WELLNESS INTERNATIONAL NETWORK V. SHARIF: MINIMIZING THE JURISDICTIONAL IMPACT OF *STERN* THROUGH CONSENT OF BANKRUPTCY LITIGANTS

ISHAQ KUNDAWALA*

I. INTRODUCTION

Without conducting an official poll, it can safely be said that a majority of lawyers, judges, and scholars agree the nature and scope of bankruptcy jurisdiction is quite confusing and at times uncertain.[1] There has always been—and perhaps always will be—a tug-of-war between the legislative and judicial branches of government over the proper scope of bankruptcy jurisdiction,[2] with one side expanding the reach of bankruptcy jurisdiction legislatively and the other side limiting that reach judicially.[3] This poses a classic separation of powers struggle between the two branches, which has certainly played out in recent bankruptcy jurisprudence.[4]

When Congress created the bankruptcy court system, it gave bankruptcy judges (formerly called referees) many of the powers of Article III courts, but without the Article III protections such as life tenure and protection against salary diminution.[5] The scope of bankruptcy jurisdiction has seen several iterations, from the first bankruptcy laws enacted in 1800 to the current jurisdictional scheme established by the 1984 Amendments but further limited by jurisprudence.[6] Regardless of

---

* Professor of Law, Shepard Broad College of Law, Nova Southeastern University, Fort Lauderdale, Florida. J.D., Tulane Law School; B.A., Austin College. I thank my research assistant, Joseph Kadis, for his invaluable assistance. I also thank the editors of the Capital University Law Review for their good work and professionalism. Last but not least, I thank my wife, Joy, for her support and encouragement.

[1] *See* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 941 (2000).

[2] *Id.* at 773.

[3] *Id.* at 900.

[4] *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015); Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014); Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011).

[5] *See* Bankruptcy Act of 1800, 6 Cong. Ch. 19, April 4, 1800, 2 Stat. 19.

[6] *See* FEDERAL JUDICIAL CENTER, THE EVOLUTION OF U.S. BANKRUPTCY LAW: A TIMELINE, http://www.rib.uscourts.gov/newhome/docs/the_evelution_of_bankruptcy_law.pdf (last visited Aug. 18, 2015) (In 1984, Congress passed the Bankruptcy Amendments (*continued*)

these various iterations, the legislature's broad conferral of power to bankruptcy judges, without providing corresponding Article III safeguards, has raised and continues to raise serious constitutional questions regarding the proper scope of bankruptcy jurisdiction.[7]

The United States Supreme Court's most recent decision in *Wellness International Network, Ltd. v. Sharif* [8] continues the judicial inquiry into the constitutionality of the bankruptcy court's jurisdictional scheme.[9] The *Wellness* decision[10] substantially limits the jurisdictional impact of the Court's earlier 2011 landmark decision in *Stern v. Marshall*.[11] In *Stern*, the Court held that Article III prohibited Congress from vesting a bankruptcy court with the authority to finally adjudicate certain claims, even when the bankruptcy court had statutory authority to do so.[12] *Wellness*, however, limits *Stern* by allowing bankruptcy litigants to consent to bankruptcy court adjudication on these types of claims despite the lack of constitutional authority.[13]

To fully appreciate the significance of *Wellness*, one must first understand how bankruptcy courts were vested with jurisdiction historically and how that authority has since expanded and contracted. This Article examines and explores the history and current status of the bankruptcy court's jurisdictional reach, the *Wellness* opinion and its significance, and the open questions and issues that remain in the wake of *Wellness*.[14]

---

and Federal Judgeship Act, which created the current jurisdictional scheme of the bankruptcy courts found in Title 28 of the United States Code. As will be discussed below, the United States Supreme Court has limited the effect of the 1984 Amendments by finding parts of it to be unconstitutional).

[7] *See* Brett A. Axelrod, *U.S. Supreme Court Dramatically Curtails Bankruptcy Courts' Powers* (Sept. 2011), http://www.foxrothschild.com/content/uploads/2015/05/alert_axelrod_stern-v-marshall_sept2011.pdf.

[8] 135 S. Ct. 1932 (2015).

[9] *See id.* at 1939.

[10] *Id.* at 1949.

[11] 131 S. Ct. 2594 (2011).

[12] *See id* at 2601.

[13] *See Wellness*, 135 S. Ct. at 1954.

[14] *See infra* Part IV.

II. THE APPLICABLE JURISDICTIONAL STANDARDS FOR BANKRUPTCY COURTS BEFORE AND AFTER STERN AND EXECUTIVE BENEFITS

The history of bankruptcy law can be traced back to the ratification of the U.S. Constitution in 1798.[15] The Constitution grants Congress the power to make uniform bankruptcy laws.[16] Congress used this authority numerous times between 1800 and 2005.[17] However, while Congress tried to expand the bankruptcy court's reach, the judiciary fought to limit it, thus beginning a classic separation of powers tug-of-war between the two branches.[18]

It is not necessary for the purposes of this Article to turn the clock back to the early 1800s. However, as a starting point, the Bankruptcy Act of 1898 (1898 Act) vested jurisdiction over bankruptcy matters in the federal district courts.[19] Before 1978, the district courts referred bankruptcy matters to specially appointed bankruptcy referees.[20] The referees (who were designated as judges in 1973) were vested with summary jurisdiction, which covered "controversies involving property in the actual or constructive possession of the court."[21] The referees did not have jurisdiction over plenary matters, such as disputes involving property in the possession of someone else, unless the litigants consented.[22] Thus, where plenary matters were concerned, the district courts retained jurisdiction unless the parties consented to have their dispute adjudicated by a bankruptcy referee.[23]

---

[15] U.S. CONST. art. I, § 8, cl. 4.

[16] *Id.*

[17] *See* FEDERAL JUDICIAL CENTER, *supra* note 6 and accompanying text.

[18] *See* Brubaker, *supra* note 1, at 941.

[19] *See* Bankruptcy Act of 1898, ch. 541, § 2, 30 Stat. 544–46.

[20] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015). *See also* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014).

[21] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984), *as recognized in Wellness*, 135 S. Ct. at 1939.

[22] *Id.*

[23] *See Exec. Benefits*, 134 S. Ct. at 2170.

The distinction between summary and plenary jurisdiction was quite confusing and led to much litigation over which types of matters the bankruptcy courts could and could not hear.[24]

> The report of the Commission on Bankruptcy Laws of the United States discussed the problems arising from the summary/plenary jurisdictional allocations under the 1898 Act as follows: "There are . . . serious flaws in the present allocation of responsibility for handling the administrative and judicial functions to be performed by the Bankruptcy Act. . . . The first and most important objection to the present dispensation is the division of labor between the bankruptcy court and other courts. . . . There are several objectionable results to the division of jurisdiction of the judicial business generated by bankruptcy cases. The first is delay. . . . Another objection to the division of jurisdiction is the extra expense entailed by the estate in litigating outside the bankruptcy court. . . . The most serious objection to the division of jurisdiction is the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding. As Professor McLachlan [sic] has observed, 'When a "summary" proceeding in the bankruptcy court is appropriate and when a plenary suit is required is one of the most involved and controversial questions in the entire field of bankruptcy.'"[25]

These problems and others led Congress to overhaul the bankruptcy system.[26] In 1978, after years of research, Congress enacted significant

---

[24] *See* Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 267–68 (1999).

[25] Gallo v. Herpich (*In re* Cemetery Dev. Corp.), 59 B.R. 115, 118 n.3 (Bankr. M.D. La. 1986) (alteration in original) (quoting EXEC. DIR., COMM'N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 88–91 (1973)).

