PREFERENCES ARE PUBLIC RIGHTS

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In the wake of the Supreme Court's decision in *Stern v. Marshall*, there is widespread uncertainty as to what other proceedings may constitutionally fall within a bankruptcy court's core jurisdiction. Supreme Court jurisprudence has been cryptic regarding the constitutional limitations of non-Article III courts, but the Court has identified a "public rights exception" to the general rule that the judicial power must be exercised only by judges with life tenure and salary protection. This public rights exception has not yet been explicitly extended to a bankruptcy proceeding, but the reasoning of the Court strongly suggests that a trustee's motion to avoid preferences would fall under the public rights exception, as a proceeding stemming exclusively from bankruptcy law and necessary to resolve claims against the estate. Accordingly, and contrary to what most scholars have suggested, preference proceedings fit comfortably within the jurisdiction of bankruptcy courts, even after the Supreme Court's ruling in *Stern*.

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INTRODUCTION

Article III of the U.S. Constitution dictates that the judicial power of the United States shall be vested in courts ordained and established by Congress. It further requires that the judges of these courts shall be granted life tenure and salary protection.[1] This straightforward requirement was relatively uncontroversial during the first few decades of its application. However, particularly in recent years, the implications of Article III's reservation of judicial power have become increasingly relevant.[2] Even as the administrative state becomes more complex—with decisions made increasingly by specialized bodies rather than Article III federal judges—scholars, judges, and litigants are raising concerns that the exercise of adjudicatory powers by administrative agencies and legislative courts is a violation of the Constitution.[3]

These concerns have been especially prevalent in the field of bankruptcy law. The bankruptcy judge is a federal official appointed to fourteen-year terms by the Circuit Court for his or her district. By virtue of this arrangement, the bankruptcy judge falls outside Article III, and accordingly cannot constitutionally exercise the "judicial Power of the United States." Nonetheless, the bankruptcy judge historically has exercised judicial authority over a broad swath of bankruptcy proceedings, including actions between the bankruptcy trustee and creditors of the estate.[4] Until recently, the ability of a bankruptcy judge to enter final judgment in such "core proceedings" was well established.[5]

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1. U.S. CONST. art. III, § 1.

2. *See, e.g.*, Tyson A. Crist, Stern v. Marshall*: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627, 627–28 (2012).

3. *See, e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 979–80 (2011).

4. 28 U.S.C. § 157(b)(2) (2006).

5. *See, e.g.*, *Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp., Inc.*), 456 B.R. 318, 320–21 (Bankr. W.D. Mich. 2011) ("For over twenty-five years, my colleagues and I have operated with the understanding that we were properly constituted judges capable of rendering final judgments in . . . so-called 'core proceedings.' . . . Moreover, in exercising my delegated authority, I have entered countless orders as final

However, in the wake of the Supreme Court's decision in *Stern v. Marshall*,[6] which concluded that bankruptcy judges could not constitutionally enter final judgment on a debtor's counterclaims against a creditor of the estate,[7] the authority of bankruptcy judges in such proceedings is more uncertain.[8] Many are questioning whether bankruptcy judges may issue final rulings in other proceedings, such as motions by the trustee to avoid fraudulent or preferential transfers, or whether those proceedings warrant *de novo* review by the district court at a party's request, with a bankruptcy judge's conclusions constituting a mere report and recommendation to the district court judge.[9]

The principle cause for this uncertainty is that the underlying constitutional justification for allowing bankruptcy judges to enter final

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without a second thought about the legitimacy of what I was doing. However, *Stern v. Marshall* reveals how misplaced my confidence has been."). *But see* John C. McCoid, II, *Right to Jury Trial in Bankruptcy:* Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 40 (1991) [hereinafter McCoid, *Right to Jury Trial*] (indicating that "[i]t has not been settled whether under Article III the bankruptcy court can exercise jurisdiction over core proceedings which involve the recapture of preferences and fraudulent conveyances").

6. 131 S. Ct. 2594 (2011).

7. *Id.* at 2620.

8. *See generally*, Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 147 (2012) [hereinafter Brubaker, *A "Summary" Theory*] ("*Stern v. Marshall* resurrects . . . the long-smoldering suspicion that other portions of the statutory grant of core jurisdiction to non-Article III bankruptcy judges are likewise unconstitutional."); Crist, *supra* note 2, at 635 (noting that the Supreme Court's reasoning in *Stern* "seems equally applicable to other subsections of section 157"); *see also Tabor v. Kelly* (*In re Davis*), No. 05-15794-GWE, Adv. No. 07-05181-L, 2011 WL 5429095, at *13 (Bankr. W.D. Tenn. Oct. 5, 2011) ("Other bankruptcy judges believe that *Stern* is to be limited solely to the particular core proceeding at issue there . . . . I do not agree with the conclusion of these bankruptcy judges.").

9. *See* Brubaker, *A "Summary" Theory*, *supra* note 8, at 180; George W. Kuney, Stern v. Marshall*: A Likely Return to the Bankruptcy Act's Summary/Plenary Distinction in Article III Terms*, 21 NORTON J. BANKR. L. & PRAC. 1, 9 (2012). The characterization of a bankruptcy judge's decision as a report and recommendation is unlikely, in most situations, to change the outcome of the case, as district courts tend to endorse such reports. *See* Lawrence P. King, *Jurisdiction and Procedure under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 681–82 (1985) ("In practical terms . . . the nonarticle III court's proposed findings and conclusions will be *the* findings and conclusions."); Adam Lewis et al., Stern v. Marshall*: A Jurisdictional Game Changer?*, 7 PRATT'S J. BANKR. L. 483, 492 (2011) ("[A]s a practical matter, bankruptcy courts may still be the ultimate decisionmakers on these issues, particularly to the extent district courts remain overburdened, and therefore more prone to 'rubber stamping' bankruptcy courts' conclusions."); Dan Schechter, *Although Bankruptcy Courts Lack Jurisdiction to Hear and Determine Fraudulent Transfer Claims, They May Issue Reports and Recommendations, and Defendant May Waive Objection to Lack of Jurisdiction*, COMM. FIN. NEWSL. Dec. 6, 2012, at 100 ("The district courts will almost invariably rubber-stamp the bankruptcy courts' 'reports and recommendations,' properly deferring to the bankruptcy judges' acknowledged expertise in such matters.").

orders in bankruptcy proceedings is obscure. Congress began constructing Article I courts and providing administrative agencies with adjudicatory power long before constitutional scholars began to question the consistency of such organizations with Article III of the Constitution.[10] As a consequence, the dividing line between Article I and Article III in matters of fact finding and enforcing rules is indistinct, at best.[11] Over the past thirty years, since the establishment of the current bankruptcy system, which vested significant jurisdictional authority in non-Article III bankruptcy judges, the Supreme Court has grappled with drawing appropriate boundaries around Article III "judicial Power."[12] In so doing, the Court has established multiple and often conflicting standards that have created more uncertainty than direction.

In each case where the Court has addressed the jurisdictional authority of bankruptcy judges, it has raised the issue of "public rights," a concept first identified in the mid-1800s, but notoriously vague and largely undefined.[13] The Court has stated that public rights, as distinguished from private rights, are "integrally related to particular federal government action,"[14] and "must at a minimum arise 'between the government and others.'"[15] However, the Court has been reluctant to positively identify specific bankruptcy proceedings as falling inside the category of public rights.[16] In cases involving public rights, the Court has reiterated time and again, final adjudication outside an Article III court is warranted and permissible, but those charged with implementing Supreme Court decisions in bankruptcy legislation and legal rulings are left to surmise what actually qualifies as a public right.[17] The Court has identified some boundaries by excluding counterclaims by the estate against a creditor who has filed a claim[18] and fraudulent conveyance proceedings against a creditor who has not filed a claim[19] from the

10. *See* Merrill, *supra* note 3, at 979–80.

11. *See* John Harrison, *The Relation between Limitations on and Requirements of Article III Adjudication*, 95 CAL. L. REV. 1367, 1378 (2007); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 198–99.

12. U.S. CONST. art. III, § 1; Kenneth G. Coffin, *Limiting Legislative Courts: Protecting Article III from Article I Evisceration*, 16 BARRY L. REV. 1, 2 (2011).

13. *See* S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 202 (2012); Coffin, *supra* note 12, at 5.

14. *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011).

15. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

16. *Murphy v. Felice* (*In re Felice*), 480 B.R. 401, 412–13 (Bankr. D. Mass. 2012); *see* Crist, *supra* note 2, at 627–28

17. *See generally* Brown, *supra* note 13, at 202.

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

19. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 (1989).

category of public rights. Other courts have expanded on these rulings, concluding that actions by the trustee to recover preferential transfers, which are payments made by the debtor to a creditor in the ninety days prior to bankruptcy, must also be outside this category such that a bankruptcy judge may not enter a final judgment in preference proceedings.[20]

The conclusion that preference proceedings, by virtue of their similarities to fraudulent conveyance proceedings,[21] are outside the authority of bankruptcy judges to issue final judgments is misguided. Up to now, the justification for treating preferences like fraudulent conveyances has focused on the cosmetic similarities between the two types of proceedings, with little attention given to differences relevant to the public rights/private rights distinction. Focusing on those differences, it becomes clear that preferences, which stem exclusively from bankruptcy law and are necessary in resolving claims against the estate, are public rights and thus may be administered by non-Article III judges under the public rights doctrine.

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20. *See Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp., Inc.*), 469 B.R. 713, 717 (Bankr. W.D. Mich. 2012); *Tabor v. Kelly* (*In re Davis*), No. 05-15794-GWE, Adv. No. 07-05181-L, 2011 WL 5429095, at *12 (Bankr. W.D. Tenn. Oct. 5, 2011). *But see Zazzali v. 1031 Exch. Grp.* (*In re DBSI, Inc.*), 467 B.R. 767, 772–73 (Bankr. D. Del. 2012) (holding that bankruptcy courts have the constitutional authority to enter final judgments in preference proceedings); *Burns v. Dennis* (*In re Se. Materials, Inc.*), 467 B.R. 337, 367 (Bankr. M.D.N.C. 2012); *West v. Freedom Med., Inc.* (*In re Apex Long Term Acute Care-Katy, L.P.*), 465 B.R. 452, 468 (Bankr. S.D. Tex. 2011).

21. This Article presumes, as the Ninth Circuit has held, that the holding in *Granfinanciera* is sound and that it signifies that fraudulent conveyances are outside the realm of public rights in both in the jury trial and Article III context. *See Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 562 (9th Cir. 2012). However, this presumption does not reflect my personal views. The ruling in *Granfinanciera*, dealing with the question of jury trials, was based primarily on a questionable understanding of the historic treatment of bankruptcy proceedings in England. It is unclear why this history should have any bearing on the structural question of when and whether a bankruptcy judge without life tenure should be permitted to enter a final judgment in the United States today. *See* Redish, *supra* note 11, at 211. However, because the Supreme Court will shortly address this issue, see *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 562 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (U.S. Apr. 3, 2013) (No. 12-1200), I limit my remarks in this Article to the question of preferences actions under the current legal regime, and save an analysis of the advisability of the public rights doctrine and whether it has been properly applied to fraudulent conveyance proceedings for another day. It may be that the Supreme Court's decision in *Arkison* will warrant additional commentary. In the meantime, this Article demonstrates that even assuming fraudulent conveyances are not public rights, as the Supreme Court has stated, see *Granfinanciera*, 492 U.S. at 55, and therefore outside a bankruptcy judge's permitted authority to issue final judgments, as the Ninth Circuit has concluded, see *In re Bellingham Ins. Agency Inc.*, 702 F.3d at 562, preferences are public rights and are constitutionally within a bankruptcy judge's ability to issue final rulings.

This paper makes the case that bankruptcy judges rightly possess the constitutional authority to issue final rulings in preference proceedings. Part I describes the constitutional concerns surrounding a bankruptcy court's exercise of final adjudicatory authority. The current structure of the bankruptcy system employs bankruptcy judges to issue final rulings in proceedings which many have argued require the exercise of judicial power by a judge with life tenure and salary protection: bankruptcy judges have neither. Supreme Court decisions have left a significant number of issues relating to bankruptcy judge jurisdiction unexplored, creating widespread uncertainty and disagreement regarding the appropriate scope of a bankruptcy judge's authority to issue final determinations.

Part II explains the doctrinal exception to the requirement that judicial proceedings be determined by Article III courts, namely, that proceedings involving a determination of public rights may be finally resolved by a tribunal that lacks the Article III protections. This part traces the history and development of the public rights doctrine, which has been treated at different times as both a bright-line rule and a non-dispositive factor, and summarizes the current state of the law in this area. It also defends the ongoing relevance of the public rights doctrine, despite inconsistent historical treatment and academic criticism that the public rights doctrine is obsolete.

Part III introduces preferences, explaining their role in bankruptcy proceedings and comparing them with fraudulent conveyance actions. It highlights important distinctions between the two causes of action that are particularly relevant in the context of public rights analysis. It then defends preference proceedings as matters of public right appropriate for final determination before a non-Article III judge by drawing heavily on Court opinions, most notably *Stern*, for standards pertinent to the public rights exception. The most widely cited and accepted standards are that the action at issue must stem from the bankruptcy itself or be necessarily resolved in the course of claims determination.[22] Preference actions satisfy both standards: Congress created a preference cause of action for the purpose of ensuring the effectiveness of the bankruptcy distributional process, and resolution of such an action is necessary for the proper determination of claims. In so arguing, this Part challenges the contradictory conclusions of several established scholars and bankruptcy courts.

22. Crist, *supra* note 2, at 636–37.

I. The Problem of Core Jurisdiction in Bankruptcy Courts

The jurisdictional boundaries of bankruptcy courts and the constitutional authority of bankruptcy court judges are long-debated issues, subject to significant controversy. For purposes relevant to this discussion, the problem first arose in the early 1970s, when Congress determined that amendments to bankruptcy law were necessary in the area of bankruptcy jurisdiction.[23] As demonstrated below, the relevant issues are still far from resolution, and there is significant disagreement within the bankruptcy community as to the current status of the law and the direction it is heading.

Prior to 1978, jurisdiction in bankruptcy cases was split between "summary jurisdiction," exercised by non-Article III officials, and "plenary jurisdiction," exercised by Article III judges or the state courts, unless the parties consented to bankruptcy court jurisdiction.[24] The non-Article III officials who could hear and determine summary proceedings were called bankruptcy "referees," reflecting the fact that cases were "referred" to them by the district courts.[25] Unfortunately, the scope of summary jurisdiction was imprecise,[26] with courts across the nation issuing conflicting opinions regarding the summary or plenary nature of, for example, counterclaims by the estate against claimants of the estate.[27] This uncertainty created fertile ground for litigation over the jurisdictional authority of the bankruptcy referees to preside over the proceeding at issue. As a consequence, bankruptcy scholars chafed against the summary/plenary distinction as inefficient.[28] The primary complaint was that the system encouraged delay,[29] but costs were also an issue[30]—as was the perceived opportunity to forum shop.[31]

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23. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32–33 (1995).

