the bankruptcy court's authority.

Pierce argues that we should treat core matters that arise neither under Title 11 nor in a Title 11 case as proceedings "related to" a Title 11 case. Brief for Respondent 60 (internal quotation marks omitted). We think that a contradiction in terms. It does not make sense to describe a "core" bankruptcy proceeding as merely "related to" the bankruptcy case; oxymoron is not a typical feature of congressional drafting. See *Northern Pipeline*, 458 U. S.,

at 71 (plurality opinion) (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"); Collier on Bankruptcy ¶3.02[2], p. 3–26, n. 5 (16th ed. 2010) ("The terms 'non-core' and 'related' are synonymous"); see also *id.,* at 3–26, ("The phraseology of section 157 leads to the conclusion that there is no such thing as a core matter that is 'related to' a case under title 11. Core proceedings are, at most, those that arise in title 11 cases or arise under title 11" (footnote omitted)). And, as already discussed, the statute simply does not provide for a proceeding that is simultaneously core and yet only related to the bankruptcy case. See §157(c)(1) (providing only for "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11").

As we explain in Part III, we agree with Pierce that designating all counterclaims as "core" proceedings raises serious constitutional concerns. Pierce is also correct that we will, where possible, construe federal statutes so as "to avoid serious doubt of their constitutionality." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986) (internal quotation marks omitted). But that "canon of construction does not give [us] the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Ibid.* In this case, we do not think the plain text of §157(b)(2)(C) leaves any room for the canon of avoidance. We would have to "rewrit[e]" the statute, not interpret it, to bypass the constitutional issue §157(b)(2)(C) presents. *Id.*, at 841 (internal quotation marks omitted). That we may not do. We agree with Vickie that §157(b)(2)(C) permits the bankruptcy court to enter a final judgment on her tortious interference counterclaim.

C

Pierce argues, as another alternative to reaching the constitutional question, that the Bankruptcy Court lacked jurisdiction to enter final judgment on his defamation claim. Section 157(b)(5) provides that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose." Pierce asserts that his defamation claim is a "personal injury tort," that the Bankruptcy Court therefore had no jurisdiction over that claim, and that the court therefore necessarily lacked jurisdiction over Vickie's counterclaim as well. Brief for Respondent 65–66.

Vickie objects to Pierce's statutory analysis across the board. To begin, Vickie contends that §157(b)(5) does not address subject matter jurisdiction at all, but simply specifies the venue in which "personal injury tort and wrongful death claims" should be tried. See Reply Brief for Petitioner 16–17, 19; see also Tr. of Oral Arg. 23 (Deputy Solicitor General) (Section "157(b)(5) is in [the United States'] view not jurisdictional"). Given the limited scope of that provision, Vickie argues, a party may waive or forfeit any objections under §157(b)(5), in the same way that a party may waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim. Reply Brief for Petitioner 17–20; see §157(c)(2) (authorizing the district court, "with the consent of all the parties to the proceeding," to refer a "related to" matter to the bankruptcy court for final judgment). Vickie asserts that in this case Pierce consented to the Bankruptcy Court's adjudication of his defamation claim, and forfeited any argument to the contrary, by failing to seek withdrawal of the claim until he had litigated it before the Bankruptcy Court for 27 months. *Id.,* at 20–23. On the merits, Vickie contends that the statutory phrase "personal injury tort

and wrongful death claims" does not include non-physical torts such as defamation. *Id.,* at 25–26.

We need not determine what constitutes a "personal injury tort" in this case because we agree with Vickie that §157(b)(5) is not jurisdictional, and that Pierce consented to the Bankruptcy Court's resolution of his defamation claim.[4] Because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system," *Henderson* v. *Shinseki*, 562 U. S. ___, ___–___ (2011) (slip op., at 4–5), we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 516 (2006) ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character").

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[4] Although Pierce suggests that consideration of "the 157(b)(5) issue" would facilitate an "easy" resolution of the case, Tr. of Oral Arg. 47–48, he is mistaken. Had Pierce preserved his argument under that provision, we would have been confronted with several questions on which there is little consensus or precedent. Those issues include: (1) the scope of the phrase "personal injury tort"—a question over which there is at least a three-way divide, see *In re Arnold*, 407 B. R. 849, 851–853 (Bkrtcy. Ct. MDNC 2009); (2) whether, as Vickie argued in the Court of Appeals, the requirement that a personal injury tort claim be "tried" in the district court nonetheless permits the bankruptcy court to resolve the claim short of trial, see Appellee's/Cross-Appellant's Supplemental Brief in No. 02–56002 etc. (CA9), p. 24; see also *In re Dow Corning Corp.*, 215 B. R. 346, 349–351 (Bkrtcy. Ct. ED Mich. 1997) (noting divide over whether, and on what grounds, a bankruptcy court may resolve a claim pretrial); and (3) even if Pierce's defamation claim could be considered only by the District Court, whether the Bankruptcy Court might retain jurisdiction over the counterclaim, cf. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006) ("when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U. S. C. §1367, over pendent state-law claims"). We express no opinion on any of these issues and simply note that the §157(b)(5) question is not as straightforward as Pierce would have it.

Section 157(b)(5) does not have the hallmarks of a jurisdictional decree. To begin, the statutory text does not refer to either district court or bankruptcy court "jurisdiction," instead addressing only where personal injury tort claims "shall be tried."

The statutory context also belies Pierce's jurisdictional claim. Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See §157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case). By the same token, §157(b)(5) simply specifies where a particular category of cases should be tried. Pierce does not explain why that statutory limitation may not be similarly waived.

We agree with Vickie that Pierce not only could but did consent to the Bankruptcy Court's resolution of his defamation claim. Before the Bankruptcy Court, Vickie objected to Pierce's proof of claim for defamation, arguing that Pierce's claim was unenforceable and that Pierce should not receive any amount for it. See 29 Court of Appeals Supplemental Excerpts of Record 6031, 6035 (hereinafter Supplemental Record). Vickie also noted that the Bankruptcy Court could defer ruling on her objection, given the litigation posture of Pierce's claim before the Bankruptcy Court. See *id.,* at 6031. Vickie's filing prompted Pierce to advise the Bankruptcy Court that "[a]ll parties are in agreement that the amount of the contingent Proof of Claim filed by [Pierce] shall be determined by the adversary proceedings" that had been commenced in the Bankruptcy Court. 31 Supplemental Record 6801. Pierce asserted that Vickie's objection should be overruled or, alternatively, that any ruling on the objection "should be continued until the resolution of the pending adversary proceeding litigation." *Ibid.* Pierce identifies no point in the record where he argued to the Bankruptcy Court that

it lacked the authority to adjudicate his proof of claim because the claim sought recompense for a personal injury tort.

Indeed, Pierce apparently did not object to any court that §157(b)(5) prohibited the Bankruptcy Court from resolving his defamation claim until over two years—and several adverse discovery rulings—after he filed that claim in June 1996. The first filing Pierce cites as raising that objection is his September 22, 1998 motion to the District Court to withdraw the reference of the case to the Bankruptcy Court. See Brief for Respondent 26–27. The District Court did initially withdraw the reference as requested, but it then returned the proceeding to the Bankruptcy Court, observing that Pierce "implicated the jurisdiction of that bankruptcy court. He chose to be a party to that litigation." App. 129. Although Pierce had objected in July 1996 to the Bankruptcy Court's exercise of jurisdiction over Vickie's counterclaim, he advised the court at that time that he was "happy to litigate [his] claim" there. 29 Supplemental Record 6101. Counsel stated that even though Pierce thought it was "probably cheaper for th[e] estate if [Pierce's claim] were sent back or joined back with the State Court litigation," Pierce "did choose" the Bankruptcy Court forum and "would be more than pleased to do it [t]here." *Id.,* at 6101–6102; see also App. to Pet. for Cert. 266, n. 17 (District Court referring to these statements).

Given Pierce's course of conduct before the Bankruptcy Court, we conclude that he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary). We have recognized "the value of waiver and forfeiture rules" in "complex" cases, *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 487–488, n. 6 (2008), and this case is no exception. In such cases, as here, the consequences of "a litigant . . . 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor,"

Puckett v. *United States*, 556 U. S. ___, ___ (2009) (slip op., at 5) (some internal quotation marks omitted)—can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly. See *United States* v. *Olano*, 507 U. S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'" (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944))). Instead, Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.

III

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.

A

Article III, §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." The same section provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[] a Compensation[] [that] shall not be diminished" during their tenure.

As its text and our precedent confirm, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline*, 458 U. S., at 58 (plurality opinion). Under "the basic concept of separation of powers . . . that flow[s] from the

scheme of a tripartite government" adopted in the Constitution, "the 'judicial Power of the United States' . . . can no more be shared" with another branch than "the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States* v. *Nixon*, 418 U. S. 683, 704 (1974) (quoting U. S. Const., Art. III, §1).

In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).

We have recognized that the three branches are not hermetically sealed from one another, see *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977), but it remains true that Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, 564 U. S. ___, ___ (2011) (slip op., at 10).

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists 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." The Declaration of Independence ¶11. The Framers undertook in Article III 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 with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896).

Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline*, 458 U. S., at 90 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary. *Id.,* at 86–87, n. 39 (plurality opinion).

B

This is not the first time we have faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline,* we considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. 458 U. S., at 53, 87, n. 40 (plurality opinion); see *id.,* at 89–92 (Rehnquist, J., concurring in judgment). The Court concluded that assignment of such state law claims for resolution by those judges "violates Art. III of the Constitution." *Id.,* at 52, 87 (plurality opinion); *id.,* at 91 (Rehnquist, J., concurring in judgment).

The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. That opinion concluded that this "public rights" exception extended "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those" branches. *Id.,* at 67–68 (internal quotation marks omitted). A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case. *Id.,* at 69–72; see *id.,* at 90–91 (Rehnquist, J., concurring in judgment) ("None of the [previous cases addressing Article III power] has gone so far as to sanction the type of adjudication to which Marathon will be subjected . . . . To whatever extent different powers granted under [the 1978] Act might be sustained under the 'public rights' doctrine of *Murray's Lessee* . . . and succeeding

cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained").[5]

A full majority of Justices in *Northern Pipeline* also rejected the debtor's argument that the bankruptcy court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Id.,* at 71–72, 81–86 (plurality opinion); *id.,* at 91 (Rehnquist, J., concurring in judgment) ("the bankruptcy court is not an 'adjunct' of either the district court or the court of appeals").

After our decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located. 28 U. S. C. §152(a). And, as we have explained, Congress permitted the newly constituted bankruptcy courts to enter final judgments only in "core" proceedings. See *supra,* at 7–8.

With respect to such "core" matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978 (1978 Act), 92 Stat. 2549. As in *Northern Pipeline,* for example, the newly constituted bankruptcy courts are charged under §157(b)(2)(C) with resolving "[a]ll matters of fact and law in whatever domains of the law to which" a counterclaim may lead. 458 U. S., at 91 (Rehnquist, J., concurring in judgment); see, *e.g.,* 275 B. R., at 50–51 (noting that Vickie's counterclaim required the bankruptcy court to determine whether Texas recognized a cause of action for tortious interference with an *inter vivos* gift—something the Supreme Court of Texas had yet to do). As

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[5]The dissent is thus wrong in suggesting that less than a full Court agreed on the points pertinent to this case. *Post,* at 2 (opinion of BREYER, J.).

in *Northern Pipeline*, the new courts in core proceedings "issue final judgments, which are binding and enforceable even in the absence of an appeal." 458 U. S., at 85–86 (plurality opinion). And, as in *Northern Pipeline*, the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges' findings of fact. See §158(a); Fed. Rule Bkrtcy. Proc. 8013 (findings of fact "shall not be set aside unless clearly erroneous").

C

Vickie and the dissent argue that the Bankruptcy Court's entry of final judgment on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. 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, just as the court did in *Northern Pipeline*. No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*. Vickie argues that this case is different because the defendant is a creditor in the bankruptcy. But the debtors' claims in the cases on which she relies were themselves federal claims under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims. Here Vickie's claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy. *Northern Pipeline* and our subsequent decision in *Granfinanciera,* 492 U. S. 33, rejected the application of the "public rights" exception in such cases.

Nor can the bankruptcy courts under the 1984 Act be

dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone.

1

Vickie's counterclaim cannot be deemed a matter of "public right" that can be decided outside the Judicial Branch. As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate. See 458 U. S., at 69–72 (plurality opinion); *id.,* at 90–91 (Rehnquist, J., concurring in judgment). Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions.

We first recognized the category of public rights in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on its behalf. *Id.,* at 274, 275. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III. *Id.,* at 274–275, 282–283.