[26] *Exec. Benefits*, 134 S. Ct. at 2170.

changes through the Bankruptcy Act of 1978 (1978 Act).[27] First and foremost, the 1978 Act eliminated the confusing and historical distinction between summary and plenary jurisdiction.[28] Instead, it considerably expanded the jurisdiction of the bankruptcy courts by giving bankruptcy judges jurisdiction over all civil proceedings arising under title 11 or arising in or related to cases under title 11.[29] The 1978 Act vested concurrent jurisdiction in the district court and the bankruptcy court over these types of proceedings, which allowed bankruptcy courts to enter final judgments in matters that would have otherwise been plenary and off limits under the 1898 Act. [30]

The 1978 Act also eliminated the referee system and instead established a bankruptcy court in each judicial district as an adjunct to the district court there.[31] Under the 1978 Act, bankruptcy court judges were appointed for fourteen-year terms, subject to removal by the judicial council of the circuit in which they served on grounds of incompetence, misconduct, neglect of duty, or disability.[32] The bankruptcy judges' salaries were statutorily mandated but subject to adjustment.[33]

The 1978 Act served to consolidate bankruptcy matters into one forum: the bankruptcy court.[34] However, many problems remained. The most prominent was that Congress gave bankruptcy courts many of the powers of Article III courts (e.g., expanded jurisdiction, ability to enter final judgments in a wide variety of matters), but without the corresponding Article III safeguards (e.g., life tenure, protection against salary diminution).[35]

---

[27] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as primarily amended by 11 U.S.C. §§ 101–1532 (2012), and various sections of title 28, including 28 U.S.C. § 151(2012)); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52–53 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015).

[28] *N. Pipeline*, 458 U.S. at 54.

[29] *Id.*

[30] *In re* Mid-States Express, Inc., 433 B.R. 688, 694 (Bankr. N.D. Ill. 2010).

[31] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *N. Pipeline*, 458 U.S. at 53.

[32] *See* 28 U.S.C. § 152(a)(1). *See also id.* § 152(e).

[33] *See id.* § 153(a).

[34] *See id.* § 151.

[35] *See N. Pipeline*, 458 U.S. at 60–62.

In 1982, the Court in *Northern Pipeline* considered the constitutionality of the broad conferral of jurisdiction to non-Article III bankruptcy courts under the 1978 Act.[36] In this case, Northern Pipeline Construction Company, a Chapter 11 debtor, brought an adversary proceeding against Marathon Pipe Line Co. seeking damages for an alleged state-law breach of contract and warranty claim, along with several other claims.[37] Marathon moved to dismiss the adversary proceeding, arguing that the 1978 Act unconstitutionally conferred Article III jurisdiction to the bankruptcy courts.[38] Marathon claimed that the bankruptcy court should not have been able to decide a state-law contract claim against it because Marathon was not otherwise a party to the bankruptcy proceedings.[39]

The bankruptcy court denied Marathon's motion to dismiss, but the district court reversed on appeal and granted the motion on the ground that the jurisdictional scheme was unconstitutional.[40] The issue in *Northern Pipeline* was whether Congress's conferral of jurisdiction to bankruptcy courts under the 1978 Act violated Article III of the Constitution.[41]

In a plurality opinion, the Supreme Court of the United States held that the 1978 Act's broad conferral of jurisdiction to bankruptcy courts violated Article III.[42] The Court distinguished between cases involving public rights (which may be removed from the jurisdiction of Article III courts to bankruptcy courts) and private rights (which may not be so removed)[43] and concluded that claims arising from debtor-creditor relations are distinguishable from state-created private rights, which belong in an Article III court for adjudication.[44] According to the Court, Marathon's breach of contract suit against Northern, which arose under state law, was a matter of private rights, subject to adjudication before an Article III court and not a non-Article III bankruptcy court.[45]

After *Northern Pipeline*, bankruptcy courts no longer had jurisdiction to enter final judgments in proceedings only "related to" bankruptcy cases

---

[36] *Id.* at 52.
[37] *Id.* at 56.
[38] *Id.* at 56–57.
[39] *Id.* at 62–63.
[40] *Id.* at 57.
[41] *Id.* at 52.
[42] *Id.* at 87–88.
[43] *Id.* at 69–70.
[44] *Id.* at 71–72.
[45] *Id.* at 70, 84.

and not those "arising under or in . . . cases under title 11."[46] The Court held that Congress might properly grant jurisdiction to non-Article III bankruptcy judges over matters central to the operation of the bankruptcy case but not matters only related to the bankruptcy case and predicated on private rights, such as the state-law breach of contract claim involved in *Northern Pipeline*.[47]

To say the decision in *Northern Pipeline* shook up the bankruptcy system is a vast understatement. The bankruptcy courts were in a state of uncertainty and crisis,[48] with little guidance on what constituted their grant of jurisdiction.[49] Recognizing the impact of its decision, the Court stayed its decision in *Northern Pipeline* until October of 1982 to "afford Congress an opportunity to reconstitute the bankruptcy courts . . . without impairing the interim administration of the bankruptcy laws."[50]

During the interim period between the effectiveness of the *Northern Pipeline* decision and the next batch of legislation, all district courts adopted an emergency rule, or a slight variation of it, which provided for the allocation of judicial power over bankruptcy cases.[51] The emergency

---

[46] 28 U.S.C. § 1334(b) (2012); *see N. Pipeline*, 458 U.S. at 81–82.

[47] 458 U.S. at 71.

[48] *See* Anthony Michael Sabino, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court*, 21 SETON HALL L. REV. 258, 259 (1991) (considering "the landmark decision of the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* a cataclysmic event whose shock waves continue to rumble throughout the bankruptcy courts").

[49] *See id.* at 259–60.

[50] *N. Pipeline*, 458 U.S. at 88.

[51] *See* Anne G. Maseth, *Jurisdiction: A New System for the Bankruptcy Courts*, 2 BANKR. DEV. J. 1, 9 (1985). The proposed emergency rule provided as follows:

> (B) Reference to Bankruptcy Judges
>
> (1) All cases under Title 11 and all civil proceedings arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.
>
> (2) The reference to a bankruptcy judge may be withdrawn by the district court on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter bank to the bankruptcy

(*continued*)

rule went into effect on December 25, 1982, and remained in effect until the enactment of the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Amendments).[52]

After *Northern Pipeline*, Congress worked fast to mend a broken bankruptcy system.[53] The legislature went back to the drawing board and came up with the 1984 Amendments, which were enacted on July 10, 1984.[54] The 1984 Amendments codified the current jurisdictional scheme for bankruptcy courts in title 28 of the United States Code.[55] Three sections of title 28 are of particular importance to bankruptcy court jurisdiction: 151, 157, and 1334.[56]

The designation of bankruptcy courts is contained in 28 U.S.C. § 151.[57] That section provides that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."[58] It further states:

> Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.[59]

> judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

Id. (quoting Memorandum from William E. Foley and Joseph F. Spaniol, Administrative Office of the United States Courts, to all Article III and Bankruptcy Judges 3 (Sept. 27, 1982)).

[52] *See id.*

[53] *See id.* at 10.

[54] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); *see* 28 U.S.C. § 157 (2012), *declared unconstitutional in part by* Stern v. Marshall, 131 S. Ct. 2594 (2011).

[55] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

[56] 28 U.S.C. §§ 151, 157, 1334.

[57] *Id.* § 151.

[58] *Id.*

[59] *Id.*

One major difference from the 1978 Act and the 1984 Amendments is the characterization of bankruptcy judges as "units" of the district court rather than as "adjuncts" of the district courts.[60] The significance of this new characterization is that a bankruptcy judge is now a judicial officer of the district court.[61] This change in terminology and structure is critical. Under *Northern Pipeline*, the Court held that bankruptcy courts were not valid Article I adjuncts to the Article III district courts because the essential attributes of the judicial power did not remain in the Article III courts.[62] Under the structure created by the 1984 Amendments, the judicial power now remains in the Article III district courts.[63] Thus, this structural change resolves one of the defects noted by the Court in *Northern Pipeline*.[64]

The issue of jurisdiction and abstention over bankruptcy matters is covered in 28 U.S.C. § 1334.[65] With respect to jurisdiction, § 1334(a) and (b) provide in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have *original and exclusive* jurisdiction of all *cases* under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have *original but not exclusive* jurisdiction of all civil *proceedings* arising under title 11, or arising in or related to cases under title 11.[66]

---

[60] *Compare* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as primarily amended by 11 U.S.C. §§ 101–1532 (2012), and various sections of title 28, including 28 U.S.C. § 151 (2012)), *with* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336 (1984).

[61] 28 U.S.C. § 151.

[62] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015).