24. *See* Martin Gendel, *Jurisdiction Problems in Bankruptcy Court*, 44 J. NAT'L CONF. REF. BANKR. 61, 61 (1970).

25. *See* Leslie R. Masterson, *Waiving the Right to a Jury: Claims, Counterclaims, and Informal Claims*, 85 AM. BANKR. L.J. 91, 97 (2011).

26. *See* Troy A. McKenzie, *Getting to the Core of* Stern v. Marshall*: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23, 40 (2012).

27. Masterson, *supra* note 25, at 97.

28. *See, e.g.*, Gendel, *supra* note 24, at 62.

29. *See* Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 6 (1985); Gendel, *supra* note 24, at 62; *see also* Tabb, *supra* note 23, at 25 (explaining the frequent nature of litigation over bankruptcy referee jurisdiction).

30. Gendel, *supra* note 24, at 62.

31. *Id.* at 62–63.

In response to these concerns, and in recognition of the difficulties faced by the bankruptcy referees,[32] Congress enacted the Bankruptcy Code of 1978 ("Bankruptcy Code"), which granted bankruptcy referees—now termed "bankruptcy judges"—all the jurisdiction that the district court could have exercised over bankruptcy proceedings.[33] Under the new Bankruptcy Code, bankruptcy judges would be permitted to hear and issue final determinations in all "civil proceedings arising under . . . or arising in or related to cases under [the Bankruptcy Code]."[34] There was some talk of appointing bankruptcy judges under Article III,[35] but ultimately Congress opted for bankruptcy judges who would not enjoy life tenure or salary protection.[36] This proved to be a mistake: due to bankruptcy judges' Article I status, and even before all provisions of the new law were to take effect, the Supreme Court struck down the new Bankruptcy Code as unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[37]

In *Northern Pipeline*, the debtor had filed a lawsuit against a creditor for breach of contract and warranty in connection with a bankruptcy petition before the bankruptcy court.[38] The creditor sought dismissal of the suit on the grounds that the Bankruptcy Code had unconstitutionally conferred Article III powers on Article I bankruptcy judges.[39] The Supreme Court agreed.[40]

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32. Senator Quentin Burdick called for hearings on amending the bankruptcy laws in response to conversations with a friend and bankruptcy trustee, Richard Barry, who had commented on the difficulties met by referees who attempted to operate bankruptcy cases under the Bankruptcy Act of 1898. *See* Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 6 (2007). Senator Burdick investigated by requesting feedback from referees; the flood of responses from the referees sparked Burdick to introduce Senate Joint Resolution 100 and establish the commission. *Id.*

33. *See* 28 U.S.C. § 157(a) (2006).

34. 28 U.S.C. § 1471(b) (1976 & Supp. V 1982).

35. *See* Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to* Stern v. Marshall, 86 AM. BANKR. L.J. 55, 82–83 (2012) (describing Congressional hearings on the question of Article I status for bankruptcy judges); *compare* H.R. REP. NO. 95-595, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5968, *with* S. REP. NO. 95-989, at 15–16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5801–02.

36. There is some evidence that the resistance to appointing bankruptcy judges under Article III stemmed primarily from the federal bench itself. *See generally* Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Three: On the Hill*, 81 AM. BANKR. L.J. 341, 347–53 (2007).

37. 458 U.S. 50, 84 (1982).

38. *Id.* at 56.

39. *Id.* at 56–57.

40. *Id.* at 87.

Citing the constitutional system of checks and balances, the Court concluded that the congressionally appointed bankruptcy bench—which lacked Article III protections but nonetheless wielded the "judicial power of the United States"—constituted an "unwarranted encroachment" by the legislative branch into the judicial branch.[41] Appellants had argued that the determinations of bankruptcy judges in bankruptcy proceedings were within the "public rights" doctrine, as first set forth in the Supreme Court case *In re Murray's Lessee*,[42] and in the alternative, that bankruptcy courts were mere "adjuncts" of the district courts, meaning the essential attributes of judicial power had been retained by the judicial branch.[43] The Court rejected both arguments.[44] Instead, it concluded, absent any historically recognized exceptions to the Article III requirements, "Art[icle] III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."[45] The Court acknowledged that "when Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right."[46] However, "when the right being adjudicated is not of congressional creation"—like the contract at issue in *Northern Pipeline*—Congress cannot create such a tribunal without offending the Constitution.[47]

The Supreme Court stayed enforcement of its action for several months to permit Congress to enact new legislation that would respond to the constitutional deficiencies identified in *Northern Pipeline*.[48] When Congress proved unable to act within the given time period, the Judicial Conference of the United States promulgated an "Emergency Rule" bifurcating the bankruptcy court's jurisdictional authority between "core" bankruptcy matters, which the drafters believed could be heard and finally determined by bankruptcy judges even under the *Northern Pipeline* ruling, and "non-core" matters, which would have to be finally determined by the district court.[49] It was hoped that in this way the basic structure of the proposed bankruptcy courts could be preserved, while

41. *Id.* at 84.

42. *Murray v. Hoboken Land & Improvement Co.* (*In re Murray's Lessee*), 59 U.S. 272, 284 (1855).

43. *N. Pipeline*, 458 U.S. at 67, 76–77.

44. *Id.* at 71–72, 81–87.

45. *Id.* at 76.

46. *Id.* at 83.

47. *Id.* at 84.

48. *Id.* at 88; Block-Lieb, *supra* note 35, at 93; Masterson, *supra* note 25, at 103.

49. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 50 (2d ed. 2009).

still satisfying constitutional requirements.[50] Although many doubted this effort would succeed,[51] the Emergency Rule was upheld by the courts, codified by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) [52] and continues to provide the jurisdictional structure of the bankruptcy courts over thirty years later.[53]

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50. *See* Vern Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1, 2 (1983); Jeffrey T. Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. REV. 47, 47 (1987).

51. *See* Countryman, *supra* note 50, at 3; *Bankruptcy Reform: Hearing before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 98th Cong. 19–20 (1983) (statement of Jonathan C. Rose).

52. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

53. Core proceedings are now delineated in 28 U.S.C. § 157(b)(2) (2006) as follows:

> (2) Core proceedings include, but are not limited to—
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> (A) matters concerning the administration of the estate;
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> (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;
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> (C) counterclaims by the estate against persons filing claims against the estate;
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> (D) orders in respect to obtaining credit;
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> (E) orders to turn over property of the estate;
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> (F) proceedings to determine, avoid, or recover preferences;
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> (G) motions to terminate, annul, or modify the automatic stay;
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> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
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> (I) determinations as to the dischargeability of particular debts;
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> (J) objections to discharges;
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> (K) determinations of the validity, extent, or priority of liens;
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> (L) confirmation of plans;
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> (M) orders approving the use or lease of property, including the use of cash collateral;
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> (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;
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> (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.

However, recent case law has again raised questions regarding the constitutionality of the bankruptcy courts' jurisdictional structure. In 2011, the case of *Stern v. Marshall* came before the Supreme Court, involving another challenge to the bankruptcy judge's power to issue a final ruling in a tort counterclaim brought by the debtor against a creditor of the estate.[54] In a decision that surprised many,[55] the Court ruled that permitting bankruptcy judges to issue final judgments over such counterclaims—previously identified as "core" proceedings—raised the same constitutional issues identified in *Northern Pipeline*.[56] Specifically, the Court found that the bankruptcy judge, by issuing a final ruling in the tort counterclaim, had exercised the "judicial Power of the United States," thereby encroaching into the sphere of Article III.[57] The Court again rejected arguments that such a proceeding fell under the "public rights" doctrine,[58] as well as the argument that the bankruptcy judge was acting as an adjunct of the district court, noting that "[t]he judicial powers the courts exercise in cases such as this remain the same [as they were under the 1978 Act discussed in *Northern Pipeline*], and a court exercising such broad powers is no mere adjunct of anyone."[59]

Many academics first responding to the *Stern* decision described it in calamitous terms,[60] although many others concluded, as Chief Justice John Roberts had suggested in his opinion, that the decision "does not

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

55. *See* Block-Lieb, *supra* note 35, at 57 ("The Supreme Court's decision in *Stern* has been even more shocking to the bankruptcy bar than its earlier decision in *Northern Pipeline*."); Jolene Tanner, Stern v. Marshall*: The Earthquake That Hit the Bankruptcy Courts and the Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 588 (2012) ("The Court's holding in *Stern* caused judges, practitioners, scholars, and litigants to question bankruptcy judges' authority and the sanctity of the bankruptcy courts. This decision sent shockwaves through the entire bankruptcy community.").

56. *Stern*, 131 S. Ct. at 2610–11.

57. *Id.* at 2611.

58. *Id.* at 2615 ("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.").

59. *Id.* at 2611.

60. *See, e.g.*, MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY: CASES AND MATERIALS 91 (4th ed. 2012); Kuney, *supra* note 9, at 1; *see also Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp., Inc.)*, 456 B.R. 318, 322–23 (Bankr. W.D. Mich. 2012) ("[B]ombshell is an exaggeration if surprise alone is to be the measure. . . . However, bombshell does fairly describe *Stern's* impact upon the more practical issue of how bankruptcy judges are to perform what the [Bankruptcy] Code still calls us to do.").

change all that much."[61] Certainly, the case meant that bankruptcy judges could no longer issue final decisions in proceedings involving counterclaims by the estate against an objecting creditor, but many argued that the holding could be largely contained to this fact pattern.[62] In cases where the creditor did not object, for example, commentators suggested that the bankruptcy court could still issue the final determination;[63] in other words, consent could overcome the constitutional infirmity identified in *Stern*. To this end, members of the Advisory Committee on Bankruptcy Rules have proposed rule-making responses to *Stern* that would require an explicit statement of consent as to all non-core proceedings,[64] including proceedings such as that raised in *Stern* that have been unconstitutionally included in the core category.

However, not all are convinced that consent can serve as the solution to the constitutional issue presented in *Stern*,[65] and thus far the courts are divided.[66] The development of case law after *Stern* has also

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

62. *See, e.g.*, *Menotte v. United States* (*In re Custom Contractors, LLC*), 462 B.R. 901, 905–08 (Bankr. S.D. Fla. 2011); *Tibble v. Wells Fargo Bank, N.A.* (*In re Hudson*), 455 B.R. 648, 656–57 (Bankr. W.D. Mich. 2011); *In re Salander O'Reilly Galleries*, 453 B.R. 106, 116–17 (Bankr. S.D.N.Y. 2011);

63. *See, e.g.*, Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER No. 9, Sept. 2011, at 19 [hereinafter Brubaker, *Bleak House*].

64. Memorandum to Advisory Comm. on Bankr. Rules from Subcomm. on Bus. Issues (Mar. 15, 2012), *in* ADDENDUM TO AGENDA MATERIALS FOR THE MEETING OF THE ADVISORY COMM. ON BANKR. RULES 57–58 (2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/bankruptcy/2012-03-BK_Addendum.pdf.

65. *See* Erwin Chemerinsky, *Formalism without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 211 ("The argument is that there are two kinds of restrictions on the authority imposed by Article III: lack of subject matter jurisdiction and lack of power to issue a final judgment; consent cannot cure the former, but can solve the latter. But there is no apparent basis for this distinction."); Schechter, *supra* note 9, at 100 ("I wish that the [Ninth Circuit in *In re Bellingham*] were right, but I don't think that the bankruptcy court's lack of subject matter jurisdiction can be waived under *Stern v. Marshall* . . . ."). *But see* Crist, *supra* note 2, at 640–41 (arguing that *Stern* has nothing to do with subject matter jurisdiction).

66. *Compare Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 566–67 (9th Cir. 2012) (concluding that consent permits a non-Article III judge to issue final judgments in non-core proceedings, and holding that the creditor in this case had consented), *with Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) (finding the constitutional system of checks and balances to be a non-waivable structural principle, and accordingly overturning the bankruptcy judge's issuance of a final ruling despite the creditor's initial failure to object). *See also In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011) (arguing that in the face of *Stern* "it may now be, and it's fair to assume that it will now be argued, that consent, no matter how uncoerced and unequivocal, will never again be sufficient for bankruptcy judges ever to issue final judgments on non-core matters"); Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications*, 32 BANKR. L. LETTER No.

demonstrated that its "narrow" opinion[67] may not be confined to the single core proceeding identified in the decision. To the contrary, other proceedings previously identified as "core" have also come under attack.[68] Most notably, the Ninth Circuit recently concluded in *Executive Benefits Insurance Agency v. Arkison* (*In re Bellingham*)[69] that bankruptcy judges could not constitutionally issue final determinations in fraudulent conveyance actions absent consent by the defending party.[70] The *Bellingham* decision reasoned that *Stern* had clarified the position taken by the Supreme Court in *Northern Pipeline*: that only matters of "public rights" could be decided outside of the judicial branch.[71] *Granfinanciera, S.A. v. Nordberg*,[72] a Supreme Court case decided in the years between *Northern Pipeline* and *Stern*, had already established the principal that "a bankruptcy trustee's right to recover a fraudulent conveyance . . . [is] more accurately characterized as a private rather than a public right . . . ."[73] Accordingly, the Ninth Circuit reasoned that

12, Dec. 2012, at 1, 8 (arguing that the *Waldman* court may not have fully appreciated that its ruling calls into question the constitutionality of bankruptcy judges issuing final rulings on "non-core" proceedings with litigant consent, and that such a conclusion is both startling and likely inaccurate based on an historical review of Supreme Court jurisprudence in bankruptcy).

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

68. *See, e.g.*, *Kirschner v. Agoglia* (*In re Refco, Inc.*), 476 B.R. 75, 80 (S.D.N.Y. 2012) (concluding that the fraudulent conveyance claim could not be a "public rights" claim under the logic of *Granfinanciera* and *Stern* and that accordingly the bankruptcy court could not issue a final determination over the claim); *Heller Ehrman LLP v. Arnold & Porter, LLP* (*In re Heller Ehrman LLP*), 464 B.R. 348, 354 (N.D. Cal. 2011) (finding that the bankruptcy court lacks constitutional authority to enter final judgment on claims for recovery of alleged fraudulent transfers); *In re Fairfield Sentry, Ltd.*, 458 B.R. 665, 687–89 (S.D.N.Y. 2011) (holding that bankruptcy court could not adjudicate common law contract claim); *Paloian v. Am. Express Co.* (*In re Canopy Fin., Inc.*), 464 B.R. 770, 773 (N.D. Ill. 2011) (finding that the bankruptcy court lacks constitutional authority to enter final judgment on claims for recovery of alleged fraudulent transfers); *Ivey v. Vester* (*In re Whitley*), No. 10-10426-WLS, Adv. No. 11-2056, 2012 WL 1268220, at *2 (Bankr. M.D.N.C. Apr. 13, 2012) (finding that entering a final judgment on claims for recovery of fraudulent transfers is beyond the scope of the bankruptcy court's constitutional authority); *see also Tabor v. Kelly* (*In re Davis*), No. 05-15794-GWE, Adv. No. 07-05181-L, 2011 WL 5429095 at *14–15 (Bankr. W.D. Tenn. Oct. 5, 2011) (finding that the bankruptcy court could not issue a final judgment in a preferential transfer claim to recover against a creditor who had not filed a proof of claim because the matter was a private right); *Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp.*), 456 B.R. 318, 325 (Bankr. W.D. Mich. 2011) (noting in dicta that "*Stern* and *Granfinanciera* now seem to hold that only an Article III court would be capable of entering the money judgment needed to recover [a] preference").

