

REDEFINING NON-ARTICLE III ADJUDICATORY AUTHORITY
POST-*STERN V. MARSHALL*

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INTRODUCTION

In 2011, the Supreme Court in *Stern v. Marshall* ruled that bankruptcy courts, as adjuncts of Article III courts, do not have the constitutional authority to enter final judgments on state law counterclaims in bankruptcy proceedings.¹ In doing so, the Court appeared to be diverging from its most recent precedent, which recognized a more expansive Congressional authority to establish non-Article III adjudicatory bodies, and reverting back to the more restrictive, public rights/private rights dichotomy in determining the constitutionality of non-Article III tribunals. This Comment seeks to explore this gap in legal scholarship, and argues that the holding in *Stern* has forced administrative agencies and legislative courts to occupy a position of uncertainty as to their constitutionality within the Supreme Court's Article III analysis. Before delving into the doctrinal inconsistencies of *Stern* and its potential implications on non-Article III adjudicatory bodies, this Comment will address the key points in the Supreme Court's precedent that are relevant to the discussion.

Article III of the United States Constitution requires the judicial power of the United States to "be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."² Furthermore, it specifies that "[t]he judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States"³ The Framers of the Constitution believed this was not only necessary to preserve the inde-

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1 131 S. Ct. 2594, 2620 (2011).

2 U.S. CONST. art. III, § 1.

3 U.S. CONST. art. III, § 2.

pendence of the judiciary from encroachment by other branches of the government, but also necessary to preserve individual liberty.⁴ Over time, the Supreme Court began to recognize limited exceptions in which it would be constitutionally permissible to substitute Article I tribunals for Article III courts. Based on its rulings in prior decisions,⁵ the Court articulated three categories of valid, non-Article III adjudicatory authority in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*: territorial courts, military tribunals, and matters involving public rights.⁶

This Comment will focus primarily on the development of the public rights doctrine, its growth, abandonment, and revival following the Supreme Court's decision in *Stern v. Marshall*. *Stern* has garnered much attention over the past three years due to its lack of clarity in specifying the parameters of Article III and the Separation of Powers Doctrine. While many legal scholars have examined the implications of the Supreme Court's decision in *Stern* for bankruptcy courts and their authority to preside over claims arising out of bankruptcy proceedings, very few have analyzed *Stern's* implications outside of the bankruptcy context—specifically, the legitimacy of administrative agencies and other legislative courts in the post-*Stern* era.⁷

This Comment examines the implications of *Stern* on the authority of non-Article III adjudicatory bodies. In particular, it will examine Congress's delegation of Article I authority to magistrate judges under the Federal Magistrates Act as well as the Act's constitutionality under the majority's reasoning in *Stern*. While some scholars have argued that the Supreme Court's decision in *Stern* signifies the Court's return to a more formalistic approach, this Comment argues that the Court, in attempting to reconcile *Stern* with its earlier decisions in

4 See THE FEDERALIST NO. 51 (James Madison) (“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own . . .”).

5 See, e.g., *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857) (recognizing Congress's authority to establish non-Article III military courts); *Den, ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (upholding the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving “public rights”); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828) (acknowledging Congress's authority to create non-Article III territorial courts).

6 458 U.S. 50, 66–67 (1982).

7 See, e.g., Joshua D. Talicska, *Jurisdictional Game Changer or Narrow Holding? Discussing the Potential Effects of Stern v. Marshall and Offering a Roadmap through the Milieu*, 9 SETON HALL CIR. REV. 31, 42–43 (2012) (interpreting *Stern* within the context of the history of bankruptcy system in the United States).

*Thomas v. Union Carbide Agricultural Products Co.*⁸ and *Commodity Futures Trading Commission v. Schor*,⁹ occupies a precarious position between formalism and functionalism that is both confusing and doctrinally inconsistent. One of the implications of this inconsistency is that it places non-Article III tribunals in a constitutional limbo that, without clarification from the Supreme Court, may raise serious questions about their constitutionality post-*Stern*.

Part I of this Comment examines the evolution of the Public Rights Doctrine as well as the gradual expansion of non-Article III tribunals leading up to *Stern v. Marshall*. Part II analyzes the doctrinal inconsistencies in the Court's opinion in *Stern v. Marshall*, and Part III discusses the potential implications of *Stern* in the context of magistrate judges.

I. LEGISLATIVE COURTS AND ADMINISTRATIVE AGENCIES

A. *The Rise of the Public Rights Doctrine*

The Supreme Court established the notion of “public rights” for the first time in *Murray's Lessee v. Hoboken Land & Improvement Co.*¹⁰ In *Murray's Lessee*, the Court acknowledged that while Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of the suit at the common law, or in equity, or admiralty[,]” there may be 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.”¹¹

Nearly four decades later, the Supreme Court revisited the public rights exception in *Crowell v. Benson*, which upheld a federal employee compensation program under the Longshoremen's and Harbor Worker's Compensation Act.¹² In *Crowell*, the Court distinguished

⁸ 473 U.S. 568 (1985).

⁹ 478 U.S. 833 (1986).

¹⁰ 59 U.S. at 272. In *Murray's Lessee*, the Supreme Court addressed the issue of whether the Department of Treasury, pursuant to a federal statute, can deprive an individual of his property without the exercise of judicial power of the United States.