[63] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 333, 341 (1984).

[64] *Id.* at 333, 341.

[65] 28 U.S.C. § 1334.

[66] 28 U.S.C. § 1334(a)–(b) (emphasis added).

Under the 1984 Amendments, the district courts have original and exclusive jurisdiction over bankruptcy cases arising under title 11.[67] However, the terms "cases" and "proceedings" must be distinguished because the language in § 1334(a) and (b) make these distinctions.[68] A "case" refers to the debtor's entire Chapter 7, 9, 11, 12 or 13 case (from commencement to termination),[69] whereas a "proceeding" refers to any discrete dispute arising within the debtor's bankruptcy case, that is, a contested matter (e.g., claim objection, motion for relief from the automatic stay, motion for use of cash collateral) or an adversary proceeding (e.g., a civil suit seeking avoidance of a fraudulent or preferential transfer).[70] Note that the term "proceeding" is quite inclusive and is intended to cover anything that occurs in a case; it encompasses contested matters, adversary proceedings, plenary actions and disputes with respect to administrative matters under the current bankruptcy law.[71]

Under § 1334(b), the district courts have original, but not exclusive, jurisdiction over three types of civil proceedings: (1) those arising under title 11; (2) those arising in title 11; or (3) those related to cases under title 11.[72] Although each of the these types of proceedings is subject to the district courts' original, but not exclusive, jurisdiction, it is still necessary and important to determine which type of proceeding is at issue because the type of proceeding affects the abstention and venue rules, among others.[73] Unfortunately, the distinction between these three types of proceedings is sometimes difficult to decipher.[74]

Bankruptcy jurisdiction is conferred on the district court by 28 U.S.C. § 1334(b), as explained above, but § 157 allows the district court to refer this specific type of jurisdiction and its related powers to the bankruptcy court.[75] Under 28 U.S.C. § 157, "[e]ach district court *may* provide that any or all cases under title 11 and any or all proceedings arising under title 11

---

[67] *Id.* § 1334(a).

[68] *Id.* § 1334(a), (b).

[69] COLLIER ON BANKRUPTCY ¶ 3.01[2][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013).

[70] *Id.* ¶ 3.01[3][d].

[71] *Id.*

[72] 28 U.S.C. § 1334(b) (2012).

[73] *Id.* § 1334(c), (d).

[74] Nilsen v. Neilson (*In re* Cedar Funding, Inc.), 419 B.R. 807, 818 (B.A.P. 9th Cir. 2009).

[75] 28 U.S.C. § 157, *declared unconstitutional as applied in part by* Stern v. Marshall, 131 S. Ct. 2594 (2011).

or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[76] Although district courts have total discretion over whether to refer bankruptcy cases and proceedings to the bankruptcy courts, they all universally do;[77] all district courts have rules in place that automatically refer bankruptcy cases and proceedings to the bankruptcy courts within their districts without the necessity of any further action.[78]

Once a bankruptcy case or proceeding has been referred to the bankruptcy judge, the district court may still withdraw the reference and take back the case.[79] The district court's authority to withdraw the reference is governed by 28 U.S.C. § 157, which provides for mandatory and permissive withdrawal.[80]

The types of matters bankruptcy judges may hear and determine are found in 28 U.S.C. § 157.[81]

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.[82]

All *cases* are within the bankruptcy court's jurisdiction to hear and determine, but not all *proceedings* are.[83] Instead, only "core" proceedings "arising under," "arising in," or "referred under subsection (a)," are subject to the bankruptcy court's jurisdiction for both hearings and final determinations.[84] The statute provides a non-exhaustive list of sixteen core proceedings as follows:

---

[76] *Id.* § 157(a) (emphasis added).

[77] *Bankruptcy Court*, CLIENT FIRST BANKRUPTCY, http://www.clientfirstbankruptcy.com/ bankruptcy-court/ (last visited Nov. 1, 2015).

[78] *See* Ronald Mann, *Opinion Analysis: Justices Reaffirm Authority of Bankruptcy Judges Based on Parties' Consent*, SCOTUSBLOG (May 27, 2015, 2:27 PM), http://www.scotusblog.com/2015/05/opinion-analysis-justices-reaffirm-authority-of-bankruptcy-judges-based-on-parties-consent/.

[79] 28 U.S.C. § 157(d).

[80] *Id.*

[81] *Id.* § 157(b)(1).

[82] *Id.*

[83] *Id.* § 157(a).

[84] *Id.* § 157(b)(1).

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

(A) matters concerning the administration of the estate;

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

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

(D) orders in respect to obtaining credit;

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

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

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

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

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

(J) objections to discharges;

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

(L) confirmations of plans;

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

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

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor

> or the equity security holder relationship, except personal injury tort or wrongful death claims; and
>
> (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.[85]

Again, this is a non-exclusive list of types of matters considered core.[86] If a matter is not core, then it follows that the matter is non-core. And if it is non-core, then the bankruptcy court's authority is much more limited under the statute.[87] A bankruptcy court may hear and determine a non-core matter and enter orders or judgments only with the consent of the parties.[88] Without consent, a bankruptcy court can only submit proposed findings of fact and conclusions of law to the district court for de novo review.[89] It is within the bankruptcy judge's province to determine whether a proceeding is core or non-core.[90]

The *Executive Benefits* Court aptly explained the 1984 Amendments:

> Put simply: If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceeding *de novo* and enter final judgment.[91]

With the 1984 Amendments in place, all was well and good in the bankruptcy world for almost five years, at which time the Supreme Court of the United States examined the constitutionality of the new law.[92] In *Granfinanciera, S.A. v. Nordberg*, the Court examined the issue of whether a party who had not filed a claim against a debtor's bankruptcy estate had a right to a jury trial when sued by the bankruptcy trustee to recover an alleged fraudulent transfer.[93] Recall that under the 1984 Amendments,

---

[85] *Id.* § 157(b)(2)(A)–(P).

[86] *Id.* § 157(b)(2).

[87] *Id.* § 157(b)(3).

[88] *Id.* § 157(c)(2).

[89] *Id.* § 157(c)(1).

[90] *Id.* § 157(b)(3).

[91] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172 (2014).

[92] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989).

[93] *Id.*

proceedings to determine, avoid, or recover fraudulent conveyances are core, which means that these actions are subject to the bankruptcy court's jurisdiction for both hearings and final determinations.[94]

The Court held that the Seventh Amendment entitled such a party to a jury trial, despite the fact that Congress had designated proceedings to determine, avoid, or recover fraudulent conveyances as core under the 1984 Amendments.[95] The Court's decision turned on the fact that the party being sued by the bankruptcy trustee had not filed a claim against the debtor's estate.[96] The Court noted that there was no evidence that Congress considered the constitutional implications of its designation of all fraudulent conveyance actions as core.[97] The Court dismissed concerns that its decision would slow down bankruptcy cases by stating that those reasons were insufficient to overcome the Seventh Amendment.[98]

Without question, the Court's decision in *Granfinanciera* dealt at least a limited blow to the constitutionality of the 1984 Amendments.[99] Although not quite as strong as the hit from *Northern Pipeline*,[100] the Court declared that Congress went too far with its jurisdictional grant to the bankruptcy courts.[101] That being said, the Court was very careful to state that its decision did not dismantle the 1984 Amendments.[102] Moreover, the very next year the Court had another opportunity to examine a very similar issue in *Langenkamp v. Culp*.[103]

The issue in *Langenkamp* was whether a party who had filed a claim against the debtor's bankruptcy estate was entitled to a jury trial when sued by the bankruptcy trustee to recover allegedly preferential transfers.[104]

---

[94] 28 U.S.C. § 157(b)(1), (2)(H).

[95] *Granfinanciera*, 492 U.S. at 36.

[96] *Id.* at 58 ("Because petitioners . . . have not filed claims against the estate, respondent's fraudulent conveyance action does not arise 'as part of the process of allowance and disallowance of claims.'").

[97] *Id.* at 60.

[98] *Id.* at 63.

[99] *Id.* at 61–62 n.16.

[100] *Compare* N. Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (concluding that broad granting of jurisdiction to bankruptcy courts is unconstitutional), *with Granfinanciera*, 492 U.S. at 51–52 (holding that Congress cannot strip parties of their right to a jury trial).