69. 702 F.3d at 553.

70. *Id.* at 565.

71. *Id.* at 562.

72. 492 U.S. 33 (1989).

73. *Id.* at 55.

fraudulent conveyance claims cannot be finally adjudicated by bankruptcy judges, despite earlier Circuit precedent to the contrary: "Following *Stern*, we can no longer resist *Granfinanciera*'s logic."[74]

Interestingly, *Granfinanciera* was not a case about the bankruptcy court's constitutional authority to issue final determinations, but rather about whether jury trials were required in bankruptcy proceedings by virtue of the Seventh Amendment.[75] In *Granfinanciera*, the trustee had sought to recover the conveyance of $1.7 million transferred by the debtor's predecessor to the defendants, who had not filed a claim against the estate and were not technically creditors of the estate.[76] The defendants subsequently demanded a jury trial on the issue of the alleged fraudulent conveyance, a demand the bankruptcy judge denied, instead hearing the merits and issuing a final determination from the bench.[77] On appeal, the Supreme Court concluded that it was error to deny the defendants a jury trial based on historical analysis of the nature of

74. *In re Bellingham*, 702 F.3d at 562 (overturning *Duck v. Munn* (*In re Mankin*), 823 F.2d 1296, 1309–10 (9th Cir. 1987) (ruling that bankruptcy judges could constitutionally issue final determinations in fraudulent conveyance actions despite the ruling in *Northern Pipeline* because such proceedings were sufficiently federal to constitute public rights)). Although many courts have followed similar logic in determining that fraudulent conveyances cannot be constitutionally included in the category of core proceedings, others have found that bankruptcy courts may continue to issue final rulings in such cases. *See Onkyo Eur. Elecs. GMBH v. Global Technovations, Inc.* (*In re Global Technovations Inc.*), 694 F.3d 705, 722 (6th Cir. 2012) (holding that the bankruptcy court could issue final judgment in a fraudulent transfer claim because the creditor had filed a claim against the estate); *Gugino v. Canyon Cnty.* (*In re Bujak*), No. 10-03569-JDP, Adv. No. 11-6038-JDP, 2011 WL 5326038, at *4–5 (Bankr. D. Idaho, Nov. 3, 2011) (stating "[w]hile it may be interesting to ponder whether, some day, the Supreme Court could, perhaps, determine that bankruptcy courts may not constitutionally enter final judgments on such claims, the Court did not do so in *Stern*" and holding that the "Trustee's fraudulent conveyance claims against the [creditor] are not based on state law, but instead, stem solely from the bankruptcy case and arise exclusively under the Bankruptcy Code"); *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) ("Nothing in *Stern* limits a bankruptcy court's jurisdiction over other 'core' proceedings. Nor does the *Stern* Court's reliance on its earlier decision in *Granfinanciera* somehow impose some new limitations on this Court's jurisdiction that has not existed since that case was decided over twenty years ago.").

75. *Granfinanciera*, 492 U.S. at 36.

76. *Id.* Commentators have been quick in their attempts to limit the likely ramifications of the Ninth Circuit's conclusion, pointing not only to the possibility of consent as a mollifying factor, but also limiting the import of *Granfinanciera*'s conclusion to cases in which the creditor had not filed a proof of claim with the estate. *See, e.g.*, *Burns v. Dennis* (*In re Se. Materials*), 467 B.R. 337, 363 (Bankr. M.D.N.C. 2012) (applying the two-pronged test of *Stern* and concluding that bankruptcy courts could not issue final orders in fraudulent conveyance actions, which do not stem from bankruptcy, "at least where the defendant has not filed a proof of claim"); *see also* discussion *infra* Part III.D.2(b).

77. *Granfinanciera*, 492 U.S. at 37.

fraudulent conveyance claims.[78] The Court noted that defendants were entitled by the Seventh Amendment to a jury trial in suits "at law," and although lower courts had concluded that a fraudulent conveyance action in bankruptcy was historically a suit at equity, "[t]he nature of the relief respondent seeks strongly supports our preliminary finding that the right he invokes should be denominated legal rather than equitable."[79] In limiting its ruling to the issue of whether or not the claimants were entitled to a jury trial, the Court skirted the jurisdictional issues that would later arise in *Stern* and *Bellingham*—namely, whether the bankruptcy judge could constitutionally oversee such a trial. Although the Court in *Granfinanciera* did not directly address the issue, its holding regarding the private nature of fraudulent conveyance actions paved the way for the Ninth Circuit's ruling in *Bellingham*.

Assuming that the Ninth Circuit's decision is preserved on appeal,[80] there is reason to expect that whatever solution is reached for *Stern*'s restrictions on final decision making in counterclaims by the estate against a creditor will also need to be applied to cases involving fraudulent conveyances, whether the solution is as mild as establishing procedures for creditor consent or as radical as withdrawing the reference in all such proceedings. Going one step further, many believe that the authority of bankruptcy judges to issue final rulings in preference proceedings must also be suspect by virtue of the similarities between preference and fraudulent conveyance proceedings, both in form and in historical treatment.[81] In particular, Ralph Brubaker has argued that *Stern* signifies the constitutionalization of the summary/plenary distinction established prior to the enactment of the 1978 Bankruptcy Code, making any authorization of non-Article III judges to enter final orders and judgments in what would have been plenary proceedings constitutionally

78. *Id.* at 49.

79. *Id.* at 46–47.

80. A petition for certiorari was filed on April 3, 2013 and granted on June 24, 2013. *Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (U.S. Apr. 3, 2013) (No. 12-1200).

81. *See, e.g.*, *Granfinanciera*, 492 U.S. at 49–50 (drawing on the precedent of *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932), a preference case, to establish the "legal" nature of fraudulent conveyance actions); *Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp.*), 469 B.R. 713, 757 (Bankr. W.D. Mich. 2012) (noting the similarities between preferences and fraudulent conveyances and concluding that these similarities justify similar treatment); Brubaker, *A "Summary" Theory*, *supra* note 8, at 172–73 (arguing that the Court's decision in *Stern* reflects the intention to constitutionalize the summary/plenary distinction established by the 1898 Bankruptcy Act, rendering traditionally "plenary" proceedings, including both preference and fraudulent conveyance proceedings, constitutionally suspect).

suspect.[82] In so concluding, Brubaker largely glosses over discussion of the public rights doctrine as a basis for making constitutional determinations, suggesting that it "likely will not stand."[83]

As explained in greater detail below, there are good reasons to disagree with Brubaker's conclusion. The public rights doctrine, while not well understood and without clear definition in the case law, has nevertheless proved its staying power across the years, appearing time and time again in discussion connected with bankruptcy jurisdiction. It has been the explicit rationale for the Court in striking down the bankruptcy court's final jurisdiction on at least two, and arguably three, occasions.[84] It has also appeared broadly in cases regarding the appropriate scope of administrative law and the boundaries of the administrative state.[85] Based on this history, it may be wishful thinking to declare that the public rights doctrine's time has passed.[86] Instead, legal scholars will likely grapple with the public rights doctrine and its boundaries for years to come.

II. THE PUBLIC RIGHTS DOCTRINE AND CONCERNS REGARDING ENCROACHMENT ON ARTICLE III AUTHORITY

A. The Origin and Early Development of the Public Rights Doctrine— Murray's Lessee*,* Ex parte Randolph*, and* Crowell v. Benson

It is generally accepted among scholars that the first manifestation of the public rights doctrine, and perhaps the first recognition that the exercise of executive or legislative authority might interfere with the judicial branch's constitutional authority, arose in the case commonly

82. Brubaker, *A "Summary" Theory*, *supra* note 8, at 122; *see also* Brubaker, *Bleak House*, *supra* note 63, at 1–2 ("*Stern v. Marshall* . . . virtually confirms[ ] the long-smoldering suspicion that subsections 157(b)(2)(F) and (H) of the Judicial Code—granting non-Article III bankruptcy judges core jurisdiction to enter final orders and judgments in proceedings to determine, avoid, or recover preferences and fraudulent conveyances—are likewise unconstitutional.").

83. Brubaker, *A "Summary" Theory*, *supra* note 8, at 172.

84. The Court's ruling in *Granfinanciera* was technically regarding the availability of jury trials in fraudulent conveyance actions under the Seventh Amendment, not about the bankruptcy court's authority to enter final judgment. However, as explained *supra* notes 72–79 and accompanying text, the logic of *Granfinanciera* has been expanded to questions regarding the bankruptcy judge's ability to enter final judgments. It remains to be seen whether the Court will uphold this application.

85. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853–54 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585 (1985).

86. Some have argued that the public rights doctrine is inescapably flawed and should be abandoned. *See, e.g.*, Redish, *supra* note 11, at 212–14. While such arguments warrant additional commentary, they are outside the scope of this paper.

referred to as *Murray's Lessee*.[87] The case stemmed primarily from the actions of Samuel Swartwout, a collector of customs for the port of New York who, over the course of eight years, systematically embezzled $1,374,119.65 from the federal government, an astronomical sum in those days.[88] When his theft was discovered, he evaded punishment by sailing off to England, leaving the shortfall and a limited amount of assets, including a piece of real property in New Jersey.[89]

One of Swartwout's creditors, James B. Murray, levied against the New Jersey property.[90] However, the U.S. Treasury, Swartwout's prior employer, contemporaneously issued a "distress warrant" pursuant to congressional statute, directing the sale of Swartwout's property and the application of proceeds to the embezzling debt.[91] The distress warrant was executed and the sale conducted, with Hoboken Land & Improvement Company as the highest bidder, before Murray could move to enforce his levy.[92] Murray was, naturally, slowed in the race to execute by the requirements of the judicial collection process.[93] Judicial sale of the property proceeded despite the prior execution of the distress warrant.[94] At the judicial sale, Murray successfully bid on the property, and then leased it to John Den.[95] With two outstanding claims to the same property raised by two different private parties by virtue of two separate sales, Murray brought an action to quiet title,[96] arguing that the sale pursuant to the distress warrant was an unconstitutional exercise of Article III judicial power by non-judicial actors.[97]

In upholding the congressional action, Justice Benjamin Curtis rejected the argument that the actions taken constituted an exercise of

87. *See, e.g.*, Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 95 n.33 (1994); Robert G. Skelton & Donald F. Harris, *Bankruptcy Jurisdiction and Jury Trials: The Constitutional Nightmare Continues*, 8 BANKR. DEV. J. 469, 477 (1991); Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 789–95 (1987).

88. *Murray v. Hoboken Land & Improvement Co.* (*In re Murray's Lessee*), 59 U.S. 272, 274–75 (1855). Multiplication based on the percentage increase in the Consumer Price Index from 1850 to 2012 suggests that the relative value today would be over $41 million. *See Seven Ways to Compute the Relative Value of a U.S. Dollar Amount - 1774 to Present*, MEASURINGWORTH, http://www.measuringworth.com/m/calculators/uscompare/ (last visited Nov. 14, 2013).

89. Young, *supra* note 87, at 791; *see also* Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 6 (2012).

90. *Murray's Lessee*, 59 U.S. at 274; Baird, *supra* note 89, at 6–7.

91. *Murray's Lessee*, 59 U.S. at 274–75; Baird, *supra* note 89, at 7.

92. Baird, *supra* note 89, at 7.

93. *Id.*

94. *Murray's Lessee*, 59 U.S. at 274; Baird, *supra* note 89, at 7.

95. Baird, *supra* note 89, at 7.

96. Then termed an act of ejectment. *See Murray's Lessee*, 59 U.S. at 274.

97. *Id.* at 275.

Article III judicial power.[98] Although "the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act,"[99] he argued,

> [T]here 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.[100]

In other words, although the United States could have brought its action against Swartwout in a judicial proceeding before an Article III judge, it was not required to do so because of the nature of the proceedings—they concerned "public rights."

The Supreme Court had previously recognized a potential constitutional conflict in the area of distress warrants. In *Ex parte Randolph*,[101] Chief Justice John Marshall had acknowledged that, if the government's actions "be the exercise of any part of the judicial power of the United States, . . . [it] is plainly a violation of the first section of the third article of the constitution."[102] *Murray's Lessee*'s ruling expanded the government's authority to act in a judicial manner, at least in the vaguely defined category of "public rights" cases. This holding was not significantly questioned for several decades, perhaps, as at least one scholar has argued, because the danger of executive authority potentially impinging on the judicial branch was "simply not a matter of significant concern."[103] Instead, observers were more troubled by the possibility that federal courts could be drawn into administrative proceedings.[104]

This mentality arguably explains the result in *Crowell v. Benson*,[105] a case that solidified the dicta in *Murray's Lessee* regarding public rights with its own dicta, which restricted any Article III limitations on administrative courts to situations of "private rights."[106] Having

98. *Id.* at 280–81.
99. *Id.* at 280.
100. *Id.* at 284.
101. 20 F. Cas. 242 (C.C.D. Va. 1833).
102. *Id.* at 254.
103. Merrill, *supra* note 3, at 980.
104. *Id.* at 944.
105. 285 U.S. 22 (1932).
106. *Id.* at 50. The court stated:

> The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there

concluded that an administrative ruling by the Federal Employees' Compensation Commission, a federal agency, was inappropriate,[107] the Court nonetheless observed that Congress was fully authorized to establish legislative courts to handle cases "which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[108] Although it neglected to provide a more precise definition of such cases, the Court did provide a list of "[f]amiliar illustrations of administrative agencies" established for determining matters of "public rights," including "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans."[109]

*B. The Public Rights Doctrine in Bankruptcy Cases—*Northern Pipeline *and* Granfinanciera

After several decades of relative obscurity,[110] discussion of public rights resurfaced dramatically in the monumental case of *Northern*

> is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution . . . .

Id. at 56–57.

107. *Id.* at 42, 62. The Court based its ruling on the distinction between so-called "constitutional facts" and "jurisdictional facts." As explained by a reputable academic of that time period:

> The "jurisdictional fact" doctrine is that where a statute purports to confer on an administrative agency a power to make decisions, but is construed as conferring that power only over, or with reference to, certain kinds of objects, situations or acts, then the fact-question of whether or not in any given case of such a decision the object, situation or act was, *in fact*, of the kind specified in the statute goes to the jurisdiction of the administrative agency to make the decision at all.

John Dickinson, Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1059 (1932). The doctrinal basis for this ruling has since disappeared from Supreme Court jurisprudence. *See* Young, *supra* note 87, at 778.

108. *Crowell*, 285 U.S. at 50.

109. *Id.* at 50–51.

110. Five years prior to *Northern Pipeline*, the public rights doctrine was addressed by the Supreme Court in the case *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). In *Atlas Roofing*, the Supreme Court upheld the Occupational Safety and Health Act (OSHA) insofar as it permitted the administrative agency to obtain abatement orders and impose civil penalties on employers without a jury trial. *Id.* at 446, 461. Several years before that, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Supreme Court had briefly examined the public rights

Pipeline v. Marathon.[111] There, the Court rejected the appellants' argument that the bankruptcy law should be upheld by virtue of the public rights doctrine, noting that the public rights doctrine is limited to matters arising "'between the Government and persons subject to its authority . . . '"[112] and in the case at hand, the issue was one of "'the liability of one individual to another . . . [,]'"[113] a matter "'inherently . . . judicial'" in nature.[114] The Court did not explicate the distinction between public and private rights, but recognized the doctrine as sound, if inapplicable to the challenged proceeding.

The Court made reference to the public rights doctrine again in *Granfinanciera*, discussed briefly above.[115] Drawing on its earlier language in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*,[116] the Court again recognized that an exception to the Seventh Amendment could exist in the administration of public rights by using the same standard applied in the context of an Article III challenge to legislative courts.[117] The Court summarized the doctrine as follows:

> Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.[118]

In *Granfinanciera*, the Court ruled that Congress had attempted to strip the right to a jury trial from defendants in a fraudulent conveyance

exception in the context of evaluating whether judges sitting on the Court of Claims and the Court of Customs and Patent Appeals were, as Congress claimed they were, Article III judges. *Id.* at 531–32. Because the Court concluded that both judges were in fact appointed pursuant to Article III, the public rights doctrine proved irrelevant to the outcome. *See id.* at 584. The Court did make a point of saying that matters of public rights, although they may be determined by a non-Article III "legislative court," are still appropriate for determination by an Article III "constitutional court." *Id.* at 550–51. There appear to be no other major cases on this issue between *Crowell* and *Northern Pipeline*.

111. 458 U.S. 50 (1982).

112. *Id.* at 67–68 (quoting *Crowell*, 285 U.S. at 50).

113. *Id.* at 69–70 (quoting *Crowell*, 285 U.S. at 51).

114. *Id.* at 68 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). *See also* Baird, *supra* note 89, at 6 (noting that "resolving a contest between two creditors" is "the ordinary business of courts, and it is exactly what the Framers had in mind when thinking about the judicial power").

115. *See supra* notes 72–79 and accompanying text.

116. 430 U.S. 442 (1977); *see supra* note 110.

117. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989).

118. *Id.* at 51–52.

action, when that action was the sole basis for the defendants' involvement in the case: the creditors had not filed a proof of claim and were not officially creditors of the estate.[119] "Although the issue admits of some debate," the Court concluded, the action was better characterized as one of private rights, not public rights.[120]

C. The Lasting Influence of the Public Rights Doctrine—Thomas*,* Schor*, and* Stern

The years between *Northern Pipeline* and *Granfinanciera* saw additional cases referencing the public rights doctrine outside of the bankruptcy context, dealing instead with agency adjudication. These cases sought to clarify the extent to which the public rights doctrine permitted adjudication by non-Article III courts, but often did so in a way that appeared to contradict the protective position demonstrated in *Northern Pipeline*. Outside the context of bankruptcy, Supreme Court jurisprudence trended towards expanding the authority of non-Article III courts, permitting a larger category of cases to be heard and determined outside of Article III.

Scarcely three years after *Northern Pipeline* was decided, *Thomas v. Union Carbide Agriculture Products Co.*[121] presented the Supreme Court with another occasion to consider an Article III challenge, this time to the binding arbitration provision of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[122] The Act provided that manufacturers submit research data regarding their product's health, safety, and environmental effects to the Environmental Protection Agency (EPA) as a precondition for registration of a pesticide and permitted manufacturers to reference prior submissions as a method of streamlining the process and to avoid duplication of effort.[123] However, disputes arose when those manufacturers who had submitted research data demanded compensation from later manufacturers for their "follow-on" use.[124] The Act had originally provided that the parties would negotiate the amount of compensation, or, if negotiations failed, the EPA, subject to judicial review, would determine compensation.[125] However, the EPA soon became bogged down with compensation determinations, so Congress amended the statute to provide for a system

119. *Id.* at 50.
120. *Id.* at 55.
121. 473 U.S. 568 (1985).
122. *Id.* at 571.
123. *Id.*
124. *Id.* at 571–73.
125. *Id.* at 572.

of binding arbitration to resolve compensation disputes among registrants.[126]

The plaintiffs in *Thomas* brought suit to challenge the Act on the basis that the binding arbitration provision violated Article III of the Constitution by allocating the function of judicial officers to arbitrators.[127] They cited the Court's decision in *Northern Pipeline* as support.[128] The Court's opinion upholding the arbitration provisions appeared to take a step back from *Northern Pipeline*, noting that in that case "[a] divided Court was unable to agree on the precise scope and nature of Article III's limitations."[129] The Court then limited the holding of *Northern Pipeline* as establishing "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."[130] This holding did not apply to the proceedings at issue in *Thomas*, the Court explained, because the rights to compensation under FIFRA did not depend on or replace a right to compensation for use of data under state law.[131]

The Court also disavowed the concept of a bright-line test created by the public rights doctrine, noting that an indiscriminate reliance on characterization of a right as either private, and therefore requiring Article III adjudication, or public, and therefore needing no Article III involvement, "did not command a majority of the Court in *Northern Pipeline*."[132] Accordingly, the Court rejected the plaintiffs' interpretation of *Northern Pipeline* and *Crowell* as "establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record."[133] Instead, the Court explained:

> [T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced.[134]

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126. *Id.* at 573.
127. *Id.* at 576.
128. *Id.*
129. *Id.* at 584.
130. *Id.*
131. *Id.*
132. *Id.* at 585–86.
133. *Id.* at 586.
134. *Id.* at 589 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982)).

In this case, the Court observed, the right to compensation created by FIFRA, although between two individual litigants, bore many of the characteristics of a public right; most notably, it was part of a public program, and it served a public purpose.[135] The Court then held "that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution."[136]

The Court in *Thomas* thus expanded the public rights doctrine to include seemingly "private" rights, while simultaneously undermining the strength of the public/private rights test in favor of a more flexible approach. The Court went even further the next year, in *Commodity Futures Trading Commission v. Schor*,[137] which dealt with yet another Article III challenge to a legislative court, based on the previous decision in *Northern Pipeline*. The dispute in *Schor* arose when a client sued his commodity futures broker on the grounds that the broker had violated portions of the Commodity Exchange Act, resulting in trading losses and expenses that had completely depleted the client's account, leaving a negative balance.[138] Pursuant to applicable regulation, the client invoked the jurisdiction of the Commodity Futures Trading Commission (CFTC) to address his claims, but only after the broker filed an action in Federal District Court to recover the negative balance.[139] The client twice moved, both times unsuccessfully, to dismiss the broker's suit in district court; eventually the broker voluntarily dismissed the action and brought a counterclaim before the CFTC instead.[140] Only after the CFTC had ruled in favor of the broker did the client object to the CFTC's statutory authority to adjudicate the broker's counterclaim.[141]

On the surface, the dispute in *Schor* appeared very similar to that in *Northern Pipeline*, in that both involved a state law counterclaim raised before a non-Article III tribunal. However, the Court's analysis and holding in *Schor* sharply departed from those given in *Northern Pipeline*. In departing from the strong protective approach used in *Northern Pipeline*, the Court picked up where it had left off in *Thomas*, applying a flexible standard that evaluated the purposes underlying the requirements

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135. *Id.*

136. *Id.* at 593–94.

137. 478 U.S. 833 (1986).

138. *Id.* at 837.

139. *Id.*

140. *Id.* at 838.

141. *Id.* In bringing the action challenging the CFTC's ruling for lack of statutory authority, when he himself had insisted on that forum, the client likely came across as disingenuous to the Court.

of Article III, and rejected the bright-line test.[142] The Court observed that Article III was intended to protect the role of the independent judiciary for the sake of individual litigants, and to preserve the constitutional system of checks and balances.[143] Having concluded that the client waived his right to an independent judiciary when he filed his claim before the CFTC,[144] the Court moved on to analyze the separation of powers issue. It first reaffirmed its reluctance to take a bright-line stance in ruling on issues involving "the adjudication of Article III business in a non-Article III tribunal," adopting instead a multi-factored approach which analyzed "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, . . . the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III."[145] The Court then distinguished *Schor* from *Northern Pipeline* on the basis that the agency model invoked by the CFTC had been earlier approved in *Crowell*, and was far more specialized, with closer review by the district court, than the bankruptcy court model at issue in *Northern Pipeline*.[146] As for the discussion of the public rights doctrine, the Court in *Schor* acknowledged the public/private right dichotomy, but asserted again that the identification of rights as public or private "does not end our inquiry . . . ."[147] Instead, the identification of rights as private simply warrants a more searching examination of congressional action.[148]

The rulings in *Thomas* and *Schor* led some to surmise that *Northern Pipeline* was no longer good law.[149] These commentators further predicted that, although *Northern Pipeline* had not been explicitly overruled by *Thomas* and *Schor*, the bright-line holding of *Northern Pipeline* would probably impose few, if any, limitations on Congress's ability to determine the form and forum of adjudication in the federal

142. *Id.* at 847–48.
143. *Id.* at 850.
144. *Id.* at 849.
145. *Id.* at 851.
146. *Id.* at 852–53.
147. *Id.* at 853.
148. *Id.* at 854.
149. *See* George D. Brown, *Article III as a Fundamental Value—The Demise of* Northern Pipeline *and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 75 (1988) ("The fact that [Justice Brennan] dissented and the content of his opinion raise the question of whether *Northern Pipeline* is still good law, let alone the foundation of a major new doctrine."); Carl N. Pickerill, *Specialized Adjudication in an Administrative Forum: Bridging the Gap between Public and Private Law*, 82 NOTRE DAME L. REV. 1605, 1642 (2007) ("While *Schor* did not overrule *Northern Pipeline* explicitly, one must wonder whether *Northern Pipeline* still has staying power."); Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85, 107 (1988).

system.[150] This view was not universally shared, however, particularly following the Supreme Court's ruling in *Granfinanciera*, which again referenced the public rights doctrine. For example, in recent years Caleb Nelson has argued forcefully in support of the public rights doctrine, suggesting that the efforts of modern commentators to move beyond the traditional framework in an effort to draw appropriate lines around judicial power are illusory.[151] Nonetheless, prior to *Stern*, the trend in thinking appeared to be that *Northern Pipeline* was outdated and likely to be limited to its facts, if not actually overturned.[152]

D. What is the Public Rights Doctrine?—A Synopsis of Current Law

The development of case law described above makes a clean synthesis of the public rights doctrine almost impossible, as the Court has recognized.[153] There are essentially two competing approaches to non-Article III courts and their jurisdictional authority, and each has held sway at different times in the past thirty years. The first approach is most clearly represented by the decision in *Northern Pipeline*; it reserves judicial power—that is, the ability to enter a final determination—to Article III courts, except in "narrow situations . . . in which the grant of power to the Legislative and Executive Branches" justifies the power to create legislative courts and does not threaten the separation of powers.[154] These narrow situations include the category of "public rights" cases,[155] which *Northern Pipeline* defines to include only matters arising "'between the Government and persons subject to its authority in

150. *See* Brown, *supra* note 149, at 75–76; *see also* Saphire & Solimine, *supra* note 149, at 112 (arguing that any reliance on the doctrine of public rights is "misguided" in light of the Court's "half-hearted application").

151. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 613 (2007) ("Even while modern commentators purport to get beyond distinctions of the sort that the traditional framework draws, they have found it impossible to do so. Their understanding of the relationship between 'political' and 'judicial' power inevitably reflects the distinction between legal interests that belong to the public and legal interests that belong instead to individual citizens.").

152. *See, e.g.*, Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311, 317 (1991). This mindset helps to explain why the Court's ruling in *Stern* was so astonishing to so many. *But see* Brown, *supra* note 13, at 181 ("Regardless of one's view of the outcome in [*Stern*], it was hardly surprising.").

153. *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011).

154. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982).

155. The decision in *Northern Pipeline* also addresses two other categories of appropriate congressional use of legislative courts: territorial courts and courts-martial. *See id.* at 64–66.

connection with the performance of the constitutional functions of the executive or legislative departments . . . .'"[156]

The second approach is most clearly represented by the Court's decision in *Schor*, decided only four years after *Northern Pipeline*. In *Schor*, the Court loosened the constraints on legislative courts by adopting a multi-part balancing test over *Northern Pipeline*'s rule-with-exceptions approach.[157] Rather than adopting the assumption that the exercise of judicial power was in conflict with Article III, the *Schor* decision appeared to authorize legislative adjudication so long as the "essential attributes" of judicial power remained in Article III courts, important "core" rights continued to be adjudicated by Article III courts, and Congress offered a valid justification for using the legislative courts.[158] Due to this more relaxed standard, the need for a case to fall within the public rights exception became less important;[159] even a matter of private rights could be brought before a legislative court so long as the factors identified by the Court were satisfied.[160]

The differences between these two approaches have raised serious questions about the importance of the public rights doctrine in answering questions raised by legislative courts and Article III. In addition, the Court has refrained, for the most part, from making definitive statements about the boundaries of the public rights doctrine,[161] although some principles may be consistently observed. It seems to be generally agreed that causes of action created exclusively by the Legislative or Executive branches, acting within their constitutional authority, are appropriately categorized as public rights.[162] This is particularly true where the

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156. *Id.* at 67–68 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

157. *See generally Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1989).

158. *Id.* at 851–53.

159. *See id.* at 853.

160. *Id.* at 854.

161. *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011) (declining to confirm or deny the prior suggestion that "the restructuring of debtor-creditor relations is in fact a public right"); *N. Pipeline*, 458 U.S. at 71 (noting that the restructuring of debtor-creditor relations "may well be a 'public right,'" but declining to say so definitively). This propensity of the Court to demure on the issue of what is a public right is a point of particular consternation in the bankruptcy community. *See* Brown, *supra* note 13, at 213 ("This ambiguity concerning a critical feature of the modern bankruptcy structure invites further strategic, piecemeal litigation and ensures that a cloud of uncertainty will hang over bankruptcy practice until it is finally resolved."); Mark S. Scarberry, *The Supreme Court's Decision in* Stern v. Marshall*: Analysis & Implications* (Pepperdine Univ. Sch. Law, Legal Stud. Research Paper Series, Paper No. 14, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888685.

