MAGISTRATES AFTER ARKISON & WELLNESS: THE OUTER LIMITS OF CONSENT

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INTRODUCTION: THE BUTTERFLY EFFECT

It may seem obvious with the benefit of hindsight that a marriage had the potential to spawn endless litigation. But when Vickie Lynn Hogan and J. Howard Marshall II married in 1994, they pre-

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sumably were not expecting anything but marital bliss.[1] The end result of their marriage, however, was a Supreme Court case that reopened the fault lines beneath Article I judges.[2]

Non-Article III judges comprise a large part of the federal judiciary.[3] Magistrate judges, bankruptcy judges, and territorial judges are among the non-Article III adjudicators that exercise Article III powers.[4] Magistrate judges have been present in the federal judiciary in some capacity since at least the 1790s,[5] and bankruptcy judges have been present since 1978.[6] However, the role of both magistrates and bankruptcy judges has radically expanded since their inception.[7] That expansion has come with increased scrutiny of the powers that these judges exercise.[8] So when Vickie Lynn Marshall brought a state law counterclaim into a federal bankruptcy court, the question of whether those powers should—or could—be exercised by bankruptcy judges wound up being raised anew.[9]

It is important to note at the outset that many of the cases discussed in this Note, including *Stern,* only explicitly deal with bankruptcy judges. However, the same concerns that apply to bankruptcy judges—discussed later in this Note—apply to magistrate judges as well. Both sets of judges are Article I judges and as

1. David Stout, *Anna Nicole Smith Wins Supreme Court Case*, N.Y. TIMES May 1, 2006, http:/www.nytimes.com/2006/05/01/Washington/01cnd-smith.html; *see also J. H. Marshall, 90, An Oil Executive*, N.Y. TIMES, Aug. 8, 1995, http://www.nytimes.com/1995/08/08/obituaries/j-j-marshall-90-an-oil-executive.html.

2. Stern v. Marshall, 131 S. Ct. 2594 (2011).

3. There are 350 authorized bankruptcy judgeships, *see Bankruptcy Judgeships*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/judges_bank.html; 517 authorized full-time magistrate judgeships, *see Magistrate Judgeships*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/judges_magistrate.html; and ten territorial district court and magistrate judges, *see Judicial Officer Biographies*, DISTRICT COURT OF GUAM, http://www.gud.uscourts.gov/ (listing two judges); *Judges' Info*, DISTRICT COURT OF THE VIRGIN ISLANDS, http://www.vid.uscourts.gov/judges-info (listing six judges); and DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS, http://www.nmid.uscourts.gov/ (listing two judges).

4. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 339–40, 343–44, 363–64, (6th ed. 2009).

5. *Id.* at 363.

6. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat 2549 (1978). The 1978 Bankruptcy Act replaced the old referee system with the system of bankruptcy judges.

7. *See generally* FALLON, *supra* note 4, at 363–64 (discussing how bankruptcy and magistrate judges have taken on more duties over time).

8. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (considering a challenge to the Bankruptcy Act of 1978); United States v. Raddatz, 447 U.S. 667 (1980) (considering authority of magistrates under both the Magistrates Act and the Constitution).

9. *See* Stern v. Marshall, 131 S. Ct. 2594, 2600 (2011).

such, fall into the grey area of non-Article III adjudication.[10] Both the magistrate and bankruptcy judge systems, however, are arguably more independent of the political process than, for example, the Board of Immigration Appeals (B.I.A.), which primarily hears appeals from immigration judges.[11] Magistrate judges and bankruptcy judges are often considered adjuncts to the Article III district courts, whereas the B.I.A. is "the highest administrative body for interpreting and applying immigration laws[,]" and is housed within the Department of Justice's Executive Office for Immigration Review.[12] To state it differently, magistrate judges and bankruptcy judges, while not subject to the same protections as Article III judges are—by statute—appointed by Article III judges[13] and can only be removed by those judges for good cause.[14] The officers of the B.I.A. are not subject to the same protections.[15]

The underlying premise of this Note is that magistrate judges (hereafter referred to as "magistrates" for clarity) are subject to the same constitutional concerns as bankruptcy judges. This is not a novel concept.[16] However, the issue has not been considered in depth by most scholars,[17] and given that *Stern v. Marshall*,[18] *Executive*

10. Article IV judges in United States territorial courts, however, do not fall into this specific grey area. While a lengthy discussion of Article IV judges is outside the purview of this Note, it is fascinating to note that an Article IV court's jurisdiction can be more expansive than that of an Article III court. In creating an Article IV court, Congress may provide that court with both federal and local jurisdiction. *See* Nguyen v. United States, 539 U.S. 69, 83 (2003). However, Article IV judges cannot sit by designation on a Court of Appeals panel and cannot decide appeals. *See id.* at 83 (holding that a panel composed of one Article IV judge and two Article III judges lacked the authority to decide appeals).

11. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/biainfo.htm (last visited 1/25/2015, 10:37 AM).

12. *Id.*

13. 28 U.S.C. § 631 (2012).

14. 28 U.S.C. § 631(i) (2012).

15. *See Board of Immigration Appeals*, *supra* note 11.

16. *See, e.g.*, A Constitutional Analysis of Magistrate Judge Authority, 150 F.R.D. 247, 276 (1993); Latoya C. Brown, *No More Ping-Pong: The Need for Article III Status in Bankruptcy After* Stern v. Marshall, 8 FIU L. REV. 559, 584 (2013) (mentioning magistrate judges as potentially affected by *Stern*'s consent ruling); Raymond P. Bolanos, Note, *Magistrates and Felony Voir Dire: A Threat to Fundamental Fairness?*, 40 HASTINGS L.J. 827, 827, 832 (1989).

17. *See* Lori Yount, *Litigant Consent as a Constitutional Threat: Reconsidering the Jurisdiction of Magistrate Courts after* Stern v. Marshall, 55 S. TEX. L. REV. 197 (2013). I found Ms. Yount's article half-way through writing this Note, and found it useful in pointing me to several sources. Ms. Yount's article was written before *Arkison* was decided and before the Supreme Court granted certiorari in *Wellness*, and more directly compares magistrate judges to bankruptcy judges.

18. 131 S. Ct. 2594 (2011).

Benefits Ins. Agency v. Arkison,[19] and *Wellness International Network v. Sharif*[20] raise troubling questions about the powers of bankruptcy judges, this work seeks to consider the application of those questions to magistrates, especially given that the Supreme Court has previously weighed questions about the constitutionality of the powers given to magistrates.[21]

The main point of this Note is to consider these questions, offer some thoughts, and identify potential solutions. This Note first discusses the history of magistrates in the United States, from their initial inception up until the present day. This discussion includes the idea that Article I judges can hear cases with the consent of the parties—a key feature in the magistrate system. Next, this Note discusses *Stern* and its recent progeny as applied to magistrates, explaining why and how these cases apply to magistrates and discussing the circuit response. This includes the recent Supreme Court cases, *Arkison* and *Wellness*, whose effects have yet to be entirely quantified. These cases call both the bankruptcy judge system and the ability of litigants to consent to Article I jurisdiction into question. Because magistrates are Article I judges and many of their proceedings occur on consent, the logic of these cases could be extended to include magistrates—with the worst possible outcome being that magistrates are ruled unconstitutional.

Then this Note discusses what is termed the "stare decisis" problem and poses a counterfactual narrative by examining the concurrences and dissents in these cases. To illustrate the problem, in *Shelby County, Ala. v. Holder*, the Supreme Court struck down section 4(b) of the Voting Rights Act as unconstitutional.[22] Four years before *Shelby*, the Court utilized the constitutional avoidance canon in order not to decide whether the preclearance requirements of the Voting Rights Act were unconstitutional.[23] The stare decisis problem is conceptually simple—how do we deal with drastic, sometimes rapid, changes in Supreme Court jurisprudence? This Note then offers a set of potential options for dealing with the issues it raises. These options include eliminating the positions of magistrates, constitutionalizing magistrates, and making magistrates

19. 134 S. Ct. 2165 (2014).

20. 134 S. Ct. 2901 (2014) (granting certiorari as to Questions 1 and 3 of the petition); Wellness Int'l Network, Ltd. v. Sharif, 134 S. Ct. 1932 (2015).

21. *See* United States v. Raddatz, 447 U.S. 667 (1980); Peretz v. United States, 501 U.S. 923 (1991).

22. 133 S. Ct. 2612, 2631 (2013).

23. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508 (2009).

full Article III judges. Ultimately, this Note identifies the best of the potential options as either making magistrates Article III judges or constitutionalizing Article I judges.

I.
A HISTORY OF MAGISTRATE JUDGES AND THEIR POWERS

If federal district court judges consider themselves the "TTT" of the federal judiciary,[24] then one shudders to think of how magistrates might think of themselves. Magistrates are, in many respects, the workhorses of the federal system. In the twelve-month period ending in September 2013, magistrates had, among other things, disposed of 15,804 civil cases (on consent),[25] issued 56,382 reports and recommendations,[26] and disposed of 8,385 Class A misdemeanor defendants.[27] Many litigants never have their cases heard before a district court judge because a magistrate is able to resolve their cases before the case needs to proceed before a district court judge.[28] Bankruptcy judges are no different in that respect, but their powers are technically circumscribed by the fact that they can only hear issues arising out of a bankruptcy petition.[29] As a practical matter, however, bankruptcy judges have heard a broader range of cases than magistrates. That was the issue in *Stern*—whether a bank-

24. Judge Richard Knopf, *A Cheap Shot*, HERCULES AND THE UMPIRE, (Nov. 3, 2013), http://herculesandtheumpire.com/2013/11/03/a-cheap-shot/ (discussing the removal of Judge Shira Scheindlin from a case by the Second Circuit, Judge Knopf colloquially refers to the district court judges as the third string of the federal judiciary).

25. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS 2013 tbl. M-5 (2013), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/M05Sep13.pdf.

26. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS 2013 tbl. M-4B (2013), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/M04BSep13.pdf.

27. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS 2013 tbl. M-1A, (2013), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/M01ASep13.pdf.

28. One criticism of the judiciary in general has been isolation. For instance, Adrian Vermeule has argued that "political insulation produces an informational deficit on the part of judges, including a dearth of information about the consequences of constitutional decisions," and that this insulation can produce enormously consequential mistakes of constitutional law and policy. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 258 (2006). Arguably, magistrate judges are among the least insulated of federal judges.

29. 28 U.S.C. § 157 (2012).

ruptcy judge could hear state law counterclaims—which may be a saving grace for magistrates.

A. Proceeding on Consent: Historically Allowed

Magistrates perform their duties under the ever-present shadow of reversal by a district court judge.[30] It is important to note that in virtually all cases, magistrates hear cases on consent.[31] In civil cases, a cure for the fact that magistrates are not Article III judges has been that magistrates exercise final judgment only upon consent of the parties.[32] Similarly, in criminal cases, magistrates can hear misdemeanor cases upon the consent of the parties, but cannot hear felony trials.[33] When the parties consent to a magistrate hearing their case, the magistrate steps into the shoes of the district judge and exercises all the powers of a district judge.[34] Any judgment that the magistrate enters in this type of case is then directly appealable to the court of appeals in whichever circuit the magistrate sits.[35]

As a general matter, citizens—and litigants—may waive various constitutional rights.[36] The right to have a case heard by an Article III judge can be considered a due process right, and, as such, may be waivable.[37] However, judges have disagreed about whether or not consent is a non-waivable jurisdictional requirement or a waivable personal right.[38] As noted in Part C, *infra*, the 1979 amendments to the 1968 Magistrate Act expanded the cases that magistrates could hear on consent. In fairly short order, all of the courts of appeal decided that the 1979 consent expansion was constitutional.[39]

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30. 28 U.S.C. § 636 (2012).