[101] *Granfinanciera*, 492 U.S. at 52.

[102] *Id.* at 61.

[103] 498 U.S. 42, 44 (1990) (per curiam).

[104] *Id.* at 42–43.

Like the alleged fraudulent transfers in *Granfinanciera*, the proceedings at issue to determine, avoid, or recover preferences are core under the 1984 Amendments.[105] In *Langenkamp*, the Court held that the party was not entitled to a jury trial under the Seventh Amendment because it had filed a claim against the debtor's estate, thus triggering the process of allowance and disallowance of claims and subjecting the party to the bankruptcy court's equitable power.[106] Thus, under both *Granfinanciera* and *Langenkamp*, a party's right to a jury trial on an issue within the bankruptcy court's core jurisdiction depends on whether that party filed a claim against the debtor's estate.[107] The Court's holding in *Langenkamp* thus reaffirmed *Granfinanciera*.[108]

All was relatively quiet and calm in the bankruptcy world for the twenty or so years following *Langenkamp*. The 1984 Amendments remained in force despite the relatively small limitations imposed by *Granfinanciera* and *Langenkamp*.[109] This period of calm came to a screeching halt in 2011, however, when the Court decided *Stern v. Marshall*.[110]

The facts and procedural history in *Stern* are long, complex, and quite interesting.[111] The *Stern* case stemmed from a bitter dispute between bankruptcy debtor Vickie Lynn Marshall a/k/a Anna Nicole Smith and Pierce Marshall over the distribution of the much older J. Howard Marshall's vast wealth.[112] J. Howard Marshall was Vickie's husband and Pierce's father.[113] J. Howard excluded Vickie from his will.[114] Before J. Howard died, Vickie sued Pierce in Texas state court alleging that Pierce fraudulently induced his father to exclude Vickie.[115]

After J. Howard's death, Vickie filed for bankruptcy relief.[116] Pierce made two significant moves in Vickie's bankruptcy case. First, he initiated

---

[105] As a core proceeding, the bankruptcy court has statutory authority to hear the claims. 28 U.S.C. § 157(b)(2)(F) (2012).

[106] *Langenkamp*, 498 U.S. at 44.

[107] *Id.*

[108] *Id.*

[109] *See* Stern v. Marshall, 131 S. Ct. 2594, 2610–11 (2011).

[110] *Id.* at 2601.

[111] *Id.* at 2600.

[112] *Id.* at 2601.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

an adversary proceeding in Vickie's bankruptcy case by filing a complaint against her claiming that she and her lawyers had defamed him in connection with the Texas state court litigation.[117] In this complaint, he also sought a declaration that his defamation claim was non-dischargeable in her bankruptcy case.[118] Second, Pierce filed a proof of claim in Vickie's bankruptcy case for the defamation action.[119] Vickie responded to the complaint by asserting truth as a defense and by filing a counterclaim against Pierce asserting tortious interference with the gift she expected from J. Howard.[120]

In November of 1999, the bankruptcy court granted Vickie summary judgment on Pierce's defamation claim.[121] And almost a year later, after a bench trial, the bankruptcy court issued a judgment in Vickie's favor on her counterclaim, awarding her over $400 million in compensatory damages and $25 million in punitive damages.[122] In the post-trial proceedings, Pierce complained that the bankruptcy court lacked jurisdiction over Vickie's counterclaim because it was not a core proceeding.[123] The bankruptcy court concluded that it was a core proceeding and, therefore, determined it had power to enter final judgment.[124]

The district court, however, disagreed and held that Vickie's counterclaim was not a core proceeding because it was only marginally related to the claim against which it was asserted.[125] The district court relied on its reading of *Northern Pipeline* in holding "that it would be unconstitutional to hold that any and all counterclaims are core."[126] By finding that the counterclaim was not core, the district court treated the bankruptcy court's judgment as proposed and instead engaged in an independent review of the record.[127] After independently reviewing the record, the district court entered judgment in Vickie's favor and awarded her compensatory and punitive damages, each in the amount of

---

[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 2602.
[125] *Id.*
[126] *Id.*
[127] *Id.*

$44,292,767.33.[128] In the background of the district court's independent review, the Texas state court had already entered judgment on the related litigation, but in Pierce's favor.[129]

The court of appeals reversed the district court and held that a counterclaim is a core proceeding arising "only if [it] is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself."[130] According to the court of appeals, Vickie's counterclaim was not core and thus the district court erred by not giving preclusive effect to the Texas state court judgment in Pierce's favor, which was the earliest final judgment on the issues involved in the litigation.[131]

After granting certiorari, the United States Supreme Court was confronted with two main issues in *Stern*.[132] The first was whether Vickie's counterclaim for tortious interference was core and thus subject to final resolution by the bankruptcy court under 28 U.S.C. § 157(b).[133] If the counterclaim was core, the second then was whether the statutory authority conferring jurisdiction to the bankruptcy court is constitutional.[134]

Regarding the first issue, the Court reversed the court of appeals by determining that Vickie's counterclaim was indeed a core proceeding under the plain text of § 157(b)(2)(C).[135] That statute provides that core proceedings include counterclaims by the estate against persons filing claims against the estate.[136] Vickie's tortious interference counterclaim was against Pierce, who had filed a claim against the estate.[137] Pierce argued that Vickie's counterclaim did not arise in a title 11 case or arise under a title 11 case, therefore it was not a core proceeding.[138] The Court disagreed and stated that whether the matter arose in or under a title 11 case was not determinative of whether it should receive core treatment; Congress did not specify how to differentiate between a core matter that

---

[128] *Id.*

[129] *Id.*

[130] *Id. See also* Marshall v. Stern (*In re* Marshall), 600 F.3d 1037, 1040, 1058 (9th Cir. 2010).

[131] In re *Marshall*, 600 F.3d at 1064–65.

[132] *Stern*, 131 S. Ct. at 2600, 2603.

[133] *Id.* at 2600.

[134] *Id.*

[135] *Id.* at 2604.

[136] 28 U.S.C. § 157(b)(2)(C) (2012).

[137] *Stern*, 131 S. Ct. at 2601.

[138] *Id.* at 2604.

arises in or under title 11 and a core matter that did not.[139] The Court declined to rewrite the statute to bypass the second issue regarding the statute's constitutionality.[140]

The Court's treatment of the second issue was considerably more complicated. The Court held that although § 157(b)(2)(C) permits the bankruptcy court to enter final judgment on Vickie's tortious interference counterclaim as core, Article III of the Constitution does not.[141] The significance of this holding cannot be understated. This was the first time since *Granfinanciera* that the Court struck down part of the 1984 Amendments on constitutional grounds.[142]

The Court's reasoning was premised on Article III and the Court's prior jurisprudence, including *Northern Pipeline* and other notable cases.[143] The Court began by quoting Article III, Section 1: "[T]he Constitution mandates that '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'"[144]

The Court stressed that Article III imposes some basic limitations that the other branches cannot transgress, such as separation of powers and the protection of liberty, by defining the characteristics of Article III judges, specifically life tenure and the protection against salary diminution.[145] The Court emphasized that Article III could not serve its own purpose if other branches of government could confer judicial power on entities outside Article III.[146]

The Court reiterated the importance of its holding in *Northern Pipeline*, but then turned its attention to the 1984 Amendments.[147] The Court compared the broad conferral of jurisdiction to the bankruptcy courts in the 1984 Amendments to what existed previously.[148] The *Stern* Court

---

[139] *Id.* at 2605.

[140] *Id.*

[141] *Id.* at 2608.

[142] Christopher S. Lockman, *Makalíduñg's Post: How* Stern v. Marshall *Is Shaking Bankruptcy Court Jurisdiction to Its Core*, 50 DUQ. L. REV. 125, 136; *see also Stern*, 131 S. Ct. at 2614.

[143] *Stern*, 131 S. Ct. at 2608.

[144] *Id.* (second alteration in original) (quoting U.S. CONST. art. III, § 1).

[145] *Id.* at 2609.

[146] *Id.*

[147] *Id.* at 2609–10.