162. *See Stern*, 131 S. Ct. at 2598 ("The Court has continued . . . to limit the [public rights] 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

government itself is a party, although it may also include situations where two private parties operate under a federal regulatory scheme.[163] However, the right created must be sufficiently distinct from a state common law action so as not to be duplicative; causes of action that are more than "closely analogous" may be "more accurately characterized as a private rather than a public right."[164]

Recognizing the historical uncertainty regarding the importance of the public rights doctrine, the Supreme Court decision in *Stern* has definitively adopted the *Northern Pipeline* approach, suggesting that, at least in the bankruptcy context, the current Court views the public rights doctrine as a determinative principle.[165] The Court reaffirmed the relevance of the public rights doctrine in the context of bankruptcy courts, even while acknowledging that its relevance may have waned in the area of administrative law.[166] The Court's decision in *Stern* hearkens more closely to a bright-line distinction than a weighing of factors, and maintains, despite recognizing the logistical consequences, that cases of

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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 also Schor*, 478 U.S. at 851 ("In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." (internal citation omitted)); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985) ("Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.").

163. *See Thomas*, 473 U.S. at 589; *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455–56 (1977). *But see Stern*, 131 S. Ct. at 2620 (Scalia, J., concurring); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65 (1989) (Scalia, J., concurring).

164. *Granfinanciera*, 492 U.S. at 52, 55.

165. *See* Kuney, *supra* note 9, at 1–2 ("The *Stern v. Marshall* decision cuts back at the seemingly more lenient approach to Congressional incursions into the domain of Article III found in [*Schor*], and appears to be a reaction, a slap back, to Congress's practice of expansively defining the bankruptcy courts' power . . . .").

166. *Stern*, 131 S. Ct. at 2615 (noting 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" but distinguishing such instances from the case at hand). In contrast, the dissent argued for a more flexible approach to Article III constraints, and a return to the thinking behind *Crowell v. Benson* and presumably *Thomas* and *Schor*, suggesting that "non-Article III adjudication of 'private rights' is not necessarily unconstitutional," but rather that proceedings involving private rights warrant a more "searching" constitutional examination. *Id.* at 2625 (Breyer, J., dissenting).

private rights must not be taken from the Article III judiciary.[167] The *Stern* decision also seeks to constrict the scope of public rights, resisting the expansion suggested by *Thomas* and *Schor*.[168] Overall, the attitude is one of an Article III retrenchment, using *Northern Pipeline* as a guide.[169]

Further, although *Stern* has not adopted a precise test, it has indicated a two-pronged approach that lends itself to an easy application of the public rights doctrine. Many lower courts have subsequently adopted this approach.[170] The first prong of the *Stern* test is whether "the action at issue stems from the bankruptcy itself," and the second is whether the action "would necessarily be resolved in the claims allowance process."[171] The satisfaction of either prong would be sufficient to establish the bankruptcy judge's authority to enter final judgment; the failure of both confines the bankruptcy judge to do no more than issue a report and recommendation.[172]

Both prongs of the *Stern* test relate to public rights characteristics. The first prong, whether the action stems from the bankruptcy itself, relates to statements by the Court indicating that public rights must be directly linked to a Congressional "regulatory scheme,"[173] that "Congress may devise novel causes of action" and assign their adjudication to legislative courts,[174] and that the Executive and Legislative branches be permitted sufficient latitude to fulfill their duties.[175] The second prong, whether the action would necessarily be resolved in the claims allowance

167. *See id.* at 2615.

168. *Id.* at 2613 ("[I]t 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.").

169. *Id.* at 2618 (The Court quotes *Northern Pipeline*'s exhortation 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." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982)).

170. *See* Crist, *supra* note 2, at 636–37 (describing the *Stern* two-prong test for identifying adjudicatory authority).

171. *Stern*, 131 S. Ct. at 2618; *see also* Crist, *supra* note 2, at 637.

172. *See* Crist, *supra* note 2, at 637.

173. *Stern*, 131 S. Ct. at 2598; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985).

174. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989).

175. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) ("In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." (citation omitted)); *see also Thomas*, 473 U.S. at 590 ("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.").

process, is more complicated. The Court likely drew this prong from prior precedent, much of it involving preference actions that pre-dated the revival of the public rights doctrine.[176] In this precedent, the Court has issued rulings on the basis of whether actions satisfy this prong, but without explicitly finding that the "claims allowance process" is itself deemed to be within the public rights doctrine.[177] The Supreme Court's reticence to confirm this conclusion is disconcerting to some, as it forces analysts to make assumptions in an area where assumptions have been frequently undermined. Nevertheless, a straightforward reading of *Stern* suggests that bankruptcy proceedings which fulfill either of these requirements may be properly categorized as public rights, and accordingly determined by a non-Article III court.

E. The Ongoing Validity of the Public Rights Doctrine

Despite *Stern*'s repeated reference to the public rights exception, some, most notably Brubaker, have argued nevertheless that the doctrine is not a reliable prediction for how the Court will rule in future cases.[178] Brubaker has instead suggested that the true underpinnings of the *Stern* decision are a return to the historical boundaries of "summary" and "plenary" jurisdiction; in other words, all proceedings formerly under a bankruptcy referee's summary jurisdiction are likely to fall under a bankruptcy judge's authority to enter a final disposition, but former plenary proceedings will not.[179] To Brubaker, the Court's reference to the

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176. *See, e.g.*, *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977); *Katchen v. Landy*, 382 U.S. 323, 327–28 (1966) (distinguishing between situations in which preferences may be brought as a summary proceeding and when they must be brought as a plenary action); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94–95 (1932); *see also* discussion *infra* Part III.D.2. *But see Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) (noting, without reference to the public rights exception, that a defendant is entitled to a jury trial in a preference action if it does not submit a claim against the estate).

177. *See, e.g.*, *Katchen*, 382 U.S. at 330 ("Unavoidably and by the very terms of the Act, when a bankruptcy trustee presents a § 57g objection to a claim, the claim can neither be allowed nor disallowed until the preference matter is adjudicated. The objection under § 57g is, like other objections, part and parcel of the allowance process and is subject to summary adjudication by a bankruptcy court."); discussion *infra* Part III.D.2(a).

178. Brubaker, *A "Summary" Theory*, *supra* note 8, at 172; *see also Meoli v. Huntington Nat'l Bank* (*In re Teleservices Grp., Inc.*), 456 B.R. 318, 343 (Bankr. W.D. Mich. 2011) ("[T]here is no need to get ensnarled in the public rights/private rights debate to answer whether a particular order issued by the bankruptcy court is final or not.").

179. Brubaker, *A "Summary" Theory*, *supra* note 8, at 122–23; *see also* Kuney, *supra* note 9, at 9–10 (arguing that *Stern*'s reasoning seems to apply to all matters that fell historically under "plenary jurisdiction," including preference and fraudulent conveyance proceedings).

public rights exception in *Stern* is nothing but legal hand-waving with no persuasive power or precedential force. His take on *Stern*, though not without its strengths, is ultimately unpersuasive.

Brubaker's preferred interpretation of the *Stern* logic appears to stem primarily from Justice Antonin Scalia's views as expressed in his concurrence.[180] As noted above, the majority in *Stern* did not identify any bankruptcy proceeding as meeting the standard for a public right, but did leave open the possibility that the restructuring of debtor-creditor relations, an overarching theme within bankruptcy law, is itself a public right.[181] Scalia, on the other hand, writing separately, reaffirmed the opinion he expressed earlier in *Granfinanciera* that the restructuring of debtor-creditor relations was not in itself a public right, because all public rights must involve the United States as a party.[182] Brubaker suggests that the majority's reluctance to rely on the public rights doctrine, and Scalia's explicit rejection of the doctrine except in very narrow circumstances, indicate that a different rationale is at work in justifying non-Article III bankruptcy adjudications—namely, historical practice.[183]

Brubaker's argument relies too strongly on the lone opinion of Scalia, particularly since it ignores the stated rationale of the Court. In other words, it is an unconvincing argument that, despite the fact that the majority opinion and the dissent[184] both referenced the public rights exception, the true direction of the Court is likely to be the historical precedent that appears to be favored by a single Justice's concurrence. It is far more likely that the majority and dissenting opinions both reference the public rights doctrine because the Court still considers it an appropriate mechanism by which to judge alleged threats to the separation of powers doctrine, whether it is dispositive, as in *Northern Pipeline*, or a factor among many, as in *Schor*.

The best way to understand the Supreme Court's view of public rights in the context of bankruptcy is to take the *Stern* opinion on its face, as an ongoing struggle to determine the constitutional scope of legislative courts in light of the Court's historically inconsistent treatment of the public rights doctrine. There is clearly a lingering debate over the scope of the public rights doctrine, but this weakness does not undermine its ultimate relevance, particularly in the bankruptcy context.

180. *See generally* Brubaker, *A "Summary" Theory*, *supra* note 8, at 165–66.

181. *Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011).

182. *Id.* at 2620 (Scalia, J., concurring); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring) ("I would return to the longstanding principle that the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication.").

183. Brubaker, *A "Summary" Theory*, *supra* note 8, at 164–66.

184. *See Stern*, 131 S. Ct. at 2623 (Breyer, J., dissenting).

III. THE PUBLIC RIGHTS NATURE OF PREFERENCES

This next section applies the public rights doctrine to the typical preference proceeding, demonstrating that, under a narrow or an expansive reading of the doctrine, it is appropriate for a non-Article III judge to issue final determinations in preference actions. The first task in making this argument is to explain the nature and function of preference proceedings.

A. The Nature and Function of Preferences

Preference actions under English law, the clear predecessor to current American law in the area of bankruptcy, were initially justified using the same grounds as fraudulent conveyance actions, that is, the law sought to punish debtors who transferred property with the intent of hindering, delaying, or defrauding their creditors.[185] Many of the American states adopted similar laws, either by statute or by inherited common law.[186] As bankruptcy laws developed in the United States, however, Congress altered the nature of preferences, first by replacing a debtor's culpable intent to grant a preference[187] with the requirement that the receiving creditor have reasonable cause to believe the transfer was a preference,[188] and then eventually removing any intent requirement at all.[189] Preference law today is a matter of strict liability during the preference period for preferred creditors.[190]

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185. *See* Fraudulent Conveyances Act, 1571, 13 Eliz., c. 5 (Eng.); *see also* John C. McCoid, II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249, 250–51 (1981) [hereinafter McCoid, *Expression of Doubt*].

186. *See* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 714 (1985) [hereinafter Countryman, *Voidable Preference*].

187. *See* 2 GARRAD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 700–01 (rev. ed. 1940) (explaining the view that the debtor's motives are of no importance for the purpose of determining a preference).

188. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 562 (1898) (amended 1938); *see also* Countryman, *Voidable Preference*, *supra* note 186, at 722–23; McCoid, *Expression of Doubt*, *supra* note 185, at 257; Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN L. REV. 3, 86–87 (1986) (suggesting that the shift reflects a slow shift in law, "from the notion of the debtor's moral duty to his creditors, to the notion, essentially irrelevant under English doctrine, of the preferred creditor's moral duty to his fellow creditors" (citation omitted)).

189. 11 U.S.C. § 547(b) (2012); *see also* Countryman, *Voidable Preference*, *supra* note 186, at 722–23.

190. *See* McCoid, *Expression of Doubt*, *supra* note 185, at 259; *see also In re Hall*, 4 AM. B. R. 671, 678 (Bankr. W.D.N.Y. 1900) (critiquing the statutory move away from the intent requirement); Weisberg, *supra* note 188, at 89–90 (discussing Referee William Hotchkiss's critique of the system in *In re Hall*).

Determining whether a transfer constitutes a preference today is a matter of applying five straightforward statutory qualifications.[191] A preferential transfer is defined as: (1) a transfer to or for the benefit of a creditor; (2) on account of an antecedent debt; (3) made while the debtor was insolvent; (4) during the preference period, generally ninety days before the bankruptcy filing; (5) with the consequence that the recipient receives more than he would have[192] had the transfer not been made and the estate liquidated pursuant to chapter 7.[193]

The primary purpose ascribed to preference law is to preserve the bankruptcy policy of distribution, which could otherwise be frustrated by pre-bankruptcy transfers.[194] The bankruptcy policy of distribution has

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191. 11 U.S.C. § 547(b).

192. *Id.* Many courts have interpreted this rule to require only that the trustee establish that the unsecured, nonpriority creditor would have received less than 100% payout in chapter 7, rather than requiring the trustee to prove what the general dividend to unsecured, nonpriority creditors would be. *See Savage & Assocs., P.C. v. Mandl* (*In re Teligent Inc.*), 380 B.R. 324, 339 (Bankr. S.D.N.Y. 2008); Countryman, *Voidable Preference*, *supra* note 186, at 736–37.

193. The full text of 11 U.S.C. § 547(b) reads as follows:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

194. *See* Countryman, *Voidable Preference*, *supra* note 186, at 748; Weisberg, *supra* note 188, at 3–4. Deterring creditors from rushing to collect from a struggling debtor, thereby increasing the likelihood of a bankruptcy filing, has also been cited as a justification for preference law. However, there are good reasons to discount the deterring effect of preferences. First, there is a chance that a preferential transfer will not be avoided, either because the transfer will fall outside the ninety day mark, or some defense will apply. Second, even if the creditor is "caught" by preference law, the consequence is simply a surrender of the prize. Thus the creditor has little to lose and everything to gain by attempting to collect from the debtor on the eve of bankruptcy. *See* Countryman, *Voidable Preference*, *supra* note 186, at 748; McCoid, *Expression of Doubt*, *supra* note

generally been identified as "equal treatment of creditors,"[195] although it is probably more accurate to characterize the policy as "equal treatment among similarly situated creditors"; the presence or absence of security can alter creditors' treatment, as can their status as priority or non-priority creditors.[196] This purpose helps to explain the strict nature of preference liability; it makes no difference to the goal of equal treatment if the debtor or the creditor *intended* the transfer to be preferential; the relevant inquiry is simply whether the transfer *is*, in fact, preferential.

A creditor who receives a voidable preference has some defenses to surrendering the preference, outlined in Subsection (c) of Section 547.[197] For example, transfers that were intended to be and were in actuality substantially contemporaneous cannot be avoided,[198] nor can transfers made in the ordinary course of business,[199] transfers made in exchange for new value,[200] or transfers below a certain amount.[201] But outside these exceptions, the strict nature of preference law can have surprising and unfortunate consequences for creditors.[202]

If a creditor has received a preferential transfer, the trustee of the bankruptcy estate is given the authority to avoid the transfer.[203] The decision to pursue the transfer is left to the trustee's discretion, although he or she may be responsible to other creditors, who may object to the trustee's decision not to pursue a preference that could, if recovered, enrich the estate to the benefit of all other creditors.[204] In addition, a

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185, at 263–64 ("If a creditor may be able to keep the payment and at worst only has to return it, he has every incentive to accept it."). *But see* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 487 (6th ed. 2009) (suggesting that the greatest importance of the preference provision may be its effect on pre-bankruptcy behavior, "because some debtors may be better able to resist demands from their creditors by pointing out that the transactions could be avoided by a subsequent bankruptcy filing").

195. *See* McCoid, *Expression of Doubt*, *supra* note 185, at 260 ("Equal treatment of creditors is the oldest and most frequently advanced goal of preference law.").

196. *See* Countryman, *Voidable Preference*, *supra* note 186, at 748.

197. 11 U.S.C. § 547(c).

198. *Id.* § 547(c)(1).

199. *Id.* § 547(c)(2).

200. *Id.* § 547(c)(3)–(4).

201. *Id.* § 547(c)(8)–(9).

202. *See, e.g.*, *Comm. Creditors Holding Unsecured Claims v. Koch Oil Co.* (*In re Powerine Oil Co.*), 59 F.3d 969, 971 (9th Cir. 1995) ("Can an unsecured creditor be better off when the debtor defaults rather than paying off the debt? Yes: Law can be stranger than fiction in the Preference Zone.").

203. 11 U.S.C. § 547(b).

204. Such limitations include the ability of creditors to withhold a favorable vote for plans that do not avoid preferential transfers, thereby preventing confirmation. *See generally* Chad P. Pugatch et al., *The Lost Art of Chapter 11 Reorganization*, 19 U. FLA. J.L. & PUB. POL'Y 39, 52 (2008). And the requirement that a confirmable plan must be

preferred creditor's claims will not be allowed unless and until the creditor surrenders the preferential transfer.[205]

B. The Case for Similar Treatment of Preferences and Fraudulent Conveyances

Perhaps because both preferences and fraudulent conveyances fall under a trustee's avoidance powers, and, because they may cover the same or very similar transactions, it is tempting to assume that they should be treated similarly in terms of constitutional analysis. If Article III of the Constitution prohibits a non-Article III judge from issuing a final determination on whether a trustee may avoid a transfer made with the intent to hinder, delay and defraud, as in a fraudulent conveyance, then, many argue, the Constitution must also prohibit the same judge from issuing a final determination on an action by the trustee to avoid a similar transfer made without such intent.[206] Even more broadly, in both types of action "the trustee simply is seeking to augment the estate for the benefit of creditors,"[207] a characterization that rings true for counterclaims against the estate, of the type considered by *Stern*, as well. Some have argued that this is, after all, the lesson of *Stern*; any attempt by the trustee to augment the estate cannot constitutionally be a "core proceeding."[208]

In making his argument that preference actions, like fraudulent conveyance actions, are likely to be found unconstitutional if treated as

"fair and equitable" and cannot "discriminate unfairly." 11 U.S.C. § 1129(b) (2012). In addition, it may be possible for creditors to obtain derivative standing to assert such claims, if they can establish a colorable cause of action and show that the estate trustee unjustifiably failed to bring suit on behalf of the estate. *See Fogel v. Zell*, 221 F.3d 955, 965–66 (7th Cir. 2000).

205. 11 U.S.C. § 502(d) (2012).

206. *See, e.g.*, Brubaker, *Bleak House*, *supra* note 63, at 16–17; S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 169 (1991) ("Throughout its opinion the [*Granfinanciera*] Court equated fraudulent conveyance and preference actions, and thus seemingly indicated that the article III, as well as the seventh amendment, analysis would be the same for these types of proceedings.").

207. McCoid, *Right to Jury Trial*, *supra* note 5, at 40.

208. *See* Crist, *supra* note 2, at 627. A further argument that preferences should be considered outside the scope of constitutional "core proceedings" after *Stern* might be a return to *Northern Pipeline*'s assertion that public rights proceedings are only those in which the government is involved as a party. *See N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982). This position appears to have been largely abandoned by the Court. *See Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011). But it has been repeatedly reaffirmed by Justice Scalia. *See id.* at 2620 (Scalia, J., concurring); *see also Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring) ("I would return to the longstanding principle that the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication.").

core proceedings,[209] Brubaker points to the fact that the Supreme Court, in *Granfinanciera*, referred to the preference proceeding in *Schoenthal v. Irving Trust Company*[210] as "indistinguishable" from the fraudulent conveyance suit at issue "in all relevant respects."[211] In light of their similarities, the Court felt itself free to lean on *Schoenthal* as precedent for its conclusion that such suits were and should be brought at law, preserving the right of trial by jury.[212]

It is worth noting, however, that a contemporary scholar condemned the Court for this course of action, arguing that the Court had misinterpreted history when it conflated preference proceedings, which were typically heard at law, with fraudulent conveyance actions, which were more generally decided in a court of equity.[213] Accordingly, the Court may have been incorrect both in its historical conclusion that the fraudulent conveyance action at hand would have been heard in a court of law,[214] and in its suggestion that cases dealing with preferences and fraudulent conveyances could be conflated. Regardless, more recent Supreme Court precedent has at least implicitly acknowledged the public rights nature of preferences, suggesting that the Court now views them as distinct from fraudulent conveyances.[215] As demonstrated below, there are valid reasons for distinguishing between the two in the public rights context.[216]

Others have argued that preferences must be excluded from core proceedings because, like actions to recover fraudulent conveyances or pursue a counterclaim against a creditor, they seek to "augment" the estate, rather than distribute it.[217] Courts considering actions under *Stern*'s two-pronged approach[218] have concluded that proceedings

209. Brubaker, *A "Summary" Theory*, *supra* note 8, at 183 ("[T]he rationale of the *Granfinanciera* decision itself clearly called into doubt the constitutionality of bankruptcy judges' core jurisdiction over preference and fraudulent conveyance suits. After *Stern v. Marshall*, the conclusion seems inescapable that such core jurisdiction to enter final judgment . . . is unconstitutional." (internal citation omitted)); *see also* Robert Miller, *Fleshing Out the Skeleton: Defining the Prongs of* Stern v. Marshall, 11 DEPAUL BUS. & COM. L.J. 1, 52–53 (2012) (defending the view that Supreme Court jurisprudence leads to the conclusion that both fraudulent conveyances and preferences are outside a bankruptcy court's constitutional adjudication).

210. 287 U.S. 92 (1932).

211. *Granfinanciera*, 492 U.S. at 48; *see also In re Teleservices Grp., Inc.*, 469 B.R. 713, 757 (Bankr. W.D. Mich. 2012) (noting the similarities between preferences and constructive fraudulent transfers).

212. *Granfinanciera*, 492 U.S. at 48–49.

213. McCoid, *Right to Jury Trial*, *supra* note 5, at 23–25.

214. *See id.* at 28.

215. *See* discussion *infra* Part III.D.

216. *See infra* Part III.C.

217. *See, e.g.*, Crist, *supra* note 2, at 671–72 (citing cases).

218. *See supra* notes 170–77 and accompanying text.

intended to augment the bankruptcy estate do not stem from the bankruptcy itself, under the logic that bankruptcy is concerned only with "a pro rata share of the bankruptcy res."[219] These courts draw support from *Stern*'s reaffirmance of "*Granfinanciera*'s distinction between actions that seek 'to augment the bankruptcy estate' and those that seek 'a pro rata share of the bankruptcy res.'"[220]

Although this standard is attractive for its simplicity—it is fairly easy to identify actions that seek to augment rather than distribute—it misrepresents the Court's position. A quick reference to the *Granfinanciera* opinion demonstrates that the actual distinction was between actions that "more nearly resemble *state-law contract claims* brought by a bankrupt corporation to augment the bankruptcy estate than they do creditor's hierarchically ordered claims to a pro rata share of the bankruptcy res."[221] In other words, the relevant inquiry is not whether the action will augment the bankruptcy estate, but whether it will do so via claims based on private rights under state law.

These arguments, and others not presented here, seek to apply the doctrine of *Stern* and its predecessors, albeit without grappling with the public rights doctrine. Instead, these approaches adopt the logical approach of treating things that appear to be similar in a similar fashion. In so doing, they seek a less ambiguous standard. Although tempting, this is error. Mere facial similarities do not necessarily reflect similarities where it matters, and what matters here are the factors delineated by the public rights doctrine. Approaches that conflate fraudulent conveyances and preferences are flawed in that they generally fail to apply this basic justification, established by *Stern*, *Granfinanciera*, and *Northern Pipeline*. The Court has wed itself to the public rights approach, particularly when it comes to bankruptcy courts, and there can be little confidence in predicting the Court's position regarding any particular bankruptcy proceeding without applying the public rights doctrine.[222]

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219. *See, e.g.*, *Steinle v. Trico Real Estate, L.P.* (*In re CCI Funding I, LLC*), No. 09-17437, Adv. No. 10-1418 MER, 2012 WL 3421173, at *6 (Bankr. D. Colo. Aug. 15, 2012) (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011)).

220. *See, e.g.*, *Stern*, 131 S. Ct. at 2618 (quoting *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 56 (1989)).

221. *Granfinanciera*, 492 U.S. at 56 (emphasis added).

222. Some have expressed concern that the Supreme Court has refused to positively identify proceedings in bankruptcy that would qualify under the public rights doctrine, raising the specter that there may be no such proceedings. *See* Brown, *supra* note 13, at 222 (quoting Judge Jeffrey R. Hughes, in *In re Teleservices Grp.*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011)). This concern is unnecessary; the more likely explanation for the Court's reticence is a simple desire to preserve its ability to issue case-by-case determinations to preserve the Court's ability to respond with flexibility in permitting the growth of the administrative state while still preserving separation of powers. *See* Brubaker, *A "Summary" Theory*, *supra* note 8, at 172.

Application of the public rights doctrine reveals that the differences between preferences and fraudulent conveyances are sufficient to justify different constitutional treatment; preferences qualify as public rights, even if fraudulent conveyances do not. This conclusion is bolstered by the hesitation expressed by the Court in finding that fraudulent conveyances should be categorized as private, rather than public rights,[223] and its indication in *Stern* that a preference action would call for a different outcome than the result in that case.[224] The Court in *Granfinanciera* acknowledged the "debate" surrounding this issue, suggesting that a few slight differences would and are sufficient for analysis of a similar, but distinct proceeding, to reach a contrary outcome.[225] The Court in *Stern* contrasted the counterclaim against preference actions to demonstrate that the counterclaim was not a matter of public rights.[226] The contrast suggests, and other factors explained below confirm, that preference actions are public rights.[227]

C. A Contrast of Preference and Fraudulent Conveyance Law

As noted above, preference law arose largely from the same concerns that shape the law of fraudulent conveyances, also known as fraudulent transfers.[228] Both sought to punish the debtor for transfers made with the intent to hinder, delay, or defraud creditors. Accordingly, such transfers constituted "acts of bankruptcy," and could cost the debtor a discharge in bankruptcy.[229] As explained above, preference law developed away from any intent requirements, reflecting the attitude that the purpose was not to punish an individual creditor, but rather to achieve equitable distribution among all creditors.[230] As expressed by the Supreme Court, the primary distinction between a fraudulent conveyance and a preference is:

223. *See Granfinanciera*, 492 U.S. at 55; *see also id.* at 72–73 (White, J., dissenting) ("*Katchen* makes it clear that when Congress does commit the issue and recovery of a preference to adjudication in a bankruptcy proceeding, the Seventh Amendment is inapplicable.").

224. *Stern*, 131 S. Ct. at 2618 (comparing the preference actions brought in *Katchen* and *Langenkamp* with the claim at issue, noting that "Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law").

225. *See Granfinanciera*, 492 U.S. at 55.

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

227. *See id.*

228. *See supra* Part III.A.

229. *See* Countryman, *Voidable Preference*, *supra* note 186, at 715–18.

230. *See supra* Part III.A.

> One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is *malum per se* and the other *malum prohibitum*,—and then only to the extent that it is forbidden. A fraudulent conveyance is void regardless of its date; a preference is valid unless made within the prohibited period.[231]

Another difference between the two actions, particularly relevant for purposes of the public rights exceptions, is that unlike preference law, the law of fraudulent conveyance was historically applicable outside of bankruptcy,[232] as it still is today. State law regarding fraudulent conveyances outside of bankruptcy is generally uniform, thanks in large part to the Uniform Fraudulent Conveyance Act (UFCA),[233] which was replaced in 1984 with the Uniform Fraudulent Transfer Act (UFTA).[234] The UFTA has been adopted by forty-three states, as well as the District of Columbia.[235]

The fact that states have laws regarding fraudulent conveyances on the books is reflected in the Bankruptcy Code. Section 548 of the Bankruptcy Code, dealing with fraudulent conveyances, provides that the trustee may avoid any transfer made within the two years prior to the date of filing with the intent to hinder, delay, or defraud a creditor.[236] The language and wording of the section purposefully mirror the language of the UFTA,[237] with the significant exception that the bankruptcy action looks back only two years,[238] whereas the UFTA has a four year look-back.[239] In practice, the difference in statute of limitations is immaterial, because the trustee has the power, under Section 544(b)(1), to avoid transfers pursuant to applicable law,[240] which means that the

231. *Van Iderstine v. Nat'l Discount Co.*, 227 U.S. 575, 582 (1913); *see also* GLENN, *supra* note 187, at 661–62.

232. *See* Countryman, *Voidable Preference*, *supra* note 186, at 714. For a thorough history of the origins of the fraudulent conveyance cause of action, *see* 1 GARRAD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 79–99 (rev. ed. 1940).

233. The Uniform Fraudulent Conveyance Act (UFCA) was adopted by the National Conference of Commissioners on Uniform Laws in 1918. The UFCA was enacted in twenty-four states and used as a model in many others. WARREN & WESTBROOK, *supra* note 194, at 73.

234. UNIF. FRAUDULENT TRANSFER ACT (1984), 7A PT. II U.L.A. 2 (2006)

235. *Id.* at 2–3.

236. 11 U.S.C. § 548(a) (2012).

237. *Compare id. with* UNIF. FRAUDULENT TRANSFER ACT § 4 (1984), 7a Pt. II U.L.A. 2, 58–59 (2006).

238. 11 U.S.C. § 548(a).

239. *See* UNIF. FRAUDULENT TRANSFER ACT § 9 (1984), 7A PT. II U.L.A. 2, 194 (2006).

240. 11 U.S.C. § 544(b)(1).

trustee can typically take advantage of a state's longer look-back by bringing the action under that provision of the Bankruptcy Code.

The ability of the trustee to incorporate a state law cause of action is the most relevant distinction between preference actions and fraudulent conveyance actions for the purposes of the public rights exception.[241] Courts have generally recognized that private rights are those that most resemble state law claims, or claims that would have been brought under the common law, and actions to set aside fraudulent conveyances, with their frequent and intentional link to state law, are thereby more easily categorized as private rights.[242] However, there is no such link between state law and preference proceedings. This distinction is crucial for purposes of analysis under the public rights doctrine.