31. *Id.* § 636 (c)(1).

32. *Id.* § 636 (a)(3)

33. Gomez v. United States, 490 U.S. 858, 872 (1989).

34. *Id.* § 636 (c)(3).

35. *Id.*

36. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973) (holding that consent waives Fourth Amendment right to be free from searches).

37. *See, e.g.*, Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 543 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984) (holding that the right to having a trial by an Article III judge is waivable).

38. *See id.* (holding that the right to having a trial by an Article III judge is waivable); *but see Pacemaker Diagnostic*, 725 F.2d at 547 (Schroeder, J., dissenting); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045, 1048 (7th Cir. 1984) (Posner, J., dissenting).

39. *See* Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987); The D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029, 1031 (Fed. Cir. 1985); KMC Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Gairola v. Virginia Dep't of Gen.

Nonetheless, it is clear from the history that, as a general matter, magistrates are constitutionally able to hear the matters before them so long as the parties consent. The holding in *Gomez v. United States*,[40] discussed in Section D, *infra*, keeps the ability of defendants to demand an Article III judge alive and has stopped the Supreme Court from pronouncing whether there is an Article III right for defendants to have an Article III judge conduct *voir dire*. But issues over consent persist. Six years after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[41] which imposed more restrictions on habeas corpus petitions, one scholar argued that magistrates should not be hearing section 2255 post-conviction motions, arguing that if section 2255 cases were considered civil in nature, then consensual delegation of these cases violated Article III.[42] The case law regarding magistrates, then, has turned explicitly on the issues of waiver and consent and implicitly on the structural safeguards of Article III protections. With that in mind, this Note turns to the history of magistrates.

B. The Pre-1968 History of Magistrates, the 1968 Magistrate Act, and Subsequent Cases

This section begins by examining how magistrates originated in the federal judiciary. Then, the 1968 Magistrate Act is briefly discussed. It concludes by examining two cases that arose from the 1968 Magistrate Act. These two cases are relevant because they consider the scope of tasks then-magistrates could perform, including whether magistrates could be assigned evidentiary hearings in habeas cases, and congressional intent in terms of what duties and tasks could properly be given to magistrates.

The Constitution makes no reference to legislative courts in Article I or to Article III adjuncts in either Article I or Article III.[43] Nonetheless, magistrates have been present in our system since

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Servs., 753 F.2d 1281, 1285 (4th Cir. 1985); *Geras*, 742 F.2d 1037 (7th Cir. 1984); Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313 (8th Cir. 1984) (en banc); *Pacemaker Diagnostic*, 725 F.2d 537 (9th Cir. 1984); Puryear v. Edes Ltd., 731 F.2d 1153 (5th Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984); Fields v. Washington Transit Auth., 743 F.2d 890, 894 (D.C. Cir. 1984); Wharton-Thomas v. United States, 721 F.2d 922, 929–30 (3d Cir. 1983).

40. 490 U.S. 858 (1989).

41. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

42. Ira P. Robbins, *Magistrate Judges, Article III, and the Power to Preside Over Federal Prisoner Section 2255 Proceedings*, 2 FED. CTS. L. REV. 1, 31 (2002).

43. *See* U.S. CONST. art. I, III.

1789 in some form.[44] The Judiciary Act of 1789 created the magistrate position, and at the time, such judges were authorized to set bail for persons accused of federal crimes.[45] In 1817, Congress changed the position of magistrate to "commissioner" and expanded the role[46] to include taking depositions and overseeing federal arraignments.[47] In the next century and a half, Congress passed various revisions and expansions to the commissioner system.[48] During that time period, there was little to no litigation over the role of the commissioners in our constitutional system.

In 1968, Congress passed the Magistrate Act. The Act abolished the old commissioner system and created the magistrate position.[49] The first iteration of the Act provided for a system of full-time magistrates and part-time magistrates.[50] The new magistrates were given the powers previously exercised by commissioners, as well as the power to administer oaths and affirmations and the power to conduct trials for misdemeanor charges.[51] District court judges were also given an open-ended grant of authority to give magistrates additional duties.[52]

One of the earliest cases considering the authority of magistrates was *Wingo v. Wedding*.[53] The Supreme Court, in an opinion by Justice Brennan, examined the legislative history of the statute. The opinion held that the Act did not allow the assignment of evidentiary hearings in habeas cases to magistrates.[54] This was true, under a textual reading of the statute.[55]

In another 1968 Act case, the Secretary of Health, Education, and Welfare challenged the referral of a Medicare case to a magistrate.[56] In an opinion by Chief Justice Burger, the Supreme Court again examined the legislative history of the statute. The Court dis-

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44. FALLON, *supra* note 4, at 363.

45. *Id.* at 363 n.1.

46. *Id.*

47. Act of Mar. 1, 1817, ch. 30, 3 Stat. 350 (1817).

48. WILLIAM M. MCKINNEY, THE FEDERAL STATUTES ANNOTATED: CONTAINING ALL THE LAWS OF THE UNITED STATES OF A GENERAL AND PERMANENT NATURE IN FORCE ON THE FIRST DAY OF JANUARY, 1903, Volume 4 164–65 (1904).

49. *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, 1107 (1968) (preamble) (codified as amended at 28 U.S.C. §§ 631–39 (2012)).

50. *Id.* § 632, 82 Stat. at 1112.

51. Pub. L. No. 90-578 § 101 (1968) (codified as amended at 28 U.S.C. § 636(a) (2012)).

52. FALLON, *supra* note 4, at 363.

53. 418 U.S. 461, 462 (1974).

54. *Id.* at 470–72.

55. *Id.* at 469–72.

56. Mathews v. Weber, 423 U.S. 261 (1976).

cussed the fact that several witnesses at the House and Senate hearings over the 1968 Act expressed concerns that Congress "might improperly delegate to magistrates duties reserved by the Constitution to Article III judges."[57] However, the hearing and committee reports indicated that Congress addressed this concern by restricting the range of matters that magistrates could hear and by limiting their role in those cases that were referred to them.[58] The recommendation therefore fell within the "additional duties" language in the 1968 Act.[59]

Shortly thereafter, Congress amended the 1968 Act in order to expand the duties of magistrates and clarify other assignments of duties.[60] These 1976 amendments overruled *Wingo*, explicitly permitting magistrates to hold evidentiary hearings in habeas corpus cases.[61] The amendment also included a catch-all provision stating that magistrates could be "assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[62] *Wingo* and *Mathews* did not explicitly raise the issues of waiver and consent, but *Mathews* did raise the specter of Article III concerns. The 1979 Magistrate Act, however, began to raise the issues of waiver and consent more clearly.

C. The 1979 Magistrate Act through Present

This section begins by discussing the 1979 amendments to the Magistrate Act. It then considers pre-AEDPA cases brought against the Act that deal with the issue of consent. Next it turns to the procedural and substantive reforms of AEDPA, and concludes by examining a Supreme Court case and the Fifth Circuit's decision on remand. This case also dealt with consent, but did so post-AEDPA. Several of these cases found that consent was generally effective because of the close relationship that district court judges have with magistrates. All of these cases pointed to the strength of that relationship in rendering their decisions.

In 1979, Congress passed another set of amendments to the Magistrate Act. The 1979 Magistrate Act made clear that any cases to be heard by the new magistrates must originate in the district

57. *Id.* at 269.

58. *Id.* at 269–70.

59. *Id.* at 271–72.

60. Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified as amended at 28 U.S.C. § 636(b) (2012)).

61. FALLON, *supra* note 4, at 363–64.

62. *Id.* at 646 (quoting 28 U.S.C. § 636(b)(3)).

courts.[63] The district judges could transfer cases to magistrates *only* upon the consent of the parties.[64] Any final judgments issued by magistrates could then be appealed directly to the court of appeals.[65] An early analysis of the Act considered this consent approach and argued that the new magistrate system was unconstitutional, given the drastic assumption of Article III powers by magistrates.[66]

In 1980, the Supreme Court heard a challenge to 28 U.S.C. § 636(b)(1)(B). This portion of the Magistrate Act allows district court judges to refer motions to suppress to magistrates, and authorizes district court judges to decide these motions based on the record developed before a magistrate.[67] Herman Raddatz was indicted in the Northern District of Illinois in 1977 and filed a motion to suppress incriminating statements he made to law enforcement.[68] Over his objections, the district court judge referred the motion to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B). On appeal, the Seventh Circuit found that Mr. Raddatz had been deprived of due process because the district court judge did not personally hear the testimony at issue.[69] The Supreme Court took the case on certiorari. Mr. Raddatz argued, *inter alia*, that section 636(b)(1)(B) violated the Fifth Amendment's Due Process Clause and Article III of the Constitution[70] on the grounds that the one who decides a case must also be the one to hear it.[71] In his view, the report and recommendation procedure violated that principle by having the magistrate hear the case and the district court judge decide it.[72] While it is unclear whether the defendant was arguing on the basis of structural principles, the Court did consider Article III structural concerns. The Court found that section 636(b)(1)(B) adequately protected due process rights, because "the statute grants the [district court] judge the broad discretion to accept, reject, or modify the magistrate's proposed findings[,]" and provides ade-

63. Federal Magistrate Act of 1979, Pub. L. No. 96-82, §2, 93 Stat. 643 (codified as amended at 28 U.S.C. § 636(c) (2012)).

64. *Id.* § 636(c)(1).

65. *Id.* § 636(c)(3).

66. Lucinda M. Finley, Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 561 (1980).

67. United States v. Raddatz, 447 U.S. 667, 669 (1980).

68. *Id.*

69. *Id.* at 672.

70. *Id.* at 677.

71. *Id.*

72. *Id.*

quate procedures for a district court to determine whether to conduct the evidentiary hearing itself.[73] The Court also pointed out that a district court judge could hear witness testimony live, in order to resolve conflicting claims.[74] The Court upheld the use of magistrates as adjuncts to the district court, pointing to the fact that "Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates."[75] The Court stressed that "the entire process takes place under the district court's total control and jurisdiction."[76] This meant that the delegation of authority to magistrates does "not violate Art. III so long as the ultimate decision is made by the district court."[77]

Justice Blackmun, concurring, expanded on the majority's discussion of the magistrates as adjuncts.[78] The district court judge was free to adopt or to reject the magistrate's determinations regarding suppression.[79] More to the point, the magistrate was directly controlled by the district court judge.[80] Magistrates, Justice Blackmun noted, were directly appointed by district court judges, and subject to removal by them.[81] The district court judges also retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates, and "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties."[82]

After the 1979 amendments, magistrates saw their caseloads and duties drastically expand. Considering habeas petitions alone, the number of cases handled by magistrates increased by forty-six percent from 1982 through 1992; from 1992 through 1993 alone, the number of cases increased by another ten percent.[83] The Supreme Court next considered the powers of magistrates in *Gomez v. United States*, holding that magistrates could not conduct felony *voir dire*[84] under the Magistrate Act.[85] Justice Stevens, writing for the

73. *Raddatz*, 447 U.S. at 680–81.
74. *Id.*
75. *Id.* at 682–84.
76. *Id.* at 681.
77. *Id.* at 683.
78. *Id.* at 684.
79. *Raddatz*, 447 U.S. at 684–85.
80. *Id.* at 685.
81. *Id.*
82. *Id.*
83. Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates As Mediators*, 73 Neb. L. Rev. 712, 753 (1994).
84. The Second and Ninth Circuit both heard the issue of whether magistrate judges could conduct felony *voir dire*, and affirmed this expansion of delegated duties to magistrate judges, provided that there was de novo review in the district court. See United States v. Garcia, 848 F.2d 1324, 1329–30, 1332–33 (2d Cir.