[148] *Id.* at 2610.

expressed concern over the limited appellate review that bankruptcy court judgments would receive.[149]

The Court explained that Vickie's counterclaim did not fall within any of the varied formulations of the public rights exception, but instead, arose under state common law between two private parties.[150] The Court stated:

> 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 a 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.[151]

The Court also responded to Vickie's attempt to distinguish *Northern Pipeline* and *Granfinanciera* on the ground that Pierce, unlike the defendants in those cases, had actually filed a claim against the estate.[152] Vickie argued that because Pierce had filed a claim in her bankruptcy case, the bankruptcy court had authority to adjudicate her counterclaim under the Court's holding in *Langenkamp*.[153] The Court disagreed and stated that Pierce's decision to file a claim in Vickie's bankruptcy case should not govern the characterization of Vickie's counterclaim because Pierce's claim for defamation in no way affected the nature of Vickie's counterclaim for tortious interference as one at common law, which must be decided by an Article III court.[154]

The Court also rejected Vickie's argument that Pierce consented to the resolution of her counterclaim by the bankruptcy court.[155] Although it was clear that Pierce consented to the bankruptcy court's resolution of his defamation action against Vickie and of the resolution of his proof of claim, it was equally clear that he objected to the bankruptcy court's

---

[149] *See id.* at 2610–11.

[150] *Id.* at 2614.

[151] *Id.* at 2615.

[152] *Id.*

[153] *Id.* at 2615–16.

[154] *Id.* at 2616.

[155] *Id.*

exercise of jurisdiction over Vickie's counterclaim.[156] The Court found Pierce did not truly consent to resolution of the counterclaim because he had nowhere else to go if he wished to recover from Vickie's estate.[157]

The Court characterized its decision in *Stern* as narrow and one that did not meaningfully change the division of labor within the current statute.[158] The Court stressed that its decision was meant to stop legislative encroachment on the judicial power established by Article III.[159] The Court concluded that Congress exceeded the limitations of Article III, in one isolated respect, through the 1984 Amendments.[160] By limiting the improper encroachment of power to one area of the 1984 Amendments, the Court made it clear that it did not abrogate the bankruptcy system.

Although the Court's five-to-four decision in *Stern* did not go quite as far as *Northern Pipeline*, it certainly sent a shockwave through the bankruptcy court system and left open for discussion important questions regarding the types of cases bankruptcy courts would continue to hear after *Stern*.[161] Some commentators have read *Stern* to conclude only that "the United States' bankruptcy system sits on a split foundation."[162] Others have remarked that the landmark decision caused "upheaval" and "consternation amongst jurists, practitioners, and academics."[163] The Court and commentators agree, however, that the complexity of the case and lack of clarity in application are analogous to the work of Charles

---

[156] *Id.* at 2607–08.

[157] *Id.* at 2614.

[158] *Id.* at 2620.

[159] *Id.*

[160] *Id.*

[161] *See* Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern, *Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1163 (2013).

[162] *Id.* at 1163.

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

Dickens.[164] The *Stern* holding has become the gospel for litigants tactically or strategically seeking a forum other than bankruptcy court.[165]

Notably, *Stern* did not address at least two critical questions. First, it failed to address how bankruptcy or district courts should handle a so-called "*Stern* claim," that is, a claim that is core under the statute and thus subject to final adjudication by the bankruptcy court, but that a bankruptcy court cannot decide as a constitutional matter due to the Court's holding in *Stern*.[166] Second, it did not address whether parties could consent to bankruptcy court adjudication of a *Stern* claim.[167]

Almost three years later, the Court answered the first question in its very narrow, unanimous decision in *Executive Benefits Insurance Agency v. Arkison*.[168] In *Executive Benefits*, the Court first acknowledged that in *Stern*, it did not decide how bankruptcy or district courts should proceed when encountering a *Stern* claim.[169] It noted that lower courts had described *Stern* claims as falling within a statutory gap: a *Stern* claim is core and thus subject to final adjudication by the bankruptcy court pursuant to the statute, but the bankruptcy court is constitutionally prohibited from adjudicating the claim, whereas with a non-core matter, a bankruptcy court proceeds pursuant to § 157(c)(1) by submitting proposed findings of fact and conclusions of law to the district court for de novo review.[170] Many lower courts were confused about how to proceed with *Stern* claims because they do not fit into either category.[171]

The Court held that when a bankruptcy court encounters a *Stern* claim, § 157(c)(1) applies, which permits the bankruptcy court to treat the *Stern* claim as non-core and thus issue proposed findings of fact and conclusions

---

[164] *See* Latoya C. Brown, *No More Ping-Pong: The Need For Article III Status in Bankruptcy After* Stern v. Marshall, 8 FIU L. REV. 559, 559 (2013) (citing *Stern*, 131 S. Ct. at 2600 (quoting 1 CHARLES DICKENS, *Bleak House*, *in* THE WORKS OF CHARLES DICKENS 4, 4–5 (illustrated ed. 1891))).

[165] *See* David E. Leta, Stern v. Marshall *Changes the Landscape of Bankruptcy Court Jurisdiction*, 26 UTAH B.J. 34, 36 (2013) (citing *In re* Ambac Fin. Grp., Inc., 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011)).

[166] *See Stern*, 131 S. Ct. at 2611, 2620.

[167] *See id.*

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

[169] *Id.*

[170] *Id.*

[171] *Id.*

of law to the district court for de novo review.[172] The district court will then "review the claim *de novo* and enter judgment."[173] This holding reaffirmed that *Stern* was intended to be narrowly construed.[174] To hold otherwise might have meant that the district courts would hear *Stern* claims in the first instance, which would have substantially changed the division of labor in the current statute and would have been contrary to *Stern*.[175]

The Court explained that the statute contains a severability provision which states that "[i]f any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby."[176] Thus, *Stern* invalidated a small portion of the statute, but not all of it. The Court concluded that this severability provision closes the so-called gap in the statute created by *Stern* claims because the remainder of the Act (not invalidated by *Stern*) includes § 157(c), which governs non-core proceedings.[177]

Executive Benefits did not answer the second question left open by *Stern*: the issue of consent. Because the Court concluded that the petitioning party received the de novo review it was entitled to, it specifically reserved the consent issue for another day.[178] That day was May 26, 2015, when the Court decided *Wellness International Network, Ltd. v. Sharif*.[179]

III. SUMMARY OF THE WELLNESS DECISION

The landmark *Wellness* case began as a contract dispute.[180] Wellness International Network, a manufacturer of health and nutrition products, entered into a contract with Sharif, whereby Sharif agreed to distribute Wellness's products.[181] This relationship deteriorated quickly and disputes

---

[172] *Id.* While the outlined procedure was not followed precisely in this case, the Court affirmed the lower court's decision anyway because the petitioners received the de novo review from the district court that they were entitled to receive. *Id.* at 2174.

[173] *Id.* at 2170.

[174] *Id.* at 2173; Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).

[175] *Exec. Benefits*, 134 S. Ct. at 2173; *see also Stern*, 131 S. Ct. at 2620.

[176] *Exec. Benefits*, 134 S. Ct. at 2173; *see also* 28 U.S.C. § 151 (2012).

[177] *Exec. Benefits*, 134 S. Ct. at 2173; *see also* 28 U.S.C. § 157(c).

[178] 134 S. Ct. at 2170.

[179] 135 S. Ct. 1932 (2015).

[180] *Id.* at 1940.