¹¹ *Id.* at 284.

¹² 285 U.S. 22, 62 (1932). Prior to the Longshoremen's Act, there were other federal regulatory schemes in place, including the Interstate Commerce Commission (ICC) and the National Labor Relations Board (NLRB), which engaged in policy-making, rule-formulation, enforcement tasks and adjudication. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 238 (1990).

public rights, 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,”¹³ from private rights, which involve “the liability of one individual to another under the law as defined.”¹⁴ The Court found that the federal worker’s compensation scheme clearly fell within the purview of the public rights exception because “[b]y the Longshoremen’s Act, Congress created fact-finding and fact-gathering tribunals, supplementing the courts and entrusted with the power to make initial determinations in matters within, and not outside, ordinary judicial purview.”¹⁵

The Court in *Crowell* appeared to align its holding to traditional conceptions of the Public Rights Doctrine. But in reality, the Court had proposed a novel idea in upholding the constitutionality of the Longshoremen’s Act. According to Professor James E. Pfander, “the early history of public rights exception did not support granting Congress broad authority to substitute Article I tribunals for Article III courts.”¹⁶ In fact, whereas the Court in *Murray’s Lessee* “upheld Congress’s power . . . to transform the common law action against the executive officer into one against the government itself . . . it did not suggest that such an action might be assigned to an Article I tribunal.”¹⁷ In contrast, the Court in *Crowell* justified upholding the Longshoremen’s Act on the ground that the purpose of the federal worker’s compensation board was “to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal.”¹⁸ The Court’s decision in *Crowell* was significant in that it not only defined but also considerably expanded the Public Rights Doctrine first articulated by the Court in *Murray’s Lessee*, which provided the foundation for Congress to institute a vast and wide range of legislative and administrative bodies throughout the twentieth and twenty-first centuries¹⁹

¹³ 285 U.S. at 50.

¹⁴ *Id.* at 51.

¹⁵ *Id.* at 88.

¹⁶ James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 760 (2004).

¹⁷ *Id.*

¹⁸ *Crowell*, 285 U.S. at 88.

¹⁹ See Bator, *supra* note 12 at 238–39 (concluding that the Court’s decision in *Crowell* has served as “an enriching source of important institutional flexibility and innovation” that has enabled Congress to establish a wide variety of adjudicative institutions “dealing with one or many subject matters and administering a huge variety of statutory schemes through a huge variety of processes”).

B. The Expansion of the Public Rights Doctrine and the Adoption of Schor's Balancing Approach

Following in the footsteps of *Crowell*, the Supreme Court's two most recent cases leading up to its decision in *Stern v. Marshall* appeared to signal a trend towards validating expansive, non-Article III adjudicatory authority. In *Thomas v. Union Carbide Agricultural Products Co.*, the Supreme Court upheld the constitutionality of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which required private parties to arbitrate disputes about cost-sharing in connection with the registration of pesticides under the Act.²⁰ Based on the Court's reasoning in *Crowell*, FIFRA most likely would have exceeded the boundaries of the Public Rights Doctrine since the case concerned a dispute between two private parties.²¹ Nevertheless, the Court found that the mandatory and binding arbitration scheme under FIFRA does not violate Article III and separation of powers because the right to compensation under the Act arises under FIFRA and "does not depend on or replace a right to such compensation under state law."²²

By upholding the constitutionality of FIFRA and its mandatory arbitration scheme, the Court in *Thomas* effectively expanded the Public Rights Doctrine to encompass matters involving two private parties that arise, at a minimum, from a federal statutory scheme. The Court, however, went one step further in *Thomas* and rejected the public rights/private rights dichotomy as not determinative in Article III analysis.²³ From the Court's perspective a proper interpretation of Article III affords the Federal Government sufficient flexibility to rely on administrative tribunals to help carry out the proper functions of the judiciary.²⁴

Following in the same trajectory, the Court in *Commodity Futures Trading Commission v. Schor*²⁵ granted Congress even greater latitude by adopting a flexible balancing test to determine the nature and extent of the non-Article III tribunal's intrusion into the Judicial

²⁰ 473 U.S. 568, 573 (1985).

²¹ *C.f. Crowell*, 285 U.S. at 50 (defining "public rights" as relating to matters arising between the government and the individual subject to its authority).

²² *Thomas*, 473 U.S. at 584.

²³ *Id.* at 585–86.

²⁴ *Id.* at 599 (Brennan, J., concurring).

²⁵ 478 U.S. 833 (1986).

Branch.²⁶ The litigation in *Schor* arose from a Commodity Futures Trading Commission (“CFTC”) regulation that enabled the CFTC to adjudicate counterclaims, including state law counterclaims, arising out of the same transaction as the claim at issue in the CFTC reparations proceeding.²⁷ In determining whether the federal statutory scheme violated separation of powers, the Court identified four factors for lower courts to consider in deciding on the Article III challenge: (1) “the origins and importance of the right to be adjudicated”; (2) “the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts”; (3) “the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts”; and (4) “the concerns that drove Congress to depart from the requirements of Article III.”²⁸

Here, the Court found that “the relative allocation of powers between the CFTC and Article III courts . . . demonstrates that the congressional scheme does not impermissibly intrude on the province of the judiciary.”²⁹ In its analysis, the Court readily acknowledged that the state law counterclaim asserted in the CFTC proceeding was a “private” right and “is therefore a claim of the kind assumed to be at the ‘core’ of matters normally reserved to Article III courts.”³⁰ Despite this fact, the Court emphasized that measuring the extent of encroachment into Article III may be more accurately determined by looking at the substance of what Congress has done as opposed to simply adopting a categorical approach.³¹ According to the Court, the private nature of a claim made the danger of encroachment on judicial powers by other branches of the government more likely.³² Nevertheless, this characteristic alone was not determinative in Arti-

26 Justice Byron White proposed the application of a balancing approach in Article III analysis in his dissenting opinion in *Northern Pipeline*. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 114 (1982) (White, J., dissenting) (citing case precedents to argue that the Court has always weighed the value of the Article I court against the values furthered by a strict adherence to Article III).

27 *Schor*, at 837; see 7 U.S.C. § 12a(5) (2012) (“[The Commission is authorized] to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter.”); 7 U.S.C. § 18(b) (2012) (“The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section . . . [and] may prescribe, . . . without limitation . . . service of pleadings or orders, the nature and scope of discovery, *counterclaims*, [or] motion practice . . .”) (emphasis added).

28 *Schor*, 476 U.S. at 851.

29 *Id.* at 851–52.

30 *Id.* at 853.

31 *Id.* at 854.

32 *Id.*

cle III analysis.³³ Weighed against “the legislative interest in convenience and efficiency,” the CFTC’s assumption of jurisdiction over the common law counterclaim did not violate Article III of the Constitution.³⁴ Specifically, the Court noted that CFTC deals “only with a ‘particularized area of law’” as opposed to a broad grant of adjudicatory authority, and it “does not exercise ‘all ordinary powers of district courts,’” such as presiding over jury trials.³⁵

Post-*Schor*, it appeared as though the Court would permit almost any act of Congressional authority that falls short of a blatant usurpation of the authority of Article III courts. According to some scholars, *Schor* stands for two key propositions. First, the Court would find “there is no great danger to structural values when Congress simply transfers some matters from Article III courts to alternative adjudicative bodies.”³⁶ Even in cases where Congress grants non-Article III tribunals the authority to preside over matters traditionally reserved for Article III courts, Article III concerns would not automatically be implicated under the Court’s rationale. Second, where structural values are not at stake, Congress should be afforded great latitude with respect to the creation of non-Article III courts.³⁷ Based on the Court’s reasoning it is clear that the role of the public rights doctrine in Article III analysis is almost obsolete and the nature and extent of the non-Article III tribunal is determined by a balancing test.

C. *Stern v. Marshall* and the Supreme Court’s Return to the Public Rights Doctrine

The landscape of the Supreme Court’s jurisprudence leading up to *Stern v. Marshall* seemed to suggest that the Court would grant Congress significant leeway in its authority to create non-Article III adjudicatory bodies.³⁸ This, however, proved not to be the case. In *Stern*, the Court addressed the issue of whether bankruptcy courts, under the Bankruptcy Act of 1984 (“Act”), may enter final judgment

³³ See, e.g., *N. Pipeline*, 458 U.S. at 109 (White, J., dissenting) (emphasizing that the private nature of a claim is not determinative in assessing whether the act of Congress has violated Article III).

³⁴ *Schor*, 476 U.S. at 858, 863.

³⁵ *Id.* at 852–53 (quoting *N. Pipeline*, 458 U.S. at 85).

³⁶ 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, 79 (1988).

³⁷ 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, 115 (1988).

³⁸ See, e.g., Brown, *supra* note 36, at 76 (concluding that the Court did the functional equivalent of overruling *Northern Pipeline* by replacing the analysis with one which will always come out in favor of the congressional choice).

on state law counterclaims in bankruptcy proceedings. The respondent in *Stern* had filed a complaint seeking a declaration that the respondent's defamation claim against the petitioner was not dischargeable in the petitioner's bankruptcy proceeding.³⁹ In response to the complaint, the petitioner had filed a state law counterclaim against the respondent for tortious interference, for which the bankruptcy court had issued judgment in favor of the petitioner.⁴⁰

Under *Schor's* four-factor balancing test, the Supreme Court should have upheld the bankruptcy court's entry of final judgment on the petitioner's state law counterclaim.⁴¹ Instead, the Court held that the provision of the Act granting bankruptcy courts authority to preside over all counterclaims arising from or related to the bankruptcy proceeding violated Article III.⁴² The Court's reasoning in *Stern*, in many ways, baffled and troubled the lower courts as well as legal scholars because it not only indicated a divergence from the trend towards granting Congress greater authority in establishing non-Article III tribunals, it also signaled a reversion back to the application of a more restrictive Article III analysis utilized by the Court in *Northern Pipeline v. Marathon Pipe Line*.⁴³

Northern Pipeline, a predecessor to *Thomas* and *Schor*, was also a case regarding the adjudicatory authority of bankruptcy courts. In *Northern Pipeline*, a plurality of the Court held that the bankruptcy court, as a non-Article III tribunal, did not have constitutional authority to render final decisions on the parties' breach of contract and warranty, misrepresentation, coercion, and duress claims even though the Bankruptcy Act of 1978 authorized it to do so.⁴⁴ Citing a long line of precedent, the Court determined that Congress may establish non-Article III tribunals only under three, specific instances: territorial courts, military tribunals, and matters involving public rights.⁴⁵ According to the plurality, these three, narrow exceptions did not violate Article III because "the grant of [such] power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative

³⁹ *Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011).

⁴⁰ *Id.*

⁴¹ *Cf. id.* at 2624–27 (Breyer, J., dissenting) (determining that the application of *Schor's* balancing factors weighed in favor of granting bankruptcy courts authority to adjudicate state law counterclaims in bankruptcy proceedings).

⁴² *Id.* at 2608 (majority opinion).

⁴³ 458 U.S. 50 (1982).

⁴⁴ *Id.* at 87 (plurality opinion).

⁴⁵ *Id.* at 64–67; *see also id.* at 103–05 (White, J., dissenting) (describing the plurality opinion's holding).

courts was consistent with, rather than threatening to, the constitutional mandate of separation of power.”⁴⁶

Since bankruptcy courts did not fall under the category of territorial courts or military tribunals, the Court considered whether this exercise of legislative power fell within the public rights exception. First, the Court noted that “a matter of public rights must at a minimum arise ‘between the government and others.’”⁴⁷ Second, while recognizing that Congress “possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges,” the Court concluded that it does not possess the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress.⁴⁸ Under this framework, the Court concluded that the Bankruptcy Act of 1978 fell outside of the limits of the public rights doctrine because Congress had granted bankruptcy courts authority to preside over matters traditionally reserved for Article III courts.⁴⁹ Furthermore, in invalidating the Bankruptcy Act of 1978, the Court effectively “refus[ed] to recognize a new exception to Article III, and . . . upheld the traditional view that only Article III courts may exercise the judicial power.”⁵⁰

The Court’s decision in *Northern Pipeline*, which signified a valiant effort “to block any further erosion of the role of article III courts as the adjudicative arm of the national government,”⁵¹ garnered much criticism from scholars who found the analysis to be doctrinally inconsistent.⁵² Furthermore, these scholars found the Court’s decision to be troubling in the sense that “[r]ead broadly, Justice [William] Brennan’s opinion cast[] doubt upon the validity of a wide range of non-article III adjudicative mechanisms, including decision making by administrative agencies.”⁵³ The Court’s subsequent decisions in *Thomas* and *Schor*, however, appeared to reaffirm the validity of non-Article III tribunals. In *Thomas*, the Court “permitted resolution by

46 *Id.* at 64 (plurality opinion).

47 *Id.* at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

48 *Id.* at 80–82.

49 *Id.* at 87.

50 Pfander, *supra* note 16, at 770.

51 Brown, *supra* note 36, at 65.

52 *See, e.g., id.* at 55 (noting that commentators were critical of the decision); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 199–200 (1983) (asserting that an absolute interpretation of Article III would place heavy restrictions on the work of administrative agencies).

53 Brown, *supra* note 36, at 55.

non-article III arbitrators of disputes which, though implicating congressionally created rights, were between private parties.”⁵⁴ Similarly, *Schor* permitted a non-Article III tribunal to adjudicate disputes between private parties implicating rights arising under the common law, which “seemed to be just the sort of claim that *Northern Pipeline* . . . had held beyond the power of a non-article III court to adjudicate.”⁵⁵ The Court in both *Thomas* and *Schor* had essentially “rejected attempts to extend *Northern Pipeline* and accorded Congress considerable latitude in choosing adjudicative mechanisms,”⁵⁶ and this doctrinal inconsistency between *Northern Pipeline*, on the one hand, and *Thomas* and *Schor*, on the other, led many scholars to presume that the Court had implicitly overturned *Northern Pipeline*.⁵⁷

What is significant about the holding in *Northern Pipeline* for the purposes of this Comment is not so much that it is incompatible with the Court’s subsequent decisions in *Thomas* and *Schor*, but rather that the Court in *Stern* adopted and attempted to reconcile *Northern Pipeline*’s doctrinal framework with those of *Thomas* and *Schor*, even though doing so created grave inconsistencies in the Court’s Article III jurisprudence.⁵⁸

II. STERN AND THE DOCTRINAL INCONSISTENCIES IN THE SUPREME COURT’S ARTICLE III ANALYSIS

The Supreme Court’s decision in *Stern* created a lot of confusion among lower courts and constitutional scholars because it diverged significantly from the Court’s decisions in *Thomas* and *Schor*; and because the Court failed to reconcile the logical and methodological inconsistencies in its analyses, making it almost impossible for the lower courts to formulate a clear, concise rule.⁵⁹ In particular, “the

54 See Saphire & Solimine, *supra* note 37, at 111–12 (determining that *Northern Pipeline* would have excluded the regulatory scheme in *Thomas* and would have delegitimized many of the institutions of the modern administrative state).

55 *Id.* at 1010.

56 Brown, *supra* note 36, at 55.

57 *Id.*

58 Following the Court’s decision in *Schor*, many scholars concluded that *Northern Pipeline*’s “arbitrary distinctions between the public and private and between article I courts and adjuncts” were no longer part of the Court’s analysis in deciding the constitutionality of non-Article III adjudicatory authority. Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee through Crowell to Schor*, 35 BUFF. L. REV. 765, 865–66 (1986).

59 See Jonathan C. Lipson & Jennifer L. Vandermeuse, *Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1194 (2013) (“*Stern*’s indeterminacy reflects the fact that it is difficult to make sense of its ‘holding’ and any ‘rule’ that would follow from it.”).

Court's broad rhetoric about the separation of powers ma[de] unclear how far the opinion reache[d]."⁶⁰ The disparate outcomes among lower courts arising from the Court's confusing reasoning in *Stern* have forced the Court to further clarify its holding on the adjudicatory authority of bankruptcy courts.⁶¹

While the Court's recent efforts to better elucidate its Article III analysis in *Stern* have been relatively useful, these efforts have been limited to the context of bankruptcy courts and have not provided insight into the implications of *Stern* on the adjudicatory authority of administrative agencies and other non-Article III tribunals. Furthermore, whereas there has been a wealth of legal scholarship discussing the effects of *Stern* on the future of bankruptcy courts and the doctrinal inconsistencies present in the Court's opinion, few scholars have explored the potential implications of *Stern* on the legitimacy of other administrative and legislative bodies.

A. Deconstructing the Court's Decision in *Stern*

Despite the Court's more recent decision in *Schor*, which rejected the public rights/private rights categorical approach as not determinative in Article III analysis, the Court in *Stern* followed the plurality decision in *Northern Pipeline*, which held that whether a matter may be heard by a non-Article III tribunal without violating the Constitution ultimately depends on if it falls within the "public rights" doctrine.⁶² Accordingly, the Court concluded that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."⁶³ The Court effectively reverted back to its discourse in *Murray's Lessee* in recognizing a category of cases involving "public rights" as an exception to separation of powers concerns, including: cases dependent upon the will of Congress whether a remedy in the courts shall be al-

⁶⁰ *Id.* at 1189.

⁶¹ *See, e.g.*, *Exec. Benefits Ins. Agency v. Arkison*, 134 S.Ct. 2165, 2168 (2014) ("The Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court."); *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 755 (7th Cir. 2013) (cert. granted) (addressing the question of whether a party may waive an Article III objection to a bankruptcy court's constitutional authority to enter final judgment in a core proceeding).

⁶² *Stern*, 131 S. Ct. at 2610; *see* Stephanie J. Bentley, *Responding to Stern v. Marshall*, 29 EMORY BANKR. DEV. J. 145, 145 (2012) (discussing the Court's decision to readopt the categorical approach of the public rights doctrine employed in *Northern Pipeline*).

⁶³ *Stern*, 131 S. Ct. at 2609.

lowed at all; those arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments; and claims that derive from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority.⁶⁴ What is interesting about the Court's opinion in *Stern* is that the Court purposefully upheld *Thomas* and *Schor*, which had unquestionably adopted a more expansive and flexible approach than *Northern Pipeline* and *Stern*, as still being valid authority on the Court's Article III jurisprudence.⁶⁵

B. Criticism of Stern v. Marshall

The Supreme Court's attempt in *Stern* to reconcile *Northern Pipeline* with *Thomas* and *Schor* has received a great deal of criticism from legal scholars.⁶⁶ Foremost, scholars have called into question the bases for the Court's recognition of the Public Rights Doctrine in the Article III inquiry—specifically, the Court's seemingly arbitrary line-drawing between what the Court defines as “public rights” and all other matters that fall outside of this category.⁶⁷ In *Stern*, Chief Justice John Roberts, writing for the majority, emphasized at length the importance of judicial independence and the necessity of having tenured judges not only to preserve the structural principles of separation of powers but also to protect individual interests.⁶⁸ According to Chief Justice Roberts, Article III of the Constitution does not permit the bankruptcy court to enter final judgment on the state law counterclaims because bankruptcy judges lack “the tenure and salary

⁶⁴ *Id.* at 2610.

⁶⁵ *See id.* at 2614 (distinguishing *Thomas* on the grounds that the petitioner's state law counterclaim “does not flow from a federal statutory scheme,” and distinguishing *Schor* on the basis that the petitioner's counterclaim “is not ‘completely dependent upon’ adjudication of a claim created by federal law”).

⁶⁶ *See, e.g.,* Erwin Chemerinsky, *Formalism Without A Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 185 (2011) (arguing that the Court's return to formalism is not only inconsistent with *Thomas* and *Schor*, but also highly unsuitable for interpreting Article III of the Constitution).

⁶⁷ *See* Bator, *supra* note 12, at 250 (arguing that the Supreme Court's own confusing and contradictory formulations of the “public rights” category renders it very little to no holding power).

⁶⁸ *Stern*, 131 S. Ct. at 2609.

guarantees of Article III” and only Article III courts have authority to preside over claims arising from the common law.⁶⁹

As Professor Erwin Chemerinsky points out, however, Chief Justice Roberts never actually explains why Congress may constitutionally assign to “legislative” courts for resolution cases involving “public rights,”⁷⁰ while allowing the bankruptcy judge in *Stern* to enter final judgment on the state law counterclaim “compromises these goals,” other than the fact that the plurality in *Northern Pipeline* said so.⁷¹ It seems that the category of “public rights,” itself, has created much discontent among scholars. Many find that in the modern administrative state “suffused by statutory and administrative schemes that characteristically create complex interdependencies between public and private enforcement, it is unintelligible and futile to try to maintain rigid distinctions between questions of private and public rights.”⁷²

Furthermore, the actual structure of the Constitution appears to support the balancing approach adopted by the Supreme Court in *Schor*.⁷³ According to Professor Paul Bator, this is largely due to the fact that the constitutional structure is a scheme of “divided and overlapping powers in which a highly sophisticated system of checks and balances assures that no branch has exclusive jurisdiction even within its own domain.”⁷⁴ In the alternative, even if the public rights category were an “intelligible and manageable category” as opposed to one subjected to evolving interpretations, the category still is not “congruent with cases where the use of an article I court or administrative agency is valid.”⁷⁵

69 *Id.*; accord *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 284 (1855) (holding that Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty”).

70 *See Stern*, 131 S. Ct. at 2610 (“The plurality in *Northern Pipeline* recognized that there was a category of cases involving ‘public rights’ that Congress could constitutionally assign to ‘legislative’ courts for resolution.”).

71 Chemerinsky, *supra* note 66, at 201, 205.

72 Bator, *supra* note 12, at 250.

73 *See id.* at 255 (“Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. . . . The burden on Art. III values should be measured against the values Congress hopes to serve through the use of Art. I courts.” (quotations omitted)); *see also Saphire & Solimine*, *supra* note 37, at 117 (“One reason why it is difficult to identify a valid historical basis for the public-private rights distinction is that there is little, if any, support for the doctrine of legislative courts in the historical record.”).

74 Bator, *supra* note 12, at 265 (emphasis omitted).

75 *Id.* at 250.

There is a notable shift in the Court's analysis of non-Article III tribunals in *Stern* from the *functional* approach applied in *Thomas* and *Schor*, to a more *formal* approach.⁷⁶ In *Schor*, the Court utilized the four-factor balancing test to determine whether the CFTC regulation violated Article III. In determining that CFTC adhered to Article III principles, the Court rejected the stringent categorical approach and, instead, looked at the nature of the matter to assess whether an Article III violation had occurred.⁷⁷ In contrast, the Court in *Stern* merely looked to see whether or not the counterclaim fell under the category of "private rights" without actually measuring the extent of the supposed intrusion into the authority of the judiciary.⁷⁸ While some scholars have criticized the Court's adoption of the formal approach in *Stern* as the cause of the inconsistency in the Court's analysis,⁷⁹ this Comment argues that the doctrinal inconsistency actually arises from the Court's attempt to utilize both the functional and formal approaches in its Article III analysis.

The Court in *Stern* held that the bankruptcy court's entry of final judgment on the state law counterclaim violated Article III of the Constitution. In response to the dissenting Justices' argument that Congress's delegation of authority to the bankruptcy court in the particular instance posed minimal threat to encroaching upon the authority of the judiciary,⁸⁰ Justice Roberts, writing for the majority stated that "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."⁸¹ Looking at this quotation, alone, suggests the Court has overruled *Thomas* and *Schor*. Moreover, had the Court overruled these two cases, either implicitly or explicitly, it would have been easier for the lower courts and legal scholars to deduce a bright-line rule from the Court's opin-

76 See Chemerinsky, *supra* note 66, at 184 ("The only way to understand *Stern v. Marshall* is to see it as a very formalistic application of legal rules . . ."); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1941 (2011) ("Functional decisions presuppose that Congress has plenary authority to compose the government under the Necessary and Proper Clause, subject only to the requirement that a particular governmental scheme maintain a proper overall balance of power. Formalist opinions, in contrast, assume that the constitutional structure adopts a norm of strict separation which may sharply limit presumptive congressional power to structure the government.").

77 *Schor*, 478 U.S. at 855.

78 *Stern*, 131 S. Ct. at 2611.

79 See, e.g., Bentley, *supra* note 62, at 192 (concluding that the *Stern* decision declined to give much guidance on identifying "permissible public rights actions"); Chemerinsky, *supra* note 66, at 206–08 (explaining that the lack of clarity in the Supreme Court's decision in *Stern* has "immediately caused enormous litigation as to its scope and application.").

80 *Stern*, 131 S. Ct. at 2625 (Breyer, J., dissenting).

81 *Id.* at 2620 (majority opinion).

ion. The inconsistency arises, however, because the majority effectively upheld its decisions in *Thomas* and *Schor*, which are both incompatible with the Court's formalistic approach in *Stern*.⁸² As Professor Chemerinsky suggests, the Court could have "recognized and disavowed the functional approach of *Thomas* and *Schor* Or it could have embraced the functional approach of *Thomas* and *Schor* and acknowledged that they had replaced the formalism of *Northern Pipeline*."⁸³ Instead, the Court attempts to distinguish *Stern* from *Thomas* and *Schor* even though under the Court's reasoning, the federal statutory schemes in both *Thomas* and *Schor* would be declared unconstitutional.

III. THE STATUS OF NON-ARTICLE III TRIBUNALS POST-*STERN*

The Supreme Court's decision in *Stern* raises a lot of questions about the constitutionality of administrative agencies and other legislative courts. On the one hand, the Supreme Court has explicitly upheld its decisions in *Thomas* and *Schor*, despite the doctrinal inconsistency.⁸⁴ Moreover, the Court has also stated that "[g]iven the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime . . . we do not in this opinion express any view on how the doctrine might apply in that different context."⁸⁵ The lack of clarity leaves numerous non-Article III adjudicatory bodies in a precarious position in regards to their constitutionality. Without more information from the Supreme Court, the lower courts are simply left with an incoherent doctrine that may or may not be interpreted broadly to invalidate a large proportion of congressionally created non-Article III adjudicatory institutions.

A. *Federal Magistrates Act*

The Supreme Court's decision in *Stern v. Marshall* and its re-adoption of the more restrictive public rights analysis set forth in *Northern Pipeline* raises particular concerns regarding the validity of magistrate judges in the federal judiciary. Established by Congress under the Federal Magistrates Act of 1968, magistrate judges have the

⁸² See Chemerinsky, *supra* note 66, at 203 ("It is not possible to reconcile the functional approach in *Thomas* and *Schor* with the formalistic approach in *Stern v. Marshall*.").

⁸³ *Id.* at 203–04.

⁸⁴ *Stern*, 131 S. Ct. at 2615.

⁸⁵ *Id.*

authority to carry out a number of responsibilities, which include “hear[ing] and determin[ing] any pretrial matter pending before the court,”⁸⁶ and the power “to enter a sentence for a class A misdemeanor in a case in which the parties have consented.”⁸⁷ Moreover, section 636(c)(1) of the Federal Magistrates Act states:

Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.⁸⁸

Put more simply, when the parties consent to having their case proceed before the magistrate judge, the magistrate judge has the authority to exercise jurisdiction and to “direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure.”⁸⁹ If an aggrieved party chooses to appeal the decision of the magistrate judge, the party “may appeal directly to the appropriate United States court of appeals . . . in the same manner as an appeal from any other judgment of the district court.”⁹⁰

While the Federal Magistrates Act entrusts magistrate judges with significant authority to adjudicate and preside over civil and criminal proceedings in federal district court, magistrate judges do not possess Article III adjudicatory authority. In fact, magistrate judges are appointed to eight-year terms by the district court judges in each United States district—similar to the way bankruptcy judges are appointed to fourteen-year terms.⁹¹ Despite the fact that magistrate judges do not have tenure or salary protection, they have authority to preside over both criminal and civil proceedings, and even enter final judgment in civil cases with the parties’ consent, including state law counterclaims.

Under the rationale put forth by Chief Justice Roberts in *Stern*, which invalidated key provisions of the Bankruptcy Act, the Court may also find the Federal Magistrates Act unconstitutional.⁹² Magistrate judges have the authority to preside over both criminal and civil

86 28 U.S.C. § 636(b)(1)(A) (2012).

87 *Id.* § 636(a)(5).

88 *Id.* § 636(c)(1).

89 *Id.* § 636(c)(3).

90 *Id.*

91 28 U.S.C. § 631(a), (e).

92 *See Stern*, 131 S. Ct. at 2627 (Breyer, J., dissenting) (“[F]unctionally, bankruptcy judges can be compared to *magistrate judges*, law clerks, and the Judiciary’s administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.” (emphasis added)).

proceedings; they have the authority to adjudicate matters between private parties that involve private rights; and they have the authority to preside over jury trials and enter final judgment on state law claims with the parties' consent. More importantly, magistrate judges do not have lifetime appointment, and Chief Justice Roberts specifically emphasized in *Stern* that "the tenure and salary guarantees of Article III" are crucial to preserving the independence of the judiciary and to protecting individual interests.⁹³

In *United States v. Raddatz*, the Supreme Court upheld the constitutionality of section 636(b) of the Magistrates Act, which "authorizes a district court to refer such a motion to a magistrate and thereafter to determine and decide such motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations."⁹⁴ The criminal defendant in *Raddatz* appealed the district court's finding of guilt on the ground "that the review procedures established by section 636(b)(1) permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing the live testimony, violated . . . Art. III of the United States Constitution."⁹⁵ The Supreme Court disagreed and, instead, concluded that due process rights claimed by the defendant "[we]re adequately protected by § 636(b)(1)" because "the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings."⁹⁶

Prior to the Supreme Court's decision in *Stern*, most federal circuits also upheld the constitutionality of the provisions of the Federal Magistrates Act which authorize the magistrate judge to preside over and enter final judgment in jury and non-jury trials.⁹⁷ For example, in *Wharton-Thomas v. United States*, the Third Circuit found that the separation of powers concept "is not violated in the magistrate system" because "[t]he only conceivable danger of a threat to the inde-

⁹³ *Id.* at 2609 (majority opinion)

⁹⁴ 447 U.S. 667, 667, 680–81 (1980).

⁹⁵ *Id.* at 677.

⁹⁶ *Id.* at 680.

⁹⁷ *See, e.g.*, Goldstein v. Kelleher, 728 F.2d 32, 34 (1st Cir. 1984); Collins v. Foreman, 729 F.2d 108, 109–10 (2d Cir. 1984); Puryear v. Ede's Ltd., 731 F.2d 1153, 1154 (5th Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1038 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil Ref. Corp., 739 F.2d 1313, 1314 (8th Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instrumedix, Inc., 725 F.2d 537, 540 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922, 929–30 (3d Cir. 1983); *but see* Pacemaker Diagnostic Clinic of Am., Inc. v. Instrumedix, Inc., 712 F.2d 1305, 1307 (9th Cir. 1983), *withdrawn*, 718 F.2d 971 (9th Cir. 1983) (holding that section 636(c) of the Federal Magistrates Act allowing magistrate judges, with consent of parties to litigation, to conduct civil trials and enter final judgments violated the Constitution).

pendence of the magistrate comes from within, rather than without the judicial department.”⁹⁸ Similarly, in *Geras v. Lafayette Display Fixtures, Inc.* the Seventh Circuit upheld the Federal Magistrates Act based on its determination that magistrate judges functioned as adjuncts of the district court by “provid[ing] quicker and less costly alternative to the usually more delayed adjudication in a district court.”⁹⁹

Technical Automation Services Corp. v. Liberty Surplus Insurance Corp. was the first case following *Stern* that raised the question of the authority of the magistrate judge to enter a final judgment.¹⁰⁰ In *Technical Automation*, which involved the appeal of summary judgment awarded to the insured in a contract dispute case, the Fifth Circuit sua sponte addressed the jurisdictional question of “whether, in the light of *Stern v. Marshall*, the magistrate judge had authority under Article III of the Constitution to try and enter judgment in the state law counterclaim in this case.”¹⁰¹ The parties in the case consented under section 636(c) of the Federal Magistrates Act to having the magistrate judge determine and enter final judgment as to “Technical Automation’s breach of contract, duty to defend, and duty to indemnify claims; . . . third party claims; and Liberty’s reformation counterclaim.”¹⁰²

The Fifth Circuit acknowledged the Supreme Court’s concern that “even the slightest ‘chipping’ away of Article III can lead to ‘illegitimate and unconstitutional practice.’”¹⁰³ It also recognized the similarities between bankruptcy judges and magistrate judges.¹⁰⁴ Nevertheless, the court ultimately held that section 636(c) does not violate Article III of the Constitution.¹⁰⁵ Two key factors influenced the court’s decision: (1) the Supreme Court had not overruled the Fifth Circuit’s precedent in *Puryear v. Ede’s Ltd.*, which upheld the authority of magistrate judges to enter a final judgment on claims involving consenting parties; and (2) *Stern* had limited application to the context of bankruptcy courts and, as such, did not affect the magistrate judges’ authority in the Fifth Circuit.¹⁰⁶

98 *Wharton-Thomas*, 721 F.2d at 927 (quotations omitted) (citations omitted).

99 *Geras*, 742 F.2d at 1041.

100 673 F.3d 399, 401 (5th Cir. 2012).

101 *Id.*

102 *Id.* at 403.

103 *Id.* at 406.

104 *Id.* at 407.

105 *Id.*

106 *Id.*

Even if the Fifth Circuit's narrow interpretation of *Stern* is in line with those of the Supreme Court, it still does not explain why magistrate judges should be treated differently from bankruptcy judges.¹⁰⁷ Functionally, bankruptcy and magistrate judges perform essentially the same tasks and are permitted to exercise the same degree of authority under the Federal Magistrates Act and the Bankruptcy Act, respectively. Thus, it does not make sense doctrinally and practically to separate bankruptcy courts and to treat them differently from all other non-Article III tribunals. Although the Supreme Court as well as a number of the lower courts have attempted to distinguish administrative agencies and magistrate judges, among others, from bankruptcy courts, they have not provided clear justification for such distinction.¹⁰⁸ This uncertainty in the Supreme Court's Article III jurisprudence raises serious concerns because it calls into question the constitutionality of non-Article III tribunals.

CONCLUSION

The Supreme Court in *Stern v. Marshall* appears to revert back to a more restrictive Article III analysis through its application of *Northern Pipeline's* public rights/private rights dichotomy. In doing so, the Court creates a troubling doctrinal inconsistency through its adoption of both a formalist and a functionalist approach. This inconsistency raises serious concerns about the status of non-Article III adjudicatory bodies, and particularly magistrate judges who are functional equivalents of bankruptcy judges—carrying out similar tasks and possessing similar degrees of authority.

While Chief Justice Roberts does attempt, albeit unsuccessfully, to mitigate the effects of the doctrinal inconsistency by purporting to limit the Court's decision in *Stern* to bankruptcy courts, the inconsistency still remains. Even though the Supreme Court tries to distinguish bankruptcy courts from administrative agencies and other legislative bodies, it does not justify why the distinction is valid or how lower courts should go about applying *Stern's* framework in other contexts. Consequently, the Supreme Court in the coming terms

¹⁰⁷ See Joshua C. Gerber, Note, "Why the Fuss?": *Stern v. Marshall* and the Supreme Court's Understanding of Bankruptcy Court Jurisdiction, 78 BROOK. L. REV. 989, 990 (2013) (arguing "the Supreme Court applies a separate, stricter, and more formal interpretation of Article III when scrutinizing the boundaries of bankruptcy court jurisdiction than it applies when performing the same kind of analysis with respect to other non-Article III adjudicative bodies").

¹⁰⁸ See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011) (recognizing administrative agencies as adjuncts of the district court).

should address the doctrinal inconsistencies in *Stern* and better clarify the status of magistrate judges, as well as those of other non-Article III tribunals, and their ability to enter final judgments on state law counterclaims.