Court, invoked *Mathews v. Weber* in his analysis.[86] He pointed to the "additional duties" language as literally supporting the idea that magistrates could conduct felony *voir dire*, but stated that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial."[87] As such, the legislative history of the Act confirmed that inference, and further compelled the conclusion that Congress "did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties."[88]

However, shortly thereafter, the Court upheld the ability of magistrates to conduct felony *voir dire* upon consent of the defendant and government.[89] In a case arising out of the Eastern District of New York, Rafael Peretz was convicted of importing heroin.[90] At a pretrial conference at which both Mr. Peretz and his attorney were present, he consented to have *voir dire* overseen by a magistrate.[91] The trial was itself conducted by a district court judge, and the petitioner did not raise objections to the fact that *voir dire* was overseen by the magistrate. On appeal, however, Mr. Peretz argued that this violated *Gomez*, and therefore warranted reversal.[92] The Supreme Court granted certiorari, and directed the parties to brief the following issues: first, whether 28 U.S.C. § 636 allowed magistrates to conduct felony *voir dire* upon consent of a defendant; second, if magistrates were in fact allowed to do so under the statute, whether 28 U.S.C. § 636 was consistent with Article III; and third, if

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1988), *overruled by* Gomez v. United States, 490 U.S. 858 (1989); United States v. Peacock, 761 F.2d 1313, 1318 (9th Cir.), cert. denied, 474 U.S. 847 (1985); United States v. Bezold, 760 F.2d 999, 1002 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986). An earlier defendant-appellant had raised the issue, but the Second Circuit rejected it because it was not contemporaneously objected to. United States v. DeFiore, 702 F.2d 757, 764–65 (2d Cir. 1983). In *United States v. Ford*, the Fifth Circuit, sitting en banc, reached the opposite conclusion from the Second and Ninth Circuits, and held that magistrate judges could not preside over jury selection in felony cases. 824 F.2d 1430 (5th Cir. 1987) (en banc).

85. Gomez v. United States, 490 U.S. 858, 875–76 (1989). The Court rendered the decision on statutory grounds, stating that the constitutionality of Congress having the power to allow district judges to delegate felony *voir dire* to magistrates was a grave issue, and invoking the constitutional avoidance canon to avoid pronouncing on the constitutionality of § 636. *See also Ford*, 824 F.2d. at 1435.

86. *Gomez*, 490 U.S. at 864.

87. *Id.* at 872.

88. *Id.*

89. Peretz v. United States, 501 U.S. 923, 935–36 (1991).

90. *Id.* at 925.

91. *Id.*

92. *Id.*

the magistrate's supervision of *voir dire* was error, whether the consent at trial constituted a waiver of the right to raise the error on appeal.[93]

Justice Stevens, again writing for the Court, distinguished *Gomez* by pointing out the different constitutional analysis that occurred when a defendant consented to having a magistrate conduct the *voir dire*. Pointing again to the "additional duties" language of 28 U.S.C. § 636, Justice Stevens argued that Congress meant to give Article III judges discretion to experiment with potential improvements to judicial efficiency, and that had Congress expressly meant to limit additional duties, it would have included a "bill of particulars" as opposed to the broad term "additional duties."[94] *Gomez* meant that a defendant's right to object to a magistrate was retained, but the Court declined to functionally answer whether a criminal defendant had the constitutional right to demand an Article III judge at felony *voir dire*.[95] Because Mr. Peretz had not objected to the absence of the district court judge, he had no constitutional right to have an Article III judge preside over the felony *voir dire*.[96] The Court pointed to the decision in *Schor* that litigants could "waive their personal right to have an Article III judge preside over a civil trial," as well as a number of cases holding that various rights of criminal defendants could similarly be waived, as precedent for the conclusion that Mr. Peretz had waived this right.[97] The Court also stated that, even if a defendant could not waive the structural protections of Article III, the procedure at hand did not implicate those structural protections.[98] Citing to the *Raddatz* majority opinion and to Justice Blackmun's concurrence, the Court made the point that because magistrates were appointed by district court judges, could be removed by district court judges, and were ultimately subject to the control of district court judges, the use of magistrates did not involve an attempt to transfer judicial power to Congress.[99]

Commentators pointed out the tension in these cases. One author questioned the authority of magistrates to conduct extradition proceedings, arguing that in making determinations in these proceedings, they were impermissibly exercising Article III power,

93. *Id.* at 927.
94. *Id.* at 932–33.
95. *Peretz*, 501 U.S. at 936.
96. *Id.*
97. *Id.* at 936–37.
98. *Id.* at 937.
99. *Id.* at 937–39.

given that the magistrates were acting without direct supervision by an Article III judge.[100] Additionally, the Magistrate Judges Division of the Administrative Office of the United States Courts wrote a subsequent report considering the constitutionality of magistrates.[101] This report did not express an ultimate opinion on the constitutionality of magistrates.

AEDPA, passed in 1996, drastically changed habeas corpus litigation.[102] 28 U.S.C. § 2253, which governs all state petitions, both strengthened and formalized the certificate of appealability requirement, previously known as a certificate of probable cause.[103] 28 U.S.C. § 2254, also governing petitions filed by those convicted in state courts, instituted stringent requirements.[104] 28 U.S.C. § 2255, governing petitions filed by those convicted in federal courts, is only less deferential when compared to 28 U.S.C. § 2254.[105] Given that magistrates were already empowered to hear habeas cases, it is not surprising that after the passage of AEDPA, their caseloads rose. In 1995, magistrates terminated 8,967 cases pursuant to 28 U.S.C. § 636(c), and in 2005, magistrates terminated 12,282 cases under the same subsection, a roughly thirty-seven percent increase.[106] Beyond the increase in caseloads due to AEDPA, the duties and powers of magistrates granted by statute have not been seriously contracted or expanded since 1996.[107] The Federal Courts Improvement Act of 2000 (FCIA) did give magistrates limited contempt powers.[108] At least one study concluded that a system

100. Michael Edmund O'Neill, *Article III and the Process Due a Connecticut Yankee Before King Arthur's Court*, 76 MARQ. L. REV. 1, 2 (1992).

101. A Constitutional Analysis of Magistrate Judge Authority, 150 F.R.D. 247 (1993).

102. *See generally* 28 U.S.C. §§ 2241, 2254–2255 (2012) (discussing the level of review federal courts must apply when reviewing habeas cases).

103. *See* 28 U.S.C. § 2253 (2012); *see also* David Goodwin, *An Appealing Choice: An Analysis of and a Proposal for Certificates of Appealability in "Procedural" Habeas Appeals*, 68 N.Y.U ANN. SURV. AM. L. 791, 807–08 (2014).

104. *See* 28 U.S.C. § 2254 (2012).

105. *See* 28 U.S.C. § 2255 (2012).

106. *U.S. District Courts, Combined Civil and Criminal Judicial Facts and Figures*, UNITED STATES COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2006/Table606.pdf (last updated September 30, 2006).

107. *Compare* 28 U.S.C. § 636 (2012) *with* Act of March 1, 1817, ch. 30, 3 Stat. 350.

108. 28 U.S.C. § 636(e) (2012).

designed to maximize participation of magistrates in the civil caseload had positive effects.[109]

Finally, in 2003, the Supreme Court, in an opinion by Justice Souter, held that consent to a magistrate's judgment "can be inferred from a party's conduct during litigation[.]"[110] That case, *Roell v. Withrow*, arose out of a 42 U.S.C. § 1983 petition filed in the Southern District of Texas by a prisoner, Mr. Withrow, against medical staff members of the prison.[111] The petition proceeded to a preliminary hearing before a magistrate, who informed Mr. Withrow that he could request to have the district judge preside over the case.[112] He gave his consent to have the case heard by the magistrate both verbally and in writing, but the defendants did not provide consent at that point.[113] The district judge referred the case to the magistrate without waiting for the defendants' decision on consent, while adding "the caveat that 'all defendants [would] be given an opportunity to consent to the jurisdiction of the magistrate,' and that the referral order would be vacated if any of the defendants did not consent."[114] The case proceeded before the magistrate to a jury verdict and judgment for the petitioners, without any indication of consent from the petitioners.[115]

On appeal, the Fifth Circuit *sua sponte* remanded the case to the district judge to determine if both parties had *actually* consented, and if so, whether the consents were verbal or written.[116] At that point, the petitioners' counsel filed a formal letter of consent with the district court judge.[117] The district court judge remanded the case to the magistrate, who found first, that the petitioners had given implied consent, but second, that she lacked jurisdiction, because under Fifth Circuit case law, implied consent could not be effective.[118] The district court adopted her report and recommendation, and the Fifth Circuit affirmed.[119] The Court examined the Magistrate Act—specifically, section 636(c)—and concluded that,

109. James G. Woodward & Michael E. Penick, *Expanded Utilization of Federal Magistrate Judges: Lessons from the Eastern District of Missouri*, 43 ST. LOUIS U. L. J. 543, 543–44 (1999).

110. Roell v. Withrow, 538 U.S. 580, 582 (2003).

111. Withrow v. Roell, 2001 WL 35912354, at *1 (S.D. Tex., Mar. 01, 2001).

112. *Roell*, 538 U.S. at 582–83.

113. *Id.* at 583.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 583–84.

118. *Roell*, 538 U.S. at 584.

119. *Id.*

according to textual clues and the legislative history, there was good reason to think that Congress had intended implied consent to be effective.[120] The Court considered a bright-line rule in favor of express consent, and concluded that "[t]he bright line is not worth the downside."[121] The better rule, the Court said, was to accept implied consent "where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge."[122] This mitigated any potential gamesmanship, and substantially honored the Article III right.[123] These cases illustrate several principles. First, the direct control that district court judges can exert over magistrates has led to the repeated conclusion that magistrates are adjuncts to the district courts. Second, the consent of a party to a magistrate's jurisdiction has been held not to implicate the structural protections of Article III. As a result, consent has vitiated other potential constitutional concerns. It is with this background in mind that the next section turns to the line of Supreme Court cases dealing with bankruptcy judges.

II.
WAIVER & CONSENT

Stern v. Marshall, mentioned in the introduction, held that Article III prevents bankruptcy courts from entering final judgments regarding specific state law counterclaims previously designated as "core" proceedings by Congress.[124] However, the Court left a number of questions unanswered when it decided the case, with the most pressing question for this Note's purposes being whether or not a bankruptcy court could enter final judgment on *Stern* claims upon consent of the parties.[125] The issues of waiver and consent were left undecided until the recent decision in *Wellness*. Given that waiver and consent are crucial to the power of magistrates, it is necessary to study the bankruptcy case law in order to shed light on the differences between bankruptcy judges and magistrates, but also to draw attention to the similarities that have led several courts to apply *Stern* to cases involving magistrates.

120. *Id.* at 587–89.

121. *Id.* at 590.

122. *Id.*

123. *Id.*

124. 131 S. Ct. 2594, 2620 (2011).

125. *Id.*

A. Pre-Stern Case Law

This section analyzes the line of cases discussing non-Article III tribunals (excluding magistrates, discussed in Section I) before *Stern*. First considered is *Crowell v. Benson*,[126] which began with several principles that apply to Article I courts. This section then turns to a trinity of cases—*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[127] *Thomas v. Union Carbide Agricultural Products Co.*,[128] and *Commodity Futures Trading Commission v. Schor*[129]—that are familiar to students of Federal Courts and deal with various non-Article III tribunals. The last case considered is *Granfinanceria, S.A. v. Nordberg*.[130] The principles that can be drawn from these cases are muddled and arguably contradictory. But aside from observing principles to be drawn from these cases, it is also important to note that the "liberal" justices argued for bright-line rules, whereas the more "moderate" and "conservative" justices argued for balancing tests.

The use of adjuncts to Article III courts was first upheld in *Crowell v. Benson*, which did state that a delegation of judicial powers to an adjunct was unconstitutional if it removed "essential attributes" from Article III courts.[131] The Court in *Crowell* held that the United States Employees' Compensation Commission (ECC) did not violate Article III of the Constitution. Because the ECC had narrow jurisdiction and its decisions were reviewable by Article III tribunals, Article III was satisfied.[132] Famously, *Crowell* drew the line between public and private rights, originally explained in *Den ex rel Murray v. Hoboken Land & Improvement Co.*[133] An important distinction between legislative courts and the administrative agencies considered in *Crowell* is that the former are considered "exceptions" to the Article III protections of life tenure and undiminished salary, while the latter are generally held to be justified under Article III on the grounds that judicial review of agency decisions allows Article III courts to retain the essential elements of Article III jurisdiction.[134]

126. 285 U.S. 22 (1932).
127. 458 U.S. 50 (1982).
128. 473 U.S. 568 (1985).
129. 478 U.S. 833 (1986).
130. 492 U.S. 33 (1989).
131. *Crowell*, 285 U.S. at 51.
132. *Id.* at 62–65.
133. 59 U.S. (18 How.) 272, 283 (1855).
134. FALLON, *supra* note 4, at 342.

It would be another fifty years before the Court took up the issue of non-Article III courts (excluding magistrates). In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, the Supreme Court held that the 1978 Bankruptcy Act could not be read to grant non-Article III courts the ability to hear cases arising entirely under state or common law, absent litigant consent.[135] *Northern Pipeline* struck down the grant of jurisdiction under the 1978 Bankruptcy Act. In a plurality decision, Justice Brennan first considered the powers of bankruptcy judges. He noted that bankruptcy judges did not have the protections of Article III—they were appointed for fourteen-year terms and their salaries could be diminished by Congress.[136] He rejected the conclusion that Congress had intended to create legislative courts by passing the Act.[137] He argued that there were only three recognized exceptions in which Congress could create legislative courts: territorial courts, military courts, and tribunals created to adjudicate "public rights."[138] These exceptions were consistent with the constitutionally required separation of powers.[139] Justice Brennan analyzed the constitutionality of the bankruptcy courts through that formalist lens, and argued that "[a]ppellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient."[140] It had been argued that a discharge under bankruptcy was a public right, but Brennan rejected that argument.[141]

Turning to the concept of "adjunct courts," Justice Brennan cited the magistrate judge system considered in *Raddatz* as an example of an adjunct court system that was sufficiently "controlled" by an Article III court.[142] On the basis of all of the foregoing, Justice Brennan stated that two principles could be drawn from prior case law. First, when Congress creates a substantive federal right, it has discretion in determining how that right will be adjudicated, which includes the assignment of some traditional Article III functions to a non-Article III tribunal.[143] Second, any functions that an adjunct court is allowed to perform "must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III

135. 458 U.S. 50, 76, 91–92 (1982).
136. *Id.* at 60–61.
137. *Id.* at 63.
138. *Id.* at 70 & n.25.
139. *Id.* at 64–65.
140. *Id.* at 73.
141. *Northern Pipeline*, 458 U.S. at 71–72.
142. *Id.* at 79.
143. *Id.* at 80.

court."[144] In considering the bankruptcy courts under these two principles, the subject matter jurisdiction of the bankruptcy courts was incredibly broad: under the 1978 Bankruptcy Act, the courts could preside over jury trials, issue declaratory judgments, issue habeas writs, and take measures necessary to enforce judgments under Chapter 11.[145] Ultimately, Justice Brennan wrote, the bankruptcy courts were empowered far beyond the ECC in *Crowell* or the magistrates in *Raddatz*, making the title of "adjunct" misleading and inaccurate.[146] On these grounds, then, Congress's grant of jurisdiction to the bankruptcy courts was unconstitutional.

Justice Rehnquist concurred, joined by Justice O'Connor. Together, they provided the fifth and sixth votes and ultimately limited *Northern Pipeline*'s binding effect to the holding identified above.[147] Justice Rehnquist stated that because *Northern Pipeline* had "not been subjected to the full range of authority granted bankruptcy courts by § 1471," the Court should not pronounce on the constitutionality of the 1978 Bankruptcy Act.[148] He further stated:

> I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as Justice White apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act.[149]

However, under the public rights doctrine articulated in *Murray's Lessee* and *Crowell*, Justice Rehnquist was "satisfied that the adjudication of Northern's lawsuit cannot be so sustained."[150] Additionally, he found that there was insufficient Article III review of the bankruptcy courts under the 1978 Bankruptcy Act.[151]

Chief Justice Burger, in a dissenting opinion, emphasized that *Northern Pipeline*'s holding was limited to the point identified by Justice Rehnquist—"that a 'traditional' state common-law action, not made subject to a federal rule of decision and related only peripherally to an adjudication of bankruptcy under federal law, must, ab-

144. *Id.* at 81.
145. *Id.* at 84–86.
146. *Id.* at 86.
147. *Northern Pipeline*, 458 U.S. at 89 (Rehnquist, J., concurring).
148. *Id.* at 91.
149. *Id.*
150. *Id.*
151. *Id.*

sent the consent of the litigants, be heard by an 'Art. III court'" if the case will be heard by any federal court or agency.[152] Despite the initial reference to consent in the plurality opinion, no opinion in *Marathon* considered the issues of consent and waiver in any depth. It is only through the conjunction of the plurality opinion, Justice Rehnquist's concurrence, and Justice Burger's dissent that consent is illuminated, as illustrated in the following case.

The Court again took up the question of non-Article III courts two years later, in *Thomas v. Union Carbide Agricultural Products Co.*[153] *Union Carbide* considered the constitutionality of a binding arbitration scheme enacted by Congress, specifically "the tribunal's authority to adjudicate the dispute."[154] In an opinion by Justice O'Connor, the Court distinguished *Northern Pipeline* because *Union Carbide* dealt with a question of federal law.[155] Despite the difference in subject matter and Justice Brennan's presence, the Court made clear that *Northern Pipeline*'s holding was limited to the proposition that absent litigant consent, non-Article III courts did not have the ability to hear cases arising entirely under state or common law.[156] In what appeared to be a rejection of the *Northern Pipeline* plurality, Justice O'Connor's opinion stated that questions involving Article III considerations should involve "practical attention to substance rather than doctrinaire reliance on formal categories."[157] Justice Brennan, concurring, stated that this case fell within the third *Northern Pipeline* exception—courts established to adjudicate public rights—because public rights cases "involved disputes arising from the federal government's administration of its laws or programs."[158] *Union Carbide*'s only substantive discussion of consent, then, dealt with its formulation of the controlling principle in *Marathon*.

Given the bright-line test of *Northern Pipeline*, it would seem that questions regarding non-Article III tribunals would be clear-cut. However, the Court took up the issue again in *Schor*.[159] One year after *Union Carbide*, the Court adopted a multi-factor test in upholding a statute that gave the Commodity Futures Trading Commission (CFTC) jurisdiction to resolve claims between com-

152. *Id.* at 92 (Burger, C.J., dissenting).
153. 473 U.S. 568, 584 (1985).
154. *Id.* at 580.
155. *Id.* at 573-75.
156. *Id.* at 584.
157. *Id.* at 587.
158. *Id.* at 596 (Brennan, J., concurring).
159. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

modities brokers and their clients.[160] The CFTC had adopted a regulation allowing it to "adjudicate counterclaims aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint."[161] Mr. Schor invoked the CFTC's jurisdiction under the scheme by filing a complaint against Conti, a commodity futures broker.[162] Conti had begun a diversity action in the Northern District of Illinois, and Mr. Schor counterclaimed in that action.[163] Subsequently, Conti voluntarily dismissed the federal court suit, and counterclaimed against Schor before the CFTC.[164] The CFTC administrative law judge (ALJ) ruled against Schor, who then "challenged the CFTC's statutory authority to adjudicate Conti's counterclaim."[165] The D.C. Circuit, on review, dismissed Conti's counterclaims, holding that, under *Marathon*, the CFTC's exercise of jurisdiction over counterclaims raised serious constitutional issues.[166]

In another opinion by Justice O'Connor, the Court moved away from the formalism of *Northern Pipeline*. The Court held that the broad grant of power under the Commodity Exchange Act clearly authorized promulgation of regulations providing for the adjudication of common law counterclaims that arose out of the same transaction as a reparation complaint.[167] The Court's examination of the relevant statute determined that Congress "plainly intended" this counterclaim jurisdiction, and "plainly delegated" the authority to the CFTC to determine how to use it.[168] Justice O'Connor cited to the *Union Carbide* language that she used to reject the *Northern Pipeline* plurality in saying that the constitutionality of any delegation of Article III powers to a non-Article I tribunal had to be considered with reference to the underlying purposes of Article III requirements.[169] That inquiry, she stated, would be guided by substance.[170] Under this substantive inquiry, Justice O'Connor upheld the CFTC's scheme.

Schor made explicit what *Marathon* and *Union Carbide* had considered, but not squarely addressed—consent and waiver. In consid-

160. *Id.* at 847–54.
161. *Id.* at 837.
162. *Id.*
163. *Id.* at 837–38.
164. *Id.* at 838.
165. *Schor*, 478 U.S. at 838.
166. *Id.* at 839.
167. *Id.* at 843.
168. *Id.* at 841.
169. *Id.* at 847–48.
170. *Id.* at 848.

ering the protections of Article III, Justice O'Connor made the point that precedent made clear that Article III "does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court."[171] Immediately after, she came to the issue of waiver, stating that the Article III guarantee of an "impartial and independent adjudication" could be waived, just as various other personal constitutional rights can be waived.[172] Because Mr. Schor had explicitly demanded that Conti bring its counterclaim before the CFTC, rather than proceed on his own counterclaim before the district court, Mr. Schor had waived any right he may have had to a full Article III adjudication.[173] Justice O'Connor said that, assuming *arguendo* that Mr. Schor had not expressly waived his right to an Article III adjudication, his decision to bring his claim before the CFTC constituted an effective implied waiver of his Article III right.[174]

Justice Brennan, joined by Justice Marshall, argued in dissent against what he perceived to be the "incremental erosion" of Article III functions.[175] He stated that the majority's reliance on consent was "misplaced," because it suggested that there was a division between Article III's separation of powers function and impartial adjudication function, which in his view were inseparable.[176] Going further, he argued that because these two functions were co-extensive, they could not be waived, and therefore "consent [was] irrelevant to Article III analysis."[177]

After *Union Carbide* and *Schor*, it appeared that the *Northern Pipeline* approach had been put to rest. For three years after *Schor*, the Court did not issue any decisions regarding the constitutionality of Article I courts. Then, the Court appeared to adopt the *Northern Pipeline* approach in a 1989 case, *Granfinanceria, S.A. v. Nordberg*.[178] In an opinion by Justice Brennan, the Court held that the central question (of *Northern Pipeline*) was "whether the right to recover a fraudulent conveyance should be viewed as 'public' or 'private.'"[179]

The seminal textbook in the area of Federal Courts, *Hart & Wechsler's The Federal Courts and The Federal System*, attempts to syn-

171. *Schor*, 478 U.S. at 848.
172. *Id.* at 848–49.
173. *Id.* at 849–50.
174. *Id.*
175. *Id.* at 861 (Brennan, J., dissenting).
176. *Id.* at 866–67.
177. *Schor*, 478 U.S. at 867 (Brennan, J., dissenting).
178. 492 U.S. 33, 55–56, 61 (1989).
179. FALLON, *supra* note 4, at 360.

thesize the line of cases from *Crowell* through *Granfinanceria*.[180] In assessing the constitutionality of any statutory provision that delegates adjudicatory authority to a non-Article III tribunal, the authors suggest first considering whether that provision falls within one of the three *Northern Pipeline* exceptions.[181] If the provision does not fit into the *Northern Pipeline* framework, the authors suggest applying the *Schor* balancing test.[182] Consent, the functional justifications for using a non-Article III tribunal, and the scope of review available in an Article III court, will all be important factors.[183] Next, even if adjudication in a non-Article III tribunal is "permissible under Article III," there is still the question of "whether a jury trial is required under the Seventh Amendment."[184] Of course, there are other constitutional restrictions that apply to non-Article III tribunals, including the Due Process Clause. However, where Article III does not apply of its own force, "the Due Process Clause does not require adjudication by a judge with the tenure and salary guarantees of Article III."[185]

From this rather confusing decade of cases, one trend emerges: it is clear that the "liberal" justices argued for bright-line rules, whereas the more "moderate" and "conservative" justices argued for balancing tests. The exception, however, was Justice Scalia, who concurred in *Granfinanciera*. With this in mind, it is instructive to consider *Stern* and subsequent cases.

B. Stern Itself

After years of silence regarding Article I courts, the Supreme Court snapped attention back to the issue in *Stern v. Marshall*.[186] After the 1980s line of confusing decisions, the Court, in an opinion by Chief Justice Roberts, moved back to the formalism of *Northern Pipeline*. The key holding of *Stern* was that the bankruptcy courts could not constitutionally adjudicate a state law counterclaim.[187] *Stern* would also make apparent that the issues of consent and waiver had not been alleviated regarding bankruptcy judges. While concerns about magistrates had been alleviated before *Stern*, as will

180. *Id.* at 362–63.
181. *Id.* at 362.
182. *Id.*
183. *Id.*
184. *Id.* at 363.
185. FALLON, *supra* note 4, at 363.
186. 131 S. Ct. 2594 (2011).
187. *Id.* at 2620.

be seen in Section C, this case and its sequels re-opened those concerns.

As mentioned earlier, the foundation for the case was laid when Ms. Vickie Lynn Roberts married Mr. J. Howard Marshall. "Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death."[188] Ms. Roberts was not named in Mr. Howard's will, and so she brought suit in Texas state probate court, arguing that Mr. Howard's son, Mr. Pierce Howard, had fraudulently induced his father to leave her out of his will.[189] Mr. Pierce Howard defended himself in that suit, and after Mr. Howard's death, Ms. Roberts filed a bankruptcy petition in the Central District of California.[190] Pierce filed a complaint in that case, alleging defamation; Ms. Roberts filed a counterclaim, raising tortious interference.[191] "The Bankruptcy Court granted Ms. Roberts summary judgment on the defamation claim and eventually awarded her hundreds of millions of dollars in damages on her counterclaim."[192] Mr. Pierce Howard objected on the basis that the bankruptcy judge did not have the jurisdiction to enter a final judgment on Ms. Roberts' counterclaim, "because [it] was not a 'core proceeding' under 28 U.S.C. § 157(b)(2)(C)."[193] If the counterclaim was not a core proceeding, then the bankruptcy judge could not enter a final judgment on it, and is only able to provide "proposed findings of fact and conclusions of law to the district court."[194] The case was appealed to the Ninth Circuit,[195] which vacated the lower court's decision. The Supreme Court granted certiorari and remanded the case back to the Ninth Circuit,[196] which vacated and remanded the case to the Central District of California.[197] The Supreme Court again granted certiorari.[198]

Justice Roberts determined that under a plain text reading of section 157(b)(2)(c), Ms. Roberts' tortious interference counterclaim was in fact a "core proceeding" and therefore allowed under the statute.[199] He considered Pierce's argument that the bank-

188. *Id.* at 2601.
189. *Id.*
190. *Id.*
191. *Id.*
192. Stern v. Marshall, 131 S. Ct. at 2601.
193. *Id.*
194. *Id.* at 2602.
195. *In re* Marshall v. Marshall, 392 F.3d 1118 (9th Cir. 2003).
196. Marshall v. Marshall, 547 U.S. 293, 293, 314 (2006).
197. *In re* Marshall, 600 F.3d 1037, 1039 (9th Cir. 2010).
198. Stern v. Marshall, 131 S. Ct. at 2601–03.
199. *Id.* at 2604.

ruptcy court did not have the jurisdiction to enter a final judgment on his defamation claim, and, as a result, over Ms. Roberts' counterclaim,[200] and determined that Pierce had "consented to the Bankruptcy Court's resolution of his defamation claim."[201] This was due to his conduct before the bankruptcy court, which included advising that court that he was "'happy to litigate his claim' there."[202]

But with one line, Justice Roberts made clear that the case was not resolved: "Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not."[203] In explaining this conclusion, Justice Roberts drew parallels between *Northern Pipeline* and this case. Here, as in *Northern Pipeline*, the claim at issue arose under state law.[204] Again, the bankruptcy court jurisdiction is not limited by subject matter, and the bankruptcy court issues enforceable judgments.[205] These decisions were reviewable under traditional appellate standards. While Pierce had verbally consented to the resolution of both claims in the bankruptcy court,[206] Justice Roberts stated that Pierce had not truly consented because "[h]e had nowhere else to go if he wished to recover from Vickie's estate."[207]

Justice Roberts also distinguished *Union Carbide* and *Schor*. Unlike the issue in *Union Carbide*, this counterclaim did not flow from a federal statutory scheme, and it did not depend on the adjudication of a claim created by federal law, as in *Schor*.[208] *Schor* was further distinguishable because Pierce did not truly consent to bankruptcy court jurisdiction just by filing a claim.[209] Turning to adjuncts, Justice Roberts said that bankruptcy courts were not adjuncts for the same reasons they were not adjuncts in *Northern Pipeline*.[210] The courts had broad jurisdiction, not limited by subject matter, and could still enter final judgments.[211] Justice Roberts did not find it relevant that bankruptcy judges were appointed by Article III judges, because if the bankruptcy judges exercise the "essential at-

200. *Id.* at 2606.
201. *Id.*
202. *Id.* at 2607.
203. *Id.* at 2608.
204. Stern v. Marshall, 131 S. Ct. at 2611.
205. *Id.* at 2610–11.
206. *Id.* at 2607–08.
207. *Id.* at 2614.
208. *Id.*
209. *Id.*
210. Stern v. Marshall, S. Ct. at 2619.
211. *Id.*

tributes of power [that] are reserved to Article III courts," it does not matter who appoints them—"the constitutional bar remains."[212] Finally, in responding to the argument that restricting jurisdiction over compulsory counterclaims would delay litigation and impose additional costs, Justice Roberts cited *I.N.S. v. Chadha*[213] for the proposition that a law's efficiency or usefulness cannot save a law if it is unconstitutional.[214] His opinion was joined by Justices Scalia, Thomas, Kennedy, and Alito.

Justice Scalia also wrote a concurring opinion, reiterating the view espoused in *Granfinanciera* that public rights cases must, at a minimum, arise between the government and another party.[215] In his view, Article III judges are required in all federal adjudications, except where there is established historical practice to the contrary.[216] In essence and in fact, he adopted the *Northern Pipeline* view.

Justice Breyer, in dissent, and joined by Justices Ginsburg, Sotomayor, and Kagan, argued for a functional approach.[217] He criticized the majority for relying on the plurality in *Northern Pipeline*, as opposed to the *Schor* and *Union Carbide* decisions, which had majorities.[218] He pointed to the "practical attention to substance" language in *Union Carbide* as providing the guideline for his approach.[219] Under *Union Carbide* and *Schor*, he argued, the nature of the counterclaim—arising from state law—was less significant because bankruptcy courts often decide claims that resemble state law counterclaims.[220] In considering protection from the legislative and executive branches, bankruptcy judges have considerable protection from politics, because they are appointed by Article III judges.[221] They are, in turn, removable only by those same Article III judges, and then only for cause. Additionally, Article III judges supervise bankruptcy courts just as much, if not more, than they supervised the agency in *Crowell*.[222] Justice Breyer argued that the fact that the parties consented was important—Pierce voluntarily appeared in bankruptcy court to press a claim he could have as-

212. *Id.* (internal quotations and citations omitted).
213. 462 U.S. 919, 944 (1983).
214. Stern v. Marshall, 131 S. Ct. at 2619.
215. *Id.* at 2620 (Scalia, J., concurring).
216. *Id.* at 2621.
217. *Id.* at 2621 (Breyer, J., dissenting).
218. *Id.* at 2622.
219. *Id.* at 2624.
220. Stern v. Marshall, 131 S. Ct. at 2626 (Breyer, J., dissenting).
221. *Id.* at 2626–27.
222. *Id.* at 2627.

serted in another forum.[223] Even regarding private rights, adjudication in a non-Article III forum may be appropriate when the parties consent.[224] Finally, counterclaim jurisdiction is important: Congress concluded it was critical to the efficient operation of the bankruptcy system.[225]

Stern left several important questions open. It was unclear whether *Northern Pipeline* was now the preferred approach to defining non-Article III courts. The question of whether a party could consent to bankruptcy court authority to enter a final judgment on non-core proceedings was left open. Additionally, commentators noted that if bankruptcy judges could not undertake decisions upon consent of the parties, magistrates would be in trouble, given their analogous situations. At least one commentator argued, on the basis of the magistrate cases, that consent should be sufficient.[226] One point is clear: consent and waiver appear to have alleviated concerns over magistrates, but consent and waiver had not dealt with concerns regarding bankruptcy judges.

C. Decisions between Stern and Wellness

The circuit response to *Stern* was swift and interesting. The relevant cases are examined chronologically in this section, looking at decisions that implicate both bankruptcy and magistrates. To be sure, the majority of cases have dealt with bankruptcy judges, and magistrates have gone mostly unnoticed in the fray of litigation. The Sixth Circuit, in *Waldman v. Stone*, held that consenting to a bankruptcy judge's hearing of a claim otherwise limited by Article III was impermissible, and that structural interests meant that litigants could not waive their right to an Article III judge under such circumstances.[227] The Ninth Circuit reached the opposite conclusion, holding that Article III can be waived.[228] However, the Ninth Circuit held that because fraudulent conveyance claims do not fall within the public rights exception, they cannot be adjudicated by non-Article III judges.[229] The Court analogized bankruptcy judges

223. *Id.* at 2627–28.

224. *Id.* at 2628.

225. *See id.* at 2629 (discussing counterclaim jurisdiction as it relates to Congress' "effort to create an efficient, effective federal bankruptcy system.").

226. *See* Geoffrey K. McDonald, *The Question of Consent in Executive Benefits: Can Bankruptcy Courts Exercise the Judicial Power of the United States Under Article III Based on Litigant Consent Alone?*, 87 AM. BANKR. L.J. 271, 285–89 (2013).

227. 698 F.3d 910, 918 (6th Cir. 2012).

228. *In re* Bellingham Ins. Agency, Inc. v. Arkison, 702 F.3d 553, 567 (9th Cir. 2012).