[181] *Id.*

arose between the parties.[182] In 2005, Sharif sued Wellness in a federal district court in Texas.[183] In this litigation, Sharif did not respond to Wellness's discovery requests, which ultimately resulted in default judgment for Wellness.[184] The district court also sanctioned Sharif by awarding Wellness over $650,000 in attorneys' fees.[185] Wellness tried for many years to collect on this judgment but was unsuccessful.[186]

Sharif filed for Chapter 7 bankruptcy relief in February 2009 in the Northern District of Illinois.[187] Sharif's bankruptcy schedules listed Wellness as a creditor.[188] Through his bankruptcy case, Sharif sought to discharge the debt he owed to Wellness as a result of the state court litigation.[189] Wellness requested documents related to Sharif's assets, which Sharif did not provide.[190] Wellness obtained an older loan application that Sharif filed in 2002, which showed that Sharif had more than $5 million in assets.[191] When asked about these significant assets, Sharif told Wellness and the Chapter 7 Trustee assigned to his case that he lied on that particular loan application and that the listed assets actually belonged to a trust he administered for his mother.[192] Wellness requested more information about this trust, but Sharif did not provide it.[193]

Wellness commenced an adversary proceeding against Sharif in his bankruptcy case by filing a complaint objecting to Sharif's discharge, seeking a declaration that the trust was Sharif's alter ego, and thus deeming trust assets as part of Sharif's bankruptcy estate.[194] Wellness alleged that Sharif was concealing property from his bankruptcy estate by claiming it was owned by the trust.[195] Thus, Wellness argued Sharif should be denied a discharge of all debts.[196]

---

[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*

In his answer, Sharif admitted that Wellness's adversary proceeding was a core proceeding subject to final adjudication by the bankruptcy court.[197] Similar to his failures in the state court litigation, Sharif did not answer Wellness's discovery requests in the bankruptcy court litigation.[198] In July 2010, the Bankruptcy Court ruled that Sharif had violated the discovery order.[199] The bankruptcy court granted a default judgment against Sharif in the adversary proceeding after denying Sharif's request for a discharge.[200] The judgment granted Wellness all of the relief it had requested regarding the denial of Sharif's discharge, and it also included a declaration that the trust assets were in fact property of Sharif's bankruptcy estate.[201]

Sharif appealed to the District Court.[202] However, *Stern* was decided six weeks before Sharif filed his opening brief in the appeal.[203] Sharif did not cite *Stern* in his opening brief, but he moved to supplement his briefing to argue that, under *Stern*, the bankruptcy court's judgment should be treated as a mere report and recommendation.[204] The district court denied Sharif's request to supplement his briefing with the *Stern* objection—finding it was untimely raised—and affirmed the bankruptcy court's judgment.[205]

Sharif appealed to the Court of Appeals for the Seventh Circuit.[206] The Seventh Circuit affirmed in part and reversed in part.[207] The Seventh Circuit found that Sharif's *Stern* objection, although untimely, could still be made because it was not waivable.[208] The Seventh Circuit agreed almost completely with the bankruptcy court's reasoning to resolve Wellness's adversary complaint.[209] The Seventh Circuit, however, did not agree with the bankruptcy court's resolution of Wellness's request for a

---

[197] *Id.* at 1940–41.
[198] *Id.*
[199] *Id.* at 1941.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*

declaration that the trust assets were assets of Sharif's bankruptcy estate.[210] It concluded that this particular issue presented a *Stern* claim and thus was not capable of final adjudication by the bankruptcy court as a constitutional matter.[211]

The Supreme Court granted certiorari and reversed the Seventh Circuit.[212] The main issue before the Court was "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threaten the institutional integrity of the Judicial Branch.'"[213] The Court held "that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts."[214]

The Court stated that it could not answer this question without considering the practical effects of its decision on the federal judiciary.[215] This point cannot be overstated. A contrary ruling in this case would have immediately and dramatically increased the caseload of the already overburdened district courts. Other than the overriding practical significance of its decision, the Court's holding in *Wellness* was based on two premises. First, adjudication by consent of the parties is nothing new, and case law makes it clear that litigants may validly consent to adjudication by bankruptcy courts.[216] Second, permitting bankruptcy courts to decide *Stern* claims through consent of the parties does not threaten the judicial branch in any way.[217]

In determining that parties could validly consent to adjudication of a *Stern* claim by a non-Article III court, the Court relied quite heavily on its

---

[210] *Id.*

[211] *Id.* at 1941–42.

[212] *Id.* at 1942.

[213] *Id.* at 1944 (citing Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 851 (1986)). Interestingly, the Court did not decide whether the claim involved here was a *Stern* claim. *Id.* at 1942 n.7. The Court's holding, which is based on the parties' consent to adjudication by a bankruptcy court, would apply whether or not the claim was actually a *Stern* claim. *Id.*

[214] *Id.* at 1944–45.

[215] *Id.* at 1944.

[216] *Id.* at 1942.

[217] *Id.* at 1945.

prior decision in *Commodity Futures Trading Commission v. Schor*.[218] The Court described *Schor* as the "foundational case in the modern era."[219]

In *Schor*, the Court considered whether the Commodity Exchange Act empowered the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings, and if so, whether that grant of authority violated Article III of the Constitution.[220] The Court held "that Article III does not confer on litigants the absolute right to the plenary consideration of every nature of claim by an Article III court."[221] The Court explained that "Article III, § 1's guarantee of an independent and impartial adjudication . . . serves to protect primarily personal, rather than structural, interests."[222] Thus, the Court held that those personal interests (i.e., to an Article III adjudication) can be waived, just as other personal constitutional rights (e.g., a right to a jury trial) can be waived.[223]

In the few short years following *Schor*, the Court decided two cases that reaffirmed the importance of consent to the constitutional analysis.[224] The issue in each case was "whether the Federal Magistrate Act authorized magistrate judges to preside over jury selection in a felony trial."[225] In one case, the defendant consented; in the other case, the defendant did not.[226] The presence or absence of consent in those cases was dispositive to the issues before the Court.[227] The Court's decision in each case was consistent with its prior holding in *Schor*.[228]

The *Wellness* Court summarized its prior jurisprudence approving adjudication by consent, as follows:

> The lesson of *Schor*, *Peretz*, and the history that preceded them is plain: The entitlement to an Article III adjudicator is "a personal right" and thus ordinarily "subject to waiver." Article III also serves a structural

---

[218] *Id.* at 1942 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)).

[219] *Id.*

[220] *Schor*, 478 U.S. at 835–36.

[221] *Id.* at 848.

[222] *Id.*

[223] *Id.* at 848–49.

[224] *Wellness*, 135 S. Ct. at 1943 (citing Gomez v. United States, 490 U.S. 858 (1989), *and* Peretz v. United States, 501 U.S. 923 (1991)).

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *See Schor*, 478 U.S. at 848–49; *Peretz*, 501 U.S. at 933; *Gomez*, 490 U.S. at 876.

> purpose, "barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts and thereby prevent[ing] 'the encroachment or aggrandizement of one branch at the expense of the other.'" But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.[229]

After concluding that parties may validly consent to adjudication by non-Article III tribunals, the Court turned its attention to the issue of whether allowing bankruptcy courts to decide *Stern* claims by consent would impermissibly threaten the constitutional integrity of the judicial branch.[230] To answer this question, the Court weighed

> the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in 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.[231]

After applying this test, the Court concluded no such threat to the judicial branch exists, and permitting bankruptcy courts to adjudicate *Stern* claims by consent would not "usurp the constitutional prerogatives of Article III."[232] The Court emphasized several key points in making its decision. First, bankruptcy judges "are appointed and subject to removal by Article III judges."[233] Second, bankruptcy courts only hear matters referred to them by the district courts and thus they have no "free-floating authority" to decide matters.[234] Third, there is no indication that Congress has tried to encroach upon the judiciary by giving bankruptcy courts the

---

[229] *Wellness*, 135 S. Ct. at 1944 (alteration in original) (citations omitted) (quoting *Schor*, 478 U.S. at 848, 850).

[230] *Id.*

[231] *Id.* (quoting *Schor*, 478 U.S. at 851) (internal quotation marks omitted).

[232] *Id.* at 1944–45.

[233] *Id.* at 1945 (quoting *Peretz*, 501 U.S. at 937).