"To avoid misconstruction upon so grave a subject," the Court laid out the principles guiding its analysis. *Id.,* at 284. It confirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is

the subject of a suit at the common law, or in equity, or admiralty." *Ibid.* The Court also recognized that "[a]t the same time there are matters, involving public rights, which 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." *Ibid.*

As an example of such matters, the Court referred to "[e]quitable claims to land by the inhabitants of ceded territories" and cited cases in which land issues were conclusively resolved by Executive Branch officials. *Ibid.* (citing *Foley* v. *Harrison*, 15 How. 433 (1854); *Burgess* v. *Gray*, 16 How. 48 (1854)). In those cases "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. *Murray's Lessee*, 18 How., at 284. The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the "public rights" category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. *Id.,* at 283–284. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.

Subsequent decisions from this Court contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that were instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S. 22, 50, 51 (1932).[6] See *Atlas Roofing Co.* v. *Occupa-*

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[6] Although the Court in *Crowell* went on to decide that the facts of the

tional Safety and Health Review Comm'n, 430 U. S. 442, 458 (1977) (Exception extends to cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights," while "[w]holly private tort, contract, and property cases, as well as a vast range of other cases . . . are not at all implicated"); *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452 (1929). See also *Northern Pipeline*, *supra,* at 68 (plurality opinion) (citing *Ex parte Bakelite Corp.* for the proposition that the doctrine extended "only to matters that historically could have been determined exclusively by" the Executive and Legislative Branches).

Shortly after *Northern Pipeline*, the Court rejected the

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private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. 285 U. S., at 38, 44–45, 54; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 78 (1982) (plurality opinion). In other words, the agency in *Crowell* functioned as a true "adjunct" of the District Court. That is not the case here. See *infra*, at 34–36.

Although the dissent suggests that we understate the import of *Crowell* in this regard, the dissent itself recognizes—repeatedly—that *Crowell* by its terms addresses the determination of *facts* outside Article III. See *post*, at 4 (*Crowell* "upheld Congress' delegation of primary factfinding authority to the agency"); *post,* at 12 (quoting *Crowell*, 285 U. S., at 51, for the proposition that "'there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges'"). *Crowell* may well have additional significance in the context of expert administrative agencies that oversee particular substantive federal regimes, but we have no occasion to and do not address those issues today. See *infra,* at 29. The United States apparently agrees that any broader significance of *Crowell* is not pertinent in this case, citing to *Crowell* in its brief only once, in the last footnote, again for the limited proposition discussed above. Brief for United States as *Amicus Curiae* 32, n. 5.

limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular federal government action. See *United States* v. *Jicarilla Apache Nation*, 564 U. S. ___, ___–___ (2011) (slip op., at 10–11) ("The distinction between 'public rights' against the Government and 'private rights' between private parties is well established," citing *Murray's Lessee* and *Crowell*).

Our decision in *Thomas* v. *Union Carbide Agricultural Products Co.*, for example, involved a data-sharing arrangement between companies under a federal statute providing that disputes about compensation between the companies would be decided by binding arbitration. 473 U. S. 568, 571–575 (1985). This Court held that the scheme did not violate Article III, explaining that "[a]ny right to compensation . . . results from [the statute] and does not depend on or replace a right to such compensation under state law." *Id.,* at 584.

Commodity Futures Trading Commission v. *Schor* concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures Trading Commission (CFTC). 478 U. S. 833, 836 (1986). A customer filed such a claim to recover a debit balance in his account, while the broker filed a lawsuit in Federal District Court to recover the same amount as lawfully due from the customer. The broker later submitted its claim to the CFTC, but after that agency ruled against the customer, the customer

argued that agency jurisdiction over the broker's counterclaim violated Article III. *Id.,* at 837–838. This Court disagreed, but only after observing that (1) the claim and the counterclaim concerned a "single dispute"—the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a "'particularized area of law'"; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." *Id.,* at 844, 852–855 (quoting *Northern Pipeline*, 458 U. S., at 85); see 478 U. S., at 843–844; 849–857. Most significantly, given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was "necessary" to allow the agency to exercise jurisdiction over the broker's claim, or else "the reparations procedure would have been confounded." *Id.,* at 856.

The most recent case in which we considered application of the public rights exception—and the only case in which we have considered that doctrine in the bankruptcy context since *Northern Pipeline*—is *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989). In *Granfinanciera* we rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the "public rights" exception. We explained that, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.,* at 54–55. We reasoned that fraudulent conveyance suits were "quintessentially suits at com-

mon 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." *Id.,* at 56. As a consequence, we concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.,* at 55.[7]

Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, 18 How., at 284, or one that "historically could have been determined exclusively by" those branches, *Northern Pipeline*, *supra,* at 68 (citing *Ex parte Bakelite Corp.*, 279 U. S., at 458). The claim is instead one under state common law between two private parties. It does not "depend[] on the will of congress," *Murray's Lessee*, *supra,* at 284; Congress has nothing to do with it.

In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, 473 U. S., at 584–585, or *Atlas Roofing*, 430 U. S., at 458. It is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, 478 U. S., at 856. And in contrast to the objecting party in *Schor*, *id.,* at 855–856, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate. See

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[7] We noted that we did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right." 492 U. S., at 56, n. 11. Our conclusion was that, "even if one accepts this thesis," Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court. *Ibid.* Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here.

Granfinanciera, *supra,* at 59, n. 14 (noting that "[p]arallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims").[8]

Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law," as in *Crowell*, *Thomas*, and *Schor*. *Northern Pipeline*, 458 U. S., at 85 (plurality opinion). We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. See *ibid.*; *id.,* at 91 (Rehnquist, J., concurring in judgment). This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell*, 285 U. S., at 46; see *Schor*, *supra,* at 855–856. The "experts" in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as "'establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of

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[8] Contrary to the claims of the dissent, see *post,* at 12–13, Pierce did not have another forum in which to pursue his claim to recover from Vickie's pre-bankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. Creditors who possess claims that do not satisfy the requirements for nondischargeability under 11 U. S. C. §523 have no choice but to file their claims in bankruptcy proceedings if they want to pursue the claims at all. That is why, as we recognized in *Granfinanciera*, the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.

the litigants, and subject only to ordinary appellate review.'" *Post,* at 6 (quoting *Thomas*, *supra*, at 584). Just so: Substitute "tort" for "contract," and that statement directly covers this case.

We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.

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

2

Vickie and the dissent next attempt to distinguish *Northern Pipeline* and *Granfinanciera* on the ground that Pierce, unlike the defendants in those cases, had filed a proof of claim in the bankruptcy proceedings. Given Pierce's participation in those proceedings, Vickie argues, the Bankruptcy Court had the authority to adjudicate her counterclaim under our decisions in *Katchen* v. *Landy*, 382 U. S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U. S. 42 (1990) (*per curiam*).

We do not agree. As an initial matter, it is hard to see why Pierce's decision to file a claim should make any difference with respect to the characterization of Vickie's counterclaim. "'[P]roperty interests are created and defined by state law,' and '[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 451 (2007) (quoting *Butner* v. *United States*, 440 U. S. 48, 55 (1979)). Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court.

Contrary to Vickie's contention, moreover, our decisions in *Katchen* and *Langenkamp* do not suggest a different result. *Katchen* permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as "summary jurisdiction" over a voidable preference claim brought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. See 382 U. S., at 325, 327–328. A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee. See *id.,* at 330; see also 11 U. S. C. §§502(d), 547(b).

Although the creditor in *Katchen* objected that the preference issue should be resolved through a "plenary suit" in an Article III court, this Court concluded that summary adjudication in bankruptcy was appropriate,

because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue. 382 U. S., at 329–330, 332–333, and n. 9, 334. There was no question that the bankruptcy referee could decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. Once the referee did that, "nothing remains for adjudication in a plenary suit"; such a suit "would be a meaningless gesture." *Id.,* at 334. The plenary proceeding the creditor sought could be brought into the bankruptcy court because "the same issue [arose] as part of the process of allowance and disallowance of claims." *Id.,* at 336.

It was in that sense that the Court stated that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." *Id.,* at 333, n. 9. In *Katchen* one of those consequences was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court. See *id.,* at 334. Indeed, the *Katchen* Court expressly noted that it "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." *Id.,* at 333, n. 9.

Our *per curiam* opinion in *Langenkamp* is to the same effect. We explained there that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." 498 U. S., at 44. If, in contrast, the creditor has not filed a

proof of claim, the trustee's preference action does *not* "become[] part of the claims-allowance process" subject to resolution by the bankruptcy court. *Ibid.*; see *id.,* at 45.

In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. *Katchen*, *supra,* at 332, n. 9. There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory, 600 F. 3d, at 1057, or at least in an "attenuated" sense related to Pierce's claim, 264 B. R., at 631. But there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim. See *id.,* at 631, 632 (explaining that "the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements," and "the counterclaim raises issues of law entirely different from those raise[d] on the defamation claim"). The United States acknowledges the point. See Brief for United States as *Amicus Curiae,* p. (I) (question presented concerns authority of a bankruptcy court to enter final judgment on a compulsory counterclaim "when adjudication of the counterclaim requires resolution of issues that are not implicated by the claim against the estate"); *id.,* at 26.

The only overlap between the two claims in this case was the question whether Pierce had in fact tortiously taken control of his father's estate in the manner alleged by Vickie in her counterclaim and described in the allegedly defamatory statements. From the outset, it was clear that, even assuming the Bankruptcy Court would (as it did) rule in Vickie's favor on that question, the court could not enter judgment for Vickie unless the court additionally

ruled on the questions whether Texas recognized tortious interference with an expected gift as a valid cause of action, what the elements of that action were, and whether those elements were met in this case. 275 B. R., at 50–53. Assuming Texas accepted the elements adopted by other jurisdictions, that meant Vickie would need to prove, above and beyond Pierce's tortious interference, (1) the existence of an expectancy of a gift; (2) a reasonable certainty that the expectancy would have been realized but for the interference; and (3) damages. *Id.,* at 51; see 253 B. R., at 558–561. Also, because Vickie sought punitive damages in connection with her counterclaim, the Bankruptcy Court could not finally dispose of the case in Vickie's favor without determining whether to subject Pierce to the sort of "retribution," "punishment[,] and deterrence," *Exxon Shipping Co.*, 554 U. S., at 492, 504 (internal quotation marks omitted), those damages are designed to impose. There thus was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim.

In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U. S. C. §547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U. S., at 43; see, *e.g.,* §547(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor"). In *Katchen*, "[t]he Trustee . . . [asserted] that the payments made [to the creditor] were preferences inhibited by Section 60a of the Bankruptcy Act." Memorandum Opinion (Feb. 8, 1963), Tr. of Record in O. T. 1965, No. 28, p. 3; see 382 U. S., at 334 (considering impact of the claims allowance process on "action by the

trustee under §60 to recover the preference"); 11 U. S. C. §96(b) (1964 ed.) (§60(b) of the then-applicable Bankruptcy Act) ("preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent"). Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

In light of all the foregoing, we disagree with the dissent that there are no "relevant distinction[s]" between Pierce's claim in this case and the claim at issue in *Langenkamp*. *Post*, at 14. We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*. 492 U. S., at 56. *Granfinanciera*'s distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," *ibid.*, reaffirms that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Vickie has failed to demonstrate that her counterclaim falls within one of the "limited circumstances" covered by the public rights exception, particularly given our conclusion that, "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Northern Pipeline,* 458 U. S., at 69, n. 23, 77, n. 29 (plurality opinion).

3

Vickie additionally argues that the Bankruptcy Court's final judgment was constitutional because bankruptcy courts under the 1984 Act are properly deemed "adjuncts" of the district courts. Brief for Petitioner 61–64. We

rejected a similar argument in *Northern Pipeline*, see 458 U. S., at 84–86 (plurality opinion); *id.,* at 91 (Rehnquist, J., concurring in judgment), and our reasoning there holds true today.

To begin, as explained above, it is still the bankruptcy court itself that exercises the essential attributes of judicial power over a matter such as Vickie's counterclaim. See *supra,* at 20. The new bankruptcy courts, like the old, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." *Northern Pipeline*, 458 U. S., at 85 (plurality opinion). Instead, bankruptcy courts under the 1984 Act resolve "[a]ll matters of fact and law in whatever domains of the law to which" the parties' counterclaims might lead. *Id.,* at 91 (Rehnquist, J., concurring in judgment).