D. Preferences Are Public Rights

Because the Court has never actually found a bankruptcy proceeding to be within the category of public rights, there is no template in the case law for making the case that preferences are public rights. The case law does not identify the specific characteristics of a public right. It does, however, explain what prevents qualification as a public right. Consequently, identifying a public right at this point in the doctrine's development involves arguing a positive based on the absence of negative factors, with the limited assistance of some vague guidelines and generalities that purport to define public rights.

The analysis here draws from *Stern*'s two-pronged approach. In making the case that the counterclaim at issue did not fall within Congress's power to bypass Article III, the Court indicated that "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[243] In so stating, the Court appears to be presenting two mechanisms by which non-Article III adjudication can be justified, or rather, two manifestations of the public rights doctrine. As explained below, most preference

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241. The two actions have also historically been treated differently in the courts. *See, e.g.*, McCoid, *Right to Jury Trial*, *supra* note 5, at 22–23 (observing that historically preference actions were brought in a court of law, whereas fraudulent conveyance actions were typically brought in a court of equity). *But see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 48–49 (1989) (indicating that the preference action in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932) is "indistinguishable from" the fraudulent conveyance suit at issue).

242. *See Granfinanciera*, 492 U.S. at 55–56.

243. *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011); *see also id.* at 2611 (distinguishing the debtor's counterclaim from cases that were "federal claims under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims").

actions satisfy both prongs of the *Stern* test, accordingly, their final determination before a non-Article III judge should not be in question.[244]

1. PREFERENCES STEM FROM BANKRUPTCY

The public rights test suggested by *Stern* is satisfied because preference law stems from the bankruptcy itself, and from no other source. It is widely acknowledged that preference doctrine is a central feature of bankruptcy law.[245] As the Supreme Court recently stated, the authority to avoid preferential transfer "has been a core aspect of the administration of bankrupt estates since at least the 18th century."[246] In addition, preference actions, unlike fraudulent conveyance actions, counterclaims by the estate against creditors, and other similar efforts to "augment" the estate, are strictly creatures of federal law, established by Congress in the Bankruptcy Code itself.

Although the Supreme Court has not issued a ruling on the basis of preference actions' origins in bankruptcy, it has referenced preference law's close relationship with bankruptcy law by way of counterexample. The decision in *Stern* made much of the fact that the debtor's counterclaim was not established by Congress.[247] In finding that the counterclaim did not fall within "the varied formations of the public rights exception," the Court noted "[i]t is not a matter that can be pursued only by grace of the other branches . . . [, i]t does not 'depend[] on the will of congress'; Congress has nothing to do with it."[248] The Court further observed that the "claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, or *Atlas Roofing*. It is not 'completely dependent upon' adjudication of a claim created by federal law, as in *Schor*."[249] These observations cannot be said for preference

244. *See infra* Part III.D.1–2.

245. Weisberg, *supra* note 188, at 3 ("[T]he preference, unlike its somewhat mismatched partner, the fraudulent conveyance, is strictly a creature of bankruptcy law, rather than a part of nonbankruptcy commercial law that simply receives special enforcement in the bankruptcy process.").

246. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2006) ("[T]hose who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property."). *But see Schoenthal*, 287 U.S. at 94–95 (observing that under the bankruptcy act of that time, "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it. They may be brought in the state courts as well as in the bankruptcy courts" (citation omitted)).

247. *See Stern*, 131 S. Ct. at 2605.

248. *Id.* at 2614 (quoting *Murray v. Hoboken Land and Improvement Co.* (*In re Murray's Lessee*), 59 U.S. 272, 284 (1855)) (internal citations omitted).

249. *Id.* (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986)) (internal citations omitted).

actions, which do depend on the will of Congress, and flow entirely and exclusively from a federal statutory scheme. Indeed, the Court in *Stern* used preferences to illustrate the distinction between such "public rights" types of cases and the "private right" case at issue.[250]

In addition, and unlike fraudulent conveyance actions addressed in *Granfinanciera*, preference actions are particular to bankruptcy, and have no ties to state law.[251] Preferences are defined by and accordingly exclusive to bankruptcy cases, a step beyond causes of action that arise in or out of the bankruptcy filing.[252] Like the causes of action in *Atlas Roofing* and *Thomas*, preference laws "do[] not depend on or replace a right . . . under state law."[253]

Further, preference actions are a "'particularized area of law'"[254] dealing with a specific set of requirements under a strict liability statute. The Court previously rejected the assertion that counterclaims of the type asserted by the debtor in *Stern* fell within the category of public rights because the authority to determine such counterclaims was "not limited to a 'particularized area of the law,' as in *Crowell, Thomas,* and *Schor*."[255] In contrast, Congress has drafted law regarding preference actions to create a specific cause of action arising only when the particularized standards are satisfied.[256] Analysis of a preference action involves a simple application of the standard to the facts; resolution of preference actions before bankruptcy judges familiar with the standards and accustomed to their application could well be described as 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.'"[257]

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250. *Id.* at 2618. In acknowledging that the Court's language here goes against his argument, Brubaker suggests that this is a "head fake" by the Court. Brubaker, *A "Summary" Theory*, *supra* note 8, at 183. My concerns regarding this attitude of refusing to take the Court at face value are expressed *supra* Part II.E.

251. *See* McCoid, *Right to Jury Trial*, *supra* note 5, at 41 ("The contours of avoidable preferences are peculiarly the subject of bankruptcy law.").

252. *See In re Ortiz*, 665 F.3d 906, 911–12 (7th Cir. 2011) (finding the proceedings at issue to be outside the public rights doctrine despite the fact that they "would have 'no existence outside of the bankruptcy'" and are "'predicated on the defendants' participation'" in the bankruptcy (quoting *In re Repository Techs., Inc.*, 601 F.3d 710, 719–20 (2010))).

253. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985); *see also Atlas Roofing v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977).

254. *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 852).

255. *Id.* at 2615 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982)).

256. *See generally* 11 U.S.C. § 547 (2012).

257. *Stern*, 131 S. Ct. at 2615 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)); *see also* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of*

Preference actions are distinct to bankruptcy—created by virtue of Congress's authority to enact laws of bankruptcy—and are sufficiently particularized to justify adjudication by a specialized tribunal. Preference actions stem from the bankruptcy itself; accordingly, they are public rights. As a public right, it is appropriate and constitutional for Congress to assign the final adjudication of a preference action to non-Article III bankruptcy courts. [258]

2. PREFERENCE ACTIONS ARE NECESSARILY RESOLVED IN THE CLAIMS ALLOWANCE PROCESS

Commentators and judges attempting to make sense of the standard set forth in *Stern* have frequently taken refuge in the second prong of the *Stern* standard to answer questions surrounding Article III.[259] The second prong, whether the action is necessarily resolved in the claims allowance process, may be more conducive to application in any given factual scenario than the first prong's "stemming" requirement because it involves a forward-looking prediction of current judicial processes rather than a backward-looking explanation of an action's origins. As demonstrated by earlier Court opinions, the origins of an action can be the subject of much debate.[260] More to the point, the second prong has

Bankruptcy Administration, 60 UCLA L. REV. 384, 389 (2012) (arguing that bankruptcy policymaking should be shifted from courts to an administrative agency). *But see* McCoid, *Right to Jury Trial*, *supra* note 5, at 41 (arguing that neither preferences nor fraudulent conveyances are sufficiently specialized to warrant an "extension of the realm of legislative courts").

258. In ruling on *Stern* challenges, lower courts have followed a similar rationale for other types of bankruptcy proceedings. *See Miller v. Greenwich Capital Fin. Prods., Inc.* (*In re Am. Bus. Fin. Servs., Inc.*), 457 B.R. 314, 319–20 (Bankr. D. Del. 2011) ("If not for the bankruptcy, these [equitable subordination] claims would never exist. Therefore, this Court concludes that is has [constitutional authority to hear and enter a final judgment on] this adversary proceeding as it directly stems from the bankruptcy case.").

259. *See Sundale, Ltd. v. Fla. Assocs. Capital Enters. LLC*, No. 11-20635-CIV, 2012 WL 488110, at *5–6 (S.D. Fla. Feb. 14, 2012) (holding that the bankruptcy court could enter final judgment on the creditor's claim because it would necessarily be resolved in ruling on the proof of claim) *aff'd sub nom. Sundale, Ltd. v. Fla. Assocs. Capital Enters., LLC* (*In re Sundale, Ltd.*), 499 F. App'x 887 (11th Cir. 2012); *In re Salander O'Reilly Galleries*, 453 B.R. 106, 115–18 (Bankr. S.D.N.Y. 2011) *aff'd sub nom. Kraken Invs. Ltd. v. Jacobs* (*In re Salander-O'Reilly Galleries, LLC*), 475 B.R. 9 (S.D.N.Y. 2012)) ("The thread that binds these cases is the concept that when the jurisdiction of the bankruptcy court is at issue, the adjudication of a proof of claim—a request for payment from the estate—is of paramount concern."); Brubaker, *A "Summary" Theory*, *supra* note 8, at 170–71

260. *See* McCoid, *Right to Jury Trial*, *supra* note 5, at 18 (taking issue with Justice William Brennan's analysis that a fraudulent conveyance action was historically

been explicitly determinative in Supreme Court precedent, meaning that the Supreme Court has identified actions necessarily resolved in the claims allowance process and issued rulings on that basis. This is in contrast to the Supreme Court's reliance on the first prong, which has been much less definitive. Unfortunately, as explained below, the Supreme Court's rulings on the second prong have also muddied the waters somewhat, and provoked some misinterpretations regarding this portion of *Stern*'s public rights test.

a. A filed proof of claim—the easy case

It is generally agreed among commentators and jurists alike that a preference action may be finally adjudicated by a bankruptcy judge when the creditor-defendant has filed a proof of claim in the bankruptcy action, because it is necessary to determine the preference action to make a final determination on the proof of claim. This position is well-supported in the Court's jurisprudence. Two cases in particular are informative on this point.

The first is *Katchen v. Landy*,[261] a case pre-dating the modern Bankruptcy Code, in which the Court considered the jurisdiction of a bankruptcy referee over a voidable preference action.[262] At that time, the summary/plenary distinction still applied; the bankruptcy judge only had summary jurisdiction, or the authority to enter final orders, over "'controversies relating to property over which [the courts] have actual or constructive possession.'"[263] The creditor argued that, because preference actions were considered plenary when the preferred creditor had not filed a claim in the bankruptcy proceeding, the situation should be the same when the creditor's filed claim is contested by the trustee.[264]

The Court disagreed, finding that, although the Bankruptcy Act had not expressly conferred summary jurisdiction to claims to surrender preferences, it had conferred the express power to allow or disallow claims.[265] Recognizing this authority, the Court further observed that "[u]navoidably and by the very terms of the [Bankruptcy] Act, when a bankruptcy trustee presents [an objection to a claim based on the existence of a preference], the claim can neither be allowed nor

established at law, and arguing instead that such an action "was grounded in a historical option to pursue [a fraudulent conveyance] in equity").

261. 382 U.S. 323 (1966).

262. *Id.* at 325.

263. *Id.* at 327 (quoting *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940)).

264. *Id.* at 327–28.

265. *Id.* at 328–30.

disallowed until the preference matter is adjudicated."[266] Accordingly, the preference action is "part and parcel of the allowance process and is subject to summary adjudication by a bankruptcy court."[267] As explained by the Court in *Stern*, "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."[268] The Court then declined to say whether summary jurisdiction would have existed had "'all of the substantial factual and legal bases'" for the preference action not been disposed of in ruling on the creditor's claims.[269] In other words, while the Court deemed summary jurisdiction appropriate when a creditor filed a proof of claim, it did not foreclose whether jurisdiction would have been appropriate had the creditor not filed a proof of claim, either in *Katchen* or more recently in *Stern*.

Several decades after *Katchen*, the Court was confronted by another challenge to preference procedure, this time brought under the Seventh Amendment by preferred creditors who argued that they were entitled to a jury trial in avoidance proceedings.[270] In a per curiam opinion issued in the case *Langenkamp v. Culp*,[271] the Court drew on its ruling in *Granfinanciera* to hold that "filing a claim against a bankruptcy estate . . . triggers the process of 'allowance and disallowance of claims,' thereby subjecting [the creditor] to the bankruptcy court's equitable power."[272] "In other words," the Court explained, "the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship . . . ."[273] Accordingly, the defendants were not entitled to a jury trial on the alleged preference.[274] Following the Supreme Court's lead in *Stern*, commentators have conflated the public rights analysis involved in Seventh Amendment challenges and Article III challenges, reading *Langenkamp* as support for the conclusion that the bankruptcy court may issue a final determination in cases where the defendant/creditor has filed a proof of claim.[275]

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266. *Id.* at 330.

267. *Id.*

268. *Stern v. Marshall*, 131 S. Ct. 2594, 2616 (2011).

269. *Id.* at 2616–17 (quoting *Katchen*, 382 U.S. at 332 n. 9).

270. *Langenkamp v. Culp*, 498 U.S. 42, 42–43 (1990).

271. 498 U.S. 42 (1990).

272. *Id.* at 44 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58 (1989)).

273. *Id.* at 44.

274. *Id.* at 45.

275. *See, e.g.*, Brubaker, *Bleak House*, *supra* note 63, at 17; Gibson, *supra* note 206, at 166–68, 167 n.165; Christopher S. Lockman, Esq., *Makalíduñg's Post: How* Stern v. Marshall *Is Shaking Bankruptcy Court Jurisdiction to Its Core*, 50 DUQ. L. REV. 125,

b. A filed proof of claim—the misinterpretation

Unfortunately, many commentators have also been misled or even seduced by the ease of the proof of claim analysis, arguing that the presence of a filed proof of claim is a necessary element to non-Article III final adjudication, rather than just a factor in the broader public rights analysis.[276] This flawed application of *Stern* stems in part from language found in *Langenkamp*. In dicta, the Court had proposed that "[i]f a party does *not* submit a claim against the bankruptcy estate, [. . . that party] is entitled to a jury trial,"[277] suggesting that the real issue is not the public rights doctrine at all, but merely whether or not the creditor filed a claim.[278] The Court has previously held as much in the context of another Seventh Amendment challenge.[279]

In light of the similarities between the jury trial and Article III analyses, some have concluded that *unless* a creditor has filed a proof of claim, preference actions fall outside the category of actions appropriate for a non-Article III court's final adjudication.[280] Alec Ostrow, for example, has argued that the only justification for core jurisdiction by a non-Article III court in preference proceedings is voluntary waiver of the right to Article III adjudication by the participants in the case, as demonstrated by the filing of a proof of claim.[281]

This reasoning is flawed in at least four respects. First, it relies heavily on the idea that fraudulent conveyance actions and preference actions are indistinguishable for purposes of the public rights analysis,

150 (2012) ("While the analysis in both *Granfinanciera* and *Langenkamp* was couched in terms of a jury trial right and not Article III judicial power, the Supreme Court has on several occasions equated the analysis between the two. As a consequence, many courts have concluded that by waiving a right to a jury trial through filing a claim, creditors were also waiving their rights to be heard by an Article III tribunal." (internal footnotes omitted)); Miller, *supra* note 209, at 2.