[234] *Id.*

ability to hear *Stern* claims.[235] In short, Article III courts retain complete supervisory authority over the process.[236]

Next, the Court distinguished *Stern*.[237] It stated that *Stern* does not change the result in *Wellness* because in *Stern*, the litigant "did not truly consent to" the bankruptcy court resolution of its claim.[238] The Court also distinguished *Northern Pipeline*.[239] The Court explained that in *Northern Pipeline*, like *Stern*, the litigant "did not truly consent to resolution of the claim against it in a non-Article III forum."[240] The Court further explained that the constitutional bar announced in *Stern* and *Northern Pipeline* simply does not govern situations where "litigants may validly consent to adjudication by a bankruptcy court."[241] The Court summarizes the point quite simply: "[T]he cases in which this Court has found a violation of a litigant's right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court."[242] This was not the scenario in *Wellness*.[243]

The Court recounted how *Stern* was meant to be narrowly construed and that it did "'not change all that much' about the division of labor between district court and bankruptcy courts."[244] The majority described its holding in *Wellness* as consistent with *Stern*'s narrow reach.[245] The Court stated that it was confident that reaffirming approval for adjudication based on consent "poses no great threat to anyone's birthrights, constitutional or otherwise."[246]

Chief Justice Roberts, the author of the majority opinion in *Stern*, disagreed and wrote a lengthy dissent in *Wellness*.[247] He characterized the

---

[235] *Id.*

[236] *Id.* at 1944, 1946.

[237] *Id.* at 1946.

[238] *Id.* (quoting Stern v. Marshall, 131 S. Ct. 2594, 2614 (2011)).

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* at 1947.

[243] *Id.*

[244] *Id.* at 1946–47 (quoting Stern v. Marshall, 131 S. Ct. 2594, 2594 (2011)).

[245] *Id.*

[246] *Id.* at 1947.

[247] *Id.* at 1950 (Roberts, C.J., dissenting). This is an interesting dissent. Chief Justice Roberts would have also reversed the Seventh Circuit, but by finding that the claim at issue was a core claim, and not a *Stern* claim, and thus subject to final adjudication by the bankruptcy court. *Id.*

majority's interpretation of *Stern* as an "imaginative reconstruction" and warned that the Court's decision allows Congress to encroach upon the federal judiciary.[248] In short, Chief Justice Roberts did not agree that one can consent to a constitutional violation.[249] The majority responded by characterizing Roberts's dissent as being inconsistent with *Stern* (i.e., that it was a narrow decision based on one isolated encroachment by Congress).[250]

Last but not least, the Court explained that consent can be either express or implied.[251] It reasoned that neither the Constitution, nor the relevant statute, 28 U.S.C. § 157, requires express consent.[252] Instead, the statute only requires "consent *simpliciter*" and "a requirement of express consent would be in great tension" with the Court's prior decisions.[253] However, the Court emphasized "that a litigant's consent—whether express or implied—must still be knowing and voluntary."[254]

Interestingly, the Court did not describe any procedure for how lower courts should determine whether litigants had given express or implied consent to bankruptcy court adjudication, other than stating that it "would require a deeply factbound analysis."[255] Instead, it remanded the case to the Seventh Circuit for a determination of whether Sharif consented to adjudication of Wellness's claims by the bankruptcy court and also whether Sharif forfeited his *Stern* argument.[256]

On remand, the Seventh Circuit concluded that Sharif forfeited his *Stern* argument by waiting too long to raise it.[257] Notably, the Seventh

---

[248] *Id.* at 1957.

[249] *Id.* at 1961 (Thomas, J., dissenting).

[250] *Id.* at 1947 (majority opinion); *see also* Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011). The majority goes even further to describe Chief Justice Roberts's dissent as a story of how "the world will end not in fire, or ice, but in a bankruptcy court." *Wellness*, 135 S. Ct. at 1947.

[251] *Wellness*, 135 S. Ct. at 1947.

[252] *Id.* at 1947–49 (Alito, J., concurring in part and concurring in the judgment). In his concurring opinion, Justice Alito disagreed with the Court. *Id.* Justice Alito believes that consent should be express only. *Id.*

[253] *Id.* at 1947.

[254] *Id.* at 1948.

[255] *Id.* at 1949.

[256] *Id.*

[257] *See* Wellness Int'l Network, Ltd. v. Sharif, 617 Fed. App'x 589 (7th Cir. 2015) (mem.).

Circuit did not answer the consent question at all.[258] It treated the issue on remand as one of consent *or* forfeiture rather than one of consent *and* forfeiture.[259] The court concluded that since the Supreme Court held that a litigant can waive his personal right to an Article III adjudicator by consent, then the personal right can also be forfeited if not properly raised.[260] However, the end result is the same: Sharif's *Stern* objection will not be addressed.[261]

IV. PRACTICAL CONSIDERATIONS IN THE WAKE OF WELLNESS

The *Wellness* six-to-three majority limited *Stern*'s impact by holding that Article III permits bankruptcy courts to decide *Stern* claims submitted by consent of the parties.[262] However, several important, practical issues and unanswered questions remain after *Wellness*.

It is first important to see what the structure of bankruptcy court jurisdiction will be after the 1984 Amendments were judicially altered by the Court's holdings in *Granfinanciera*, *Stern*, *Executive Benefits*, and *Wellness*. Under the current jurisdictional scheme, four separate subcategories of bankruptcy jurisdiction exist.

First is the group of "unaltered" core claims under § 157(b)(2).[263] These types of claims were core before the four landmark cases, and they remain so now.[264] They include all of the core claims listed in § 157(b)(2), except (1) fraudulent transfer claims where the defendant has requested a jury trial,[265] and (2) some, but not all, counterclaims by an estate against persons that have filed claims against the estate.[266] Just as before,

---

[258] *Id.*

[259] *Id.* (emphasis added).

[260] *Id.*

[261] *Id.*

[262] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015).

[263] 28 U.S.C. §157(b)(2) (2012).

[264] *Id.*

[265] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989) (holding that "the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress'[s] designation of fraudulent conveyance actions as 'core proceedings' in 28 U.S.C. § 157(2)(H)").

[266] Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011) (holding that "although the Bankruptcy Court had the statutory authority to enter judgment on [defendant]'s counterclaim, it lacked the constitutional authority to do so").

bankruptcy courts can finally adjudicate these unaltered core claims without the consent of the parties.[267]

Second is the group of "unaltered" non-core claims. If a matter was non-core before the landmark cases, it remains non-core now.[268] This means that when bankruptcy courts encounter non-core claims, they must follow the same procedure as before.[269] They can enter final judgment on these non-core claims if the parties consent to bankruptcy court adjudication, but if the parties do not consent, then they must submit their proposed findings of fact and conclusions of law to the district courts for de novo review.[270]

Next are the *Stern* claims. *Stern* claims comprise the next two subcategories of the current bankruptcy jurisdictional scheme. Again, *Stern* claims are both core under the statute and subject to final adjudication by the bankruptcy court, but they cannot be decided by a bankruptcy court due to constitutional concerns.[271] Thus, courts can proceed with a *Stern* claim in one of two ways.

First, if the parties do not consent to bankruptcy court adjudication of a *Stern* claim, then, under the Court's holding in *Executive Benefits*, the bankruptcy court can treat the claim as non-core and follow the procedure outlined in § 157(c)(1): hear the matter initially and then submit proposed findings of fact and conclusions of law to the district court for de novo review.[272] Second, if the parties expressly or impliedly consent to

---

[267] 28 U.S.C. § 157(b)(1).

[268] Determining whether or not a matter is non-core is quite complicated and is beyond the scope of this Article. For general guidance on this point, see Jack Zarin-Rosenfeld, *Designing Related-to Bankruptcy Jurisdiction*, 89 N.Y.U. L. REV. 390 (2014), Duane Loft, *Jurisdictional Line-Drawing in a Time When So Much Litigation is "Related To" Bankruptcy: A Practical and Constitutional Solution*, 72 FORDHAM L. REV. 1091 (2004), and Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 68 STAN. L. REV. 747 (2010).

[269] "Absent consent, bankruptcy courts in non-core proceedings may only 'submit proposed findings of fact and conclusions of law,' which the district courts review *de novo*." *Wellness*, 135 S. Ct. at 1940 (quoting 28 U.S.C. § 157(c)(1)).

[270] 28 U.S.C. § 157(c)(1).

[271] *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014) (observing that a "'*Stern* claim[]' [is] a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter").