In addition, whereas the adjunct agency in *Crowell* v. *Benson* "possessed only a limited power to issue compensation orders . . . [that] could be enforced only by order of the district court," *Northern Pipeline, supra,* at 85, a bankruptcy court resolving a counterclaim under 28 U. S. C. §157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§157(b)(1), 158(a)–(b). It is thus no less the case here than it was in *Northern Pipeline* that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with" the bankruptcy judge, not the district court. 458 U. S., at 81 (plurality opinion) (internal quotation marks omitted). Given that authority, a bankruptcy court can no more be deemed a mere "adjunct" of the district court than a district court can be deemed such an "adjunct" of the court of appeals. We certainly cannot accept the dissent's notion that judges who have the power to enter final, binding orders are the "functional[]" equivalent of "law clerks[] and the Judiciary's administrative

officials." *Post*, at 11. And even were we wrong in this regard, that would only confirm that such judges should not be in the business of entering final judgments in the first place.

It does not affect our analysis that, as Vickie notes, bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President. See Brief for Petitioner 59. If—as we have concluded—the bankruptcy court itself exercises "the essential attributes of judicial power [that] are reserved to Article III courts," *Schor*, 478 U. S., at 851 (internal quotation marks omitted), it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains. See The Federalist No. 78, at 471 ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [a judge's] necessary independence").

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Finally, 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. See, *e.g.,* Brief for Petitioner 34–36, 57–58; Brief for United States as *Amicus Curiae* 29–30. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944 (1983).

In addition, we are not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest. See *post*, at 16–17. The dissent asserts that it is important that counterclaims such as Vickie's be resolved "in a bankruptcy court," and

that, "to be effective, a single tribunal must have broad authority to restructure [debtor-creditor] relations." *Post*, at 14, 15 (emphasis deleted). But the framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts. Section 1334(c)(2), for example, requires that bankruptcy courts abstain from hearing specified non-core, state law claims that "can be timely adjudicated[] in a State forum of appropriate jurisdiction." Section 1334(c)(1) similarly provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, "in the interest of comity with State courts or respect for State law."

As described above, the current bankruptcy system also requires the district court to review *de novo* and enter final judgment on any matters that are "related to" the bankruptcy proceedings, §157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, §157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. Brief for Respondent 61. 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; we agree with the United States that the question presented here is a "narrow" one. Brief for United States as *Amicus Curiae* 23.

If our decision today does not change all that much, then why the fuss? 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.

"Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid* v. *Covert*, 354 U. S. 1, 39 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," we cannot overlook the intrusion: "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). 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.

* * *

Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. 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. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 10–179

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL, PETITIONER *v.* ELAINE T. MARSHALL, EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2011]

JUSTICE SCALIA, concurring.

I agree with the Court's interpretation of our Article III precedents, and I accordingly join its opinion. I adhere to my view, however, that—our contrary precedents notwithstanding—"a matter of public rights . . . must at a minimum arise between the government and others," *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 65 (1989) (SCALIA, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. I count 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," *ante*, at 27; that it was "not 'completely dependent upon' adjudication of a claim created by federal law," *ibid.;* that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings," *ibid.;* that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law,'" *ante*, at 28; that "there was

never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim," *ante*, at 32; that the trustee was not "asserting a right of recovery created by federal bankruptcy law," *ante*, at 33; 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," *ante*, at 35.

Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. For example, Article III gives no indication that state-law claims have preferential entitlement to an Article III judge; nor does it make pertinent the extent to which the area of the law is "particularized." The multifactors relied upon today seem to have entered our jurisprudence almost randomly.

Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell* v. *Benson*, 285 U. S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 71 (1982) (plurality opinion). Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate, see, *e.g.,* Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L. J. 567, 607–609 (1998); the subject has not been briefed, and so I state no position on the matter. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.

SUPREME COURT OF THE UNITED STATES

No. 10–179

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL, PETITIONER *v.* ELAINE T. MARSHALL, EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2011]

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, join dissenting.

Pierce Marshall filed a claim in Federal Bankruptcy Court against the estate of Vickie Marshall. His claim asserted that Vickie Marshall had, through her lawyers, accused him of trying to prevent her from obtaining money that his father had wanted her to have; that her accusations violated state defamation law; and that she consequently owed Pierce Marshall damages. Vickie Marshall filed a compulsory counterclaim in which she asserted that Pierce Marshall had unlawfully interfered with her husband's efforts to grant her an *inter vivos* gift and that he consequently owed her damages.

The Bankruptcy Court adjudicated the claim and the counterclaim. In doing so, the court followed statutory procedures applicable to "core" bankruptcy proceedings. See 28 U. S. C. §157(b). And ultimately the Bankruptcy Court entered judgment in favor of Vickie Marshall. The question before us is whether the Bankruptcy Court possessed jurisdiction to adjudicate Vickie Marshall's counterclaim. I agree with the Court that the bankruptcy statute, §157(b)(2)(C), authorizes a bankruptcy court to adjudicate the counterclaim. But I do not agree with the

majority about the statute's constitutionality. I believe the statute is consistent with the Constitution's delegation of the "judicial Power of the United States" to the Judicial Branch of Government. Art. III, §1. Consequently, it is constitutional.

I

My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents. In my view, the majority overstates the current relevance of statements this Court made in an 1856 case, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), and it overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), and that was subsequently disavowed. At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell* v. *Benson*, 285 U. S. 22 (1932). And it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568 (1985); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986).

I shall describe these cases in some detail in order to explain why I believe we should put less weight than does the majority upon the statement in *Murray's Lessee* and the analysis followed by the *Northern Pipeline* plurality and instead should apply the approach this Court has applied in *Crowell*, *Thomas*, and *Schor*.

A

In *Murray's Lessee*, the Court held that the Constitution permitted an executive official, through summary, nonjudicial proceedings, to attach the assets of a customs collector whose account was deficient. The Court found evidence in common law of "summary method[s] for the recovery of debts due to the crown, and especially those due from receivers of the revenues," 18 How., at 277, and it analogized the Government's summary attachment process to the kind of self-help remedies available to private parties, *id*., at 283. In the course of its opinion, the Court wrote:

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which 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." *Id.*, at 284.

The majority reads the first part of the statement's first sentence as authoritatively defining the boundaries of Article III. *Ante*, at 18. I would read the statement in a less absolute way. For one thing, the statement is in effect dictum. For another, it is the remainder of the statement, announcing a distinction between "public rights" and "private rights," that has had the more lasting impact. Later Courts have seized on that distinction when *upholding* non-Article III adjudication, not when striking it down. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452

(1929) (Court of Customs Appeals); *Williams* v. *United States*, 289 U. S. 553, 579–580 (1933) (Court of Claims). The one exception is *Northern Pipeline,* where the Court struck down the Bankruptcy Act of 1978. But in that case there was no majority. And a plurality, not a majority, read the statement roughly in the way the Court does today. See 458 U. S., at 67–70.

B

At the same time, I believe the majority places insufficient weight on *Crowell*, a seminal case that clarified the scope of the dictum in *Murray's Lessee*. In that case, the Court considered whether Congress could grant to an Article I administrative agency the power to adjudicate an employee's workers' compensation claim against his employer. The Court assumed that an Article III court would review the agency's decision *de novo* in respect to questions of law but it would conduct a less searching review (looking to see only if the agency's award was "supported by evidence in the record") in respect to questions of fact. *Crowell*, 285 U. S., at 48–50. The Court pointed out that the case involved a dispute between private persons (a matter of "private rights") and (with one exception not relevant here) it upheld Congress' delegation of primary factfinding authority to the agency.

Justice Brandeis, dissenting (from a here-irrelvant portion of the Court's holding), wrote that the adjudicatory scheme raised only a due process question: When does due process require decision by an Article III judge? He answered that question by finding constitutional the statute's delegation of adjudicatory authority to an agency. *Id.*, at 87.

Crowell has been hailed as "the greatest of the cases validating administrative adjudication." Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 251 (1990).

Yet, in a footnote, the majority distinguishes *Crowell* as a case in which the Court upheld the delegation of adjudicatory authority to an administrative agency simply because the agency's power to make the "specialized, narrowly confined factual determinations" at issue arising in a "particularized area of law," made the agency a "true 'adjunct' of the District Court." *Ante*, at 23, n. 6. Were *Crowell*'s holding as narrow as the majority suggests, one could question the validity of Congress' delegation of authority to adjudicate disputes among private parties to other agencies such as the National Labor Relations Board, the Commodity Futures Trading Commission, the Surface Transportation Board, and the Department of Housing and Urban Development, thereby resurrecting important legal questions previously thought to have been decided. See 29 U. S. C. §160; 7 U. S. C. §18; 49 U. S. C. §10704; 42 U. S. C. §3612(b).

C

The majority, in my view, overemphasizes the precedential effect of the plurality opinion in *Northern Pipeline*. *Ante*, at 19–21. There, the Court held unconstitutional the jurisdictional provisions of the Bankruptcy Act of 1978 granting adjudicatory authority to bankruptcy judges who lack the protections of tenure and compensation that Article III provides. Four Members of the Court wrote that Congress could grant adjudicatory authority to a non-Article III judge only where (1) the judge sits on a "territorial cour[t]" (2) the judge conducts a "courts-martial," or (3) the case involves a "public right," namely, a "matter" that "at a minimum arise[s] 'between the government and others.'" 458 U. S., at 64–70 (plurality opinion) (quoting *Ex parte Bakelite Corp.*, *supra*, at 451). Two other Members of the Court, without accepting these limitations, agreed with the result because the case involved a breach-of-contract claim brought by the bankruptcy trustee on

behalf of the bankruptcy estate against a third party who was not part of the bankruptcy proceeding, and none of the Court's preceding cases (which, the two Members wrote, "do not admit of easy synthesis") had "gone so far as to sanction th[is] type of adjudication." 458 U. S., at 90–91 (Rehnquist, J. concurring in judgment).

Three years later, the Court held that *Northern Pipeline*

> "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas*, 473 U. S., at 584.

D

Rather than leaning so heavily on the approach taken by the plurality in *Northern Pipeline*, I would look to this Court's more recent Article III cases *Thomas* and *Schor*—cases that commanded a clear majority. In both cases the Court took a more pragmatic approach to the constitutional question. It sought to determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.

1

In *Thomas*, the Court focused directly upon the nature of the Article III problem, illustrating how the Court should determine whether a delegation of adjudicatory authority to a non-Article III judge violates the Constitution. The statute in question required pesticide manufacturers to submit to binding arbitration claims for compensation owed for the use by one manufacturer of the data of

another to support its federal pesticide registration. After describing *Northern Pipeline*'s holding in the language I have set forth above, *supra*, at 6, the Court stated that "*practical attention to substance* rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas*, 473 U. S., at 587 (emphasis added). It indicated that Article III's requirements could not be "determined" by "the identity of the parties alone," *ibid.*, or by the "private rights"/"public rights" distinction, *id.*, at 585–586. And it upheld the arbitration provision of the statute.

The Court pointed out that the right in question was created by a federal statute, it "represent[s] a pragmatic solution to the difficult problem of spreading [certain] costs," and the statute "does not preclude review of the arbitration proceeding by an Article III court." *Id.*, at 589–592. The Court concluded:

> "Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme." *Id.*, at 590.

2

Most recently, in *Schor*, the Court described in greater detail how this Court should analyze this kind of Article III question. The question at issue in *Schor* involved a delegation of authority to an agency to adjudicate a counterclaim. A customer brought before the Commodity Futures Trading Commission (CFTC) a claim for reparations against his commodity futures broker. The customer noted that his brokerage account showed that he owed the broker money, but he said that the broker's unlawful actions had produced that debit balance, and he sought damages. The broker brought a counterclaim seeking the money that the account showed the customer owed. This Court had to decide whether agency adjudication of such a

counterclaim is consistent with Article III.

In doing so, the Court expressly "declined to adopt formalistic and unbending rules." *Schor*, 478 U. S., at 851. Rather, it "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Ibid.* Those relevant factors include (1) "the origins and importance of the right to be adjudicated"; (2) "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts; (4) the presence or "absence of consent to an initial adjudication before a non-Article III tribunal"; and (5) "the concerns that drove Congress to depart from" adjudication in an Article III court. *Id.*, at 849, 851.

The Court added that where "private rights," rather than "public rights" are involved, the "danger of encroaching on the judicial powers" is greater. *Id.*, at 853–854 (internal quotation marks omitted). Thus, while non-Article III adjudication of "private rights" is not necessarily unconstitutional, the Court's constitutional "examination" of such a scheme must be more "searching." *Ibid.*

Applying this analysis, the Court upheld the agency's authority to adjudicate the counterclaim. The Court conceded that the adjudication might be of a kind traditionally decided by a court and that the rights at issue were "private," not "public." *Id.*, at 853. But, the Court said, the CFTC deals only with a "'particularized area of law'"; the decision to invoke the CFTC forum is "left entirely to the parties"; Article III courts can review the agency's findings of fact under "the same 'weight of the evidence' standard sustained in *Crowell*" and review its "legal determinations . . . *de novo*"; and the agency's "counterclaim jurisdiction" was necessary to make "workable" a

"reparations procedure," which constitutes an important part of a congressionally enacted "regulatory scheme." *Id.*, at 852–856. The Court concluded that for these and other reasons "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Id.*, at 856.

II

A

This case law, as applied in *Thomas* and *Schor*, requires us to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. That is to say, we must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government. Those factors include (1) the nature of the claim to be adjudicated; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties' consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections. The presence of "private rights" does not automatically determine the outcome of the question but requires a more "searching" examination of the relevant factors. *Schor*, *supra*, at 854.

Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. *Thomas*, *supra*, at 587 ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); *Schor*, *supra*, at 851 ("[T]he Court has declined to adopt formalistic and unbending rules" for deciding Article III cases).

B

Applying *Schor*'s approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.

First, I concede that *the nature of the claim to be adjudicated* argues against my conclusion. Vickie Marshall's counterclaim—a kind of tort suit—resembles "a suit at the common law." *Murray's Lessee*, 18 How., at 284. Although not determinative of the question, see *Schor*, 478 U. S., at 853, a delegation of authority to a non-Article III judge to adjudicate a claim of that kind poses a heightened risk of encroachment on the Federal Judiciary, *id.*, at 854.

At the same time the significance of this factor is mitigated here by the fact that bankruptcy courts often decide claims that similarly resemble various common-law actions. Suppose, for example, that ownership of 40 acres of land in the bankruptcy debtor's possession is disputed by a creditor. If that creditor brings a claim in the bankruptcy court, resolution of that dispute requires the bankruptcy court to apply the same state property law that would govern in a state court proceeding. This kind of dispute arises with regularity in bankruptcy proceedings.

Of course, in this instance the state-law question is embedded in a debtor's counterclaim, not a creditor's claim. But the counterclaim is "compulsory." It "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rule Civ. Proc. 13(a); Fed. Rule Bkrtcy. Proc. 7013. Thus, resolution of the counterclaim will often turn on facts identical to, or at least related to, those at issue in a creditor's claim that is undisputedly proper for the bankruptcy court to decide.

Second, *the nature of the non-Article III tribunal* argues in favor of constitutionality. That is because the tribunal

is made up of judges who enjoy considerable protection from improper political influence. Unlike the 1978 Act which provided for the appointment of bankruptcy judges by the President with the advice and consent of the Senate, 28 U. S. C. §152 (1976 ed., Supp. IV), current law provides that the federal courts of appeals appoint federal bankruptcy judges, §152(a)(1) (2006 ed.). Bankruptcy judges are removable by the circuit judicial counsel (made up of federal court of appeals and district court judges) and only for cause. §152(e). Their salaries are pegged to those of federal district court judges, §153(a), and the cost of their courthouses and other work-related expenses are paid by the Judiciary, §156. Thus, although Congress technically exercised its Article I power when it created bankruptcy courts, functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary's administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.

Third, *the control exercised by Article III judges over bankruptcy proceedings* argues in favor of constitutionality. Article III judges control and supervise the bankruptcy court's determinations—at least to the same degree that Article III judges supervised the agency's determinations in *Crowell*, if not more so. Any party may appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law *de novo*. Fed. Rule Bkrtcy. Proc. 8013; 10 Collier on Bankruptcy ¶8013.04 (16th ed. 2011). But for the here-irrelevant matter of what *Crowell* considered to be special "constitutional" facts, the standard of review for factual findings here ("clearly erroneous") is more stringent than the standard at issue in *Crowell* (whether the agency's factfinding was "supported by evidence in the record"). 285 U. S., at 48; see *Dickinson* v. *Zurko*, 527 U. S. 150,

152, 153 (1999) ("unsupported by substantial evidence" more deferential than "clearly erroneous" (internal quotation marks omitted)). And, as *Crowell* noted, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." 285 U. S., at 51.

Moreover, in one important respect Article III judges maintain greater control over the bankruptcy court proceedings at issue here than they did over the relevant proceedings in any of the previous cases in which this Court has upheld a delegation of adjudicatory power. The District Court here may "withdraw, in whole or in part, any case or proceeding referred [to the Bankruptcy Court] . . . on its own motion or on timely motion of any party, for cause shown." 28 U. S. C. §157(d); cf. *Northern Pipeline*, 458 U. S., at 80, n. 31 (plurality opinion) (contrasting pre-1978 law where "power to withdraw the case from the [bankruptcy] referee" gave district courts "control" over case with the unconstitutional 1978 statute, which provided no such district court authority).

Fourth, the fact that *the parties have consented* to Bankruptcy Court jurisdiction argues in favor of constitutionality, and strongly so. Pierce Marshall, the counterclaim defendant, is not a stranger to the litigation, forced to appear in Bankruptcy Court against his will. Cf. *id.*, at 91 (Rehnquist, J., concurring in judgment) (suit was litigated in Bankruptcy Court "over [the defendant's] objection"). Rather, he appeared voluntarily in Bankruptcy Court as one of Vickie Marshall's creditors, seeking a favorable resolution of his claim against Vickie Marshall to the detriment of her other creditors. He need not have filed a claim, perhaps not even at the cost of bringing it in the future, for he says his claim is "nondischargeable," in which case he could have litigated it in a state or federal court after distribution. See 11 U. S. C. §523(a)(6). Thus,

Pierce Marshall likely had "an alternative forum to the bankruptcy court in which to pursue [his] clai[m]." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 59, n. 14 (1989).

The Court has held, in a highly analogous context, that this type of consent argues strongly in favor of using ordinary bankruptcy court proceedings. In *Granfinanciera,* the Court held that when a bankruptcy trustee seeks to void a transfer of assets from the debtor to an individual on the ground that the transfer to that individual constitutes an unlawful "preference," the question of whether the individual has a right to a jury trial "depends upon whether the creditor has submitted a claim against the estate." *Id.*, at 58. The following year, in *Langenkamp* v. *Culp*, 498 U. S. 42 (1990) *(per curiam)*, the Court emphasized that when the individual files a claim against the estate, that individual has

> "trigger[ed] the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Id.*, at 44 (quoting *Granfinanciera*, 492 U. S., at 58; citations omitted).

As we have recognized, the jury trial question and the Article III question are highly analogous. See *id.,* at 52–53. And to that extent, *Granfinanciera*'s and *Langenkamp*'s basic reasoning and conclusion apply here: Even when private rights are at issue, non-Article III adjudication may be appropriate when both parties consent. Cf. *Northern Pipeline*, *supra*, at 80, n. 31 (plurality opinion)

(noting the importance of consent to bankruptcy jurisdiction). See also *Schor*, 478 U. S., at 849 ("[A]bsence of consent to an initial adjudication before a non-Article III tribunal was relied on [in *Northern Pipeline*] as a significant factor in determining that Article III forbade such adjudication"). The majority argues that Pierce Marshall "did not truly consent" to bankruptcy jurisdiction, *ante*, at 27–28, but filing a proof of claim was sufficient in *Langenkamp* and *Granfinanciera*, and there is no relevant distinction between the claims filed in those cases and the claim filed here.

Fifth, *the nature and importance of the legislative purpose served* by the grant of adjudicatory authority to bankruptcy tribunals argues strongly in favor of constitutionality. Congress' delegation of adjudicatory powers over counterclaims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end. Article I, §8, of the Constitution explicitly grants Congress the "Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." James Madison wrote in the Federalist Papers that the

> "power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 271 (C. Rossiter ed. 1961).

Congress established the first Bankruptcy Act in 1800. 2 Stat. 19. From the beginning, the "core" of federal bankruptcy proceedings has been "the restructuring of debtor-creditor relations." *Northern Pipeline*, *supra*, at 71 (plurality opinion). And, to be effective, a single tribunal must have broad authority to restructure those relations, "hav-

ing jurisdiction of the parties to controversies brought before them," "decid[ing] all matters in dispute," and "decree[ing] complete relief." *Katchen* v. *Landy*, 382 U. S. 323, 335 (1966) (internal quotation marks omitted).

The restructuring process requires a creditor to file a proof of claim in the bankruptcy court. 11 U. S. C. §501; Fed. Rule Bkrtcy. Proc. 3002(a). In doing so, the creditor "triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp*, *supra*, at 44 (quoting *Granfinanciera*, *supra*, at 58). By filing a proof of claim, the creditor agrees to the bankruptcy court's resolution of that claim, and if the creditor wins, the creditor will receive a share of the distribution of the bankruptcy estate. When the bankruptcy estate has a related claim against that creditor, that counterclaim may offset the creditor's claim, or even yield additional damages that augment the estate and may be distributed to the other creditors.

The consequent importance to the total bankruptcy scheme of permitting the trustee in bankruptcy to assert counterclaims against claimants, *and resolving those counterclaims in a bankruptcy court*, is reflected in the fact that Congress included "counterclaims by the estate against persons filing claims against the estate" on its list of "[c]ore proceedings." 28 U. S. C. §157(b)(2)(C). And it explains the difference, reflected in this Court's opinions, between a claimant's and a nonclaimant's constitutional right to a jury trial. Compare *Granfinanciera*, *supra,* at 58–59 ("Because petitioners . . . have not filed claims against the estate" they retain "their Seventh Amendment right to a trial by jury"), with *Langenkamp*, *supra,* at 45 ("Respondents filed claims against the bankruptcy estate" and "[c]onsequently, they were not entitled to a jury trial").

Consequently a bankruptcy court's determination of

such matters has more than "some bearing on a bankruptcy case." *Ante*, at 34 (emphasis deleted). It plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system. At the least, that is what Congress concluded. We owe deference to that determination, which shows the absence of any legislative or executive motive, intent, purpose, or desire to encroach upon areas that Article III reserves to judges to whom it grants tenure and compensation protections.

Considering these factors together, I conclude that, as in *Schor*, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." 478 U. S., at 856. I would similarly find the statute before us constitutional.

III

The majority predicts that as a "practical matter" today's decision "does not change all that much." *Ante*, at 36–37. But I doubt that is so. Consider a typical case: A tenant files for bankruptcy. The landlord files a claim for unpaid rent. The tenant asserts a counterclaim for damages suffered by the landlord's (1) failing to fulfill his obligations as lessor, and (2) improperly recovering possession of the premises by misrepresenting the facts in housing court. (These are close to the facts presented in *In re Beugen*, 81 B. R. 994 (Bkrtcy. Ct. ND Cal. 1988).) This state-law counterclaim does not "ste[m] from the bankruptcy itself," *ante*, at 34, it would not "necessarily be resolved in the claims allowance process," *ibid.*, and it would require the debtor to prove damages suffered by the lessor's failures, the extent to which the landlord's representations to the housing court were untrue, and damages suffered by improper recovery of possession of the premises, cf. *ante*, at 33-33. Thus, under the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim.

Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. See, *e.g.*, *In re CBI Holding Co.,* 529 F. 3d 432 (CA2 2008) (state-law claims and counterclaims); *In re Winstar Communications, Inc.*, 348 B. R. 234 (Bkrtcy. Ct. Del. 2005) (same); *In re Ascher*, 128 B. R. 639 (Bkrtcy. Ct. ND Ill. 1991) (same); *In re Sun West Distributors, Inc.*, 69 B. R. 861 (Bkrtcy. Ct. SD Cal. 1987) (same). Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. Administrative Office of the United States Courts, J. Duff, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010). Because unlike the "related" non-core state law claims that bankruptcy courts must abstain from hearing, *see ante*, at 36, compulsory counterclaims involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts. Because under these circumstances, a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.

For these reasons, with respect, I dissent.

EXHIBIT B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 5, 2011 Decided June 24, 2011

No. 10-5245

AMERICAN NATIONAL INSURANCE COMPANY AND AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,
APPELLANTS
FARM FAMILY LIFE INSURANCE COMPANY AND FARM FAMILY CASUALTY INSURANCE COMPANY,
APPELLANTS
NATIONAL WESTERN LIFE INSURANCE COMPANY,
APPELLANT

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR WASHINGTON MUTUAL BANK, HENDERSON, NEVADA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-01743)

Gregory Stuart Smith argued the cause for appellants. With him on the briefs were *Andrew J. Mytelka* and *James M. Roquemore*.

Joseph Brooks, Counsel, Federal Deposit Insurance Corporation, argued the cause for appellee Federal Deposit Insurance Corporation, As Receiver For Washington Mutual Bank. With him on the brief were *Colleen J. Boles*, Assistant General Counsel, *Lawrence H. Richmond*, Senior Counsel, and *John J. Clarke Jr.* *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Robert A. Sacks argued the cause for appellees JPMorgan Chase & Co., et al. On the brief were *Bruce E. Clark* and *Stacey R. Friedman.*

Before: SENTELLE, *Chief Judge*, TATEL, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: Bondholders of the failed Washington Mutual Bank allege that JPMorgan Chase, through a series of improper acts, pressured the federal government to seize Washington Mutual Bank and then sell to it the bank's most valuable assets, without any accompanying liabilities, for a drastically undervalued price. The bondholders asserted three Texas state law claims in Texas state court, but, after the Federal Deposit Insurance Corporation intervened in the lawsuit, the case was removed to federal district court. Finding that 12 U.S.C. § 1821(d)(13)(D)(ii) jurisdictionally barred appellants from obtaining judicial review of their claims because they had not exhausted their administrative remedies under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the district court dismissed appellants' complaint. Because we hold that appellants' suit falls outside the scope of the jurisdictional bar of § 1821(d)(13)(D), we reverse the decision of the district court and remand for further proceedings.

I.

On review of a district court's dismissal of a complaint for lack of subject matter jurisdiction, we make legal determinations *de novo*. *Nat'l Air Traffic Controllers Ass'n, AFL-CIO v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 786 (D.C. Cir. 2010); *see* FED. R. CIV. P. 12(b)(1). We assume the truth of all material factual allegations in the complaint and "construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged," *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)); *see also Talenti v. Clinton*, 102 F.3d 573, 574–75 (D.C. Cir. 1996), and upon such facts determine jurisdictional questions. Applying that standard to the complaint before us, we assume the following facts:

Prior to September 2008, Washington Mutual Bank ("WMB"), a wholly owned subsidiary of Washington Mutual, Inc. ("WMI"), was the nation's largest savings and loan association. Compl. ¶ 33. However, on September 25, 2008, the Office of Thrift Supervision ("OTS") seized WMB and placed it in receivership with the Federal Deposit Insurance Corporation ("FDIC"). *Id.* ¶ 64. On the same day, the FDIC signed a purchase and assumption agreement with JPMorgan Chase & Co. and its wholly owned subsidiary JPMorgan Chase Bank (collectively, "JPMC"), in which it agreed to sell to JPMC for $1.9 billion "the most valuable assets of [WMB] without any of [its] liabilities," including its obligations to unsecured debt holders and litigation risk. *Id.* ¶ 67. WMB's bond contracts remained with the FDIC-as-receiver, which now cannot meet its obligations under the contracts. *Id.* ¶ 71. Left without its "primary income-producing asset," WMI, which filed for bankruptcy immediately following the sale of WMB's assets to JPMC, became similarly unable to service its bond contracts, and its common stock was rendered worthless. *Id.* ¶ 70.

Again assuming the truth of the allegations in the complaint, the dramatic fall of WMB and WMI (collectively, "Washington Mutual") was engineered by JPMC. JPMC engaged in an elaborate scheme designed to "improperly and illegally take advantage of the financial difficulties of [WMI]" and "strip away valuable assets of Washington Mutual without properly compensating the company or its stakeholders." *Id.* ¶¶ 20, 30. To carry out this scheme, JPMC first "strategically plac[ed] key personnel [at Washington Mutual] to gather information regarding Washington Mutual's strategic business decisions and financial health," *id.* ¶ 25, and "misus[ed] access to government regulators to gain non-public information" about Washington Mutual, *id.* ¶ 32. Further, when Washington Mutual sought to sell itself, JPMC "misrepresented to Washington Mutual that it would negotiate in good faith for the purchase of the company" and engaged in sham negotiations with Washington Mutual to gain access to Washington Mutual's confidential financial information. *Id.* ¶¶ 53–54. Then, despite signing a confidentiality agreement with Washington Mutual, JPMC leaked harmful information to news media, government regulators, and investors, in an effort to "distort the market and regulatory perception of Washington Mutual's financial health," *id.* ¶¶ 46, 54, 58.

JPMC also applied direct pressure on the FDIC to effectuate its scheme: It "exerted improper influence over government regulators to prematurely seize Washington Mutual . . . and to sell assets of Washington Mutual without an adequate or fair bidding process," *id.* ¶ 32. Indeed, prior to the seizure of WMB, JPMC had already negotiated an agreement with the FDIC that, anticipating the seizure of WMB, set forth the requirements for a bid to purchase assets of WMB-in-receivership and provided for the transfer of WMB's valuable assets by the FDIC-as-receiver to JPMC, at a large profit to JPMC. *Id.* ¶¶ 47, 58, 62.

JPMC used its inside knowledge of Washington Mutual to create a bid for WMB that would be profitable to JPMC. *Id.* ¶ 58. When, just prior to the seizure of WMB, the FDIC sought official bids for WMB, JPMC submitted its prearranged bid, *id.* ¶¶ 58, 62–63, and the FDIC accepted it, *id.* ¶ 64. In quick succession, OTS then seized WMB and JPMC signed a purchase and sale agreement with the FDIC for the below-market sale of WMB's "cherry-picked" assets, stripped of liabilities. *Id.* ¶¶ 43, 64, 67.

On February 16, 2009, several insurance companies that hold bonds of WMB and bonds and stocks of WMI filed suit against JPMC in the District Court of Texas, Galveston County, alleging that JPMC's execution of its scheme had injured the value of their stocks and bonds. The insurance companies asserted three Texas state law claims: tortious interference with existing contract, *id.* ¶¶ 88–93, breach of confidentiality agreement, *id.* ¶¶ 94–99, and unjust enrichment, *id.* ¶¶ 100–03.

After JPMC filed its answer, the FDIC intervened in the lawsuit and thereby became a party to the action. *See* TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party."). The FDIC then removed the action to the U.S. District Court for the Southern District of Texas, *see* 12 U.S.C. § 1819(b)(2)(A) ("[A]ll suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), and successfully moved for a transfer of venue to the U.S. District Court for the District of Columbia.

Before the District Court for the District of Columbia, the FDIC and JPMC both filed motions to dismiss, and plaintiffs filed a motion to remand to Texas state court. Prior to disposition of these motions, plaintiffs voluntarily dismissed with prejudice all claims premised upon harm to their WMI bonds or stock. As a result, four original plaintiffs lost their stake in the suit, and all remaining claims alleged damage solely to WMB bonds.

On April 13, 2010, the district court issued a Memorandum Opinion and Order granting the FDIC and JPMC's motions to dismiss and denying plaintiffs' motion to remand, holding that it lacked jurisdiction over plaintiffs' suit. *Am. Nat'l. Ins. Co. v. JPMorgan Chase & Co.*, 705 F. Supp. 2d 17 (D.D.C. 2010). Plaintiffs timely moved to alter or amend the judgment and requested leave to file an amended complaint. The district court denied their motion on July 19, 2010. Plaintiffs appeal the district court's April 13, 2010, and July 19, 2010, orders.

II.

The district court held that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA" or "the Act") barred it from exercising jurisdiction to hear appellants' claims. It held that because appellants' injuries depended on the FDIC's sale of Washington Mutual's assets to JPMC, § 1821(d)(13)(D)(ii) of FIRREA required it to dismiss appellants' complaint. *Id.* at 21.

Passed to "enable the FDIC . . . to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country," *Freeman v. FDIC*, 56 F.3d 1394, 1398 (D.C. Cir. 1995), FIRREA creates an administrative claims process for banks in receivership with the FDIC. 12 U.S.C. § 1821(d)(3)–(13). The Act requires the FDIC to give notice to

the failed bank's creditors to file claims against the bank, § 1821(d)(3)(b), and authorizes the FDIC to receive and then disallow or allow and pay such claims, § 1821(d)(5), (10).

FIRREA allows claimants either to obtain administrative review, followed by judicial review, of "any [disallowed] claim against a depository institution for which the [FDIC] is receiver," or to file suit for *de novo* consideration of the disallowed claim in a district court. § 1821(d)(6)–(7). It also prevents a court from exercising jurisdiction, "[e]xcept as otherwise provided" in the Act, over:

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

§ 1821(d)(13)(D).

Noting that § 1821(d)(6) is "[t]he only clause of the subsection that 'otherwise provide[s]' jurisdiction," *Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1200 (D.C. Cir. 1998), we have described § 1821(d)(6) and § 1821(d)(13)(D) as setting forth a "standard exhaustion requirement," *id*. Section 1821(d)(6)(A) "routes claims through an administrative review process, and [§ 1821](d)(13)(D) withholds judicial review unless and until claims are so routed." *Id.*; *see also Freeman*, 56 F.3d at 1400 ("Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies.").

The question we must answer, the same as that addressed by the district court, is whether § 1821(d)(13)(D) applies to and bars the suit brought by appellants. The FDIC and JPMC argue that subsection (ii) of § 1821(d)(13)(D) bars appellants' claims, in the absence of administrative exhaustion under § 1821(d)(6), because they "relat[e] to" an act of the FDIC-as-receiver: the FDIC's sale of Washington Mutual's assets to JPMC. Alternatively, they contend that subsection (i) of the same provision withholds jurisdiction without administrative exhaustion because appellants' claims are "for payment from, or . . . seek[] a determination of rights with respect to, the assets" of Washington Mutual.

We disagree. First, subsection (ii) of § 1821(d)(13)(D) bars only *claims* that relate to an act or omission of the failed bank of the FDIC-as-receiver, and appellants' suit is simply not a "claim" under FIRREA. In FIRREA, the word "claim" is a term-of-art that refers only to claims that are resolvable through the FIRREA administrative process, and the only claims that are resolvable through the administrative process are claims against a depository institution for which the FDIC is receiver. Because appellants' suit is against a third-party bank for its own wrongdoing, not against the depository institution for which the FDIC is receiver (i.e., Washington Mutual), their suit is not a claim within the meaning of the Act and thus is not barred by subsection (ii).

Second, although subsection (i) of § 1821(d)(13)(D) reaches more broadly than (ii), encompassing not just "claims" but also "action[s] for payment from, or . . . seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver," its plain language excludes the suit brought by appellants. Appellants' suit seeks relief from JPMC for its own conduct; the mere fact that JPMC now owns assets that Washington Mutual once

owned does not render this suit one against or seeking a determination of rights with respect to those assets. *See Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 394 (3d Cir. 1991) (holding that claims for damages against assuming bank for its own acts did not fall within jurisdictional bar of subsection (i) because "they seek neither payment from nor a determination of rights with respect to the assets of [the bank-in-receivership]" but from the assuming bank).

An examination of FIRREA as a whole demonstrates that "claim" is a term-of-art that encompasses only demands that are resolvable through the administrative process set out by FIRREA. The Act creates a comprehensive administrative mechanism simply for the processing and resolution of "claims." Indeed, it builds the components of the administrative mechanism by defining how "claims" are to be treated at each stage of the administrative process. For example, after establishing the "[a]uthority of [the FDIC-as-receiver] to determine claims," § 1821(d)(3), and the FDIC's "[r]ulemaking authority relating to determination of claims," § 1821(d)(4), FIRREA sets forth the "[p]rocedures for determination of claims," § 1821(d)(5), the requirements for "agency review or judicial determination of claims," § 1821(d)(6), the content of administrative "[r]eview of claims," § 1821(d)(7), the availability of "[e]xpedited determination of claims," § 1821(d)(8), the exclusion of certain "[a]greement[s] as [forming the] basis of claim[s]," § 1821(d)(9), and the authority of the FDIC to make "[p]ayment of claims," § 1821(d)(10). It borders on tautology, therefore, that "claims" are necessarily demands that come within the scope of FIRREA's administrative process. Stated another way, demands unresolvable through the process are not "claims," as the term is used in the Act. *See Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1274 (10th Cir. 1994) ("As a practical matter of statutory construction, . . . we proceed on the

assumption that Congress intended the 'claims' barred by § 1821(d)(13)(D) to parallel those contemplated under FIRREA's administrative claims process laid out in the greater part of § 1821(d)."); *Rosa*, 938 F.2d at 394 ("Whatever its breadth, we do not believe that clause (ii) [of § 1821(d)(13)(D)] encompasses claims that are not susceptible of resolution through the claims procedure.").

Several factors convince us that only claims against depository institutions for which the FDIC has been appointed receiver can be processed by the administrative system set forth in FIRREA. First, § 1821(d)(5)(A)(i), entitled "Procedures for determination of claims: Determination period: In general," provides that "[b]efore the end of the 180-day period beginning on the date any claim *against a depository institution* is filed with the [FDIC] as receiver, the [FDIC] shall determine whether to allow or disallow *the claim*" (emphasis added). FIRREA does not contain any other deadline for FDIC action for other types of claims. No other kinds of claims are ever specified in the provisions setting forth the administrative claims process. Rather, § 1821(d)(6), which establishes the availability of "agency review or judicial determination of claims," similarly governs only "claim[s] against a depository institution for which the [FDIC] is receiver," and subsequent claims process provisions refer simply to "claims." Furthermore, FIRREA authorizes the FDIC to allow and pay claims, *see* § 1821(d)(3)(A), (5)(B), (10)(A)–(B), and requires the FDIC to distribute "amounts realized from the liquidation or other resolution of any insured depository institution" in payment of claims, *see* § 1821(d)(11)(A). That such relief would be categorically inappropriate in cases not against a depository institution for which the FDIC is receiver strengthens our conviction that FIRREA's administrative claims process is available only to claims against depository institutions.

The FDIC and JPMC argue that the jurisdictional bar of § 1821(d)(13)(D) demonstrates that claims other than those against a depository institution can go through the administrative claims process. They claim that the broad language used in that subsection demonstrates that the claims process was intended to be more widely available. To be sure, we have construed § 1821(d)(6)'s "claim against a depository institution" language broadly in light of §§ 1821(d)(13)(D)(i) and (ii). *See Freeman v. FDIC*, 56 F.3d 1394, 1400–01 (D.C. Cir. 1995); *OPEIU, Local 2 v. FDIC*, 962 F.2d 63, 67 (D.C. Cir. 1992). Indeed, to have done otherwise would mean either ignoring Congress's use of such broad language in § 1821(d)(13)(D) or transforming FIRREA from an administrative exhaustion scheme into a grant of immunity, "a result troubling from a constitutional perspective and certainly not the goal of FIRREA," *Auction Co. v. FDIC*, 141 F.3d 1198, 1200 (D.C. Cir. 1998); *see also id.* ("Congress did not intend FIRREA's claims process to immunize the receiver, but rather wanted to require exhaustion of the receivership claims before going to court." (quoting *Hudson United Bank v. Chase Manhattan Bank of Conn.*, 43 F.3d 843, 848–49 (3d Cir. 1994))). We, however, have only construed the claims process broadly where either the failed depository institution or the FDIC-as-receiver might be held legally responsible to pay or otherwise resolve the asserted claim. Where, as here, neither the failed depository institution nor the FDIC-as-receiver bears any legal responsibility for claimant's injuries, the claims process offers only a pointless bureaucratic exercise. *See supra* 10–11. And we doubt Congress intended to force claimants into a process incapable of resolving their claims.

The FDIC and JPMC also assert that the principle motivating the Sixth Circuit's decision in *Village of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373 (6th Cir. 2008), bars this lawsuit. In *Village of Oakwood*, depositors of a failed bank sued

another bank (the "assuming bank") that had purchased various assets and liabilities of the failed bank from the FDIC-as-receiver. 539 F.3d at 376. Although plaintiffs in that case named only the assuming bank as a defendant in the action, their complaint alleged that the FDIC, not the assuming bank, had breached its fiduciary duty. *Id.* One of the four claims asserted against the third-party bank was aiding and abetting the FDIC's breach of its fiduciary duty. *Id.* Holding that plaintiffs' claims fell within the jurisdictional bar of FIRREA, the court of appeals explained that "permit[ting] claimants to avoid [the] provisions of [§ 1821](d)(6) and [§ 1821](d)(13) by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid." *Id.* at 386 (quoting *Brady Dev. Co. v. Resolution Trust Corp.*, 14 F.3d 998, 1002–03 (4th Cir. 1994)) (alterations in original). In other words, the court of appeals rightly noted that plaintiffs cannot circumvent FIRREA's jurisdictional bar by drafting their complaint strategically. Where a claim is *functionally*, albeit not *formally*, against a depository institution for which the FDIC is receiver, it is a "claim" within the meaning of FIRREA's administrative claims process. Thus because the *Village of Oakwood* plaintiffs' suit was functionally a claim against the FDIC-as-receiver, which is a claim against the depository institution for which the FDIC is receiver, *see O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) ("[T]he FDIC as receiver steps into the shoes of the failed [bank]") (internal quotations marks omitted); § 1821(d)(2)(A) ("[T]he [FDIC] shall, . . . by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution."), the court of appeals correctly held the action jurisdictionally barred.

The suit appellants press, however, is clearly distinguishable from that in *Village of Oakwood*. As just described, in *Village of Oakwood* the wrongdoing alleged was perpetrated by the FDIC-as-receiver, which the assuming bank

allegedly aided and abetted. Here, in contrast, appellants allege that JPMC, not the FDIC-as-receiver or Washington Mutual, itself committed the tortious acts for which they claim relief. Although the complaint alleges that the FDIC engaged in conduct without which JPMC's tortious acts would not have caused injury to appellants, that actions by the FDIC form one link in the causal chain connecting JPMC's wrongdoing with appellants' injuries is insufficient to transform the complaint into one against the FDIC.

The FDIC and JPMC maintain that this case resembles *Village of Oakwood* because appellants' complaint is similarly premised upon wrongdoing by the FDIC: They argue that the complaint alleges an agreement between JPMC and the FDIC to commit the torts alleged. However, even if a suit against only a third party that alleged a conspiracy between the FDIC and the third party to commit the acts forming the basis of the claim were properly characterized as a suit against a depository institution—a question we do not reach—that is not the case here. Although appellants' complaint may be susceptible to the interpretation urged by the FDIC and JPMC, the procedural posture of this case requires us to construe the complaint liberally, in the light most favorable to appellants. *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005). Doing so, we read the complaint to allege that JPMC alone committed the wrongdoing for which appellants sue and find no agreement between JPMC and the FDIC.

We therefore hold that § 1821(d)(13)(D) does not withdraw jurisdiction from the judiciary to entertain appellants' lawsuit because their complaint neither asserts a "claim" under FIRREA nor constitutes an action for payment from, or seeking a determination with respect to, the assets of a depository institution for which the FDIC is receiver.

III.

The FDIC and JPMC argue that we should uphold the district court's dismissal of appellants' complaint on an alternative jurisdictional ground. They contend that appellants lacked standing to bring their claims because the claims are for generalized harm to Washington Mutual and thus belong to the FDIC-as-receiver. *See* 12 U.S.C. § 1821(d)(2)(A) ("The [FDIC] shall, as conservator or receiver, and by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution.").

Perhaps it is true that *if* either the exclusive right to bring appellants' claims or the right to preclude appellants from bringing those claims rested with Washington Mutual, that right was passed to the FDIC-as-receiver by operation of § 1821(d)(2)(A) and appellants may not assert those claims here. However, the question whether Washington Mutual had any such right was not decided by the district court. This question is complex and involves several layers of inquiry: Are the "rights, titles, powers, and privileges" inherited by the FDIC-as-receiver from Washington Mutual determined exclusively by reference to state law or does federal law play a role? If we should look to state law, which state's law governs the claims asserted in this case? What is the substance of the applicable body of law? And, most basically, is the ownership of the claims presented below a jurisdictional question, as the FDIC and JPMC suggest, or is it a question of whether appellants have a cause of action? We need not answer these knotty questions and instead remand to the district court to consider them in the first instance.

Because we conclude that § 1821(d)(13)(D) did not bar the district court from hearing appellants' suit and remand to the district court for further proceedings, we do not reach appellants' alternative arguments regarding the availability of subject matter jurisdiction or appellants' contention that the district court erred in denying its motion to alter or amend the judgment and for leave to file an amended complaint.

IV.

For the reasons set forth above, we reverse the order of the district court and remand for proceedings consistent with this opinion.

Exhibit C

Claims/Actions Proposed To Be Resolved Or Released Pursuant To The Settlement

WMI ACTION (currently Pending in District Court in District of Columbia)[13]

WMI CLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Determination of Debtor's Proof of Claim in WMB Receivership	**P**: WMI; WMI Investment **D**: FDIC	• Pursuant to 12 U.S.C. § 1821(d)(6)(A), Debtors seek review and determination of the validity of their claims against the FDIC Receivership.
Dissipation of WMB's Assets	**P**: WMI; WMI Investment **D**: FDIC	• Debtors allege the FDIC breached its statutory duty to maximize distribution (12 U.S.C. § 1821(d)(13)(E)(i)) of the Debtors' assets by entering into the Purchase and Assumption ("P&A") Agreement with JPMC, rather than liquidating WMB's assets.
Fifth Amendment Taking of Debtors' Property Without Just Compensation	**P**: WMI; WMI Investment **D**: FDIC	• Based on the above, the FDIC's wasting of WMB's assets constituted a taking of Debtors' property without just compensation pursuant to the Fifth Amendment of the United States Constitution.
Conversion of Debtors' Property	**P**: WMI; WMI Investment **D**: FDIC	• Because the FDIC failed to compensate Plaintiffs for the property taken into the Receivership (property that belonged to Debtors rather than WMB), the FDIC **converted** Plaintiffs' property, which is *actionable under the Federal Tort Claims Act* (28 U.S.C. §§ 1346(b), 2671-80).
Declaration that the FDIC-Receiver's Disallowance of Debtors' Claim in the WMB Receivership is Void	**P**: WMI; WMI Investment **D**: FDIC	• Plaintiffs seek a declaratory judgment finding the FDIC-Receiver's failure to consider Plaintiffs' Proof of Claim (and subsequent disallowance of that POC) to be a violation of the FDIC's statutory duties, and, by extension, the decision the FDIC made (to disallow the claim) void.

[13] Washington Mut., Inc. v. FDIC, Adv. Proc. No. 09-00533 (RMC) (D.D.C. Oct. 13, 2009) (a/k/a "DC Action").

FDIC COUNTERCLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Ownership of Tax Refunds – *Declaratory Relief*	**P:** FDIC **D**: WMI; WMI Investment	• All tax refunds either received or due to WMI are due and owing in substantial part to WMB. • Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, the FDIC requests a declaratory judgment finding that any refunds received by, or now due to, WMI be held in trust for WMB.
Recovery of Tax Related Assets	**P:** FDIC **D**: WMI; WMI Investment	• Based on above facts, the FDIC requests that tax-related funds now held by WMI that for which WMB is the rightful owner be turned over to WMB.
Trust Preferred Securities – *Declaratory Relief*	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC seeks a declaratory judgment finding WMB is the rightful owner of the TPS, or, in the alternative, that the FDIC-Receiver or JPMC, as its assignee, may record the transfer of ownership of the TPS in the ownership registers of the SPE subsidiaries of WMPF. • The Assignment Agreement, under which WMI purportedly transferred the TPS to WMB, is governed by Washington State Law.
Request for Turnover or Compensation for Trust Preferred Securities	**P:** FDIC **D**: WMI; WMI Investment	• In the alternative, the FDIC seeks an order requiring WMI to turnover the TPS to the FDIC-Receiver, or pay a sum to the FDIC equal to the full amount of any liquidation preference accompanying the TPS.
Recovery of Intercompany Amounts	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC seeks payment of any intercompany monies owed to WMB.

Deposit Accounts	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC alleges substantial WMB assets exist in the co-mingled Deposit Accounts and requests an order requiring the turnover of those funds to the FDIC.
Damages for Failure to Comply with Capital Maintenance Obligations	**P:** FDIC **D**: WMI; WMI Investment	• WMI's alleged failure to maintain its capital obligations harmed WMB in an unliquidated amount. • The FDIC demands judgment against WMI for failing to maintain its capital obligations, and requests damages in an amount to be determined at trial.
Unlawful dividends	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC asserts fraudulent transfer claims for the $15 billion in cash dividend payments WMI made from September 2003 to September 2008.
Goodwill Litigation	**P:** FDIC **D**: WMI; WMI Investment	• To the extent WMI recovers anything through the litigation that preceded the filing of its petition, the FDIC claims that it is entitled to the proceeds due WMB.
Insurance Proceeds	**P:** FDIC **D**: WMI; WMI Investment	• To the extent covered losses occurred under the Insurance Policies held by WMI and WMB (for which WMB was, at least in part, claimed to be a named or intended beneficiary), FDIC demands payments for covered losses suffered by WMB.

JPMC ACTION (Currently Pending In Bankruptcy Court)[14]

JPMC CLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Ownership of Trust Securities – *Request for Declaratory Relief*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding Debtors must proceed with any claim to the TPS via its District Court action (the "DC Action"). • Alternatively, JPMC requests declaratory judgment finding JPMC to be the rightful owner of the TPS by virtue of the Purchase and Assumption Agreement [entered into pursuant to 12 U.S.C. § 1823(c)(2)(A)].
Trust Securities – *Breach of Contract*	**P**: JPMC **Ds**: WMI; WMI Investment	• By entering into the Contribution Agreement, WMI is claimed to have assumed a direct obligation to WMB to immediately contribute and transfer the TPS to WMB following a Conditional Exchange. • Alternatively, it is claimed that WMB was the third-party beneficiary of WMI's commitment to the OTS and the FDIC under the Contribution Agreement. • It is also claimed that WMI assumed a direct obligation to WMB pursuant to the Assignment Agreement (governed by the laws of the State of Washington).
Trust Securities – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• To the extent the Court does not enter a judgment declaring JPMC the rightful owner of the TPS, JPMC requests the creation of a **constructive trust**, alleging the Debtors would be unjustly enriched on

[14] JPMorgan Chase Bank, N.A. v. Washington Mut., Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del. March 24, 2009).

		account of their treatment of the TPS as core capital, which allowed the Debtors to satisfy regulatory requirements and satisfy higher capital ratios.
Tax Refunds – *Request for Declaratory Relief*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory relief that it, through its acquisition of WMB, is the rightful owner of any tax refunds inuring to WMB and its subsidiaries. • WaMU filed—and JPMC claims ownership of the refunds for—returns in AK, AZ, CA, CO, HI, ID, IL, IN, KS, ME, MI, MN, MT, NE, NH, NM, OK, OR, TN, TX, UT, VT, as well as Federal returns
Tax Refunds – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks, in the alternative to its request for declaratory relief, the imposition of a constructive trust, into which would flow any proceeds from the tax refunds.
Disputed Funds – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC disputes the deposit liability that WMI claims it owns on account of receiving a $3.7 billion Book Entry Transfer and seeks declaratory judgment finding that (a) WMI must proceed with its deposit liability action through the DC Action or (b) JPMC is not liable.
Disputed Funds – *Setoff, Recoupment, & Other Equitable Remedies*	**P**: JPMC **Ds**: WMI; WMI Investment	• To the extent the Court finds that JPMC has *any* liabilities to the Debtors, including deposit liability, JPMC alleges that it should be entitled to (a) recoup and/or setoff all such amounts under the MBA; (b) impose a constructive trust over the funds of Debtors it possesses; or (c) enforce any security interest determined to apply to the Debtors' funds.
Disputed Funds – *Interpleader*	**P**: JPMC **Ds**: WMI; WMI Investment; FDIC	• JPMC seeks to interplead any remaining funds that constitute deposit liability
Goodwill Litigation – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI	• JPMC seeks a declaratory judgment finding it to be the owner of the beneficial interests in all judgment monies paid by and through

	Investment	*Anchor Savings Bank* and/or *American Savings Bank* litigation.
Rabbi Trusts – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment that it is the rightful owner of WMB and WMI's 16 Legacy Rabbi Trusts valued at approximately $550 million.
Rabbi Trusts – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court does not provide JPMC with its requested declaratory relief, JPMC requests that the Court impose **a** constructive trust consisting of the value of the Legacy Rabbi Trusts.
Pension and 401(k) Plans – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks to assume the Pension and 401(k) Plans in their entirety. • Debtors maintain that (a) the pensions must be terminated; (b) that JPMC must pay WMI an amount reflecting a purported "excess funding"; and (c) pay for associated litigation costs. • JPMC seeks a declaratory judgment forcing WMI to pursue any ownership claims in the DC Action and, in the alternative, a declaratory judgment finding JPMC may assume the Pensions without paying excess funding.
Pension and 401(k) Plans – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court does not provide JPMC with its requested declaratory relief, JPMC requests that the Court impose a post-petition constructive trust in the full amount necessary to compensate JPMC for the amounts it contributed to the 401(k) Plans.
Bank Owned Life Insurance Policies – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding WMI must pursue any claim to ownership of the Bank Owned Life Insurance ("BOLI") and Split Dollar Life Insurance Policies in the DC Action, or, alternatively, that JPMC is the rightful owner of the BOLI and Split Dollar Life Insurance Policies issued to the Debtors by various

		insurance companies.
Bank Owned Life Insurance Policies – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court does not provide JPMC with its requested declaratory relief, JPMC requests that the Court impose a constructive trust consisting of the value of the BOLI and Split Dollar Policies.
Visa Shares – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding the Visa Shares are assets purchased by JPMC, or, in the alternative, if the Court finds the Visa Shares belong to the Debtors, that the Debtors assume full liability for the restructuring and initial public offering associated with those shares.
Visa Shares – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court finds the Debtors remain the rightful owners of the Visa Shares, JPMC seeks to impose a constructive trust for the value of those shares (to cover any attendant litigation and provide excess value of those shares to JPMC).
Intangible Assets – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding that pursuant to the P&A and Title 12, it owns the Intangible Assets (including trademarks, logos, vendor contracts, and other contracts (e.g., licensing/software Ks)), or, in the alternative, has no liability to any persons for those Intangible Assets
Intangible Assets – *Constructive Trust*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court finds the Debtors remain the rightful owners of the Intangible Assets, JPMC seeks to impose a constructive trust for the value of those Intangible Assets.
Administrative Claim	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks reimbursement for litigation expenses incurred in any disputes over the Debtors' assets.
Indemnification	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks indemnity for any acts, omissions or conduct of the Debtors prior to the Petition Date for which JPMC, on

		account of its acquisition of WaMu, might be held liable.

WMI COUNTERCLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Avoidance and Recovery of Capital Contributions Pursuant to 11 U.S.C. §§ 548, 550	**P**: WMI; WMI Investment **D**: JPMC	• WMI made capital contributions to WMB within 2 years of filing for bankruptcy for which it did not receive reasonably equivalent value. • JPMC, as successor to WMB, owes WMI approximately $6.5 billion for the fraudulent transfers made by WMI to WMB.
Avoidance and Recovery of Capital Contributions Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.041, 19.40.051, & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• Based on the same facts, JPMC is liable for the fraudulent transfers WMB received pursuant to 11 U.S.C. § 544 and under Washington State Law [RCW (Revised Code of Washington) §§ 19.40.041 and 19.40.051].
Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 548, 550	**P**: WMI; WMI Investment **D**: JPMC	• WMI alleges that the transfer of the TPS to either WMB or JPMC was a fraudulent transfer since the transfer either rendered WMI insolvent or WMB being seized by the OTS was so likely that equity shares in WMB were valueless.
Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.041, 19.40.051, 19.40.071 & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• Based on the same facts, JPMC is liable for the fraudulent transfers WMB received pursuant to 11 U.S.C. § 544 and under Washington State Law.

Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 547, 550	**P**: WMI; WMI Investment **D**: JPMC	• In the alternative, the transfer of the TPS was a preference avoidable under 11 U.S.C. § 547.
Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.051, 19.40.071, & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• In the alternative, the transfer of the TPS is avoidable pursuant to 11 U.S.C. § 544 and under Washington State Law.
Declaratory Judgment that Trust Securities are Property of the Estate	**P**: WMI; WMI Investment **D**: JPMC	• WMI disputes that the P&A transferred ownership interest of the TPS to JPMC
Avoidance and Recovery of Preferential Transfers to WMB Pursuant to 11 U.S.C. §§ 547, 550	**P**: WMI; WMI Investment **D**: JPMC	• Within one year of the petition date, WMI transferred substantial sums of cash to WMB and WMB fsb to satisfy tax and intercompany obligations. Those transfers were preferential and thus now avoidable, since JPMC is liable as a subsequent transferee.
Avoidance and Recovery of Preferential Transfers Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.051, 19.40.071, & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• In the alternative, the Preferential Transfers are avoidable pursuant to 11 U.S.C. § 544 and under Washington State Law.
Fraudulent Transfer Pursuant to 11 U.S.C. § 541; RCW §§ 19.40.041, 19.40.051, 19.40.071 & 19.40.081; NEV. REV. STAT. §§ 112.180, 112.190, 112.210, & 112.220	**P**: WMI; WMI Investment **D**: JPMC	• The P&A Transaction is avoidable as a fraudulent transfer under Nevada State Law or, in the alternative, under Washington State Law.
Disallowance of Claims Pursuant to 11 U.S.C. §§ 105, 502	**P**: WMI; WMI Investment **D**: JPMC	• Debtors object to any and all claims filed by JPMC pursuant to 11 U.S.C. § 502(d). • Debtors also have a right of set off so,

		because the Debtors have claims against JPMC that exceed any liability they may have to JPMC, JPMC's claims are unenforceable and should be disallowed.
Declaratory Judgment that Certain Assets are Property of the Estate	**P**: WMI; WMI Investment **D**: JPMC	• Debtors dispute JPMC's claims to the Assets JPMC lists in its Complaint and request declaratory judgment finding that those Disputed Assets are property of the Debtors.
Turnover of Intercompany Amounts Due Pursuant to 11 U.S.C. § 542	**P**: WMI; WMI Investment **D**: JPMC	• Pursuant to 11 U.S.C. § 542, Debtors allege that the Intercompany Amounts Due are debts that JPMC must pay to the Debtors' estates.
Unjust Enrichment, Constructive Trust, and Equitable Lien	**P**: WMI; WMI Investment **D**: JPMC	• In the event the Court does not grant Debtors' request for a Declaratory Judgment finding them to be the rightful owner of the Disputed Assets, the Debtors request the Court impose a constructive trust for the value of those assets transferred to JPMC.
Trademark Infringement Pursuant to 15 U.S.C. § 1114	**P**: WMI; WMI Investment **D**: JPMC	• WMI, as the owner of the WaMu trademarks, alleges it is entitled to (a) force JPMC to reassign any rights it may have in the WaMu trademarks or (b) recover damages as a result of the JPMC federal trademark infringement, including any profits arising therefrom. • WMI seeks treble damages for the willful and deliberate infringement of its trademarks.
Common Law Trademark Infringement	**P**: WMI; WMI Investment **D**: JPMC	• Same facts as above for federal trademark infringement
Patent Infringement	**P**: WMI; WMI Investment **D**: JPMC	• WaMu developed and registered a patent that JPMC, by practicing the patent in connection with its business, is infringing pursuant to 35 U.S.C. § 271.

Federal Copyright Infringement Pursuant to 17 U.S.C. § 501	**P**: WMI; WMI Investment **D**: JPMC	• Despite WMI owning the copyright for the website at wamu.com, JPMC continues to display, reproduce, and distribute the website, thus violating 17 U.S.C. § 106.

TURNOVER ACTION (Currently Pending in Bankruptcy Court)[15]

WMI CLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Turnover Pursuant to 11 U.S.C. § 542	**P**: WMI; WMI Investment **D**: JPMC	• Plaintiffs demand that JPMC turnover the nearly $4 billion in deposits that the Debtors held with WMB pre-petition, citing **11 U.S.C. §§ 363 and 542** as authority. • Moreover, JPMC is not entitled to set off (pursuant to 11 U.S.C. § 553) any of the monies it holds in those deposit accounts.
Unjust Enrichment	**P**: WMI; WMI Investment **D**: JPMC	• Plaintiffs claim that JPMC has been unjustly enriched by withholding the funds in the deposit accounts, and that they "do not have an adequate remedy of law." • Plaintiffs seek an order from the Court finding JPMC has been unjustly enriched and providing Plaintiffs with restitution, at an amount to be determined by the Court.

JPMC COUNTERCLAIMS

Claim/Matter	**Parties** (P = Plaintiff; D = Defendant)	**Description of Claim/Matter**
Intercompany Amounts in Disputed Accounts – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• Absent a contrary finding in the DC Action, WMI has had its claim against the FDIC-Receiver disallowed. • JPMC seeks a declaratory judgment (i) that WMI's claims against JPMC for the same assets for which their claim against the

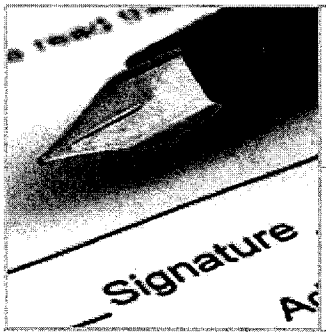
[15] Washington Mut., Inc. v. JPMorgan Chase Bank, N.A., Adv. Proc. No. 09-50934 (Bankr. D. Del. April 27, 2009).

		FDIC were disallowed are similarly disallowed and (ii) that it may challenge disallowance only in the DC Action.
$3.7 Billion Book Entry Transfer – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• JPMC requests a declaratory judgment finding that Debtors must proceed with any claim to ownership of the nearly $4 billion in deposit monies in the DC Action or, alternatively, that JPMC has no deposit liability.
Setoff, Recoupment, and Other Equitable Limitations – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• To the extent JPMC has any liabilities, it seeks to (i) recoup/set off all such amounts under the MBA Policy, (ii) impose a **constructive trust**, or (iii) enforce any security interest that may apply to the funds of the Debtors.
Fraud	**P**: JPMC **D**: WMI	[Asserted only if Court determines JPMC has deposit liability] • WMI directed the nearly $4 billion to WMB's deposit accounts with knowledge that WMB was unsafe and would shortly be seized by regulators, and it intentionally concealed these facts from WMB fsb.
Interpleader	**P**: JPMC **D**: WMI; WMI Investment; FDIC	• JPMC seeks to interplead any remaining funds that constitute deposit liabilities, since JPMC, WMI, and the FDIC have asserted (and may assert) competing claims to those funds.
Disputed Assets – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• JPMC seeks a declaratory judgment that it owns the Disputed Assets (intercompany amounts; the TPS; tax refunds; proceeds of the Debtors' goodwill litigation; ownership of certain Rabbi trust and benefit plans; ownership of common stock in Visa; and ownership of the intellectual property, contracts, and intangible assets of the Debtors).
Ownership of Other Assets – *Declaratory Judgment*	**P**: JPMC **D**: WMI; WMI Investment; FDIC	• JPMC seeks a declaratory judgment that it is the rightful owner of the assets transferred from WMB to JPMC, but now subject to a claim dispute by the Debtors.

Ownership of Other Assets – *Unjust Enrichment*	**P**: JPMC **D**: WMI	• In the event the Court denies JPMC's request for declaratory judgment finding the Other Assets are not property of JPMC, JPMC requests the Court impose a **constructive trust** for the benefit of JPMC consisting of the value the Debtors realized as a result of treatment of the TPS as core capital; tax refunds; value of certain Rabbi trusts and life insurance policies; amounts necessary to reimburse JPMC for contributions made to a benefit plan; ownership of common stock in Visa; and value of the intellectual property, contracts, and intangible assets of the Debtors.
Breach of Contract re Trust Securities	**P**: JPMC **D**: WMI	• By entering into the Contribution Agreement [entered into pursuant to 11 U.S.C. § 365(o)], WMI assumed a direct obligation to WMB to immediately contribute and transfer the TPS to WMB following the Conditional Exchange. • Alternatively, WMB was the third-party beneficiary of WMI's commitment to the OTS and the FDIC under the Contribution Agreement. • WMI also assumed a direct obligation to WMB pursuant to the Assignment Agreement (governed by the laws of the State of Washington). • WMI breached the Contribution Agreement in the event the Assignment Agreement is interpreted as providing anything more than bare legal title. WMI further breached by refusing to assist JPMC in obtaining registered ownership of the TPS. • JPMC alleges money damages as a proximate result of WMI's breach.
Administrative Claim	**P**: JPMC **Ds**: WMI	• JPMC seeks reimbursement for litigation expenses incurred in any disputes over the Debtors' assets.

Indemnification	**P**: JPMC **Ds**: WMI	JPMC seeks indemnity for any acts, omissions or conduct of the Debtors prior to the Petition Date for which JPMC, on account of its acquisition of WaMu, might be held liable.

Exhibit D



Bankruptcy Blog

Stern Views on Bankruptcy Court Jurisdiction – United States Supreme Court Addresses Bankruptcy Court Jurisdiction in the Anna Nicole Smith Case

Posted By Sara Coelho
Published on July 6, 2011

Category: Claims,Jurisdiction

Recently [1], we wrote about the United States Supreme Court's decision in *Stern v. Marshall* [2], where the Court held by a 5 to 4 majority that the United States Constitution prohibits federal bankruptcy judges from entering a final judgment on a state law counterclaim asserted by a debtor where the counterclaim is not resolved in the process of ruling on the creditor's proof of claim. In *Stern*, the Court found that such determinations may only be made by judges who enjoy the privileges of lifetime tenure and salary protection provided by Article III of the Constitution. The decision revives questions about the extent and nature of bankruptcy court jurisdiction, that many thought were resolved by the Court's seminal 1982 decision on bankruptcy jurisdiction, *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, and subsequent amendments to the bankruptcy jurisdiction statutes in 1984. In this post, we explore the underpinnings of the Court's decision, and some of its implications, in more detail.

Facts and Procedural History

The case arises from disputes over the inheritance of the late J. Howard Marshall II's fortune. Before Howard Marshall's death, his wife, Vickie Lynn Marshall (better known as Anna Nicole Smith), filed a suit in Texas alleging that Howard Marshall's son, E. Pierce Marshall, fraudulently induced Howard Marshall to cut Smith out of his estate. Following Howard Marshall's death, Smith filed for bankruptcy in California. Pierce Marshall filed a claim against Smith in the bankruptcy case, asserting that Smith's allegations of fraud defamed him, and an adversary proceeding seeking a determination that his defamation claim was not dischargeable in the bankruptcy. Smith counterclaimed, alleging, among other claims, tortious interference with the gift she expected from Howard Marshall. Under Federal Rule of Bankruptcy Procedure 7013, she was required to do so to the extent that her counterclaim was "compulsory."

The bankruptcy court ruled against Pierce Marshall's claim and in favor of Smith's claim, and awarded Smith more than $425 million. Appeals ensued. In the meantime, the Texas state court issued a conflicting judgment in favor of Pierce Marshall. The various appellate findings (including one by the U.S. Supreme Court) are not detailed here, except to say that, in the end, on remand, the Ninth Circuit found that Smith's counterclaim was not a "core" proceeding that bankruptcy judges have the power to hear under section 157(b)(2)(C) of the Judicial Code because resolution of her claim was not necessary to resolve the claims asserted against her by Pierce Howard. Although Smith had, by that time, passed away, her estate had continued the case. The U.S. Supreme Court granted certiorari.

The Court's Decision

The Court agreed with Smith that the bankruptcy court correctly applied section 157 of the Judicial Code, but it held that the Constitution requires that Smith's common law claim be resolved by an Article III judge. Under the U.S. Constitution, Article III defines the judicial power of the United States and prescribes that federal judges enjoy important salary and tenure protections designed to prevent the political branches from encroaching on the judicial power. U.S. Const. Art. III, § 1. Bankruptcy judges on the other hand, are appointed pursuant to Article I of the U.S. Constitution, which confers on the Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," and do not enjoy constitutionally imposed salary and tenure protections. U.S. Const. Art. I, § 8. Citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856), a 155-year-old Supreme Court decision, which states that "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,'" the Court found that Congress could not confer authority on a bankruptcy judge to resolve Smith's state law counterclaim without violating the mandate of Article III of the Constitution because a non-Article III judge could not enter final judgment on claims like

those asserted by Smith. The Court further concluded that this result was consistent with the plurality opinion in *Marathon*, 458 U.S. 50 (1982), which found that a statute's grant of jurisdiction to bankruptcy judges to issue final decisions on state law contract claims violated Article III, and the opinion of the majority in *Marathon* that (i) a public rights exception did not apply in that case, and (ii) the bankruptcy court was not acting as an adjunct of the district court. The Court rejected arguments that Smith's counterclaim could be resolved in the bankruptcy court under several alternate theories, which are discussed here in turn.

First, the Court found that any "public rights" exception to the requirement of Article III adjudications was not applicable and did not permit a bankruptcy court to adjudicate Smith's claim. In *Murray's Lessee*, the Court described "matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Such rights, the Court argued, are historically within the purview of the legislative or executive branches, which, in conferring such rights, have the power to determine whether those rights will be subject to adjudication before Article III courts or before a different tribunal, such as an administrative law judge. Subsequent cases have expounded on this doctrine, but the Court maintained the doctrine has always been limited to cases where the "claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority" and that public rights are "integrally related to particular federal government action." The Court held that Smith's counterclaim did not resemble public rights under any of the precedent as it was not a "matter that could be pursued only by grace of the other branches." It also found that Smith's counterclaim did not flow from any federal statutory scheme and that the bankruptcy court authority to decide Smith's counterclaim was not limited to a particularized area of the law, as in an agency adjudication.

The Court similarly rejected the argument that the bankruptcy court had jurisdiction to decide Smith's counterclaim as a result of Pierce Marshall having filed a proof of claim in Smith's bankruptcy case. The Court asserted that Pierce Marshall's "decision to file a claim" should not "make any difference with respect to the characterization of [Smith's] counterclaim." The majority opinion referred to and distinguished from the instant case previous cases that had permitted assertion of a preference action in the bankruptcy court against creditors that had filed proofs of claim because, among other things, in those cases, resolution of the preference actions had been necessary to resolve the disputed proofs of claim, and the actions brought had been created by federal bankruptcy law. Thus, the Court continued the validity of bankruptcy court jurisdiction for certain counterclaims, particularly where such claims are grounded in the Bankruptcy Code. Resolution of Smith's counterclaim however, required rulings from the bankruptcy court on issues that the bankruptcy court did not need to determine in the course of allowing or disallowing Pierce Howard's claim.

The Court also rejected the notion that the mandates of Article III were met because the bankruptcy court was operating as an "adjunct" of the district court. It found that because the bankruptcy court "exercises the essential attributes of judicial power" and because it did not make "specialized" factual determinations in a particular area of law, but rather resolves "'[a]ll matters of fact and law in whatever domains of the law to which' the parties' counterclaims might lead," the bankruptcy court could not properly be viewed as an adjunct to another court.

The Court dismissed arguments that its ruling would lead to substantial additional cost and delay as unconvincing, and pointed to other kinds of state law claims that reside outside the bankruptcy court's jurisdiction. It so doing, the majority downplayed the potential effects of its decision stating, "[w]e do not think the removal of counterclaims such as [Smith's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree . . . that the question presented here is a 'narrow' one."

The Dissent

In the dissent, Justice Breyer, joined by justices Ginsburg, Sotomayor and Kagan, argued that the Court overstated the importance of *Murray's Lessee* and *Marathon*, and failed to apply more recent precedent under which the Court has laid out factors to consider in determining whether a particular delegation of adjudicatory authority to a non-Article III judge encroaches on the judicial branch. Such factors include the nature of the claim to be adjudicated and of the non-Article III tribunal, the extent of control over the proceeding by Article III courts, whether the parties consent, and the nature and importance of the legislative purpose served by the grant of adjudicatory authority to the non-Article III forum. To the extent that the rights in question are "private rights," a more "'searching' examination of the relevant factors" is required. In weighing these factors under the Court's precedent, Justice Breyer concluded that the "magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." (Internal quotations omitted).

Justice Breyer's dissent also argued against the majority's assertion that the effect of its decision would be minor, citing the frequency of similar disputes, the "staggering" volume of bankruptcy cases (approximately 1.6 million filings in 2010 compared with approximately 358,000 federal district court cases for the same period) and the fact that

compulsory counterclaims are frequently premised on the same factual disputes as the claims asserted against bankruptcy estates that the bankruptcy courts are authorized to adjudicate. He argued that a "constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."

Effects of the Decision

In addition to the logistical difficulties identified by the dissent, the *Stern* opinion raises numerous questions about a bankruptcy court's jurisdiction in general, and how a debtor should assert its counterclaims in particular. Most importantly, although the majority was careful to say that it was ruling on a narrow question, it will have to be seen how litigants and courts apply *Stern's* reasoning. In the case of state law counterclaims asserted by a debtor, it is not clear how procedures for referring those matters to the district court will evolve, or how claims presently being litigated will be treated. In addition, the jurisdictional issue will, in some instances, be difficult for the bankruptcy court to determine at the outset of a case, and there may be cases where it becomes apparent that jurisdiction is lacking after substantial investment in the litigation by the parties.

Stern is not the first Supreme Court decision to raise substantial questions about the bankruptcy court's power, however, and if past controversies are any guide, it will take time to fully understand its significance as the bankruptcy courts (and no doubt, Article III courts) grapple with its application.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
WASHINGTON MUTUAL, INC., et al.,	)	
	)	Case No. 08-12229 (MFW)
Debtors	)	Jointly Administered

CERTIFICATE OF SERVICE

I, Kathleen Campbell Davis, of Campbell & Levine, LLC, hereby certify that on July 7, 2011, I caused a copy of the Second Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code to be served upon the attached service list via First Class Mail.

Dated: July 7, 2011

/s/ Kathleen Campbell Davis
Kathleen Campbell Davis (No. 4229)

In re: Washington Mutual, Inc., *et al*
08-12229
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