276. *See, e.g.*, Crist, *supra* note 2, at 633; Ostrow, *supra* note 87, at 112.

277. *Langenkamp*, 498 U.S. at 45.

278. *West v. Freedom Med., Inc.* (*In re Apex Long Term Acute Care—Katy LP*), 465 B.R. 452, 455–56 (Bankr. S.D. Tex. 2011) ("If the Seventh Amendment question requires the same answer as the Article III question, the *Schoenthal*/*Katchen*/*Langenkamp* line of cases implies that preference actions may not be public rights disputes.").

279. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58 (1989) ("We read *Schoenthal* and *Katchen* as holding that, under the Seventh Amendment, a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate . . . .").

280. Ostrow, *supra* note 87, at 117; *see also Tabor v. Kelly* (*In re Davis*), No. 05-15794-GWE, Adv. No. 07-05181-L, 2011 WL 5429095, at *12 (Bankr. W.D. Tenn. Oct. 5, 2011) (finding that the court could not issue a final ruling in the debtor's preference and fraudulent conveyance actions because the defendant had not filed a proof of claim).

281. Ostrow, *supra* note 87, at 117.

and second, that the analysis regarding jury trials can be overlaid on questions regarding Article III, making *Granfinanciera* controlling precedent. For reasons explained above, the first assertion is simply incorrect[282] and the second lacks a strong justification.[283] Third, it places undue emphasis on the proof of claim, using this approach as an alternative to the public rights doctrine.[284] Rather than conducting a full analysis of the public rights doctrine, this approach relies instead on a quick factual determination—was there a claim filed by the creditor? Fourth, it misunderstands the nature of preference proceedings and claims determination, supposing that there is a temporal requirement that the claim must be filed before the preference action is heard in order for the preference action to have an impact on the claim.[285] Bankruptcy practice suggests that no such temporal requirement exists.

The consequence of these errors is twofold. First, proponents of this approach skip an analysis of preference actions under the public rights doctrine altogether, opting for a "proof of claim" shortcut instead of the methodology adopted by the Supreme Court. Second, in applying this shortcut, proponents assume that it may only be satisfied when the creditor/defendant of a preference proceeding has previously filed a claim against the estate. This assumption is incorrect both as a doctrinal matter, when looking at modern Supreme Court cases, and as a practical matter because bankruptcy practice must regularly cope with allowed claims and preference proceedings that do not follow a consistent temporal order.[286]

c. Countering the proof of claim shortcut

The shortcut described above, which has been embraced by Ostrow and others, reflects an inappropriate application of Supreme Court precedent and a flawed interpretation of bankruptcy law. First, the ruling in *Stern* indicates that the mere filing of a claim is not a dispositive factor; under a complete public rights analysis, both prongs are relevant and require examination.[287] By virtue of the two-pronged approach, final

282. *See* discussion *supra* Part III.C.

283. *See* discussion *supra* note 21.

284. *See* discussion *infra* Part III.D.3.

285. *See id.*

286. *See infra* notes 294–99 and accompanying text.

287. Despite critics' reliance on the preference cases discussed above, nothing in the Supreme Court's jurisprudence contradicts this conclusion. In *Katchen*, for example, the Court declined to say whether summary jurisdiction, or the issuing of a final order by the bankruptcy referee, would have been appropriate even if "all of the substantial factual and legal bases" had not been disposed of in ruling on the creditor's claims, a point the *Stern* Court emphasized. *Stern v. Marshall*, 131 S. Ct. 2594, 2616–17 (2011) (quoting *Katchen v. Landy*, 382 U.S. 323, 332 n.9 (1966)).

orders may be issued in preference actions by a non-Article III judge even if the preference actions are not finally resolved in ruling on the creditor's claims, simply because they are public rights themselves.[288]

Second, justifying the proof of claim approach outside the context of the second prong on the grounds that it demonstrates the creditor's intent to waive his right to an Article III court[289] is problematic because it presupposes that the right is subject to waiver. This issue is heavily disputed and the subject of an outstanding petition to the Supreme Court.[290] Further, the Court's decision in *Stern* held that the mere filing of a proof of claim by the defendant in that case was not sufficient to permit the bankruptcy court to issue a final ruling when it was not necessary to determine the cause of action in order to resolve the claim.[291] This indicates that the filing of a proof of claim either does not constitute waiver, or that waiver of a personal right is insufficient to justify final determination by a non-Article III court.[292] There is no reason to think that this ruling in *Stern* is not equally applicable to other core proceedings, like preferences or fraudulent conveyances, which face a challenge under Article III.

Third, preference actions may be deemed "necessarily resolved in the claims allowance process" even if they are not preceded by a creditor's proof of claim. The recovery of a "true" preference, true in that it is not actually a fraudulent conveyance, necessarily creates an allowable claim against the estate. This is because a preference, rather than a fraudulent conveyance, is given on account of a legitimate debt.

288. This conclusion is also consistent with *Stern*'s suggestion that its holding was a narrow one, which at least one court has interpreted to mean that "most fundamental bankruptcy matters must fall within bankruptcy courts' constitutional authority." *West v. Freedom Med., Inc.* (*In re Apex Long Term Acute Care—Katy LP*), 465 B.R. 452, 458 (Bankr. S.D. Tex. 2011).

289. *See* Ostrow, *supra* note 87, at 109.

290. *See* discussion *supra* notes 80–85 and accompanying text.

291. *Stern*, 131 S. Ct. at 2616–17. In rejecting this argument, the Court again runs through considerations pertinent to the public rights exception, namely, that the right at interest was created under state law, and that the claim against the estate was unaffected by the counterclaim. *Id.* at 2611–13; *see also* Brubaker, *A "Summary" Theory*, *supra* note 8, at 163 (noting that the majority of the Court in *Stern* rejected the inference that the creditor's proof of claim reflected consent sufficient to authorize the bankruptcy court to determine the counterclaim against him).

292. For more on the issue of consent to jurisdiction, *see* Masterson, *supra* note 25, at 109–10 (noting that where there are non-exempt assets, a creditor's decision to file a proof of claim or not is really a Hobson's choice, because failure to file a proof of claim will mean foregoing any hope of collecting from the debtor); *see also* Miller, *supra* note 209, at 11 ("Because a creditor filing a proof of claim in bankruptcy cannot choose to pursue the debt elsewhere, both *Granfinanciera* and *Stern* rejected [the notion] that filing a proof of claim constituted implied consent to bankruptcy court adjudication of an estate's counterclaim.").

As it is currently constructed, the preference requires no fraud, misappropriation, or even ill-will in its grant or its acceptance. Accordingly, creditors who have received a preference that is then avoided will always have an enforceable claim against the estate on account of the underlying debt, at least in the amount of the avoided preference, if not greater.[293]

Finally, the view that preference actions are only necessarily resolved in the claims process if a proof of claim was filed prior to the preference action is contrary to modern bankruptcy practice. The view seeks to force the claims process into a rigid temporal sequence, when in reality cases often advance on a much more circuitous route. Because of differing deadlines for the submission of claims[294] and the filing of preferences proceedings,[295] preference actions may continue to be brought long after claims have been filed. But then, once a preference action has been determined, new claims may be filed as a consequence of the creditor's newly reinstated debt.[296] Bankruptcy courts are repeatedly called upon to manage this fluctuating system as part of the claims resolution process.

For example, it is not altogether uncommon for the trustee in a chapter 11 case to bring a preference action after the plan has already been voted on and confirmed. In such cases, preference defendants who have allowed claims under the plan have sought to have the preference action disallowed on the basis that the trustee failed to raise the preference as a defense to their claims.[297] Under the rigid temporal view of the process of determining claims, such an action would be disallowed, because it failed to raise objections to the claims prior to their allowance under the confirmed chapter 11 plan. However, the

293. *See* 11 U.S.C. § 502(b) (2012).

294. Pursuant to Federal Rule of Bankruptcy Procedure 3002(c), a timely proof of claim must be filed not later than ninety days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a). FED. R. BANKR. P. 3002(c). This § 341(a) meeting must be scheduled by the trustee "[w]ithin a reasonable time after the order for relief" in a bankruptcy filing. 11 U.S.C. § 341(a). Although it does not overcome this standard of reasonableness, the Federal Rule of Bankruptcy Procedure 2003(a) indicates that the trustee shall call the § 341(a) meeting between twenty and forty days following the order for relief. FED. R. BANKR. P. 2003(a). *But see Scroggins v. BP Exploration & Oil, Inc.* (*In re Brown Transp. Truckload, Inc.*), 161 B.R. 735, 738 (Bankr. N.D. Ga. 1993) (finding an initial creditor's meeting scheduled for seven months after the filing was within a "reasonable time" and the Bankruptcy Rule requiring an earlier creditors meeting was void).

295. Pursuant to 11 U.S.C. § 546 of the Bankruptcy Code, the estate trustee may not commence an avoidance action more than one year after his appointment or two years after the order for relief, whichever is later. 11 U.S.C. § 546(a)(1).

296. *Id.* § 502(h); *see also id.* § 550(a).

297. *See id.* § 502(d) (disallowing claims from any entity from which property is recoverable as a preference).

majority view among the courts is that such an action may continue, based on a close reading of the applicable statute and the reality that smooth administration of a reorganization may require that preferences are only attended to after a plan is in place.[298] Accordingly, preferences remain closely intertwined with the claims allowance process, despite the time frame in which those claims are brought and allowed. When analyzing the link between preferences and the claims allowance process, it should not matter whether those claims were filed prior to the preference action or arose by virtue of the preference action itself.[299]

In conclusion, the appropriate test for preference actions is the public rights test laid out in *Stern*, a two pronged approach, with each prong intended to reach cases consistent with the justification for the public rights exception to Article III determination. Under this two-pronged approach, preference actions are decidedly matters of public rights—both because they stem from bankruptcy law itself as the creation of exclusively federal law,[300] and because they are necessary to resolve claims of creditors against the estate.[301] Concerns that

298. *See Gold v. Eccleston* (*In re Dornier Aviation (N. Am.), Inc.*), 320 B.R. 831, 837 (E.D. Va. 2005) ("Nowhere does the plain language of the statute provide or even suggest a corollary right of creditors to dispute avoidance actions on the basis of previously settled claims."); *Shurn v. Gilbert* (*In re Gulf Coast Glass & Erection Co.*), 484 B.R. 685, 695 (Bankr. S.D. Tex. 2013) (noting practical considerations to delay a preference action until after plan confirmation); *TWA Inc. v. S.F. Airports Comm'n* (*In re TWA Inc. Post Confirmation Estate*), 305 B.R. 221, 227 (Bankr. D. Del. 2004) ("I have experienced a number of large chapter 11 cases where the plan confirmation process turned on the resolution of a number of large claims. This dictates the need for a claims resolution process occurring long before any preference analysis is undertaken."). *But see LaRoche Indus. v. Gen. Am. Transp. Corp.* (*In re La Roche Indus.*), 284 B.R. 406, 408–09 (Bankr. D. Del. 2002) (holding that 11 U.S.C. § 502(d) "stands for the proposition that if a claim is allowed there is no longer a voidable transfer due from that claimant" and that a voidable transfer "must be determined, as part of the claims process and not at a later time") *abrogated by Caliolo v. Saginaw Bay Plastics, Inc.* (*In re Cambridge Indus. Holdings*), No 00-1919, 2006 WL 516764 (D. Del. Mar. 2, 2006).

299. This view of preferences is further supported by the Supreme Court's recent holding in *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369–72 (2006) (describing preference actions as *in rem* proceedings "premised on the debtor and his estate, and not on the creditors" (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004)). *See also West v. Freedom Med., Inc.* (*In re Apex Long Term Acute Care—Katy LP*), 465 B.R. 452, 457 (Bankr. S.D. Tex. 2011) ("*Granfinanciera*, *Katchen*, *Langenkamp*, and *Schoenthal*, taken together, imply that § 547 claims fall outside the public rights doctrine. But *Katz—the most recent pronouncement*—weighs heavily in the other direction.").

300. *See Stern v. Marshall*, 131 S. Ct. 2594, 2612 ("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.").

301. *See In re Apex*, 465 B.R. at 463 (Bankr. S.D. Tex. 2011) ("The Court concludes that preference actions both stem from the bankruptcy itself and are decided primarily pursuant to *in rem* jurisdiction. The cause of action for preferential transfers is

preferences do not fall under this category appear to be rooted in the mistaken belief that preferences and fraudulent conveyances are indistinguishable, or should be treated as such for the purposes of analysis under the public rights exception, and a corresponding misinterpretation of Supreme Court jurisprudence.[302]

CONCLUSION

In the wake of the Supreme Court's decision in *Stern*, the procedural mechanism by which preference actions are determined, typically through the statutorily "core" jurisdiction of a non-Article III bankruptcy judge, has proved to the be the subject of controversy. In the post-*Stern* scramble to interpret the decision and predict the future implications, some have concluded that preference actions must lie outside a non-Article III court's authority to issue final determinations. This conclusion is incorrect, as demonstrated by a careful look at the Supreme Court's ruling in *Stern* and an analysis of previous jurisprudence on the issue of the public rights doctrine and preference actions. The public rights doctrine, under which final determination by a non-Article III court is authorized under the Constitution, is alive and well, and dispositive[303] regarding the bankruptcy courts' scope of authority with respect to preference actions. Preference actions both stem from the bankruptcy itself and are necessary for a final determination of

established by the Bankruptcy Code.") The majority of courts who have considered the matter appear to have reached a similar conclusion. *See* Crist, *supra* note 2, at 663–66.

302. Concerns of this type may be partially rooted in the fact that preference actions, like fraudulent conveyance actions, are discretionary, meaning that a trustee may choose to bring such an action or not, according to the strategic demands of the situation. Under this procedural setup, such actions appear less "public rights," established by Congress and involving the government as a party, and more "private rights," actions brought by one individual against another. Although the presence of two private parties has not proved fatal to all determinations of "public rights," see *supra* notes 163–64 and accompanying text, it would seem the "gold standard" of public rights would not permit such a discretionary scheme. A simple solution may be to make preference actions mandatory, resembling more the automatic stay than the fraudulent conveyance. Such an alteration to the system would introduce other advantages, primarily greater legitimacy in the eyes of creditors. An in-depth evaluation of this proposal is outside the scope of this paper.

303. There may be a lingering debate that, despite *Stern*'s attachment to the *Northern Pipeline* approach, *Schor* has not been overturned; accordingly, a balancing test may be more appropriate to determine whether a proceeding must be finally determined by an Article III court. To the extent that *Schor*'s balancing test will be held relevant to an inquiry regarding bankruptcy proceedings, it remains likely that preference proceedings would fall within the bankruptcy court's proper jurisprudence, given the generous nature of the test. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986).

claims against the bankruptcy estate. Accordingly, they satisfy the test of public rights set forth by the Supreme Court in *Stern*.