229. *Id.* at 561.

proceeding on consent to magistrates proceeding on consent, citing to *Roell*.[230]

Two other post-*Stern* cases discussed magistrates critically. First, the Fifth Circuit held in *Technical Automation Services Corp. v. Liberty Surplus Ins. Corp*, that magistrates had "the constitutional authority to enter final judgment on state law counterclaims."[231] The Fifth Circuit considered *Technical Automation* in light of the holding in *Stern*, and mentioned that the holding in *Stern* "can be translated to the many similarities of the statutory powers of federal magistrates."[232] This was because, as has been discussed, neither bankruptcy judges nor magistrates have life tenure or protection from diminished salaries. On the basis of Fifth Circuit precedent, however, the Fifth Circuit declined to extend *Stern* to magistrates and argued that *Stern* was a narrow holding.[233] As such, magistrates—at least in the Fifth Circuit—could enter final judgment on state law counterclaims.[234]

Second, the Eleventh Circuit held that magistrates, under principles of statutory interpretation, could not enter final judgment on section 2255 motions.[235] In its analysis, the Eleventh Circuit considered the history of magistrates[236] and concluded that, because they lacked Article III protections, the exercise of Article III powers by magistrates posed constitutional issues.[237] However, invoking the constitutional avoidance canon, the Eleventh Circuit first analyzed whether section 636(c) allows magistrates to enter final judgments.[238] While section 2255 matters could best be characterized as civil matters, the Circuit argued that Congress "did not evince an intent to allow [magistrate judges] to enter final judgment on § 2255 motions."[239] Section 2255 motions, while "comparable to habeas corpus petitions," are different and are procedural devices for federal prisoners to challenge their convictions.[240] Because there was no legislative history indicating that Congress intended to allow magistrates to enter final judgments, the Circuit found the absence of that legislative history could lead to the conclusion that

230. *Id.* at 569.
231. 673 F.3d 399, 404 (5th Cir. 2012).
232. *Id.* at 406.
233. *Id.* at 407.
234. *Id.*
235. Brown v. United States, 748 F.3d 1045, 1058 (11th Cir. 2014).
236. *Id.* at 1050–58.
237. *Id.* at 1058.
238. *Id.*
239. *Id.* at 1059.
240. *Id.* at 1061.

magistrates could not enter final judgment.[241] Then the Circuit turned to *Stern*, saying that "[a]lthough *Stern* concerned bankruptcy courts and here we deal with magistrates, the rationale motivating the Supreme Court's decision in *Stern* would appear to apply with equal force here."[242] The Circuit stated that "[*l*]*ike bankruptcy judges*, magistrate judges acting pursuant to § 636(c) exercise the essential attributes of judicial power by resolving [a]ll matters of fact and law in whatever domains of the law to which the parties' civil claims might lead."[243] As a result, Congress's determination that magistrates were Article III adjuncts was wrong because magistrates were exerting the "judicial power of the United States" while lacking the protections of Article III.[244] Finally, consent did not mitigate these concerns, because just as parties cannot consent to a case lacking subject matter jurisdiction, consent cannot fix structural concerns.[245] Ultimately, however, the Circuit held that the constitutional avoidance canon meant that they had to read section 2255 motions as not "civil," thereby stopping magistrates from entering final judgment in those cases under section 636(c).[246] Several other cases mentioned magistrates, or discussed them in the class-action context.[247]

Only one case reached the Supreme Court, however. The Court granted certiorari to *In re Bellingham* on four issues,[248] although the case was renamed before the Court as *Executive Benefits*

241. *Brown*, 748 F.3d at 1065–68.

242. *Id.* at 1069.

243. *Id.* (emphasis added) (internal citations omitted).

244. *Id.*

245. *Id.* at 1070.

246. *Id.* at 1058, 1072.

247. *See In re* BP RE, L.P., 744 F.3d 1371, 1372 (5th Cir. 2014) (discussing *Technical*); Peterson v. Somers Dublin Ltd., 729 F.3d 741, 746–47 (7th Cir. 2013) (stating that "[i]t is established that parties may consent to the entry of final decision by a magistrate judge under 28 U.S.C. § 636(c), followed by an appeal that bypasses the district court, even though a magistrate judge lacks Article III tenure"); Wellness Int'l. Network, Ltd. v. Sharif, 727 F.3d 751, 770 (7th Cir. 2013) (discussing magistrate judge cases); Day v. Persels & Associates, LLC, 729 F.3d 1309, 1316 (11th Cir. 2013) (concluding that "absent class members are not "parties" whose consent is required for a magistrate judge to enter a final judgment under section 636(c)"); *In re* BP RE, L.P., 735 F.3d 279, 288 n.11 (5th Cir. 2013) (discussing *Technical*); *In re* Pilgrim's Pride Corp., 690 F.3d 650, 663 (5th Cir. 2012) (discussing Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 404 (5th Cir. 2012) for "rule of orderliness"); *In re* Ortiz, 665 F.3d 906, 915 (7th Cir. 2011) (mentioning Roell v. Withrow, 538 U.S. 580 (2003)).

248. *In re* Bellingham Ins. Agency, Inc. v. Arkison, 702 F.3d 553 (9th Cir. 2012), *cert. granted*.

Ins. Agency v. Arkison.[249] The four questions posed on certiorari could be condensed into two composite questions.[250] The first question could be phrased as whether Article III permits bankruptcy judges to exercise the judicial power of the United States on the basis of litigant consent, and whether the bankruptcy provision at issue was constitutional.[251] The second question could be phrased as whether "implied consent" is sufficient to satisfy Article III, and if so, whether that doctrine was properly applied.[252] While the majority of spectators worried about the bankruptcy system, given that *Arkison* again dealt with bankruptcy judges and consent, the potential effect on magistrates was not lost on everyone.[253]

However, the Supreme Court ruled narrowly in *Arkison*, and did not decide the issue of consent at all.[254] In a unanimous opinion by Justice Thomas, the Court held that where a bankruptcy court could not enter a final judgment on a claim because it is not a core claim (alternatively, a "*Stern* claim"), the statute nonetheless authorizes a bankruptcy judge "to issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court."[255] On the issue of consent, Executive Benefits Insurance Agency (EBIA) had argued that it was "constitutionally entitled" to have an Article III judge review its *Stern* claim whether or not the parties consented to have the case heard by a bankruptcy judge, and in the alternative, that even if bankruptcy judges could hear these cases on consent, it had not consented.[256] Justice Thomas stated that EBIA, in essence, wanted an Article III court to review its claim, and that "in effect, EBIA received exactly that."[257]

The practical effects of *Arkison* on magistrates are understandably hard to quantify, given its narrow holding and the fact that the case was decided in June 2014. The case was essentially a statutory interpretation decision, given the care with which Justice Thomas examined the statute. The only mention of *Northern Pipeline* was when Justice Thomas discussed the prior history of the bankruptcy

249. 134 S. Ct. 2165 (U.S. 2014).

250. *See* McDonald, *supra* note 226, at 300–02.

251. *Id.* at 300.

252. *Id.* at 301–02.

253. Katherine Riley, *The Constitutionality of Consent After Stern v. Marshall: Splitting the Circuits*, 32 CAL. BANKR. J. 551, 561–62 (2013); Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to Stern v. Marshall*, 87 AM. BANKR. L.J. 191, 200–01 (Spr. 2013).

254. *Arkison*, 134 S. Ct. at 2170 n.4.

255. *Id.* at 2168.

256. *Id.* at 2175.

257. *Id.*

system.[258] As of May 2015, in the eight precedential appellate decisions citing *Arkison*, there were no mentions of magistrates.[259] One case analyzed consent, but ultimately held that the aggrieved party had waived any consent-based arguments.[260]

In this term, however, the Supreme Court took up the issue of consent and waiver (as applied to bankruptcy judges) again in *Wellness International Network, Ltd. v. Sharif*.[261] Mr. Sharif sued Wellness International Networks (WIN) in the Northern District of Texas, and WIN obtained a $650,000 sanctions judgment against Mr. Sharif.[262] As a direct result of this judgment, Mr. Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois. WIN, as a judgment creditor, filed an adversary complaint in Mr. Sharif's case, alleging, *inter alia*, that a trust he administered was actually an alter ego for him and seeking a declaratory judgment to that effect.[263] The bankruptcy court eventually entered a default judgment in WIN's favor and Mr. Sharif appealed to the district court. After the entry of judgment, but before the district court appeal was briefed, the Supreme Court decided *Stern*. Mr. Sharif initially did not challenge the authority of the bankruptcy judge to enter the default judgment, but his sister filed a motion to withdraw the referral of the case to the bankruptcy judge on the basis of *Stern*.[264] Shortly thereafter, Mr. Sharif asked for supplemental briefing so that he could file a *Stern*-based claim.[265] The district court denied both motions, "holding that a Stern objection to a bankruptcy judge's authority to enter final judgment is waivable and that Sharif's failure to raise it earlier constituted waiver."[266]

The Seventh Circuit decided that "a constitutional objection based on *Stern* is not waivable."[267] The Circuit held that the claim at issue—WIN's alter ego complaint against Sharif—was not contem-

258. *Id.* at 2170–71.

259. *See In re* Fisher Island Inv., Inc., 778 F.3d 1172 (11th Cir. 2015); Moses v. Cashcall, Inc., No. 14-1195, 2015 WL 1137242 (4th Cir. Mar. 16, 2015); U.S. Bank. Nat. Ass'n v. Verizon Comms. Inc., 761 F.3d 409 (5th Cir. 2014); *In re* Galaz, 765 F.3d 426 (5th Cir. 2014); Mastro v. Rigby, 764 F.3d 1090 (9th Cir. 2014); *In re* Deitz, 760 F.3d 1038 (9th Cir. 2014); Schultze v. Chandler, 765 F.3d 945 (9th Cir. 2014); Kismet Acquisition, LLC v. Icenhower (*In re* Icenhower), 757 F.3d 1044 (9th Cir. 2014).

260. *In re* Fisher Island, 778 F.3d at 1191–92.

261. 134 S. Ct. 2901 (2014).

262. Wellness Int'l. Network, Ltd. v. Sharif, 727 F.3d 751, 754 (7th Cir. 2013).

263. *Id.*

264. *Id.* at 755.

265. *Id.*

266. *Id.*

267. *Id.*

plated under the statute as a core proceeding and stated that they would not assume it to be so.[268] They then turned to the constitutional question.[269] The decision discussed the fact that bankruptcy judges had terms fixed by statute, and that they could be removed "for incompetence, misconduct, neglect of duty, or physical or mental disability" by a majority vote of "the judicial council of the circuit in which the judge's official duty station is located[.]"[270] The Circuit examined *Northern Pipeline*, *Granfinanciera*, and *Stern*,[271] pointing to the fact that *Stern* had rejected Ms. Roberts's argument that the bankruptcy courts were properly considered adjuncts to the district court as one factor in the analysis.[272] The decision cited a prior Seventh Circuit case, *In re Ortiz*, which applied *Stern* and held that a bankruptcy court did not have the constitutional authority to enter final judgment on debtor claims based on Wisconsin law.[273] WIN asserted that *Stern* held that Mr. Sharif could waive Article III objections, and that by his conduct during litigation and failure to raise the objection, he had in fact waived any objection.[274] However, the Seventh Circuit stated that Mr. Sharif's argument, unlike in *Stern*, dealt with the bankruptcy judge's constitutional authority.[275]

Citing to portions of *Stern* and *Granfinanciera*, the Circuit went so far as to say that it was questionable whether waiver and consent had *any* role in bankruptcy, as creditors were required to go to bankruptcy courts to have their claims heard.[276] However, the Supreme Court has found a limited role for consent and waiver in the Article III, section 1 context. This was because Section I "protects two separate interests—it safeguards litigants' right to have their cases decided by independent and impartial judges, and it also operates as an inseparable element of separation of powers by protecting the judicial branch from encroachment by the political branches."[277]

The Seventh Circuit also teased out the "difficulty of separating out the waivable personal safeguard from the nonwaivable struc-

268. *Sharif*, 727 F.3d at 755.
269. *Id.* at 762.
270. *Id.* at 763.
271. *Id.* at 763–66 (internal citations omitted).
272. *Id.* at 765–66.
273. *Id.* at 766–67.
274. *Sharif*, 727 F.3d at 767.
275. *Id.*
276. *Id.* at 767–68.
277. *Id.* at 769.

tural safeguard."[278] Examining *Schor*, *Waldman*, and *In re Bellingham*, the Seventh Circuit agreed with the Sixth Circuit's use of *Schor* in *Waldman*.[279] Specifically, *Schor* allowed consent and waiver to be *factors* in making determinations of whether delegation of Article III powers to non-Article III tribunals is constitutional, but did not allow them to be *dispositive* because of Article III, section 1's structural role. According to the Seventh Circuit, because *Stern* had held that 28 U.S.C. § 157(c) violated Article III, section 1 on that structural basis, *Waldman*'s conclusion that bankruptcy judges could not hear cases on consent due to structural issues was the correct conclusion.[280] Turning to the constitutional argument that bankruptcy judges could not enter final judgment on the claim at issue, the Seventh Circuit determined that bankruptcy judges lacked the constitutional authority to do so.[281] This was because WIN's "alter-ego claim [was] a state-law claim between private parties that [was] wholly independent of federal bankruptcy law and [unresolvable] in the claims-allowance process."[282] The Circuit did not state that it was extending the reasoning of *Stern* to creditor claims, but appears to have done so, as WIN was a judgment creditor.

Prior to the Supreme Court's decision in *Wellness*, the only certain results of the past four years had been that *Northern Pipeline* may again be good law; that the Court appeared to be trying to avoid deciding the question of consent; and that litigants before the Court appeared to be trying to either draw strong parallels between the magistrate and bankruptcy systems, or distinguish the two. The oral arguments in *Wellness* did not shed any light on the continued constitutionality of Article I courts and whether consent can cure any potential defects. The Supreme Court heard oral arguments for *Wellness* on January 14, 2015,[283] and rendered its decision on May 26, 2015.[284]

278. *Id.*

279. *Id.* at 769–72.

280. *Sharif*, 727 F.3d at 771–72. Given that Chief Justice Roberts had rejected the argument that Pierce consented to having the bankruptcy judge hear Pierce's claim, *Stern* arguably rests on both the structural Article III concerns *and* individual due process concerns as well.

281. *Id.* at 775–76.

282. *Id.* at 775.

283. *Wellness Int'l. Network, Ltd. v. Sharif*, OYEZ, http://www.oyez.org/cases/2010-2019/2014/2014_13_935 (last visited Apr. 13, 2015).

284. *Wellness Int'l. Network, Ltd. v. Sharif*, No. 13-935, slip op. (U.S. May 26, 2015).

D. Wellness

This section examines the recent decision in *Wellness*. It begins with the functionalist majority opinion and then discusses the formalist dissent. The shift in rationale in *Wellness* further complicates the line of non-Article III case law, especially given that *Stern* was decided a scant four years ago. Interestingly, this quick shift parallels the shift in rationales among the 1980s cases.

In a 6-3 opinion penned by Justice Sotomayor, the Court reversed the Seventh Circuit,[285] holding that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge."[286] Chief Justice Roberts dissented, joined by Justices Scalia and Thomas.[287] Justice Sotomayor explicitly drew on the functional approach adopted by Justice O'Connor in *Schor*.[288] She emphatically stated that, on the basis of Supreme Court precedent, litigants could constitutionally consent to have a bankruptcy court adjudicate claims.[289]

Justice Sotomayor began by citing to *Schor*'s discussion of waiver and Mr. Schor's waiver of his right to have a jury trial before an Article III tribunal.[290] She integrated *Gomez* and *Peretz* into her analysis, pointing out that the dispositive difference between the two cases was that Mr. Peretz had consented to have a magistrate conduct felony *voir dire*, while Mr. Gomez had not.[291] Justice Sotomayor cited to the statement in *Peretz* that allowing a magistrate to do so did not raise structural concerns, and stated that "[t]he 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[.]'"[292] As long as an Article I adjudicator is supervised by an Article III court, separation of powers concerns are alleviated.[293] In contrast to *Marathon* and *Stern*, Justice Sotomayor stated that because bankruptcy judges were subject to the same control as magistrates—appointment and removal by Article III adjudicators—the Article III power was not impermissibly infringed upon.[294] There was no indication, she pointed out,

285. *Id.* at 8.
286. *Id.* at 2.
287. *Id.* at 1 (Roberts, J., dissenting).
288. *Id.* at 9 (Sotomayor, J., majority).
289. *Id.* at 8.
290. *Wellness*, slip op. at 9.
291. *Id.* at 10.
292. *Id.* at 11–12.
293. *Id.* at 15.
294. *Id.* at 11.

that Congress sought to aggrandize itself at the expense of the judiciary.[295]

Justice Sotomayor distinguished *Stern* and *Marathon* on the grounds that they both "turned on the fact that the litigant 'did not truly consent to' resolution of the claim against it in a non-Article III forum."[296] She further pointed out that *Stern* claimed to be a "narrow decision," covering only situations where a party did not consent to jurisdiction, and therefore did not apply to the case at hand.[297] She stated that "[t]o hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court."[298] Her rejoinder was that consent has been a part of the Article III system virtually since its inception.[299]

The opinion next considered whether consent had to be express, and held that it did not. According to Justice Sotomayor, neither the Constitution nor the relevant statute required that consent be express.[300] An express consent requirement would be squarely at odds with the Court's decision in *Roell*. While *Roell* involved magistrates, Justice Sotomayor stated that the standard in *Roell* provided the "appropriate rule" for bankruptcy judges and implied consent under section 157.[301] Justice Alito concurred, as he felt that the majority "faithfully applie[d]" *Schor*, and *Schor* was not being overruled, nor did the parties ask that it be overruled.[302] However, he stated that he disagreed with the majority's decision on implied consent.[303]

Chief Justice Roberts, in dissent, argued the majority misread *Schor*. Given that *Schor* stated that parties cannot cure Article III violations implicating separation of powers concerns upon consent, he stated the majority held that parties could do just that.[304] He stridently disagreed with the majority's functionalist approach, and stated that the Court could have decided a narrower question—"whether the Bankruptcy Court's entry of final judgment on Wellness's claim violated Article III based on *Stern*."[305] Chief Justice Roberts cited to Justice Brennan's dissent in *Schor* and Justice

295. *Id.* at 13.
296. *Wellness*, slip op. at 15.
297. *Id.* at 16.
298. *Id.* at 17.
299. *Id.*
300. *Id.* at 18.
301. *Id.* at 19.
302. *Wellness*, slip op. at 1 (Alito, J., concurring).
303. *Id.*
304. *Id.* at 13 (Roberts, J., dissenting).
305. *Id.* at 15.

Scalia's concurrence in *Granfinanciera*, as well as his own opinion in *Stern*, to argue that allowing bankruptcy courts to decide *Stern* claims upon consent of the parties was an unconstitutional violation of separation of powers,[306] constituting an infringement on the power of the judicial branch.[307] He also dismissed the majority's comparison of bankruptcy judges to magistrates, stating that "none of [the magistrate decisions] involved a constitutional challenge to the entry of final judgment by a non-Article III actor."[308]

Justice Thomas dissented as well, stating that he wished to draw attention to issues that both the majority and Chief Justice Roberts did not.[309] He argued that when bankruptcy judges hear *Stern* claims, two potential violations of separation of powers occur. First, non-Article III adjudicators are utilizing Article III power.[310] Second, the statutory grant of this power to bankruptcy judges was itself invalid, as Congress impermissibly exceeded its powers when purporting to grant authority "to perform a function that requires the authority of a power vested elsewhere by the Constitution."[311] He relied on the *Marathon* exceptions in reaching these conclusions.[312] Justice Thomas also stated that "[e]ven if consent could lift the private-rights barrier to non-judicial Government action, it would not necessarily follow that consent removes the Stern adjudication from the core of the judicial power."[313]

So, in the past five years, with the same nine justices, the Supreme Court has adopted, then rejected, the *Marathon* approach to Article I courts. Of course, Chief Justice Roberts, who penned *Stern*, dissented in *Wellness*. Curiously, Justices Kennedy and Alito, who joined the *Stern* majority, joined or concurred with the majority opinion in *Wellness*. The issue of consent was ignored in *Arkison*, then decided, for now, in *Wellness*. This quick turnaround in rationale—four years—in some ways mirrors the 1980s shift through *Marathon*, *Union Carbide*, *Schor*, and *Granfinanciera*.

It is interesting to note the shift over time regarding the Article I system. In *Northern Pipeline*, it was Justice Brennan, the liberal justice, who wrote the opinion striking down the 1978 Bankruptcy Act, arguing that we needed bright-line rules and delineating the three

306. *Id.* at 21.
307. *See id.*
308. *Wellness*, slip op. at 24.
309. *Id.* at 27 (Thomas, J., dissenting).
310. *Id.* at 28.
311. *Id.*
312. *Id.* at 30.
313. *Id.* at 33.

exceptions.[314] In *Stern*, it was Chief Justice Roberts, a conservative justice, who brought the formalist *Northern Pipeline* distinctions back to life.[315] Justice Scalia, the conservative lion, who wanted bright-line rules, cited approvingly to *Northern Pipeline*.[316] It is with these principles in mind that this Note turns to the consequences of striking down the magistrate system, possible constitutional saving throws,[317] and the author's recommendations. In considering the effect of *Wellness*, especially after *Stern*, this Note turns to the issue of what is termed the stare decisis problem.

III.
REPORT AND RECOMMENDATIONS ON SECTION 636 REFORM

A. Overview

There are a number of solutions to the problem identified in this Note. The basic arguments in favor of Article III judges retaining all jurisdiction is familiar—the Article III system ensures judicial independence from the political process because all judges have life tenure and guaranteed salaries.[318] Magistrates, on the other hand, are appointed for a term of eight years,[319] are not appointed by the President, and do not have protection from salary reductions.[320]

B. The Stare Decisis Problem Defined

This author does not mean to create *sturm und drang* out of these decisions, but what is termed the stare decisis problem[321] is the recognition that the Supreme Court is not monolithic, and drastic shifts do occur—sometimes rapidly—in its jurisprudence. In *Shelby County, Ala. v. Holder*, the Supreme Court struck down section 4(b) of the Voting Rights Act as unconstitutional in a five-four opin-

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

315. *See* Stern v. Marshall, 131 S. Ct. 2594, 2609–11 (2011) (discussing *Northern Pipeline*).

316. *Id.* at 2621 (Scalia, J., concurring).

317. *Saving Throws*, WIKIPEDIA, https://en.wikipedia.org/wiki/Saving_throw, (last modified Oct. 18, 2015, 5:57 PM).

318. U.S. CONST. art. III, § 1.

319. 28 U.S.C. § 631(e) (2012).

320. *See* 28 U.S.C. § 634(b) (2012), which provides that magistrate judge salaries shall not be diminished, but is repealable.

321. Of course, this problem could easily be named the *Miranda* problem, given Justice Harlan's argument.

ion, written by Chief Justice Roberts.[322] A short four years before *Shelby*, in an opinion by Chief Justice Roberts, the Court utilized the constitutional avoidance canon in order not to decide whether the preclearance requirements of the Voting Rights Act were unconstitutional.[323] So the stare decisis problem is, in a nutshell, drastic changes in Supreme Court jurisprudence. The answer to a stare decisis problem considers how to deal with the specter of these drastic shifts, through either constitutional amendments or legislative fixes.

It is possible, however unlikely, that the Court could again consider a challenge to bankruptcy judges, or even take up a challenge to magistrates. Declaring bankruptcy judges unconstitutional would have the practical effect of throwing the federal judiciary into chaos, and so such a ruling seems unlikely.[324] Declaring bankruptcy judges unconstitutional or holding that they cannot proceed on consent would immediately call magistrates into question. However, the Supreme Court has thrown curveballs before, in this context[325] and in others.[326] Indeed, observers of the Court's magistrate jurisprudence have argued that the powers granted to magistrates violate Article III.[327] Unlike with bankruptcy judges, though, the Supreme Court has never ruled on the basic structure of magistrate judge provisions, including the consent provisions first set out in the 1979 Magistrate Act.

In considering the conjunction of the magistrate judge system, the cases involving the constitutionality of provisions of the Magistrate Act, and the *Northern Pipeline-Stern* line of cases, the end result

322. 133 S. Ct. 2612 (2013).

323. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508 (2009).

324. One post-*Stern* commentator stated that "[t]he use of legislative courts and adjuncts to the Article III district court has become so entrenched that returning to a literal interpretation of the Constitution is 'virtually unthinkable.'" Kurt F. Gwynne, *Pandora's Box and Peace on the Darkling Plain: Setting the Article III Limits on Congress' Power to Assign Claims to Article I Bankruptcy Judges*, 88 AM. BANKR. L.J. 411, 411 (2014). Another commentator noted that the prospect of the Supreme Court (which had inferred consent from conduct in a case involving magistrates) overlooking whether the Magistrate Act provision allowing for consent was unconstitutional was not a strong argument. *See* McDonald, *supra* note 226, at 302.

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

326. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

327. *See, e.g.*, J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1034–35 (1985) ("[T]he powers given to magistrates by the 1979 Act exceed those which Congress may grant to non-Article III officials.").

is unclear, although many commentators have, as we have seen, predicted that magistrates being found unconstitutional is dubious to downright implausible. A problem, however, arises when one considers the compromises made in reaching the line of decisions beginning with *Northern Pipeline*, especially by reading the dissents and concurrences in these cases. There is language in these dissents and concurrences that illuminates radical approaches previously at the margins that one day might command a majority. Examining these opinions also allows one to opine on whether any sense of order can be made out of these opinions, especially given the seeming abandonment of the *Northern Pipeline* case, the return of that approach in *Stern*, and its seeming rejection—once more—in *Wellness*.

C. The Stare Decisis Problem Considered

The stare decisis problem potentially applies in many contexts that fall outside the scope of this Note. If the Supreme Court were to strike down the current bankruptcy judge system, the constitutionality of magistrates—and indeed, other Article I judges—would be in serious question, if not outright decided. Given that *Wellness* upheld the use of consent in bankruptcy court decisions, this arguably fortifies the magistrate judge system.

However, playing out the idea, if the Court struck down the current bankruptcy system, the fifth vote to do so would likely come from Justice Kennedy, who provided the fifth vote in *Stern*. Justices Breyer, Ginsburg, Kagan, and Sotomayor were sympathetic to the claims in *Stern*, and dissented in that case.[328] If magistrates were similarly held to lack jurisdiction to hear cases on consent, that decision would likely fall along the same five-four lines. Without magistrates to adjudicate petty offenses, misdemeanors and the civil cases that they hear on consent, district judges would see their dockets explode. Given the number of cases decided or settled by magistrates, it is easy to visualize the effects on the already-overloaded court system.

The counterfactual narrative is relatively short, but makes clear the potential domino effect of different Supreme Court decisions.[329] First, consider the effect if Justice Brennan's view in *Northern Pipeline* had received a majority. Justice Rehnquist or Justice

328. *See* Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Breyer, J., dissenting).

329. For an example of a counterfactual narrative, see DAVID A. STRAUSS, THE LIVING CONSTITUTION 12–18 (2010).

O'Connor would likely have provided the fifth vote. If Justice O'Connor, the author of *Union Carbide* and *Schor*, had been persuaded to join the plurality (making it a majority), *Union Carbide* and *Schor* would likely have come out drastically differently. The formalist distinctions of *Northern Pipeline* would have provided the rule of the decision, and the functional language of *Schor* would have been lost. *Gomez*, however, would likely have been decided the same way—magistrates could not conduct felony *voir dire*. Given that *Peretz*, which allowed felony *voir dire* on consent, rested in part on Justice Rehnquist's concurrence in *Northern Pipeline*, it is entirely possible that *Peretz* would have come out the other way. *Roell*, which rested on the understanding that magistrates were adjuncts, and therefore able to act on consent, would have been able to rest on that distinction. Ironically, *Stern v. Marshall* would have come out the same way. Had Justices Alito and Kennedy joined the *Wellness* dissenters—which they did in *Stern*—*Wellness* could have instead been a body blow to the bankruptcy system, and indeed, to the very idea of consent in the Article III system. Justice Alito's concurrence does implicitly refer to the potential to overrule *Schor*.

D. Reforms for the Article I "Deficiency"

This subpart first discusses the options to reform the magistrate judge system, then considers whether these methods of reform would withstand any decision that held Article I courts, or proceedings on consent in those fora, unconstitutional. In considering the options to reform the system as it stands, some options are perhaps obvious, but pose their own set of problems. Ultimately, one or two options involving constitutional or structural change emerge as the best solution(s) to the issues raised in this Note.

One solution is to simply abolish the statutory system of magistrates. Given the current gridlock and the history of Congressional support for both bankruptcy judges and magistrates, it is unlikely that Congress could—or would—do so. It is more likely that the Supreme Court would strike down the current system as contravening Article III. As a practical matter, the Supreme Court will almost certainly not do so, given concerns about judicial economy. On the basis of precedent involving magistrates, the Supreme Court will likely continue to stretch the Article I doctrine to allow the current system to continue.[330] However, the Court has struck down the

330. *See, e.g.*, Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014); Peretz v. United States, 501 U.S. 923 (1991); United States v. Raddatz, 447 U.S. 667 (1980).

bankruptcy system before, and as discussed, could conceivably move in a different direction on magistrates.[331] Given the Eleventh Circuit's decision in *Brown*, the question of whether magistrates can hear cases on consent may come before the Court in the next decade.

Another *highly* radical (and in this author's opinion, inadvisable) solution would be constitutional disobedience on the part of the litigants, the lower courts, and even the legislative and executive branches. The idea comes from Professor Louis Michael Seidman, who has written an entire book[332] on the topic and advocated for it in the *New York Times*.[333] The idea specifically would be to ignore any precedential decision from the Supreme Court striking down the exercise of Article III jurisdiction by magistrates. The pitfalls of this approach are obvious, however. Constitutional disobedience means exactly what it says. It would involve courts outright ignoring Article III. Given the concerns around "activist judges" and the fact that judges take oaths to follow the Constitution, this would be a literally illegal option.

Another solution is to amend the Constitution to "constitutionalize" the procedures by which Article I judges are appointed. Given that the exercise of Article III power by bankruptcy judges—who really are analogous to magistrates—has been held unconstitutional in several cases, this is one option that would stop litigation on the point of consent and waiver. This would be done by a constitutional amendment—perhaps to Article I—enshrining the statutory appointment procedures by which magistrate and bankruptcy judges are selected. The language could be something akin to the following: "Congress may establish procedures by which Article III judges may appoint Article I judges, and these Article I judgeships may only be appointed by the Article III judges in the circuit in which the proposed judgeships will be established. These Article I judges, subject to the control of Article III courts, may exercise Article III judicial powers. During the term of each judge, Congress

331. One only need look at the substantive due process case law to see that the Court, composed as it is of different judges over time, can move drastically away from previous lines of thought. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905).

332. Louis Michael Seidman, On Constitutional Disobedience (2013).

333. Louis Michael Seidman, *Let's Give Up On The Constitution*, N.Y. Times (Dec. 30, 2012) http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html.

may not diminish their salary or remove them from office."[334] Of course, given the trouble with constitutional amendments, this is an extremely unlikely possibility. Alternatively, consent and waiver could be constitutionalized, but that is subject to the same issue as any constitutional amendment.

One solution would be to make magistrates full federal judges. The practical effect would be to eliminate the concerns about non-Article III adjudicators exercising Article III powers. However, given the contentiousness in the judicial nomination process,[335] adding magistrates to that system might be impractical. Arguably, all current magistrates would have to be re-evaluated and then confirmed. They could not be grandfathered in to the position of Article III magistrate judge, as all Article III judges must be nominated by the President and confirmed upon advice and consent of the Senate.[336] There is also the curious question of quality, as magistrates are currently appointed by committees of federal district and circuit judges, and so are generally highly qualified individuals. At least one magistrate has joked that magistrates are the only judges truly selected on merit.[337] While that joke does not give credit to the highly qualified Article III judges, the fact that Article I judges are not subject to the same political considerations that can befall Article III nominees is unmistakable.

Finally, one idea, proposed in 1992, was to direct magistrates towards "corporate litigants who are arguably less susceptible to coerced consent."[338] However, this solution does not obviate the concern about consent. Arguably, corporate litigants are able to make sophisticated arguments due to greater resource allocation. A decent corporate litigator would be remiss not to raise the constitutional issues of proceeding on consent, and given the recentness of

334. The language proposed here draws on Section 636, as well as Article II, Section 2, and Article III of the Constitution. *See generally* U.S. CONST., art. II, § 2; *id.* art. III; 28 U.S.C. § 636 (2012).

335. *See, e.g.*, Linda Greenhouse, *Bork's Nomination is Rejected, 58 – 42; Reagan 'Saddened'*, N.Y. TIMES (Oct. 24, 1987) http://www.nytimes.com/1987/10/24/politics/24REAG.html?pagewanted=all; Felicia Sonmez, *Senate Republican Filibuster blocks Obama D.C. Circuit Nominee Caitlin Halligan*, WASH. POST (Dec. 6, 2011) http://www.washingtonpost.com/blogs/2chambers/post/senate-republican-filibuster-blocks-obama-dc-circuit-nominee-caitlin-halligan/2011/12/06/gIQAtp6nZO_blog.html.

336. U.S. CONST., art. II, § 2.

337. Jonathan M. Kirshbaum, *Magistrate Judges*, HABEAS CORPUS BLOG (June 10, 2009) http://habeascorpusblog.typepad.com/habeas_corpus_blog/2009/06/habeas-corpus-magistrate-judges.html.

338. Claudia L. Psome, Note, *Magistrates: Constitutionality and Consent*, 36 N.Y.L. SCH. L. REV. 675, 717–18 (1991).

Stern, *Arkison*, and *Sharif*, would be on notice regarding those arguments. Indeed, in the Eleventh Circuit, further litigation about the jurisdiction of magistrates would be unsurprising.

Ultimately, the best long-term solution would be to make magistrates Article III judges, *or* to constitutionalize the Article I judges. At least one other commentator to evaluate this issue has made the same determination that magistrates should be made Article III judges,[339] and after *Arkison*, *Sharif*, and *Brown*, the need to shore up the bankruptcy and magistrate judge systems is starkly apparent. Unlike Yount, who argued that this change should eventually take place, this Note advocates that this take place in the next ten years. Given the rate at which changes have been made in the past to the judiciary, this provides time for Congress to review the judiciary and make changes as appropriate.[340] The same logic applies to bankruptcy judges. Congress has the power to do so under Article I, and has created new Article III courts, most recently, the Federal Circuit. Alternatively, the nation could constitutionalize the procedures by which Article I judges are created and appointed, but that is a harder lift.

CONCLUSION

As was noted previously, it is unlikely that magistrates will be held unconstitutional. This is due to the close control that district court judges are said to have over magistrates, and in practical terms, due to the efficiency and usefulness of magistrates. As Chief Justice Roberts stated, however, efficiency and usefulness cannot save unconstitutional provisions. While magistrates are currently constitutional, if one justice changes his or her mind, or appointments shift the ideological balance of the court, they may one day be held to be unconstitutional. Better to solve the problem sooner, rather than wait for it to be an issue in a decade's time, or even a century's. Magistrate judges—and bankruptcy judges—should be constitutionalized, like the judges of the Federal Circuit.

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339. *See* Yount, *supra* note 17, at 226–227.

340. *See, e.g.*, Pub. L. No. 89-571, 80 Stat. 764 (1966) (conferring Article III on D.P.R.); Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (creating magistrate positions); Pub. L. No. 95-598, 92 Stat. 2657 (1978) (creating bankruptcy court system); Federal Courts Improvement Act of 1982, 96 Stat. 25 (1982) (establishing the Federal Circuit); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (reforming bankruptcy system in response to *Northern Pipeline*); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.