[272] *Id.* at 2174 (holding that "because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been

(*continued*)

bankruptcy court adjudication of a *Stern* claim, then the bankruptcy court can enter a final judgment on the claim per the Court's holding in *Wellness*.[273]

Perhaps the most striking issue with the two new *Stern* subcategories is that the bankruptcy court will hear the *Stern* claim initially regardless of whether the parties consent to bankruptcy court adjudication.[274] This is critically important because it reduces the likelihood of gamesmanship that might otherwise take place. For example, before *Wellness*, a bankruptcy court litigant might not have initially provided consent for bankruptcy court adjudication of the *Stern* claim. First, the litigant perhaps did not know that the *Stern* issue could be resolved by consent.[275] Second, he or she may not have wanted the bankruptcy court to hear the matter initially.[276]

The litigant might have chosen to wait to see how the bankruptcy court would rule on other matters first to get a flavor of the bankruptcy court's predispositions or instead seek to withdraw the bankruptcy court's reference. By successfully withdrawing the reference, the litigant could have the district court hear the matter in the first instance.[277] Now, however, because the bankruptcy court will be the first to hear the *Stern* claim regardless of the parties' consent,[278] it may incentivize the parties to provide consent much earlier in the process. Providing consent would likely be a good strategic decision in many cases. If a litigant consents, the bankruptcy court can enter final judgment and the disappointed party can appeal to the district court.[279] If the litigant does not consent, the bankruptcy court will still hear the matter initially and provide its report and recommendation to the district court for de novo review.[280] In all likelihood, however, the district court will give strong deference to its

---

permitted to follow the procedures required by that provision, i.e., to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*").

[273] *Wellness*, 135 S. Ct. at 1944–45 (concluding "that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts").

[274] *See Exec. Benefits*, 134 S. Ct. at 2174. *See also Wellness*, 135 S. Ct. at 1944–45.

[275] *Wellness*, 135 S. Ct. at 1944–45.

[276] *Id.*

[277] 28 U.S.C. § 157(d).

[278] *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2174 (2014). *See also Wellness*, 135 S. Ct. at 1944–45.

[279] 28 U.S.C. § 157(c)(2) (2012).

[280] *Wellness*, 135 S. Ct. at 1940.

judicial colleague on the bankruptcy court who took the time to learn the facts, frame the issues, analyze the law, and recommend a course of action.[281]

Nevertheless, the Federal Rules of Bankruptcy Procedure force litigants to decide whether to consent to bankruptcy court adjudication of a *Stern* claim (or a non-core claim) at the beginning of the adversary process. *Wellness* made this point as well.[282] The procedural rules already require that pleadings in adversary proceedings contain a statement specifying the following: (1) whether or not the matter is core or non-core; and (2) if the matter is non-core, whether the pleader consents to final adjudication by the bankruptcy court.[283] Thus, the real issue for the *Stern*-claim litigant, as plaintiff, might be when to commence the litigation, because he or she will have to choose whether to provide consent at the very beginning of the process.[284] The issue for the *Stern* claim litigant, as defendant, is not as complicated. He or she will have to make a decision on the issue of consent when filing an answer.[285]

Because bankruptcy courts will initially hear *Stern* claims regardless of consent,[286] the balance of work between bankruptcy courts and district courts may return to its pre-*Stern* form (i.e., the reference will be withdrawn from bankruptcy courts far less often).[287] This will be helpful to the federal judiciary, generally, because district court dockets are overburdened, and they certainly do not need the extra workload that *Stern* creates.[288] However, if bankruptcy courts are uncertain about entering a final adjudication on a matter, they will increasingly make reports and recommendations to the district courts for de novo review.[289] This will

---

[281] *See supra* notes 76–78 and accompanying text.

[282] *Wellness*, 135 S. Ct. at 1949.

[283] FED. R. BANKR. P. 7008 (opening pleadings); *id.* at 7012 (responsive pleadings). Notice that FED. R. BANKR. P. 7012(b) requires express consent. *Id.* This was one of Justice Thomas's points in his dissent. *Wellness*, 135 S. Ct. at 1961 (Thomas, J., dissenting).

[284] FED. R. BANKR. P. 7008.

[285] *Id.* at 7012.

[286] *See supra* notes 172–174 and accompanying text.

[287] *See supra* notes 76–79 and accompanying text.

[288] *See* Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Oct. 1, 2015, 9:34 AM), http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_55d77721e4b0a40aa3aaf14b.

[289] *See supra* notes 169–175 and accompanying text.

shift the burden back to the district courts.[290] Thus, it will be interesting to see whether the balance of work between bankruptcy and district courts will ever return to pre-*Stern* levels.

After *Wellness*, several significant questions remain. Have the legislature and the judiciary finally resolved their separation of powers tug-of-war over the scope of bankruptcy courts' jurisdiction? Will any other core provisions of § 157(b)(2) be struck down as unconstitutional? Each topic provides fodder for additional scholarly inquiry and debate.

It is quite doubtful we have seen the last of Article III challenges to the bankruptcy court's jurisdiction. However, the six-to-three majority in *Wellness* certainly signaled a cease-fire with the legislature, at least for the time being. The majority of the Court would like for the bankruptcy courts to get back to business as usual. From the majority's view, the current structure of bankruptcy jurisdiction does not threaten the federal judiciary's power in any significant way.[291]

One area of concern, perhaps, is whether the Court will strike down any other core provisions in § 157(b)(2). Examining the non-exhaustive list of sixteen categories of core claims,[292] it is certainly possible that more will be subject to constitutional attack in future cases. Many of these core claims could incorporate elements of state law. If so, it is likely that bankruptcy courts will hesitate to enter final orders and instead submit reports and recommendations to the district court for de novo review.[293] However, even if bankruptcy courts do not follow this procedure and instead enter a final judgment on a claim where they lacked constitutional authority to do so, the error could be cured by the district court undertaking a de novo review of the bankruptcy court's final judgment. This is exactly what occurred in *Executive Benefits*.[294] Because there are more ways to avoid reversible error with respect to *Stern* claims (and *Stern*-like claims), fewer controversial cases should arise in this area in the future. *Wellness* settled the dust for now.

V. CONCLUSION

Wellness does not resolve all the issues uncovered, but left unanswered, by *Stern*; however, the decision seems to at least signal the

---

[290] *See supra* note 175 and accompanying text.

[291] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944–45 (2015).

[292] 28 U.S.C. § 157(b)(2)(A)–(P) (2012).

[293] Int'l Bank of Commerce v. Saenz (*In re* Saenz), 516 B.R. 423, 426 (Bankr. S.D. Tex. 2014).

[294] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014).

Court's willingness to show restraint when it comes to finding Article III violations within the bankruptcy court system. In *Wellness*, the majority agreed that the current functionality of the judiciary and the practical effect of its decision are more important than strict adherence to formalistic and unbending rules.[295] They concluded that there is no real threat to the judicial branch from the bankruptcy courts and thus there is no need to dismantle a system that is working quite well.[296]

Nevertheless, when the Court reviews additional bankruptcy cases, which it certainly will, it may very well hold that other core provisions of § 157 are also unconstitutional. That question was not before the Court in *Wellness*, *Executive Benefits*, or *Stern*.[297] If additional core provisions are held unconstitutional, it will likely prompt Congress to attempt to find a legislative solution, just as it did after *Northern Pipeline*.

However, this seems unlikely in the near future. With six Justices on the Court strongly favoring a very narrow construction of *Stern*, Chief Justice Roberts will likely be unable to sway the majority of the Court toward his view that Congress is unconstitutionally stripping power from the judicial branch, statute by statute.[298] Thus, Congress should take a wait-and-see approach before attempting any patchwork legislation.

While *Stern* chipped away at the semblance of stability within the bankruptcy court system, *Wellness* certainly pushed back and limited the impact of that decision. For now, the judiciary has issued a ceasefire in its struggle with the legislative branch over the proper scope of bankruptcy jurisdiction. Hopefully this will result in more stability and efficiency within the federal courts.

---

[295] *Wellness*, 135 S. Ct. at 1944.

[296] *Id.* at 1944–45.

[297] *Id.* at 1942. *See also* Daniel Bussel, *Commentary:* Wellness *After* Stern, SCOTUSBLOG (MAY 28, 2015, 10:19 AM), http://www.scotusblog.com/2015/05/commentary-wellness-after-stern/.

[298] *Wellness*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting).