THE TWO POLES OF ARTICLE III: FORMALISM AND FUNCTIONALISM IN BANKRUPTCY JURISDICTION

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ABSTRACT

Last spring, the federal courts decided two of the most consequential bankruptcy cases in American history. In May 2023, the Purdue Pharma bankruptcy released the Sackler family from direct liability to hundreds of thousands of opioid victims. In April 2023, the Boy Scouts of America bankruptcy released the nonprofit's affiliates from any liability for a century of sexual abuse. Hovering over these two cases is an unresolved question. Do bankruptcy judges, who do not enjoy the protections of Article III, have the constitutional authority to decide private law issues of contract, property, and tort?

Over the last four decades, the Supreme Court has limited Congress' power to constitute non-Article III tribunals. The Court's preferred methodology in this project has been formalism, a theory of constitutional power that prizes categorical rules, deductive reasoning, and predictability. In preferring formalism, the Court has undervalued functionalism, a theory that prizes fact-sensitive rules, inductive reasoning, and efficiency. Formalism and functionalism are the two poles of Article III and nowhere is their diametric pull more intense than in private law cases. On this point, bankruptcy presents exceptional challenges because bankruptcy judges routinely confront questions of contract, property, and tort. In short, if non-Article III doctrine is a mess, bankruptcy is part of the reason.

While bankruptcy may be the source of many problems in non-Article III doctrine, this Article argues that the history of bankruptcy jurisdiction may also be the solution. Functionalism was essential in bankruptcy cases under the Bankruptcy Act of 1898, the nation's first lasting insolvency statute. Under the Act, a referee, who was the bankruptcy judge's legal ancestor, could decide private law issues and even enter final judgments with the parties' consent. The history unveiled in this Article suggests that functionalism has a stronger pedigree and is better suited to the scale and variability of the issues that come before modern courts in mass tort cases. A functional approach is not only better aligned with the substantive goals of bankruptcy, but also deeply embedded in the traditions of the practice of bankruptcy law.

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I. INTRODUCTION

This Article begins with two related stories about corporate bankruptcies. The first story: In the 90s in Connecticut, a family-owned pharmaceutical company develops three different opioid medications.[1] At the time, opioids are typically only used to treat cancer patients, but the company's two co-CEOs, Arthur Mortimer and Raymond Sackler, see an opening.[2] They initiate and oversee an aggressive marketing campaign that aims to "'overcome' [patients'] 'concerns about addiction.'"[3] The campaign encourages doctors to prescribe one of the company's

1. *See In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 39–41 (Bankr. S.D.N.Y. 2021).

2. *See id.* at 42 ("To promote its new product OxyContin, Purdue launched an aggressive marketing campaign. That campaign was multi-fold, aiming in part to combat concerns about the abuse potential of opioids and to encourage doctors to prescribe OxyContin for more and different types of pain.") (internal citations omitted); Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH. 221, 223 (2009) ("A consistent feature in the promotion and marketing of OxyContin was a systematic effort to minimize the risk of addiction in the use of opioids for the treatment of chronic non-cancer-related pain.").

3. *Purdue Pharma I*, 635 B.R. at 42.

products for a wide variety of symptoms.[4] It circulates pamphlets that claim "that addiction 'is not caused by drugs.'"[5] Business is booming, and the drug becomes "'the most prescribed brand-name narcotic medication' in the U.S."[6] At the same time, pill mills spring up nationwide.[7] People find that they can crush up a pill, snort it or inject it, and get a quick high.[8] Although the nascent epidemic of addiction cuts across race, class, and geography; people in rural areas suffer at higher rates.[9] Around 263,000 people die from overdoses per year.[10] Millions come to live with addiction.[11]

Years pass. Starting in 2001, these people and their loved ones begin to file individual and class-action claims against the company.[12] The U.S. government, the Canadian government, state governments, local governments, and tribes begin their own investigations.[13] Scores of settlements and plea agreements follow.[14] But none of them bring these disputes to a final resolution.[15] The family that owns the company begins to transfer billions of dollars from the company to themselves.[16] Then, the beleaguered corporate entity files a petition in the Bankruptcy Court for

4. *Id*. at 42–43 ("Testimonials on [a promotional website created by Purdue Pharma] were allegedly presented as personal stories of OxyContin patients who had overcome life-long struggles with debilitating pain, although they were allegedly written by Purdue consultants who were paid to promote the drug.").

5. *Id.* at 43.

6. *Id.*

7. *Id.*

8. *See id.*

9. *See* Foister v. Purdue Pharma, L.P., 295 F. Supp. 2d 693, 696 (E.D. Ky. 2003) ("Abuse of the drug in this manner has been particularly problematic in remote, rural areas such as Eastern Kentucky."); Leonard J. Paulozzi & Yongli Xi, *Recent Changes in Drug Poisoning Mortality in the United States by Urban-Rural Status and by Drug Type*, 17 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 997, 998 (2008) (showing that between 1999 and 2004 the rates of drug poisoning caused by opioid overdoses in the United States increased more rapidly in rural areas—by 159 percent, as compared with urban areas—by 51 percent).

10. *Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/deaths/prescription/overview.html [https://perma.cc/SQJ2-FLHZ] (May 18, 2022) (stating more than 263,000 Americans have lost their lives to overdoses involving prescription opioids from 1999 to 2020).

11. *See Purdue Pharma I*, 635 B.R. at 44.

12. *See id.* at 45–46 (detailing the initial lawsuits).

13. *See id.* at 46–59.

14. *See id.*

15. *See id.* (detailing the plea agreements, settlements, state multi-district litigation, and pre-petition attempt at an out-of-court workout).

16. *See id.* at 55.

the Southern District of New York.[17] The court oversees a complicated confirmation process and ultimately authorizes a plan that releases the family members from personal liability for the harms caused by the epidemic.[18] This is relief that no member of the family could get as an individual debtor in bankruptcy.[19] The district court vacates the confirmation order.[20] The appellate court reverses and the Supreme Court grants certiorari.[21]

The second story: Over roughly the same time period, perhaps longer, American families have been sending their young sons to camp with a nonprofit organization created to promote "patriotism, courage, self-reliance, and kindred virtues."[22] For over a century, millions of boys from all walks of life partake in activities organized by the nonprofit's chartered affiliates that are designed to develop leadership skills: learning to start fires, roasting marshmallows, whittling wood safely, singing songs, and becoming better men.[23] But along with these beneficent programs, leaders in the chartered affiliates have been sexually abusing boys placed in their custodial charge.[24]

The boys, many of them now adults, begin to file lawsuits alleging sexual abuse against the national nonprofit, its affiliates, and the leaders in their individual capacities.[25] The lawsuits allege horrifying acts of harassment, grooming, inappropriate touching, and penetration.[26] As liability mounts, the nonprofit files a Chapter 11 petition in the Bankruptcy Court for the District of Delaware.[27] Over

17. *See In re* Purdue Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

18. *Purdue Pharma I*, 635 B.R. at 105–06 (confirming a plan containing nonconsensual third-party releases).

19. *See id.* at 36 ("These claims could not be released if the Sacklers were themselves debtors in bankruptcy.").

20. *See id.* at 118.

21. *See* Purdue Pharma L.P. v. City of Grande Prairie, 69 F.4th 45, 85 (2d Cir. 2023); *cert. granted sub. nom.* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031, at *1 (U.S. Aug. 10, 2023).

22. *See In re* Boy Scouts of Am. & Del. BSA, LLC (*Boy Scouts of Am. I*), 642 B.R. 504, 521 (Bankr. D. Del. 2022).

23. *See* Brian Vanvestraut, *12 Life Lessons That Every Boy Scout Has Learned*, BOY SCOUTS OF AM.: BSA TROOP 883 (Mar. 21, 2016), https://bsatroop883.com/12-life-lessons-that-every-boy-scout-has-learned/ [https://perma.cc/WW23-6ZJN].

24. *See Boy Scouts of Am. I*, 642 B.R. at 525 (detailing hundreds of sexual abuse lawsuits against the organization and its affiliates).

25. *See id.* at 525–26.

26. *See id.*

27. *See id.* at 532.

82,000 people file proofs of claim asserting sexual abuse.[28] After a lengthy confirmation process, over the objection of some claimants, the bankruptcy plan releases the nonprofit's chartered affiliates from liability.[29] The district court affirms.[30]

The stories about these two debtors—Purdue Pharma and the Boy Scouts of America—sit at the nexus of a few familiar and novel trends.[31] It is not unusual that both of these mass tort disputes should end up in Chapter 11.[32] The bankruptcy process has many built-in efficiencies.[33] Bankruptcy allows companies to undertake a divisional merger under Texas state law.[34] This procedure, known as the Texas Two-Step, lets companies shield themselves from massive tort liability by splitting into two entities; one carrying all the assets and the other carrying all the liabilities.[35] The Bankruptcy Code's automatic stay provision also halts most civil litigation against the debtor while it undergoes a confirmation plan.[36] Channeling injunctions can redirect claims against the debtor and its leadership

28. *Id.* at 534.

29. *See id.* at 677.

30. *See* Nat'l Union Fire Ins. v. Boy Scouts of Am. & Del. BSA, LLC (*In re* Boy Scouts of Am. & Del. BSA, LLC) (*Boy Scouts of Am. II*), 650 B.R. 87, 135 (D. Del. 2023).

31. *See Boy Scouts of Am. I*, 642 B.R. at 525–26; *In re* Purdue Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53, 58 (Bankr. S.D.N.Y. 2021).

32. *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 50 (2021).

33. *See* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2048 (2000) (discussing the efficiencies of bankruptcy law in mass tort disputes). *But see* Gluck & Burch, *supra* note 32 (criticizing the reality "that bankruptcy courts—Article I federal courts—could be the final resting place for so much authority in a polycentric litigation system").

34. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 1.002(55)(A) (West 2023) (allowing for "the division of a [Texas] entity into two or more new . . . entities"); *In re* LTL Mgmt., LLC, 64 F.4th 84, 95–96 (3d Cir. 2023) ("In simplified terms, the merger splits a legal entity into two, divides its assets and liabilities between the two new entities, and terminates the original entity. While some pejoratively refer to it as the first step in a 'Texas Two-Step' when followed by a bankruptcy filing, we more benignly call it a 'divisional merger.'").

35. *See In re LTL Mgmt.*, 64 F.4th at 95–96; Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 40 (2022) ("In a divisive merger, a legacy business divides in two and may allocate assets and liabilities as it wishes among the two new businesses. For a Texas Two-Step's first step, the legacy business divides itself into a new business with assets (AssetCo) and a new business with liabilities (LiabilityCo). The second step is to place LiabilityCo into bankruptcy and have the bankruptcy court discharge the liabilities while AssetCo goes on its merry way.").

36. *See* 11 U.S.C. § 362(a) (defining the scope of the automatic stay).

toward a trust made up of finite resources.[37] It is also not unusual that both Chapter 11 petitions would be filed in two of the three districts responsible for most major bankruptcies: the Southern District of New York and the District of Delaware.[38] These districts have benefited from the Bankruptcy Code's liberal venue rules.[39] It is perhaps more unusual that both of them are among the most consequential bankruptcies in American history, implicating as they do one of the world's largest pharmaceutical companies and an iconic American social institution.[40]

Viewed more capaciously, these two stories suggest that American corporations are turning to the bankruptcy system to resolve some of the most vexing questions of national policy. How much does Purdue owe to the victims and survivors of the opioid epidemic? How much do the Boy Scouts of America owe to the men who accuse them of enabling their suffering? Most unusual of all, however, is the reality that many of these claimants do not wish to be in bankruptcy court.[41] Some claimants argue they never agreed to the court's jurisdiction.[42]

37. *See id.* § 524(g) (allowing asbestos mass tort debtors to channel all claims against the entity and its leadership toward a trust).

38. *See* Jeffrey P. Fuller, *ANALYSIS: Three Bankruptcy Courts Remain Top Megacase Magnets*, BLOOMBERG L. (Dec. 17, 2021, 4:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-bankruptcy-courts-remain-top-megacase-magnets [https://perma.cc/47WG-MBS9] ("The bankruptcy courts for the District of Delaware, the Southern District of Texas, and Southern District of New York maintained their status in 2021 as the three most popular jurisdictions for major bankruptcy cases or 'megacases' (involving $100 million or more in assets).").

39. *See* 28 U.S.C. § 1408 (allowing a debtor to file for bankruptcy "in the district court for the district—(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership").

40. *In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 82 (Bankr. S.D.N.Y. 2021); *In re* Boy Scouts of Am. & Del. BSA, LLC (*Boy Scouts of Am. I*), 642 B.R. 504, 618 (Bankr. D. Del. 2022).

41. *See, e.g.*, *Purdue Pharma I*, 635 B.R. at 82. *But see* Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1747 (2023) ("[L]awyers, defendants, and some plaintiffs' lawyers gravitate to bankruptcy to do extraordinary things that have weak statutory and constitutional support. It is far from obvious that bankruptcy can deliver the level of global finality that some demand of it.").

42. *See Purdue Pharma I*, 635 B.R. at 82 (finding that consent is lacking as to some claimants).

Others say that they are there because no other litigation mechanism presents a viable alternative.[43] These developments also complicate the recent contention that our judicial system has unjustifiably treated bankruptcy as exceptional.[44] They arguments suggest that bankruptcy is exceptional not because it is wrongly out of step with other substantive areas of law, but rather because it has begun to permeate more and more areas of contemporary life.[45]

Both cases also touch on a fundamental and still unanswered question of constitutional law: to what extent can tort creditors consent to the jurisdiction of a bankruptcy court? The Supreme Court has repeatedly tried to determine the extent of Congress' power to create tribunals as an alternative to Article III courts, but it has struggled to produce a coherent doctrine.[46] Specifically, the Court has not articulated whether and to what extent bankruptcy courts have the constitutional authority to decide *private law* issues of contract, tort, and property—especially when some parties have not agreed to be before the non-Article III tribunal.[47] On this point, bankruptcy has presented exceptional challenges.[48] Bankruptcy judges, as non-Article III judges, are repeatedly asked to decide questions of contract and tort law.[49] In the *Purdue Pharma* and *Boy Scouts of America* cases, two of the largest mass tort bankruptcies in history, the question of constitutional authority is complicated by a circuit split about the bankruptcy court's statutory authority to grant nonconsensual third-party releases from tort liability.[50]

Whether bankruptcy courts have those powers is a question raised but left unanswered by the Court's decisions in *Stern v. Marshall* and *Wellness*

43. *See Boy Scouts of Am. I*, 642 B.R. at 618–19 (discussing the testimony of a sexual abuse claimant who believes that there are no alternatives to the confirmation of the plan that would release the Boy Scouts affiliate organizations of liability).

44. *See* Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 2011 (2022) ("[T]here is something to be said for the argument that bankruptcy assigns judges a more complex and disparate task than that faced by most other federal judges. That alone, though, does not justify contemporary bankruptcy practice's all-too-frequent resort to exceptionalism when resolving bankruptcy disputes.").

45. *See Purdue Pharma I*, 635 B.R. at 82; *Boy Scouts of Am. I*, 642 B.R. at 618.

46. *See supra* Part I.

47. *See supra* Part I.

48. *See supra* Part I.

49. *See supra* Part I.

50. *See infra* Part III.A; *see also* G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge,"* 84 IOWA L. REV. 753, 765–83 (1999) (discussing the statutory problems with third-party releases).

International Network Ltd. v. Sharif.[51] These two cases offer competing accounts of a bankruptcy court's jurisdiction.[52] In *Stern*, the Supreme Court held bankruptcy courts lack the constitutional authority to enter final judgments on common law counterclaims that are matters of private right.[53] In *Wellness*, the Court held bankruptcy courts could enter final judgments on *Stern* counterclaims in the presence of both parties' consent.[54] *Stern* was a *tour de force* formalist opinion, asserting categorical constitutional limitations on the bankruptcy court's ability to hale non-debtor parties into the tribunal and subject them to its jurisdiction.[55] By contrast, *Wellness* was a deeply functionalist opinion.[56] It was functionalist because it held that, depending on the circumstances, a bankruptcy court has the constitutional authority to decide a non-debtor's counterclaim if that non-debtor has consented to the exercise of the court's jurisdiction.[57] Consent is the gravamen of functionalism.[58] *Stern* treated consent to the bankruptcy court's jurisdiction as a consideration at most; *Wellness* treated consent as nearly dispositive.[59] Neither case clearly described the outer limits of a bankruptcy court's jurisdiction.[60] The formalist holding of *Stern* has hovered over many jurisdictional rulings in the lower courts, including over the opioid and *Boy Scouts* cases while the functional approach of *Wellness* has been treated as a carveout to *Stern*.[61] This treatment is par for the course, as formalism has increasingly dominated the Court's approach to many areas of law.

51. *See* Stern v. Marshall, 564 U.S. 462, 478–82 (2011); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 674–83 (2015).

52. *See Wellness*, 575 U.S. at 674–83; *Stern*, 564 U.S. at 478–82.

53. *See Stern*, 564 U.S. at 469.

54. *See Wellness*, 575 U.S. at 669.

55. *See* Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 185 (2011) ("On examination, [the formalism of *Stern*] make[s] little sense, and so [its] application . . . is inherently unsatisfying.") (citing *Stern*, 564 U.S. at 483–84 (holding that "Article III imposes some basic limitations that the other branches may not transgress" and the power to enter final judgments on common-law counterclaims was one such limitation)).

56. *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, with and Without Litigant Consent*, 33 EMORY BANKR. DEVS. J. 11, 23 (2016) ("With the *Wellness* decision, though, we see the (mysterious?) reappearance of functionalism.").

57. *See Wellness*, 575 U.S. at 669 ("We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.").

58. *See Wellness*, 575 U.S. at 675–76.

59. *See id.*; *see also* Stern, 564 U.S. at 481–82.

60. *See, e.g.*, *Wellness*, 575 U.S. at 675–76; *Stern*, 564 U.S. at 481–82.

61. *See supra* Part I.

Formalism and functionalism are the two poles of the Court's Article III jurisprudence. Formalism is a theory of constitutional power marked by categorical rules, deductive reasoning, and an aspiration toward predictability.[62] By contrast, functionalism is a theory of constitutional power marked by fact-intensive rules, inductive reasoning, and an aspiration toward efficiency.[63] These two poles continue to pull the practice of bankruptcy law in two different directions, and have created confusion for judges, practitioners, and scholars alike. Article III, Section I of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[64] By its literal meaning, Article III allows Congress to constitute any inferior courts, including bankruptcy courts, and yet for the last four decades, the Court has repeatedly limited Congress's powers in this area.[65]

It is not an accident that most of the Court's cases that constrain Congress' power to constitute non-Article III courts have been about bankruptcy. The Court has long held that in the federal courts, matters of private right—for instance, rights that sound in tort, contract, or real property—must be adjudicated by an Article III judge.[66] By contrast, matters of public right—those given to us by the sovereign, such as control over a patent, access to clean air and water, and perhaps also the discharge of debts—may be adjudicated by an administrative agency or another non-Article III judge, subject to appellate review by an Article III judge.[67] This is not a distinction that reflects the realities of bankruptcy law, where bankruptcy judges are often asked to resolve contract disputes, ownership of real estate, and thousands of tort claims against consumer-facing companies.[68] As issues of bankruptcy jurisdiction keep arriving in the Court, they have come not only to reflect the tensions between formalism and functionalism, but also to obscure the meaning of Article III.[69] It is now less clear than it was 40 years ago what Article III requires, what it allows, and how we might know the difference.[70] In short, if non-Article III doctrine is a mess, bankruptcy jurisdiction is part of the reason.

62. *See, e.g.*, *Stern*, 564 U.S. at 462.

63. *See, e.g.*, *Wellness*, 575 U.S. at 665.

64. U.S. CONST. art. III, § 1.

65. *Wellness*, 575 U.S. at 669.

66. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69–70 (1982); *Stern*, 564 U.S. at 492.

67. *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977); *N. Pipeline Constr. Co.*, 458 U.S. at 69.

68. *N. Pipeline Constr. Co.*, 458 U.S. at 96 (White, J., dissenting).

69. *See id.* at 84.

70. *See id.* at 96 (White, J., dissenting).

While bankruptcy may be a source of many problems in non-Article III doctrine, this Article argues that the history of bankruptcy jurisdiction may also be the solution. I show that functional considerations were essential in bankruptcy cases under the Bankruptcy Act of 1898, the nation's first long-standing bankruptcy law.[71] The Act, which was amended and expanded in 1978 to become the Bankruptcy Code, created the administrative post of the referee.[72] This officer of the court, selected from the community, was appointed by the district court judge and acted on the judge's behalf.[73] The history that I unveil makes clear that consent to the bankruptcy tribunal was essential to the Court's analysis in bankruptcy cases for much of the twentieth century.[74] Bankruptcy referees were even permitted to enter final judgments with the parties' consent.[75] Until the Court's opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* in 1982, it was settled law that there were no constitutional issues with bankruptcy jurisdiction.[76] Indeed, when it came to the power of the referee to resolve disputes, the Lochner Court was more functionalist than the modern Court.[77] This history suggests that formalism, the modern Court's dominant method in bankruptcy jurisdiction cases, does not live up to its promise of enabling Article III to guard the individual liberties of litigants in mass tort bankruptcies.[78] Functionalism, although imperfect and incapable of furnishing a complete theory of bankruptcy jurisdiction, has a stronger pedigree.[79] Moreover, it is better suited to the scale and variability of the issues that come before modern courts in mass tort cases like the ones discussed in this Article.[80] The Bankruptcy Code, itself a functionalist piece of legislation, contemplates a judge who will try to solve every problem that comes their way and equips them with statutory provisions that can achieve that goal.[81] If the Constitution must be involved in the resolution of mass tort bankruptcies, then a functional approach is not only better aligned with the substantive goals of bankruptcy, but also deeply embedded in the traditions of the practice of bankruptcy law.[82]

71. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

72. *Id.* at 555.

73. *Id.* at 555–56.

74. *See infra* Part III.

75. 30 Stat. at 555–56.

76. *See infra* Part II.B.

77. *See infra* Part III.C.

78. *See* 30 Stat. at 544; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 89–90 (1982); *infra* Part III.B.

79. *See infra* Part II.C.

80. *See infra* Part III.

81. *See* 28 U.S.C. § 151(a) (1978).

82. *See infra* Part IV.A; Stern v. Marshall, 564 U.S. 462, 489 (2011).

What happens when the seemingly unstoppable force of the Bankruptcy Code's functionalism meets the seemingly immoveable object of the Court's formalism? Does the Bankruptcy Code's functionalism have any influence on the formalist doctrines of Article III jurisprudence? Scholars have attempted to think about these questions in several distinct ways. Some have attempted to apply constitutional rules to the problems of bankruptcy law.[83] Others have made a strong pragmatic and conceptual argument about the limitations of the Court's formalism.[84] Still others have argued that the substantive law of bankruptcy can, and ought to, shape the approach to the constitutional issues raised by Article III.[85] None of these treatments of bankruptcy law, bankruptcy jurisdiction, or non-Article III doctrine, have focused on the deep history of consent-based adjudication in bankruptcy law. Even the historical approaches that have shaped our current understanding of bankruptcy law have not given enough attention to the potential that lies in that law's practice and traditions.[86] With the notable exception of a few

83. *See, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV 1511 (2020) (approaching bankruptcy jurisdiction through a formalist reading of Article III); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 92 (2004) (discussing the dominance of negotiations in Chapter 11 bankruptcies and explaining that the result is ready-made deals that evade appellate and constitutional review).

84. *See, e.g.*, Chemerinsky, *supra* note 55, at 183 (criticizing *Stern* because it lacks conceptual coherence); Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311 (1991) (criticizing *Northern Pipeline* on similar grounds and recommending that it be overruled); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747 (2010) (arguing that the Court's concerns about bankruptcy judges' lack of independence misses the fact that they are appointed by the district courts and not the political branches).

85. *See, e.g.*, Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155 (2015) (arguing that the benefit of the bargain theory of bankruptcy can solve the problems caused by Article III).

86. *See, e.g.*, James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656–61, 664 (2004) (detailing first the history of non-Article III adjudication, then describing the modern Court's functional approach to non-Article III tribunals, but neglecting the history of functional approaches to bankruptcy jurisdiction); DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 142 (Princeton Univ. Press 2001) (discussing the political economy of the passage of the Bankruptcy Act of 1898, but not discussing the functional approach to the referee's jurisdiction); ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR 24–26 (Univ. of Ga. Press 2004) (highlighting the jurisdictional provisions of the Bankruptcy Act of 1867 but not discussing their treatment by courts or their importance for our current understanding of bankruptcy jurisdiction); Prudence Beatty Abram & Andrew DeNatale, *From Referee in Bankruptcy to Bankruptcy Judge: A Century of Change in the Second Circuit*, *in* THE DEVELOPMENT OF BANKRUPTCY AND

passing acknowledgements, scholars have neglected the immense possibility that the history of bankruptcy *jurisdiction* demonstrates a more coherent non-Article III doctrine.[87] This Article articulates and develops those possibilities, focusing on what they mean for the increasing influence of mass tort bankruptcies.

This Article's argument proceeds in three parts. Part II offers working definitions of formalism and functionalism and details the development of those methods in the main non-Article III cases from the last four decades.[88] Specifically, it highlights how the Court has wavered between formalism and functionalism within, and not within, bankruptcy and produced a confusing doctrine of non-Article III courts.[89] Part II articulates a way out of the current confusion by showing that consent to non-Article III adjudication was a key consideration in bankruptcy cases arising under the nation's first long-standing bankruptcy statute.[90] It also shows that it was Article III judges who oversaw the expansion of the bankruptcy tribunal's jurisdiction.[91] The Court's functional approach proved more than capable of policing the boundaries of that jurisdiction, such that the

REORGANIZATION OF LAW IN THE COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES (Matthew Bender & Co. 1995) (summarizing historical developments in the treatment of referees and then bankruptcy judges in the Second Circuit but not connecting that history with the modern Court's treatment of bankruptcy jurisdiction); *cf.* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (Harvard Univ. Press 2002) (discussing the failures to enact a long-lasting bankruptcy statute in the early Republic); EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA (Univ. of N.C. Press 2001) (highlighting the short-lived nature of the Bankruptcy Act of 1841); ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 321–23 (Oceana Publ'ns 1987) (discussing bankruptcy as a special case but offering no overview of the jurisdictional problems caused by it); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 140–43 (Harvard Univ. Press 1935) (providing a near-contemporary account of the Act of 1898 but not discussing the statute's jurisdictional dimensions).

87. *See* Brubaker, *supra* note 56, at 29 ("[N]on-Article III bankruptcy referees under the 1898 Act system *did* enter final orders and judgments with consent of the litigants . . . ."); Troy A. McKenzie, *Getting to the Core of* Stern v. Marshall*: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23, 28 (2012) ("A referee could exercise summary jurisdiction only if … (2) there was consent by litigants to the exercise of summary jurisdiction . . . ."); Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REGUL. 55, 65 (2016) ("Section 904's consent clause has produced little case law. In a typical court decision, a creditor asks a court to instruct the debtor to do something that the debtor opposes. The history and case law focus on debtor or creditor requests for intervention. I have found no analysis of courts making requests for consent under section 904 *sua sponte*.").

88. *See infra* Part II.

89. *See infra* Part II.

90. *See infra* Part III.

91. *See infra* Part III.

work of the bankruptcy judge would not interfere with that of the district court judge.[92] Part III traces the doctrinal developments in the bankruptcies of Purdue Pharma and the Boy Scouts of America.[93] It then explains the tensions between the formal and functional considerations in each case.[94] Finally, it sets out a series of implications about the role of functional and formal constitutional rules in the context of bankruptcy jurisdiction.[95] A brief conclusion follows.

II. BANKRUPTCY JURISDICTION IN THE MODERN SUPREME COURT

To understand the frustration that bankruptcy jurisdiction has caused for debtors, creditors, practitioners, judges, and scholars, it is necessary to understand the mess that the modern Court has made of non-Article III doctrine. To review the doctrine, I begin by setting up working definitions of formalism and functionalism.[96] I then review the key non-Article III cases, many of which are bankruptcy disputes, and then turn to a discussion of scholars' treatment of this doctrine.[97] Most of the key bankruptcy cases—*Northern Pipeline*, *Granfinanciera, S.A. v. Nordberg*, and *Stern*—reveal the Court's tendency toward formalist reasoning about Article III, are focused on nonnegotiable boundaries around the judicial power of the United States, and are resistant to the practical realities that attend the filing and confirmation of a bankruptcy plan.[98] Other equally important cases from within, and not within, bankruptcy—*Thomas v. Union Carbide Agricultural Products Co.*, *Commodity Futures Trading Commission v. Schor*, and *Wellness*—suggest an alternate, functionalist tendency, less concerned about any inherent dangers to Article III, and cognizant of the efficient dispute resolution that is essential to the running of a national economy.[99] Ultimately, what these cases and the scholarly conversations show is that the current doctrine lacks conceptual consistency.[100] This inconsistency frustrates Congress, litigants, and scholars alike, leaving them with no clarity about the constitutional and practical limits on a

92. *See infra* Part III.

93. *See infra* Part IV.

94. *See infra* Part IV.

95. *See infra* Part IV.

96. *See infra* Part II.A.

97. *See infra* Parts II.B, II.C.

98. *See* N. Pipeline Constr. Co v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Granfinanciera, S.A. v. Norberg, 492 U.S. 33 (1989); Stern v. Marshall, 564 U.S. 462 (2011).

99. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

100. *See infra* Part II.B.

bankruptcy judge's jurisdiction.[101] As larger and more consequential disputes like *Purdue Pharma* and *Boy Scouts* continue to come before bankruptcy judges—in other words, as the lives of more people risk becoming more complicated because of the confusion that the Court has caused—there must be more clarity about what that judge can do, what they cannot do, and why.[102]

A. *Formalism and Functionalism: Working Definitions*

Following the literature on this distinction, I define formalism as a theory of constitutional power characterized by categorical rules and deductive reasoning that aspires toward stability and primarily focuses on the identity of the institution wielding the constitutional power in question. I define functionalism as a theory of constitutional power characterized by fact-intensive rules and inductive reasoning that values efficiency and primarily focuses on the kind of power that is being wielded. I then illustrate how this distinction has played out in the Supreme Court's non-Article III cases, many of which have been bankruptcy disputes.[103]

Bankruptcy litigation often finds itself caught in the middle of the debate between formalists and functionalists on the Supreme Court. Formalists, including such different jurists as Justices William Brennan Jr. and Antonin Scalia, believe that final judgment and enforcement must come from an Article III court.[104] Functionalists, like Justices Sandra O'Connor, Stephen Breyer, and Sonia Sotomayor, favor a practical mode of analysis that permits non-Article III tribunals to enter final judgment with the consent of the litigants.[105] The former see the integrity of the judiciary as a terrain that must be "jealously guarded."[106] The latter see it as a principle whose strength is undiminished by allowing other bodies to

101. *See infra* Part II.C.

102. *See, e.g.*, *In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26 (Bankr. S.D.N.Y. 2021); *In re* Boy Scouts of Am. & Del. BSA, LLC (*Boy Scouts of Am. I*), 642 B.R. 504, 518 (Bankr. D. Del. 2022).

103. *See infra* Part II.C.

104. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (Brennan, J., plurality opinion) ("Private-rights disputes . . . lie at the core of the historically recognized judicial power."); Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) ("[I]n my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary.").

105. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847 (1986) (O'Connor, J., majority opinion) ("[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III."); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 683 (2015) (Sotomayor, J., majority opinion) ("The Court has never . . . [held] that a litigant who has the right to an Article III court may not waive that right through his consent.").

106. *See N. Pipeline Constr. Co.*, 458 U.S. at 60.

supplement the work of the federal courts.[107] These frequent disagreements between the justices have frustrated many litigants and observers, and led one commentator to remark upon the "seeming schizophrenia in the analytical approach of the Court's modern decisions."[108]

To set up these definitions, I rely on and develop William Eskridge's treatment of the distinction.[109] Eskridge argues that there are three ways to contrast formalism and functionalism.[110] First, they have different approaches to legal rules.[111] Formalism prizes "bright lines" and functionalism prizes "balancing tests."[112] Second, they rely on different kinds of reasoning.[113] Formalism primarily rests on "deduction from authoritative constitutional text," while functionalism rests on "induction from constitutional policy and practice."[114] Third, they aspire toward different goals for law.[115] Formalism prizes "transparency, predictability, and continuity" whereas functionalism prizes "adaptability, efficacy, and justice in law."[116] To these three, I would add a fourth distinction, which I derive from my reading of the Court's reasoning about structural constitutional principles: formalism focuses on the *identity* of the actor wielding the power in question, whereas functionalism focuses on the *kind* of power that the actor is wielding. This distinction applies in the Court's reasoning in non-Article III doctrine. Its applicability, however, may also be broader.

In developing these working definitions, I do not mean to suggest that formalism and functionalism are completely antithetical to each other. Indeed, as Eskridge argues, "we must appreciate how [the two] are inextricably related" as theories of governance, bases for state legitimacy, and modes of constitutional argument.[117] Nor do I mean to ignore the reality that neither of the two offer a

107. *See Wellness*, 575 U.S. at 679 ("[T]here is no indication that Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the Judiciary.").

108. Brubaker, *supra* note 56, at 21.

109. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998).

110. *See id.* at 21.

111. *See id.*

112. *Id.*

113. *See id.*

114. *Id.*

115. *See id.* at 22.

116. *Id.*

117. *Id.* at 29.

complete account of the political system that the Constitution sets up.[118] But while formalism may be impossible and pure functionalism would certainly raise serious questions about the rule of law, the Constitution and its traditions give us no clear guidance about how to synthesize these two methodologies.[119] Because they are antagonistic in more ways than they are complementary, a synthesis of the two methodologies requires foregrounding one at the expense of the other.[120] While it is impossible to offer a comprehensive synthesis of formalism and functionalism that would resolve all the tensions that have emerged in this debate, in the context of bankruptcy jurisdiction, the benefits of functionalism outweigh the benefits of formalism. Functionalism is not only more suited to the scale and variability of the kinds of cases that come before a bankruptcy court, but also more reflective of the history and practice of bankruptcy law.

B. *The Constitutional Authority of Bankruptcy Courts: From* Northern Pipeline *to* Wellness

The congressional power to constitute bankruptcy courts and other non-Article III tribunals continues to confuse scholars, courts, and practitioners. In one set of cases, the Court is profoundly formalist.[121] In others, it is intensely functionalist.[122] Yet in others, it attempts a synthesis of the two methodologies that leaves something to be desired.[123] This Subpart traces the development of non-Article III doctrine in the last four decades to put the Court's current approach to bankruptcy jurisdiction in context. Understanding how the Court treats non-Article III tribunals more generally is part of understanding how it treats bankruptcy jurisdiction. To understand the current jurisdictional regime and its commitment to formalism, it is necessary to understand *Stern*.[124] "To understand *Stern*, it is necessary to first understand *Northern Pipeline*[,]"[125] a case in which the Court aggressively responded to the jurisdictional provisions of the Bankruptcy Act of 1978, now known as the Bankruptcy Code.[126] Prior to the Bankruptcy Code's

118. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011) ("[I]n some contexts, each approach relies on a freestanding separation of powers doctrine that transcends the specific meaning of any given provision of the Constitution.").

119. *See id.*

120. *Id.*

121. *See infra* Part II.C.

122. *See infra* Part III.C.

123. *See infra* Parts II.C., III.C.

124. *See generally* Stern v. Marshall, 564 U.S. 462 (2011).

125. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 681 (2015).

126. *Id.* (describing consent as the determinative jurisdictional factor in *Northern Pipeline*).

enactment, bankruptcy proceedings were overseen by referees who exercised limited jurisdiction.[127] The old Act vested referees "with 'summary jurisdiction' . . . over controversies involving property in the actual or constructive possession of the court."[128] It also vested them with plenary jurisdiction, including jurisdiction over "property in the possession of a third person."[129] The new Act eliminated the referee system, established bankruptcy courts that would operate as "adjunct[s] to the district court" just like their referee predecessors, and staffed those courts with bankruptcy judges.[130] These judges would be nominated by the President and confirmed by the Senate; they would serve 14-year terms; they could be removed by the "judicial council of the circuit" for "incompetency, misconduct, neglect of duty or physical or mental disability"; and receive salaries "subject to adjustment under the Federal Salary Act."[131] Their jurisdiction, described as the "powers of a court of equity, law, [or] admiralty," was much broader than the summary and plenary jurisdiction of the referees.[132] It included the authority to hold jury trials, issue declaratory judgments, grant writs of habeas corpus, and issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[133] With the exception of the powers to enjoin another court or punish criminal contempt not committed before the judge, the Bankruptcy Code seemed to vest as much power in the bankruptcy court as in the district court.[134] At the same time, the Bankruptcy Code denied bankruptcy judges the life tenure and protection against the diminution of salary that have historically been understood as the key indices of judicial independence.[135]

Reading *Northern Pipeline* narrowly, we could say that the question presented was whether the Bankruptcy Code could permissibly vest the new bankruptcy tribunals with jurisdiction to decide the debtor's state-law contract claims against an entity who was otherwise not party to the proceeding.[136] Six Justices signed on to the part of the opinion that answered this question in the

127. *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982).

128. *Id.*

129. *Id.*

130. *Id.* (citing 28 U.S.C. § 151(a)).

131. *Id.* (referencing Bankruptcy Act of 1978, Pub. L. No. 95–598, §§ 152–154, 92 Stat. 2549).

132. *Id.* at 55 (citing 28 U.S.C. § 1481 (1976)).

133. *See* 28 U.S.C. § 1651(a); 11 U.S.C. § 105(a).

134. *See* 28 U.S.C. § 1651(a); 11 U.S.C. § 105(a); *N. Pipeline Constr. Co.*, 458 U.S. at 53–55 (citing 28 U.S.C. § 1481 (1976); Bankruptcy Act of 1978, Pub. L. No. 95–598, §§ 152–154, 92 Stat. 2549).

135. 28 U.S.C. §§ 152(a), 153(a).

136. *See N. Pipeline Constr. Co.*, 458 U.S. at 87 n.40.

negative.[137] No opinion commanded a majority; however, and Justice Brennan's plurality opinion came to stand for a broader proposition: that the Bankruptcy Code's jurisdictional grant violated Article III because it "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court."[138] There were only three constitutionally permissible categories of legislative courts: for the territories, for the military, and for public rights disputes.[139]

Northern Pipeline was a jurisdictional earthquake. Undoing nearly a century of deference to Congress in the bankruptcy arena, complemented by deference to Congress in the use of non-Article III adjudication under *Crowell v. Benson*, the Court's decision signaled the beginning of a new age of jurisdictional policing.[140] Even though the Court later reaffirmed its holding in *Northern Pipeline*, the provenance of this categorical limitation remains unclear. Erwin Chemerinsky has persuasively argued that there does not seem to be an underlying constitutional theory that supports it.[141] One explanation sounds in political economy.[142] Another sounds in the so-called public rights doctrine.[143] Non-Article III tribunals may adjudicate controversies that arise "between the government and others" or between private parties whose rights are "so closely integrated into a public regulatory scheme" as to be appropriate for such adjudication.[144] The *Northern Pipeline* plurality held out the possibility that the restructuring of debtor-creditor relations "may well be a 'public right,'" but declined to include state created

137. *Id.* at 92 (Rehnquist, J., concurring).

138. *Id.* at 87.

139. *See id.* at 63–76 (discussing the history of and constitutional justifications for territorial, military, and public rights tribunals).

140. *See* Crowell v. Benson, 285 U.S. 22, 50 (1932) (holding that certain matters of public right can be adjudicated by administrative agencies); *N. Pipeline Constr. Co.*, 458 U.S. at 50–57.

141. *See* Chemerinsky, *supra* note 84, at 313–14 ("Justice Brennan . . . did not conceptually explain what makes these categories permissible for Article I courts, but invalidates Article I bankruptcy judges."). *But see, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 52–53 (1989) (upholding *Northern Pipeline*).

142. Chemerinsky, *supra* note 55, at 199 ("I always have believed that the liberal plurality in *Northern Pipeline* was attempting to send a message to Congress about limits on congressional power to take matters away from the Article III courts.").

143. *See* Baude, *supra* note 83, at 1574–75 (discussing challenges to the constitutional authority of non-Article III courts on the grounds of the public rights doctrine and highlighting the example of *Northern Pipeline*).

144. *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985).

private rights, understood as rights of "the liability of one individual to another."[145] Because contract claims by the debtor against a third party are often part of a Chapter 11 proceeding, the public rights doctrine provided cold comfort to the bankruptcy bar, which never sought to find itself caught in the crossfire between Congress and the Court.[146]

Indeed, *Northern Pipeline* may rightly be charged with obscuring more than it clarified. For example, in the context of bankruptcy law, a *Northern Pipeline* analysis might have meant determining whether "private rights" may encompass executory contracts, which often include bilateral outstanding obligations between the debtor and a non-debtor party, and to which the Bankruptcy Code dedicates an entire subsection.[147] More generally, if formalist decisions are meant to articulate bright lines, the opinion left unanswered the question of how, except in a specific fact pattern like the one in *Northern Pipeline*, litigants are to know where public rights end and where private rights begin.[148] If formalist decisions are also meant to draw bright lines around the powers and obligations of institutions like an agency or a court, then the opinion did not clarify why civil proceedings involving the government were less deserving of Article III protection, especially when the Constitution supposedly shields the individual from arbitrary exercises of governmental power.[149]

Both the plurality and the concurrence seemed to agree, however, that the lack of the third party's consent defeated the debtor's argument.[150] Justice Brennan suggested that the Bankruptcy Code preserved the referee's jurisdiction, "with consent, over controversies beyond those involving property in the actual or constructive possession of the court."[151] Then-Justice William Rehnquist also suggested that "[n]one of the cases has gone so far as to sanction the type of adjudication to which [the third party] will be subjected against its will" under the Bankruptcy Code.[152] These suggestions seemed to preserve the consent carveout under the prior Act.[153] In fact, the Court has confirmed that "*Northern Pipeline*

145. *N. Pipeline Constr. Co.*, 458 U.S. at 71–72 (quoting *Crowell*, 285 U.S. at 51).

146. *See id.* at 87 n.40.

147. 11 U.S.C. § 365 (2005) (providing for the debtor's authority to assume, reject, or "ride out" executory contracts). I do not mean to suggest that executory contracts are outside of the bankruptcy tribunal's jurisdiction. I merely mean to question the logic by which some contracts are included, and some excluded, from that jurisdiction.

148. *See N. Pipeline Constr. Co.*, 458 U.S. at 71–72.

149. *See generally* McKenzie, *supra* note 87.

150. *See N. Pipeline Constr. Co.*, 458 U.S. at 79 n.31, 91.

151. *Id.* at 79 n.31.

152. *Id.* at 91.

153. *See id.* at 79 n.31, 91.

turned on the lack of consent" at least three times.[154] Even the most formalist opinions have treated consent as a release valve for constitutional concerns about both due process and separation of powers.[155] None have explained what consent looks like and why it should allay deeper concerns about the core competencies of the bankruptcy tribunal to resolve disputes that sound in private rights.[156]

The 1980s saw the Court repeatedly reexamine the powers of Congress to constitute non-Article III tribunals.[157] In *Thomas v. Union Carbide Agricultural Products Co.*, the Court upheld a congressional mandate to assign disputes between private parties to arbitration as part of a regulatory regime implemented by the Environmental Protection Agency (EPA).[158] The statute required pesticide manufacturers to provide the EPA with data about the safety and risk of their products.[159] To streamline registrations and increase competition, the statute also allowed the data submitted by one registrant to be used by future, or so-called "follow-on" or "me too" registrants.[160] In the interest of efficiency, disputes between original and follow-on registrants were subjected to binding arbitration.[161] Several pesticide manufacturers challenged the arbitration provision as a violation of Article III.[162] They contended that Congress had unconstitutionally taken away their right to have their private disputes heard by an Article III judge.[163] Writing for the Court, Justice O'Connor upheld the arbitration scheme.[164] Because the private resolution of licensing disputes did not resemble suits "at common law or in equity or admiralty" which lay at the "'protected core' of Article III judicial

154. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 681 (2015); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986) ("[I]n *Northern Pipeline* . . . the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication."); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985) ("The Court's holding in [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review.") (emphasis added).

155. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 479–80 (2011).

156. *See, e.g.*, *id.*

157. *See, e.g.*, *Thomas*, 473 U.S. at 582–84.

158. *See id.* at 593–94.

159. *See id.* at 571–72.

160. *Id.*

161. *Id.* at 573.

162. *Id.* at 575–76.

163. *Id.* at 576–77.

164. *Id.* at 589.

powers," the arbitration scheme was allowed to stand.[165] "Looking *beyond form*," she wrote, "to the *substance* of what [the statute] accomplishes . . . Congress has the power . . . to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants . . . without providing an Article III adjudication."[166] The complexity of the regulatory scheme required a functionalist analysis and Article III was not going to stand in the way of Congress' valid purpose of maximizing efficiency and cutting costs.[167] Justice O'Connor also highlighted the voluntariness of the parties' participation in this scheme.[168] They consented to the jurisdiction of the arbitrator because they had sought to benefit from the follow-on licensing scheme promulgated by the EPA.[169]

The next year, the Court granted certiorari in *Schor* and again deployed a functionalist analysis, this time to uphold Congress's assignment of private rights resolution to an administrative agency.[170] The question in *Schor* was whether the Commodity Futures Trading Commission (CFTC) could entertain state law counterclaims under its organic statute, and if it could, whether that statute violated Article III.[171] The statute empowered the CFTC to hear procedures through which people could seek redress for their brokers' fraudulent or manipulative transactions of commodity futures.[172] Under the statute, the CFTC had promulgated a regulation that allowed it to adjudicate counterclaims that arose out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.[173] When a former client would initiate a proceeding against the broker, the broker was "free to seek relief against the [former client] in other fora."[174] Writing for the majority, Justice O'Connor held that Congress had the constitutional authority to grant the CFTC the power to order brokers to redress their former clients since that order was enforceable only in an Article III court.[175]

165. *Id.* at 587 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.25, 70–71 (1982)).

166. *Id.* at 589 (emphasis added); *see also id.* at 587 ("[S]ubstance rather than doctrinaire reliance on formal categories should inform application of Article III.").

167. *See id.* at 594 ("To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.").

168. *Id.* at 575–76.

169. *Id.* at 572, 576 ("[M]anufacturers must submit research data to the [EPA] . . . . Such registrations were colloquially known as 'me too' or 'follow-on' registrations. . . .").

170. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 835–36 (1986).

171. *Id.* at 835–36.

172. *Id.* at 836.

173. *Id.* at 837.

174. *Id.*

175. *Id.* at 851–52.

In this way, the CFTC functioned like an adjunct to the Article III court, and its orders did not impermissibly infringe upon the separation of powers principles immanent in Article III.[176] The Court also held that the CFTC could decide "state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties" without contravening Article III.[177] Quickly setting aside any federalism concerns, Justice O'Connor also explained that Article III's public rights doctrine sanctioned the CFTC's exercise of jurisdiction.[178] There was no dispute that fraud or misrepresentation arising from a broker-client relationship were matters of private right.[179] However, when the "congressional delegation of adjudicative functions" over such private rights was "assessed by reference to the purposes underlying the requirements of Article III" it became clear that the CFTC's limited jurisdiction was constitutional.[180] Relying on the functions and purposes of the CFTC adjudication, the Court upheld the regulation.[181] In so doing, it suggested that the formalism of *Northern Pipeline* may be limited to issues of bankruptcy law.[182] It would not be until *Wellness* that the Court would recognize the historical reality that the exercise of bankruptcy jurisdiction had also been subject to a deeply functional analysis for eight decades before *Northern Pipeline*.[183]

The Court also explained that the client-complainant in this case had consented to the CFTC's jurisdiction by demanding that the broker proceed with his claim in the agency rather than before the district court.[184] "Article III, § 1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,'" Justice O'Connor wrote, "and to safeguard litigants' 'right to have claims decided before judges who are free from

176. *Id.* at 855.

177. *Id.* at 857.

178. *Id.* at 858 ("Even assuming that principles of federalism are relevant to Article III analysis, however, we are unpersuaded that those principles require the invalidation of the CFTC's counterclaim jurisdiction. The sole fact that [respondent's] counterclaim is resolved by a *federal* rather than a *state* tribunal could not be said to unduly impair state interests, for it is established that a federal court could, without constitutional hazard, decide a counterclaim such as the one asserted here under its ancillary jurisdiction, even if an independent jurisdictional basis for it were lacking.").

179. *See id.* at 849.

180. *Id.* at 847.

181. *Id.*

182. *Compare id.*, *with* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71–72 (1982).

183. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 681 (2015).

184. *Schor*, 478 U.S. at 848–49.

potential domination by other branches of government.'"[185] Article III did not "confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court."[186] Article III contained a "personal right," which, like other personal constitutional rights that dictate procedure and not substance, could be waived.[187] To support its holding about consent, the Court cited to the concurrence and dissent in *Northern Pipeline*, the majority opinion in *Thomas*, and to two late-nineteenth century cases.[188] The focus on consent lies at the heart of the Court's functionalism.[189] It reflects a concern that a party may be denied due process if it does not waive its right to adjudication by an Article III court.[190] As the Court's citations show, this concern has been embedded in its analysis of non-Article III tribunals since at least the nineteenth century.[191] As I argue below, this confluence of due process and history will show that the jurisdiction of bankruptcy tribunals was also subjected to a functional test until *Northern Pipeline*.

Still, the Court's bankruptcy jurisprudence would evolve in a formalist direction and in direct opposition to the rest of non-Article III doctrine. Three years after *Schor*, the Court granted certiorari in *Granfinanciera*, and held that fraudulent conveyances to parties not before a bankruptcy tribunal must be adjudicated by an Article III court.[192] The Seventh Amendment guarantees that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[193] Actions to recover fraudulent transfers and conveyances were brought at law and thus, before a jury in late eighteenth century England.[194] Therefore, the Court explained, a factfinder that does not use a jury could not constitutionally adjudicate a dispute for which the Seventh Amendment preserves the right to a jury trial.[195] When the government was "involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights[,]" it could assign adjudication to a non-Article III tribunal.[196] Still, the Court

185. *Id.* at 848 (first quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985); and then quoting United States v. Will, 449 U.S. 200, 218 (1980)).

186. *Id.*

187. *Id.*

188. *See id.* (first citing Kimberly v. Arms, 129 U.S. 512 (1889); and then citing Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1865)).

189. *See id.*

190. *See id.*

191. *See id.*; *see also supra* Part II.A.

192. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 46–47 (1989).

193. U.S. CONST. amend. VII.

194. *Granfinanciera*, 492 U.S. at 42.

195. *Id.* at 51.

196. *See id.*

categorically held that while Congress may create new public rights, this right was not one of them: "On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself."[197] Writing for the majority, Justice Brennan questioned his own prior speculation that the restructuring of debtor-creditor relations "may well be a 'public right'" and held that, even if it were a public right, actions in contract, tort, and private property are not essential to it; rather, they arise from it.[198] As a case about bankruptcy jurisdiction, *Granfinanciera* can be read as attaching the approval of a majority opinion to the holding of the *Northern Pipeline* plurality.[199] As a case about non-Article III doctrine, it is profoundly confusing because it further separates the analysis of bankruptcy tribunals' exercise of jurisdiction from that of other non-Article III tribunals, like the EPA in *Thomas* or the CFTC in *Schor*.[200]

The confusion about the outer limits of bankruptcy courts' jurisdiction continued with *Stern*.[201] There, the Supreme Court held that bankruptcy courts lack the constitutional authority to enter final judgments on counterclaims that sound in tort.[202] Chief Justice John Roberts explained that common law counterclaims are matters of private right.[203] Here, tortious interference with a gift was a claim that "simply attempts to augment the bankruptcy estate" and thus had to be decided by an Article III court.[204] The adverse party's filing of a proof of claim in the bankruptcy tribunal, Chief Justice Roberts reasoned, could not be understood as consent to have that court decide on the counterclaim.[205] This holding, as will become clear in the following Part, overruled around a century's worth of precedent.[206] Permitting non-Article III tribunals to enter final judgments on matters of private right, the Court warned, would transform "Article III . . . from the guardian of individual liberty and separation of powers [the Court] ha[s] long

197. *Id.* (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 n.7 (1977)).

198. *Id.* at 56 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982)); *id.* at 56 n.11 ("We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism.").

199. *Granfinanciera*, 492 U.S. at 61.

200. *Compare id.*, *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), *and* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

201. *See* Stern v. Marshall, 564 U.S. 462, 468–69 (2011).

202. *Id.* at 469.

203. *Id.* at 493.

204. *Id.* at 495.

205. *Id.* at 493.

206. *See infra* notes 166–75 and accompanying text.

recognized into mere wishful thinking."[207] In a deft rhetorical move that cast the federal judiciary as a liberty-enhancing branch of government, Chief Justice Roberts suggested that formalism is the only way to achieve the promise of Article III.[208] Only categorical limits, in other words, can guard the individual's liberties.[209]

Aside from settling the proof of claim question, *Stern* did very little to resolve the broader consent considerations that accompanied the jurisdictional analysis.[210] In *Wellness*, the Supreme Court held that bankruptcy courts could enter final judgments on *Stern* counterclaims in the presence of both parties' consent.[211] Such consent could be express or implied, but it must be knowing and voluntary.[212] Relying on *Schor*, the majority rearticulated a functionalist vision of the federal courts' division of decisional labor.[213] In this vision, Article III has two faces.[214] The first is a personal right: a guarantee of an impartial and independent jury adjudication before an Article III tribunal that is subject to waiver, just like other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.[215] The second is a structural principle: a matter concerning the institutional integrity of the judicial branch for which consent and waiver cannot be dispositive.[216] Writing for the majority, Justice Sotomayor explained that bankruptcy courts' adjudication of *Stern* counterclaims concerned the personal right without undermining the structural principle.[217] With the litigants' consent, a bankruptcy judge could enter a final judgment on such a counterclaim without usurping the judicial power of the United States because (i) bankruptcy judges are appointed by the district court, (ii) they hear matters solely on a district court's reference, (iii) they can decide only those common law claims that are incident to the bankruptcy court's primary function, and (iv) in passing the Bankruptcy Act of 1984, Congress showed no intent to "emasculate" constitutional courts but instead sought to supplement their capacity.[218] Consent-based

207. *Stern*, 564 U.S. at 495.
208. *See id.*
209. *See id.*
210. *See generally id.*
211. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 686 (2015).
212. *Id.* at 685.
213. *Id.* at 674–76.
214. *See id.*
215. *Id.* at 675.
216. *Id.* at 676.
217. *Id.*
218. *Id.* at 679–81.

adjudication was nothing new, the Court explained.[219] Following the example of *Schor*, the Court reached into history and listed cases from as early as 1813 to show that functional considerations have been an essential part of the American judicial tradition.[220] The Court then explained that "that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts."[221] Finally, it ordered the Seventh Circuit to decide on remand whether the adverse party's actions evinced the requisite consent.[222]

I would be remiss not to note the intense functionalism of Justice Sotomayor's majority opinion in *Wellness*.[223] The Court's last word on the constitutionality of bankruptcy jurisdiction resonates more with the functionalism of the non-bankruptcy cases like *Thomas* and *Schor* than with the formalism of *Northern Pipeline* and *Stern*.[224] Indeed, we need look no further than Chief Justice Roberts's dissent, which cautioned that the Court should "not yield so fully to functionalism[,]"[225] to be certain that *Wellness* is a functionalist opinion. Justice Sotomayor's majority opinion also resonates more with the functionalism of the Bankruptcy Code, which contemplates a judge who will extrapolate principles from the facts of the case, balance varied interests, and pursue a swift and efficient resolution of the dispute.[226] The Court's focus on consent also reflects the Bankruptcy Code's functionalism, which conditions certain judicial events in a bankruptcy proceeding on the presence of consent in at least 20 different places.[227] Finally, the opinion relies on history to show that consent-based adjudications are almost as old as the country itself.[228]

219. *Id.* at 674.

220. *Id.* at 675 (first citing Thornton v. Carson, 11 U.S. (7 Cranch) 596, 597 (1813); then citing Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 131 (1865); and then citing Newcomb v. Wood, 97 U.S. 581, 583 (1878)).

221. *Id.* at 679.

222. *Id.* at 686.

223. *See id.*

224. *Compare id.*, *with* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 571–76 (1985), *and* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 835–38 (1986), *and* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–63 (1982), *and* Stern v. Marshall, 564 U.S. 462, 473–78 (2011).

225. *Id.* at 688 (Roberts, C.J., dissenting).

226. *Id.*

227. *See, e.g.*, 11 U.S.C. § 303(i) (providing that, if there is no consent from all parties regarding an involuntary petition, the bankruptcy judge may dismiss a petition, rule against a petitioner who tried to push a debtor into involuntary bankruptcy for damages caused by the petitioner's filing, and award punitive damages).

228. *See Wellness*, 575 U.S. at 683.

C. *Formalism and Functionalism in Bankruptcy Jurisdiction*

In the context of bankruptcy jurisdiction, scholars have attempted to combine the issue of consent to a bankruptcy court with broader questions of formalism and functionalism. Here, I offer three representative examples and situate my intervention alongside them. First, Anthony Casey and Aziz Huq propose a new formalist rule which would resolve the apparent contradiction between Congress' assignment of adjudicative power to bankruptcy judges and Article III's restraint of the Constitution's judicial power to judges that enjoy life tenure and salary protections.[229] After the Court's rejection of Congress' attempts to define which matters count as "core" and thus fall within the bankruptcy courts' jurisdiction, Casey and Huq argue for a jurisdictional rule based on the creditors' bargain theory of bankruptcy.[230] They also argue that this theory supports the Court's holding in *Wellness* because a consent requirement "reduces litigation friction by demanding a clear statement that one party objects to the bankruptcy forum" without creating "a risk of distorting state-created rights."[231] Second, Chemerinsky has repeatedly criticized the formalist tendencies of the Supreme Court in the context of bankruptcy jurisdiction from a functionalist perspective.[232] He argues that *Stern* brings into question the validity of *Roell v. Withrow*, in which the Court held that trial by a magistrate judge does not violate Article III when there is litigant consent.[233] These two arguments illustrate the formalist and functionalist attempts to clarify the contours of bankruptcy jurisdiction.

Third, Ralph Brubaker, a functionalist defender of bankruptcy jurisdiction, has helpfully argued that formalism regarding the bankruptcy court's discharge of debts owed to a state requires a legal fiction.[234] Responding to the Court's opinion in *Tennessee Student Assistance Corp. v. Hood*,[235] which clarified that states cannot claim sovereign immunity in discharge proceedings in bankruptcy court,

229. *See* Casey & Huq, *supra* note 85, at 1156, 1159.

230. *Id.* at 1160 ("[W]e argue that if a species of legal issue to be decided does not alter the creditors' collective relationship, then its adjudication is not integral to the restructuring of the general debtor-creditor relationship. We further demonstrate that this welfarist account of bankruptcy generates a set of boundaries that is in rough harmony with the normative goals identified in Article III jurisprudence: federalism and the separation of powers.").

231. *Id.* at 1231.

232. Chemerinsky, *supra* note 84, at 322–23 ("My conclusion is that whether bankruptcy court judges should have Article III status is a political issue, not a constitutional question.").

233. Chemerinsky, *supra* note 55, at 211–12.

234. *See* Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV 59, 62–63 (2005).

235. 541 U.S. 440 (2004).

Brubaker argues that a bankruptcy court's discharge order is a permissible *Ex parte Young* order.[236] The fiction in question is the fiction of *Ex parte Young* itself.[237] It is the fiction that a suit for injunctive or declaratory relief against state officials does not amount to a suit against the state and thus does not violate the sovereign immunity principles protected by the Eleventh Amendment.[238] It is also a second fiction required by *Hood* in which the Court held that bankruptcy courts' exercise of in rem jurisdiction does not infringe on state sovereignty.[239] Brubaker argues that the way forward is "function, not fiction" because the in rem fiction is "*not* effective in fully capturing the compulsory essence of the federal bankruptcy process."[240] A functional approach to bankruptcy jurisdiction, akin to the one embraced in the Court's broader *Ex parte Young* jurisprudence by *Edelman v. Jordan*,[241] would capture that compulsory essence.[242] As in *Edelman*, bankruptcy's restructuring of debtor or creditor relations takes place "through a series of prospective declaratory and injunctive decrees."[243] The ability to gather all claims, resolve them in an expedient manner, and bind debtors and creditors alike, is necessary to the functioning of the federal bankruptcy system.[244]

This argument illustrates a few of the benefits and challenges of a functional approach to bankruptcy jurisdiction. Primarily, functionalism offers a more honest approach to the animating principles and goals of federal bankruptcy law.[245] In the sovereign immunity context, it submits that federalism may occasionally need to be rebalanced.[246] In other words, to achieve valuable economic and political goals, Congress may occasionally need to undermine the states' "dignity" that is so often

236. *See* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief*, 76 AM. BANKR. L.J. 461, 466 (2002).

237. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104–06 (1984) (discussing "the fiction of *Young*").

238. *Id.*

239. *See* Brubaker, *supra* note 234, at 63.

240. *Id.* at 63, 125.

241. *See* Edelman v. Jordan, 415 U.S. 651, 667 (1974) (distinguishing between prospective relief, which is permitted by *Ex parte Young*, and retrospective relief, which is not).

242. Brubaker, *supra* note 234, at 126 (citing *Edelman*, 415 U.S. at 667) (distinguishing between prospective relief, which is permitted by *Ex parte Young*, and retrospective relief, which is not).

243. *Id.*

244. *See id.* at 68–69.

245. *See id.* at 63.

246. *See* Alden v. Maine, 527 U.S. 706, 757 (1999).

protected by the Court's sovereign immunity jurisprudence.[247] In the non-Article III context, functionalism submits that the judicial power of the United States may occasionally need to be affected.[248] In other words, it submits that to achieve similar economic and political goals, Congress may vest in bankruptcy judges an authority that leaves the Article III courts' power either undiminished or permissibly altered.[249]

Functionalism also disperses the power to make decisions among varied stakeholders. In the sovereign immunity context, it enjoins creditor states from chasing debtors into destitution and allows the insolvent to reorganize, renegotiate, and discharge their debts.[250] It takes away the states' unilateral authority and brings them to the negotiating table with other creditors.[251] In the non-Article III context, it allows creditors and debtors alike to consent around creditors' decision to submit themselves to the jurisdiction of the bankruptcy court.[252] It then permits bankruptcy judges to issue factual findings that determine whether consent was present or absent in the given dispute.[253] These findings are then reviewed for clear error by district judges.[254] Generally, functionalism also requires Congress and the federal judiciary to initiate a dialogue about the jurisdiction of bankruptcy tribunals.[255] This dialogue would actualize a constitutional value that the Madisonian Compromise seems to contemplate; namely, that the jurisdiction of the lower federal courts would be subject to congressional regulation.[256]

A challenge with Brubaker's argument, however, is the fear of the possibility that functionalism may itself be a theory held together by fictions.[257] In the sovereign immunity context, it requires treating a bankruptcy tribunal's discharge

247. *Id.* at 709 ("Immunity from suit in federal courts is not enough to preserve that dignity, for the indignity of subjecting a nonconsenting State to the coercive process of judicial tribunals at the instance of private parties exists regardless of the forum."). *But see* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1694 (2023) ("Under our precedents, we will not find an abrogation of tribal sovereign immunity unless Congress has conveyed its intent to abrogate in unequivocal terms. That is a high bar. But for the reasons explained below, we find it has been satisfied here.").

248. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 679 (2015).

249. *See id.* at 679.

250. *See* Brubaker, *supra* note 236, at 464.

251. *See id.*

252. *See* Brubaker, *supra* note 56, 13.

253. *See Wellness*, 575 U.S. at 685.

254. *See id.* at 690.

255. *See* Brubaker, *supra* note 56, at 17.

256. *See Wellness*, 575 U.S. at 678.

257. *See* Brubaker, *supra* note 234, at 119–27.

order as only prospective, when such a discharge order also resolves past contractual obligations between the debtor and the state.[258] In the non-Article III context, consent to a bankruptcy court's exercise of jurisdiction cannot possibly resolve the problems of subject-matter jurisdiction that plague the doctrine.[259] How could, for instance, a creditor's consent to the bankruptcy court's resolution of a tort claim against the debtor vest in the bankruptcy court subject-matter jurisdiction over tort claims that it otherwise does not have? Bankruptcy judges have no special expertise over many claims that they are required to adjudicate, and litigants' agreement to such "nonexpert adjudication" does not magically create expertise.[260] In fact, the same has been argued about Article III judges.[261] The fact that consent is a fiction is not damning to the project of functionalism.[262] It is merely a reality that requires us to relinquish the idea that legal fictions are anathema to the practice of constitutional adjudication.[263] Rather than attempting to eliminate them from the world of law, we might try to expound a functionalism that asks which fictions help us articulate more accurate and just doctrines of authority, and which fictions impede that same process. Then, we must also ask how we can know the difference.

As we have seen, bankruptcy litigation often finds itself caught in the middle of the debate between formalists and functionalists on the Supreme Court.[264] We have also seen that the antagonism between them makes a perfect synthesis improbable.[265] In the context of bankruptcy law, however, history and practice show the relative benefits of a functionalism that sees Article III's strength as undiminished when other bodies are marshalled to supplement the work of the federal courts.[266] The benefits of functionalism, however, are far from a settled matter. It is on this fraught terrain that the constitutional authority of bankruptcy courts in *Purdue Pharma* and *Boy Scouts of America* will be decided. But before

258. *See* Brubaker, *supra* note 236, at 462.

259. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 867 (1986) (Brennan, J., dissenting).

260. *See* McKenzie, *supra* note 87, at 41.

261. *Id.* at 43 ("For the proceduralist in me, the most intriguing part of the *Stern* opinion is the Court's assertion that Article III courts are 'experts' at resolving state common law claims like the one at stake in the case. That statement would come as a surprise to my civil procedure students, who learn that the Court *in Erie Railroad Co. v. Tompkins* disclaimed any expertise by the federal judiciary in common law disputes.").

262. *See id.* at 51.

263. *See id.*

264. *Compare* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), *with* Stern v. Marshall, 564 U.S. 462, 478–82 (2011).

265. Eskridge, *supra* note 109, at 21–22.

266. *See generally* McKenzie, *supra* note 87, at 41.

we proceed, a brief historical interlude is necessary to highlight the massive difference between historical practice and the current jurisdictional regime. Although the picture of legal practice that history can provide is often opaque, and thus the advice that we can take from it is limited, the history uncovered here shows quite clearly that bankruptcy jurisdiction was a functionalist's game. The reasons for that turn away to a more categorical approach have never been clarified and may portend dire consequences for thousands of litigants in these two mass torts cases.

III. FUNCTIONALISM AND CONSENT IN THE HISTORY OF BANKRUPTCY JURISDICTION

This Part argues that consent to non-Article III adjudication was a key consideration in bankruptcy cases arising under the nation's first long-standing bankruptcy statute. The Bankruptcy Act of 1898 succeeded where its predecessors had failed by striking a series of jurisdictional compromises. In direct opposition to its predecessors, the Act refused to create a list of federally exempted debtor assets and created a bifurcated bankruptcy jurisdiction between federal and state courts.[267] The Act of 1898 also revived the administrative post of the referee, a key experiment of the 1841 and 1867 Acts.[268] The referee was appointed by a district court judge and acted on his behalf.[269] There were no professional qualifications required of the post, but referees were often attorneys from the judicial district where they were appointed.[270] This post responded to the need to lower the costs of travel associated with bankruptcy.[271] While a number of the referees' rulings remained subject to review of the district court judge, the referee also entered final orders and judgments when there was litigant consent.[272] Unlike his predecessors, who received a salary, the referee was paid on a fee basis.[273] The administrative

267. Bankruptcy Act of 1898, ch. 541, § 23, 30 Stat. 544, 552 (repealed 1978) ("Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt . . . might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.").

268. *See id.* § 34.

269. *See id.*

270. *See id.* § 35.

271. *See id.*

272. *See* 2A COLLIER ON BANKRUPTCY ¶ 39.01 (James William Moore et al. eds., 14th ed. Supp. 1988); Brubaker, *supra* note 56, at 29 ("[N]on-Article III bankruptcy referees under the 1898 Act system *did* enter final orders and judgments with consent of the litigants . . . .").

273. *See* Bankruptcy Act of 1898, ch. 541, § 40(a), 30 Stat. 544 (repealed 1978) (providing referees be paid $10 and 1 percent of all dividends and commissions paid). This conflict over the referees' method of payment represents, in miniature, the broader antagonism between two

post was both a compromise in response to, and a continuation of, the political tensions that had brought down the prior statutes.[274] Whatever obstacles it may have encountered, the post was never eliminated; in fact, subsequent statutes expanded it into what would eventually become the Article I bankruptcy judge.[275] Whatever success may mean in the political sense, becoming a permanent fixture of the judicial architecture of the federal system must count as a success in the institutional sense.[276] As we shall see, the federal bankruptcy system owes part of this success in the twentieth century to the functional nature of bankruptcy jurisdiction.

A. *The Bankruptcy Act of 1898*

The fact that the last 40 years have seen a federal judiciary that is increasingly skeptical of non-Article III adjudication may surprise even the Lochner Court. A brief survey of the Act's history shows that it was federal judges who oversaw the initial expansion of the bankruptcy referees' jurisdiction.[277] Born of the Panic of 1893, and responding to an array of pro-debtor and federalist concerns, the initial statute only permitted the bankruptcy referee to exercise jurisdiction over the property that the debtor had in his possession at filing.[278] The referee could, however, extend his jurisdiction over property in the possession of a third party with that party's consent.[279] The relevant distinction was between summary proceedings, where the court exercised jurisdiction over property in possession of the debtor, and plenary proceedings, which denoted the court's more limited authority over property that the debtor did not possess.[280] Although these terms are largely absent from the Act, judicial opinions began to use them almost

visions of the federal government. One preferred to have an efficient, technocratic process paired with a permanent incursion of the federal government into the reorganization of debt. The other would rather have a less efficient, fee-based process subject to potential abuse, but one that would keep the government at arm's length and make it easier to dispose of its officer when they were no longer needed. For a detailed discussion of the evolution of payments for governmental officers in American history, *see* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 2 (Yale Univ. Press 2013) (distinguishing between fees as facilitative payments, which created a customer-seller relationship between the officer and the regulated party, and fees as bounties, which created a hostile relationship). The referee fees seem to operate as facilitative payments.

274. *See* PARRILLO, *supra* note 273, at 2.

275. *See* 11 U.S.C. §105(d).

276. *See id.*

277. *See infra* Part III.A.

278. *See* SKEEL, *supra* note 86, at 147.

279. *Id.* at 148.

280. *Id.* at 147–48.

immediately.[281] By 1934, it was clear from the amended statute, and the Supreme Court's reading of it, that plenary jurisdiction applied where the controversy concerned property in the possession of third persons or where the controversy involved no specific property, such as an action sounding in contract or tort.[282] By the 1970s, before the passing of the Act of 1974, a majority of circuit courts held that the filing of a proof of claim constituted implied consent.[283]

The 1898 Act's passage coincided with the development of bankruptcy law as a distinct body of legal academic inquiry. This development is marked by the first publication of *Collier on Bankruptcy* in 1898, a practitioner's manual that remains in use to this day, as well as the works of Frank O. Loveland, Harold Remington, J. Adriance Bush, and William H. Hotchkiss.[284] These works provide a sense of Northern elites' advocacy for a federal bankruptcy system and the role of the referee in it.[285] The records of federal courts sitting in bankruptcy in the late nineteenth century evidence the courts' understanding of the referee as a clerk or adjunct of the district court.[286] The district court judge could appoint the referee at

281. *See, e.g.*, Horner-Gaylord Co. v. Miller & Bennett, 147 F. 295, 298 (N.D.W. Va. 1906) ("Where property of the bankrupt passed out of the possession of the bankrupt, before the adjudication of bankruptcy, and is held by a third person under an adverse claim, a court of bankruptcy will not entertain a proceeding of a summary character for the purpose of compelling the delivery of the possession of such property by such third person to the officials of the bankruptcy court.").

282. *See* Jerrold L. Strasheim, *Fundamentals of Summary Jurisdiction in Straight Bankruptcy over Controversies between Trustees and Third Persons*, 51 NEB. L. REV. 505, 511 (1972) ("If the controversy is over property which the bankruptcy court has in its possession, it arises 'in a proceeding' and summary jurisdiction exists. Absent possession, if the third person consents, summary jurisdiction also exists. Other controversies, except, of course, those dealt with in the supplemental provisions of the Act, are 'at law and in equity' for which plenary is necessary.").

283. *See, e.g.*, Powell v. Maher, 307 F.2d 397, 256 (D.C. Cir. 1961); Nortex Trading Corp. v. Newfield, 311 F.2d 163, 164 (2d Cir. 1962); *In re* Majestic Radio & Television Corp., 227 F.2d 152, 156 (7th Cir. 1955).

284. *See* 1 COLLIER ON BANKRUPTCY (Alan N. Resnick & Henry J. Sommer eds., 1st ed. 1898); *see, e.g.*, William H. Hotchkiss, *Bankruptcy Laws, Past and Present*, 167 N. AM. REV. 580, 586 (1898) (criticizing "our hysterical Congressmen" because they did not enact a bankruptcy law that was aggressive enough); 1 FRANK O. LOVELAND, A TREATISE ON THE LAW AND PROCEEDINGS IN BANKRUPTCY § 5 (4th ed., W.H. Anderson Co. 1912) (criticizing the lack of access to the federal courts in bankruptcy proceedings); J. ADRIANCE BUSH, THE NATIONAL BANKRUPTCY ACT OF 1898: WITH NOTES, PROCEDURE, AND FORMS (N.Y.: The Banks L. Publ'g Co. 1899).

285. *See, e.g.*, Hotchkiss, *supra* note 284, at 587, 590.

286. *See, e.g.*, Louisville Tr. Co. v. Comingor, 184 U.S. 18, 19–24 (1902).

his discretion.[287] At the same time, the record also offers a surprising number of cases in which appellate courts upheld a referee's broad exercise of jurisdiction.[288]

The nineteenth century saw Congress make four attempts to use its constitutional power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[289] All four bankruptcy statutes were introduced and passed in response to an economic catastrophe.[290] All four crises to which they responded reflected the economic interests of the Middle Atlantic and Northeast.[291] The Act of 1800 responded to the massive accrual of debt in the decades following American independence more generally, and the Panic of 1796–1797 more specifically, by allowing merchants to discharge their debts in a narrow set of circumstances.[292] It also continued to permit creditors to throw borrowers in what became known as "debtor's prison."[293] Congress passed the Act of 1841 in response to a prolonged recessionary period that lasted between 1836 to 1838 and 1839 to 1843.[294] Creditors saw the Act as too debtor-friendly because it allowed debtors to initiate their own bankruptcy proceedings and extended the ability to discharge debts to nonmerchants.[295] The Act of 1867, passed at the peak of Radical Reconstruction, outlasted the previous two acts and survived over a decade, in part because even its staunchest Southern opponents derived great economic benefits from its operation.[296]

The Act of 1898, like its predecessors, arose from a deep financial crisis.[297] The Depression of 1793 produced the 1800 Act, and the Panics of 1837, 1857, and 1893 produced the 1841, 1867, and 1898 Acts.[298] Of course, as bankruptcy scholars have already established, the story is more complicated.[299] The debate about the 1800 Act was part of an argument between the Federalists and the Jeffersonian

287. Bankruptcy Act of 1898, ch. 541, § 34, 30 Stat. 544 (repealed 1978).

288. *See, e.g.*, White v. Schloerb, 178 U.S. 542, 548 (1900).

289. U.S. CONST. art I, § 8; *see* Hotchkiss, *supra* note 284, at 582.

290. *See* Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803); Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878); Bankruptcy Act of 1898, ch. 541, § 40(a), 30 Stat. 544 (repealed 1978).

291. *See, e.g.*, MANN, *supra* note 86, at 202–03.

292. *See id.* at 191, 202–03, 229.

293. *See generally id.* at 85–89.

294. *See* BALLEISEN, *supra* note 86, at 33.

295. *Id.* at 119.

296. THOMPSON, *supra* note 86, at 24–30.

297. *See* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEVS. J. 321, 322 (1999).

298. For a summary of this history, *see id.* at 323–26.

299. *See id.* at 325.

Democrats about the course of the nation.[300] The 1841 Act's legislative debate, framed by the memorable speeches of Daniel Webster, Henry Clay, John Calhoun, and Thomas Benton, became "a referendum on the national economy."[301] The 1867 Act passed on the same day as the Military Reconstruction Act.[302] In the South, the federal courts' implementation of the Act was essential to the economic, political, and social resuscitation of white, propertied men.[303] Southern legislators' opposition to the law, despite Southerners' reliance on it, would figure prominently in the debate leading up to the passage of the 1898 Act.[304]

The influence of the 1867 Act on the 1898 Act was manifold, but for present purposes, it is most relevant that the latter statute replicated much of the administrative architecture of the former. The appointment of bankruptcy registers—the forerunners of the referees—was left to district judges.[305] As Elizabeth Thompson has shown, all registers were required to take an oath to affirm that they had remained loyal to the Union during the Civil War.[306] She also shows that both Southerners and Northerners who moved to the former Confederate states after the Civil War served as registers and were often members of the Republican Party.[307] Final judgments and enforcement were left to a district judge and not the circuit judge.[308] The legislative debate shows that this too was a compromise, as the majority of district court judges were Democratic appointees.[309] They were also members of the communities that they served.[310] The contradiction here is striking. On the same day that the Republican Congress passed the Military Reconstruction Act, it also vested Democratic district court judges with the power to structure and administer bankruptcy proceedings as they saw fit.[311] It is not inconceivable to conclude that these legislative decisions played a substantial role in the swift economic reconstitution of the Southern elite. As shown below, while the Act of 1867 was repealed only after 11 years,[312] when such

300. DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 178–84 (Univ. of N.C. Press 1980).

301. *See* Skeel, *supra* note 297, at 323.

302. THOMPSON, *supra* note 86, at 13–14.

303. *Id.* at 12.

304. *See id.* at 62–63.

305. *See id.* at 42–43.

306. *Id.* at 42.

307. *Id.*

308. *Id.* at 43.

309. *Id.*

310. *Id.*

311. *See id.* at 13–14, 43.

312. See *id.* at 135.

reconstitution was largely complete, the notion that the person overseeing the bankruptcy proceeding should come from the community remained an essential consideration for those who would draft and implement subsequent bankruptcy statutes.[313]

The Act of 1898 had to balance the need to have the proceeding administered by officials who came from the local community with the equally pressing need to avoid the appearance of corruption. The administrative costs imposed by the Act of 1867 are widely seen as the main reason for its repeal.[314] In an 1874 report, Attorney General George Henry Williams reported to Congress and detailed these costs.[315] The assignee—who would become the trustee under the 1898 Act—commanded a substantial fee; to a lesser extent, so did court clerks and marshals.[316] David Skeel, Jr. argues that "[i]n the vast majority of cases, these officials seemed to make out like bandits," and concluded that this pattern of corruption led Congress to repeal the Act.[317] He also concludes that the minimal administrative structure of the 1898 Act, advocated by the newly formed bankruptcy bar, might be understood as a reaction to the perceived excesses of the 1867 Act.[318] The appearance that justice is being done—that the bankruptcy proceeding is being administered by an impartial adjudicator—would appear as another priority for Congress in the debates leading up to the 1898 Act's passage.[319] The repeal of the Act of 1867 yielded some lessons for the creditor lobby and northern congressmen. The exorbitant fees charged by the assignee (the predecessor to the bankruptcy trustee), that amounted to large administrative costs and occasionally left creditors with little to recover, were a large source of conflict in the legislative debate in the 1880s and 1890s.[320]

The pre-1890 legislative history suggests less an apathy for national bankruptcy legislation than an inability to compile a large enough coalition of debtor and creditor interests that would take the bill over the finish line. This inability arose from the difference in regional priorities.[321] Congressmen from the

313. *See* Skeel, *supra* note 297, at 323.

314. *See, e.g.*, Erik Berglöf & Howard Rosenthal, *The Political Economy of American Bankruptcy: The Evidence from Roll Call Voting, 1800-1978*, at 17 (Nat'l Sci. Found. & Bank of Swed. Tercentenary Found., Working Paper, 2000), https://legacy.voteview.com/pdf/Berglof_Rosenthal_Bankruptcy.pdf [https://perma.cc/YMU6-ZXBP].

315. SKEEL, *supra* note 86, at 250 n.47.

316. *Id.* at 40.

317. *Id.*

318. *Id.*

319. *See id.*

320. *Id.*

321. *See* WARREN, *supra* note 86, ch. 3.

West and South sought to protect the interests of white entrepreneurs.[322] Congressmen and senators from the Northeast sought to protect the interests of the creditors who financed many of the related enterprises.[323] In particular, the rise of aggressive speculation in the West seemed to motivate both sides of the debate.[324] As is often the case with bankruptcy, the positions in the debate were articulated in moralistic terms.[325] The failure of Grant, Ward & Co. in May of 1884, which one representative from Massachusetts called "[t]he most stupendous speculations and the most gigantic and disgraceful failure in this country's history," was reason alone to pass a uniform bill.[326] Another representative, from Kentucky, countered that the adaptation of state property exemptions would make for a non-uniform system that would foster the "fiery, rabid, quenchless, lust of gold which has excited a spirit of rash speculation that from time to time has raged like an infection throughout the land."[327] A third representative from Illinois opposed involuntary bankruptcy and charged Eastern manufacturers who supported this bill with an intent to crush the growing sector of "jobbers," middlemen, or wholesalers by pushing them into bankruptcy and monopolizing the sector.[328] The debate raged on, but with no legislative results.[329]

Then the Panic of 1893 happened. It would last for four years and upend almost every sector of the economy.[330] Railroad expansion slowed, building construction declined, and agricultural prices fell.[331] The economy that would emerge from this prolonged deflationary period looked very different; consolidation was rapid and aggressive, and Wall Street's influence was greater

322. *See id.*

323. *Id.* at 131–32.

324. *Id.* at 132–33.

325. *Id.* at 130.

326. *Id.* (quoting 15 CONG. REC. H4310 (daily ed. May 19, 1884) (statement of Rep. Patrick A. Collins)).

327. *Id.* at 130–31 (quoting 15 CONG. REC. H4304 (daily ed. May 19, 1884) (statement of Rep. Albert A. Willis) ("The beet-root frenzy, when the cry everywhere was, 'make sugar and get rich;' the vine excitement, during which the culture of corn and cotton among our Southern planters was abandoned in favor of the grape; the silk-worm . . . , or mulberry mania of the past . . . the gold and stock gambling of the present day. . . . [W]e see in our midst a spirit of prodigal expenditure and unnecessary extravagance . . . splendid apparel, luxurious feasts, retinues of servants, and other ostentatious social paraphernalia . . . . 'Live within your means,' is ignored or laughed at as an exploded absurdity.")).

328. *Id.* at 131.

329. *See id.* at 132.

330. *See* DOUGLAS STEEPLES & DAVID O. WHITTEN, DEMOCRACY IN DESPERATION: THE DEPRESSION OF 1893, at 1–5 (Greenwood Press 1998).

331. *See id.* at 45–53.

than ever.[332] At the same time, downward economic pressure exemplified by the Pullman Strike had inspired populists, socialists, and progressives to articulate and fight for new visions of a redistributive state.[333]

In this economic context, creditors and debtors felt the need for a federal bankruptcy statute more acutely. A petition submitted to Congress by the Retail Grocers and Merchants Association complained that California's debtor regime protected the interests of creditors in the state to the detriment of out-of-state creditors.[334] California's statutes, the petition claimed, "are practically to the effect that all claims on the part of California creditors must be settled by their assignees before any money whatsoever is to be paid to other creditors."[335] Discriminatory treatment was common in many states.[336] These laws made out-of-state credit more expensive and slowed economic growth.[337] Jay Torrey, the drafter of the bill that would become the 1898 Act, wrote that "[i]f a creditor suspects his debtor . . . is in financial trouble, he usually commences an attachment suit," thus throwing him into liquidation.[338] The understanding was that, as a matter of common sense, if one creditor did not initiate an attachment suit, another creditor would.[339] Merchants who traded before and after the Act's passage saw as its biggest success the elimination of this race to the bottom; what was, and sometimes still is called the "debtor's dismemberment."[340]

Although economic disaster has a way of focusing the legislative mind, the Act took almost a decade to pass both chambers.[341] The legislative record, filled with vivid depictions of the suffering that the "panic" inflicted on people, reflects an anxiety from pro-debtor congressmen about an unfair, summary process by

332. *See id.* at 77–78.

333. *See id.* at 80 ("The economy that emerged from the depression differed profoundly from that of 1893. Consolidation and the influence of investment bankers were more advanced."); R. SCOTT HUFFARD, JR., ENGINES OF REDEMPTION: RAILROADS AND THE RECONSTRUCTION OF CAPITALISM IN THE NEW SOUTH 199 (Univ. of N.C. Press 2019) (discussing how corporate consolidation accelerated in the South after the Panic of 1893).

334. Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 BUS. HIST. REV. 86, 94 (1998).

335. *Id.* (citation omitted).

336. *See* 2 S. WHITNEY DUNSCOMB, JR., BANKRUPTCY: A STUDY IN COMPARATIVE LEGISLATION 151–67 (Columbia Univ. 1893) (discussing many states' preferential treatment of local creditors).

337. *See id.*

338. Hansen, *supra* note 334, at 94–95 (citation omitted).

339. *See id.* at 95.

340. *See id.* at 96.

341. *See* WARREN, *supra* note 86, at 134.

which small merchants could be thrown into bankruptcy.[342] This anxiety may be why even in light of the prolonged recessionary period, Southern and Western congressmen resisted a bill that would provide creditor benefits without sufficient debtor relief.[343] Others were opposed to legislating in bankruptcy during a recession because it would only bring about "forced sales, and depreciated market values."[344] Representative John Davis of Kansas blamed the contraction of the currency for the depression of labor value, foreclosures on people's houses, and the general fall of prices:

> Our farmers are surrendering their homes into the hands of the Money Power. Our working people in the cities, mines, and factories and on the farms and railroads are suffering—merchants, bankrupt by the thousands annually. Farmers are unhoused and tenants evicted. Strikes of labor are rife on every hand. Men, women and children are crying for bread. Troops have recently been called out in four States at one time.[345]

Not all speeches were as tame. William H. Denson of Alabama gave a populist speech suffused with antisemitic allusions.[346] He called the bill "the most crushing and damnable instrumentality to oppress the farmers, laborers, debtors, or small dealers that the avarice, the greed, and the soulless cupidity of a Shylock could suggest."[347] He then described the bill as an "infernal engine of ruin, slavery, and destruction to the masses."[348] These anxieties—about subordination, disempowerment, and control by supposedly ethnic elites from the country's financial centers—might be familiar to anyone who has lived in a pluralistic society.[349] I would submit they were translated into the bankruptcy statute's jurisdictional provisions and the creation of the referee, who seemingly wielded only a little power.[350] This appearance was an essential component to the impression that the referee was not an agent of those reviled ethnic elites.[351]

342. *See id.* at 135–38.

343. *See id.* at 135.

344. *Id.*

345. *Id.* at 135–36.

346. *Id.* at 136 (quoting *Bankruptcy Law Reform: Oversight Hearing Before the H. Judiciary Econ. & Com. L. Subcomm.*, 51st Cong., 1st sess. (1890) (statement of Rep. William H. Denson)).

347. *Id.*

348. *Id.*

349. *See id.* at 134–36.

350. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

351. *See* WARREN, *supra* note 86, at 134–39 (discussing the attitudes of several legislative representatives).

One way the Act achieved this goal was by ensuring that referees would be selected from the local community.[352] Chapter V of the Act laid out the requirements for the appointment, removal, and jurisdiction of referees.[353] The language of the statute is relatively vague and seems to leave the specifics of the job up to the discretion of the district court judge. For instance, the statute does not require a specific number of referees that each district needs to retain.[354] It does not require that they be domiciled in the district where they work and instead permits them to serve in districts where they have an office.[355] It does not even require that they be attorneys—merely that they be competent to perform the duties of the office.[356] What competence means was left up for the district court judge's determination.[357]

District court judges seemed to supplement these requirements on their own. A notice published in the News and Observer after the passing of the Act of 1898 speaks of a district court judge's appointment of a second referee in bankruptcy for the Eastern District of North Carolina.[358] As demanded by the district court judge, and permitted by § 50 of the Act,[359] referee Victor Hugh Boyden was required to execute a $2,000 bond within 30 days of his appointment.[360] Both Boyden and the only other referee in the Eastern District of North Carolina were licensed attorneys.[361] The district judge announced that he would not hire referees who were not attorneys, despite the lack of such a statutory requirement.[362] These requirements were issued by district court judges in their capacities as

352. Bankruptcy Act of 1898, ch. 541, § 35(d), 30 Stat. 544 (repealed 1978).

353. *See id.* § 34.

354. *Id.* § 37 ("[A] Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.").

355. *Id.* § 35(4) ("Individuals shall not be eligible for appointment as referees unless they are . . . (4) residents of, or have their offices in, the territorial districts in which they are to be appointed.").

356. *Id.* § 35(1) ("Individuals shall not be eligible for appointment unless they are respectively (1) competent to perform the duties of that office . . . .").

357. *See id.*

358. *Those Discharges in Bankruptcy May Yet Get Fortune into More Trouble. They Are Worthless: Attorneys Sworn in Taxed a Fee of $2. A New Referee in Bankruptcy*, THE NEWS & OBSERVER, Nov. 18, 1899, at 6 [hereinafter *Discharges*].

359. Bankruptcy Act of 1898, ch. 541, § 50(a), 30 Stat. 544 (repealed 1978) ("Referees . . . shall . . . qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars . . . .").

360. *See id.*; *Discharges*, *supra* note 358, at 6.

361. *Discharges*, *supra* note 358, at 6.

362. *See id.*

administrators of their own courtrooms.[363] This appointment suggests that, as is often the case in the world of the law, the appearance of impartiality is often as important as impartiality itself. Individuals who had practiced as attorneys, preferably in the emerging area of commercial bankruptcy, and who had enough capital to execute a $2,000 bond, roughly equivalent to $72,000 today, would lend the air of propriety to the bankruptcy proceeding.[364]

In some ways, pro-creditor forces did not appease pro-debtor interests as much as they outorganized them.[365] For instance, members of the nascent bankruptcy bar were essential to the Act's success because they fought to preserve the new bankruptcy regime for self-interested reasons.[366] Some lawyers found professional success in serving as referees. Frank Remington was a corporate lawyer in Cleveland and was named as one of the Act's first referees.[367] He then published a treatise, *Remington on Bankruptcy*, which became a standard reference.[368] Skeel notes that "serving as a referee was not a particularly prestigious job" but lawyers chose to serve because it would advance their careers.[369] From the beginning, referees made public statements asking for reforms.[370] They were also meeting in person to discuss and organize for such reforms.[371] Relatedly, the American Bar Association, whose existence preceded the Act by two decades, and the Commercial Law League (the League), formed three years before the Act became law, both supported the legislation and fought to protect the almost instantaneous efforts to repeal it.[372] The League, whose advocacy had a decidedly pro-creditor focus, circulated a bulletin that kept interested parties focused on "the principle of national bankruptcy legislation."[373] By the time the 1903 Amendments were on the floor of the House of Representatives, pro-creditor interests had the wind at their backs and achieved even more aggressive reforms.[374] These early

363. *See id.*

364. *See, e.g.*, *id.*

365. *See* SKEEL, *supra* note 86, at 46.

366. *Id.*

367. *See id.* at 45.

368. *Id.*

369. *Id.*

370. *See, e.g.*, *Some Needed Reform in Bankruptcy Act Suggested by Referee Doran*, THE ST. PAUL GLOBE, Apr. 24, 1900, at 8 ("The law seems to be the most popular with the salaried class. The law is particularly partial to them.").

371. *See To Revise the Bankruptcy Act. Convention of Referees in Bankruptcy to Be Held in Chicago Next Month.*, THE KS. CITY J., June 28, 1899, at 2.

372. *See* SKEEL, *supra* note 86, at 45.

373. *Id.*

374. *Id.* at 145.

efforts would eventually lead to the official formation of the National Association of Referees in Bankruptcy, later renamed to the National Association of Bankruptcy Judges.[375] The pro-debtor congressmen who refused to support a bill that would create permanent bureaucratic positions ultimately lost the war, as creditors, commercial organizations, and the bankruptcy bar were much better resourced and organized.[376]

The legislative design that emerged from this process of deliberation, lobbying, and compromise was a relatively modest one. The referee was a fee-based officer with limited jurisdiction whose findings were nominally subject to review by the district court.[377] As we shall see in the following Part, however, the federal courts and subsequent amendments to the Act enabled an expansion of the referee's exercise of jurisdiction.[378] The post continued to evolve, and by the time Chief Justice Earl Warren remarked that referees engaged "'with more people than any other judge in our judicial system'" and that in "'their hands is a very important facet of our federal law'" it was no longer tenable to treat referees as special masters.[379] Instead, in the words of one member of the bankruptcy bar, "the referee [*was*] the court."[380]

B. *Functionalism in the Lochner Court*

A more granular history of consent in the first cases under the Act furnishes additional evidence that functional considerations were crucial in the Court's analysis.[381] In *Simonson v. Sinsheimer*, the debtor was a firm consisting of three partners which had assigned property in the amount of around $93,000, or around $3.4 million in today's dollars, to the firm's bookkeeper[382] for the benefit of the debtor's creditors.[383] Exemplifying one of the main reasons why bankruptcy law exists (to prevent the debtor from favoring some creditors over others) the debtor seems to have tried to create a state court resolution of the firm's financial distress

375. Paul H. King, *Greetings!*, 1 J. NAT'L ASS'N REFS. BANKR. 1, 1 (1926) (announcing the formation of the Association).

376. SKEEL, *supra* note 86, at 146.

377. Skeel, *supra* note 297, at 334.

378. *See infra* Part III.B.

379. Asa S. Herzog, *The Referee in Bankruptcy: A Judge in Search of a Name*, 75 COM. L.J. 37, 37 (1970) (first quoting 1 PROCEEDINGS OF SEMINAR FOR NEWLY APPOINTED REFEREES IN BANKRUPTCY 1 (Clark Boardman Co. 1964); and then 3 PROCEEDINGS OF THIRD SEMINAR FOR REFEREES IN BANKRUPTCY 1 (Clark Boardman Co. 1966)).

380. *Id.* at 38.

381. *See, e.g.*, Louisville Tr. Co. v. Comingor, 184 U.S. 18, 20–22 (1902).

382. 95 F. 948, 948 (6th Cir. 1899).

383. *Louisville Tr. Co.*,184 U.S at 19–20.

by paying certain consenting creditors $0.50 on the $1 while leaving other creditors with nothing.[384] This conduct exemplifies the textbook definition of a preference.[385] When other creditors caught wind of this attempt, they filed a petition in the district court and pushed the firm into involuntary bankruptcy.[386]

The bookkeeper had attempted to settle the assignment in state court by disbursing half of it and transferring the rest to the custody of the state court.[387] After going up on appeal to the Sixth Circuit twice (both times decided by then-Judge William Howard Taft) the bookkeeper was made a defendant to the bankruptcy as an assignee.[388] The referee then issued an order to the bankruptcy trustee, asking that it recover the remaining funds in the custody of the state court, and after the funds were recovered, he issued another order to the assignee, directing him to show why he and his attorney should not pay over their commissions and fees.[389] After unsuccessful efforts to avoid paying back the commission and fees, the bookkeeper argued the referee had no jurisdiction to order him to pay the monies in a summary way—an early version of what the Court would describe as a summary process.[390] After this argument failed, the bookkeeper appealed to the district court, arguing that neither the referee nor the district court had jurisdiction over him because he never consented to their exercise of jurisdiction.[391] The district court dismissed the appeal and held that the court had jurisdiction "for the reason that by long acquiescence in that mode of procedure the respondent should be regarded as having consented thereto."[392]

The bookkeeper ultimately won, but the appellate court's reasoning about why he won reveals much about the functional backdrop of bankruptcy jurisdiction.[393] The Sixth Circuit reversed, reasoning that the consent mentioned in § 23(b) of the 1898 Act meant "consent to the tribunal in which the controversy is

384. *Simonson*, 95 F. at 949.

385. *See* MARK J. ROE & FREDERICK TUNG, BANKRUPTCY AND CORPORATE REORGANIZATION: LEGAL AND FINANCIAL MATERIALS 217 (4th ed., Found. Press 2016) ("The basic elements of a preference are: 1. debtor makes a payment 2. within 90 days of the bankruptcy petition 3. on an antecedent debt 4. when the debtor is insolvent [and] 5. that allows the recipient to collect more than otherwise (i.e., to be preferred).").

386. *In re* Simonson, 92 F. 904, 905–06 (D. Ky. 1899).

387. *Louisville Tr. Co.*, 184 U.S. at 20–22.

388. *Id.* at 20; *see also Simonson*, 95 F. at 949; Simonson v. Sinsheimer, 100 F. 426 (6th Cir. 1900).

389. *Louisville Tr. Co.*, 184 U.S. at 20–21.

390. *Id.* at 20–22.

391. *Id*. at 22–25.

392. Sinsheimer v. Simonson, 107 F. 898, 904 (6th Cir. 1901).

393. *Id.* at 906.

to be carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made."[394] The Supreme Court affirmed.[395] Chief Justice Melville Fuller explained that mere joinder of the bookkeeper, without a cause of action or a prayer for special relief, did not, on its own, give the district court jurisdiction over the man.[396] In fact, it looked like the creditors joined him in the action to prevent him from taking further actions in state court in his capacity as assignee.[397] Responding to an order to show cause could not be construed as the granting of consent because the bookkeeper "did not come in voluntarily, but in obedience to peremptory orders."[398] Relying on a prior holding under the previous bankruptcy statute, the Court concluded that Congress could not have intended the parties' deprivation of property in summary process.[399] Strikingly, the Court referred to the jurisdiction of the bankruptcy court as subject matter jurisdiction, which "may be limited in various ways."[400]

The Court's holding might be understood as functionalist in at least three ways. First, Chief Justice Fuller refused to see the bookkeeper as a true debtor, despite his having been properly joined in the litigation as a defendant.[401] Instead, he examined the purpose behind this joinder, and imputed to the litigants, the district court, and the referee the motive of preventing the bookkeeper from acting further on the property in state court.[402] Second, he treated bankruptcy jurisdiction as a kind of subject matter jurisdiction regulated by a broader constitutional value of due process, without any mention of the Fifth Amendment.[403] In this view, a party who might not be a true debtor cannot be hauled into court and deprived of his property without his consent.[404] A litigant's response to an order to show cause does not constitute consent because it was not voluntary.[405] While this reasoning borders on tautology, it also reveals a deeply functionalist approach to an Article III tribunal's ability to exercise jurisdiction. It is an approach that requires balancing, at least on some level, the property interests of the litigant against the

394. *Id.*
395. *Louisville Tr. Co.*, 184 U.S. at 26.
396. *Id.* at 22–25.
397. *Id.* at 25.
398. *Id.* at 26.
399. *Id.* at 25 (citing Marshall v. Knox, 83 U.S. 551 (1872)).
400. *Id.* at 25–26.
401. *See id.* at 22–25.
402. *Id.* at 25–26.
403. *Id.*
404. *Id.* at 26.
405. *Id.*

jurisdictional grant given to the tribunal by Congress.[406] Third, the Fuller opinion begins by distinguishing between consent to the jurisdiction of the court and consent to the kind of process.[407] This distinction requires the Court to examine not only the identity of the institution that is wielding adjudicative power but also the kind of power that it is wielding.[408] It is a distinction embedded in functional considerations about what power itself looks like.[409]

The story of the disputes between bankruptcy courts and state courts shows one side of jurisdictional contestation over the powers of the referee. Another side is the story of the disputes between the referee and the district court judge. In policing the boundary between the two officers, one adjunct to the other, the appellate courts continued to rely on functional considerations. This tendency is exemplified by the case of *Weidhorn v. Levy*.[410] In that case, the Supreme Court reversed the First Circuit's holding, and upheld the referee's issuance of an equitable decree in a plenary proceeding because the property was not in the estate's custody.[411] The debtor had conveyed property to his brother four months before filing for bankruptcy.[412] A fraudulent transfer of assets by the debtor to a third party was alleged.[413] A fraudulent transfer normally occurs within a given period prior to filing, impermissibly enriches the third party on account of other creditors, and violates the priority scheme that bankruptcy law contemplates.[414] The 1898 Act had a long prohibition on preferential transfers that lasted four months.[415] In this circumstance, the trustee filed a bill of complaint—a bill in equity that alleged the conveyances were made in fraud of creditors and thus invalid under the Bankruptcy Act and Massachusetts's statute of Elizabeth.[416] The referee first held that he had jurisdiction to hear a plenary suit by the trustee,

406. *See id.* at 22–25.

407. *Id.* at 25–26.

408. *See id.* at 26.

409. *See id.*

410. 253 U.S. 268, 270 (1920).

411. *Id.* at 274.

412. *In re* Weidhorn, 243 F. 756, 757 (D. Mass. 1917), *rev'd*, 253 F. 28 (1st Cir. 1918), *rev'd sub nom*. Weidhorn v. Levy, 253 U.S. 268 (1920).

413. *Id.*

414. Bankruptcy Act of 1898, ch. 541, § 60(b), 30 Stat. 544 (repealed 1978).

415. *Id*. The Act also contained an intent requirement; the trustee could avoid payment if the preferred creditor had "reasonable cause to believe that it was intended . . . to give a preference." *Id.* The 1910 Amendments exchanged the intent requirement for one of effect. *Id.* (amended 1910); *see also* Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 88 (1986) (discussing the legislative history of the voidable preference provision).

416. *In re Weidhorn*, 243 F. at 757.

unlimited as to amount, to recover property that had never been in the possession of the bankruptcy tribunal.[417] He issued a subpoena and a temporary injunction to restrain the transfer of the property during the pendency of the litigation.[418] Over the jurisdictional objections of the respondent (the brother who held the conveyed property), the referee held a hearing on the merits and entered a final decree voiding the conveyances and ordering surrender of the goods to the trustee.[419] Vacating the referee's order, the district judge evinced a degree of shock about the former's encroachment on his territory.[420] Affirming the referee, he reasoned,

> would amount to a peculiar delegation of the general equity powers of the court, the exact limits of which, territorial or otherwise, it is not easy to understand. If it be regarded as covering all controversies to which the trustee in the case referred might be a party—which is the view of the referee, as I understand it—the effect is to create a new court having concurrent jurisdiction in equity with the state courts, and possibly with the District Court, as to cases in which a certain person, viz. the trustee in bankruptcy of the estate referred, may be a party.[421]

The district judge reversed the referee's decision, drawing on prior opinions from district courts in North Carolina, Iowa, and Massachusetts, an "able opinion" from a referee adjunct, and the balance of treatises on bankruptcy.[422] He distinguished prior case law where the referee had taken jurisdiction over a similar plenary suit because he had done so by agreement of the respondents.[423]

In the end, the district judge's holding would survive by the power of a functionalist reading of the Act.[424] Initially, the First Circuit reversed the district court's ruling, holding that the Act conferred upon the referee the power to exercise jurisdiction.[425] It employed a whole-text canon of construction to determine that "courts" in the statute included bankruptcy referees.[426] The intent of Congress, Judge Frederic Dodge reasoned, may be inferred to permit the exercise of all the functions by the bankruptcy court except the ones that are specifically listed in the

417. *Id.*
418. *Id.*
419. *Id.*
420. *See id.* at 758.
421. *Id.*
422. *Id.* at 758–59.
423. *See id.* at 759.
424. *See* Weidhorn v. Levy, 253 U.S. 268, 274 (1920).
425. *See In re* Weidhorn, 253 F. 28, 30, 32 (1st Cir. 1918), *rev'd sub nom.* Weidhorn v. Levy, 253 U.S. 268, 274 (1920).
426. *Id.* at 31.

statute.[427] The purpose was to enable "a number of local officers of the court, easily accessible throughout each district, instead of empowering the District Judge alone to exercise" the power conferred by the statute.[428] And besides, the district judge could always reverse the referee's finding.[429] The Supreme Court reversed, holding that the dispositive issue here had been the possession of property.[430] There was no reason "to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit" concerning property that was not in the estate's possession.[431] The referee's powers were "not equal to or co-ordinate with those of the court or the judge, but subordinate thereto;" he thus "bec[ame] 'the court' only by virtue of the order of reference."[432]

The analysis that allows the Court to preserve the jurisdiction of the district court is formalist in one way, and functionalist in another.[433] In determining whether the referee had jurisdiction, the relevant inquiry was whether the property was in the custody of the court.[434] He could only have jurisdiction if the property were in the estate's possession.[435] The inquiry is thus not about the identity of the institution wielding the power, but about the ownership of the property before filing.[436] While the holding is not staunchly formalist, it still relies on a categorical boundary.[437] When the property is with the estate, the referee can exercise jurisdiction over the owner, who will always be the debtor.[438] When the property is not with the estate, the district judge needs to rule.[439] However, to the extent this reading is formalist, it is moderated by functional considerations.[440] The Court could easily have held that district judges must always rule on preferential transfers, but it did not.[441] Instead, it attempted to construe the statute more narrowly than the First Circuit to preserve the unique jurisdiction of the district

427. *See id.* at 30.
428. *Id.*
429. *See id.* at 31.
430. *See* Weidhorn v. Levy, 253 U.S. 268, 271–72, 274 (1920).
431. *Id.* at 273.
432. *Id.*
433. *See* Wellness Int'l Network, Ltd. V. Sharif, 575 U.S. 665, 669 (2015); Chemerinsky, *supra* note 55, at 185.
434. *Levy*, 253 U.S. at 271–72.
435. *Id.*
436. *See id.*
437. *See id.*
438. *See, e.g., id.*
439. *See, e.g., id.*
440. *See id.* at 273–74.
441. *See id.*

court.[442] And indeed, the Court's interpretation bespeaks more than a concern about the rights to property protected by Lochner-era classical liberalism.[443] It also reveals a motivation to protect the singularity of the Article III tribunal; the referee is subordinate, not coordinate, and only has so much power as the district court's order of reference imparts.[444] The Court's reasoning on this point is intensely functionalist.[445] If the referee "becomes" the court only by virtue of the order of reference, then the nature of judicial institutions changes depending on the circumstances.[446] For instance, a general order could grant referees the power to consider preferential transfers, and Article III would pose no obstacle. The functionalist values of adaptability and efficacy are put on full display here. Crucially, the Court is also concerned with the kind of power that the referee is wielding.[447] It is power over property, which the bankruptcy tribunal is meant to exercise.[448] It is only because the property was not in the estate's possession that the referee was prohibited from presiding over this matter.[449]

C. *Functionalism in the Lower Courts*

We should be careful not to make too much out of *Weidhorn* because the circuit courts certainly read its holding as quite limited.[450] The opinion might stand for the proposition that conveyances by a debtor more than four months prior to the filing can only be set aside as fraudulent in a plenary suit, if the property is in the possession of the transferee and not in the custody of the court.[451] In *Logan v. Haynes*, the Eighth Circuit relied on *Weidhorn* to sustain an order of the referee allowing an adverse claim against the debtor in a summary proceeding.[452] The referee had found as a matter of fact that the debtor had secured a note by chattel mortgage and executed it on his property.[453] He had then decided to "pass on the question as to whether the mortgage constituted a voidable preference."[454] He held

442. *See id.*
443. *See id.* at 271–74.
444. *See id.* at 273.
445. *See id.* at 273–74.
446. *See id.* at 273.
447. *See id.* at 273–74.
448. *See, e.g.*, *id.* at 271–72.
449. *See id.* at 271–72, 274.
450. *See, e.g.*, Logan v. Haynes, 11 F.2d 369, 370 (8th Cir. 1926). *See generally Levy*, 253 U.S. at 268.
451. *See Logan*, 11 F.2d at 369–70.
452. *Id.*
453. *Id.* at 370.
454. *Id.*

that it did not and "overruled the objections of the trustee."[455] The Eighth Circuit affirmed the district court's decision sustaining the order and overruling the objections of the trustee.[456] Relying on the Supreme Court's opinion in *Weidhorn*, the court reasoned that the jurisdiction of the referee depended on the possession of the property.[457] In the case, the property was in the custody of the bankruptcy court, it was included in the bankrupt's schedules, and was not being held adversely.[458] Additionally, and perhaps more importantly, the claimant had filed a proof of claim in the bankruptcy proceeding and thus "submitted herself and her claim to the jurisdiction of the referee."[459]

The last holding is particularly striking given the Court's recent non-Article III jurisprudence. In *Stern*, the Court rejected the argument that the adverse claimant's filing of a proof of claim in a bankruptcy proceeding meant that he had submitted himself to the jurisdiction of the bankruptcy court.[460] In fact, the Court's holding in *Stern* stands athwart a long history that supported the opposite proposition that a litigant's filing of a proof of claim was enough to subject her to the jurisdiction of the bankruptcy court.[461] By 1934, it was clear from the amended statute, and the Supreme Court's reading of it, that plenary jurisdiction applied where the controversy concerned property in the possession of third persons or where the controversy involved no specific property, such as an action sounding in contract or tort.[462] By the 1970s, before the passing of the Act of 1978, a majority of circuit courts held that the filing of a proof of claim constituted implied consent.[463] The fact that a proof of claim could constitute litigant consent in the

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *See* Stern v. Marshall, 564 U.S. 462, 503 (2011).

461. *See id.*; *see, e.g.*, *Logan*, 11 F.2d at 369–70.

462. *See* Schumacher v. Beeler, 293 U.S. 367, 375–77 (1934) (describing the distinction); *see also* Strasheim, *supra* note 282, at 511 ("If the controversy is over property which the bankruptcy court has in its possession, it arises 'in a proceeding' and summary jurisdiction exists. Absent possession, if the third person consents, summary jurisdiction also exists. Other controversies, except, of course, those dealt with in the supplemental provisions of the Act, are 'at law and in equity' for which plenary is necessary.").

463. *See, e.g.*, Powell v. Maher, 307 F.2d 397, 397 (D.C. Cir. 1961); Nortex Trading Corp. v. Newfield, 311 F.2d 163, 164 (2d Cir. 1962); *In re* Majestic Radio & Television Corp., 227 F.2d 152, 156 (7th Cir. 1955).

Lochner era, but not under the current jurisdictional regime, reveals the uniqueness of the current Court's formalism.[464]

The relevance of litigant consent, which is separate from the possession of the contested property, returns us to a discussion of functionalism. In its modern decisions, the Court has continued to change the outer bounds of non-Article III tribunals' jurisdiction.[465] Formalists insist that consent cannot be dispositive, and functionalists treat it as nearly dispositive.[466] This Part has shown that whatever consent may have meant in other contexts, whatever one may think about the proper bounds of non-Article III jurisdiction, consent and other functional considerations remained deeply relevant in the jurisdictional analysis under the 1898 Act.[467] Even the Lochner-era Court had nothing to say in objection to it.[468] Crucially, because the Court reversed the referee in both *Louisville Trust Co v. Comingor* and *Weidhorn*, this history suggests that functionalism is just as equipped as formalism to guard the boundaries of Article III.[469]

IV. CONSENT IN MASS TORT BANKRUPTCIES

This Part returns to the two bankruptcies with which this Article began. It explains the circuit split that occasioned them, traces the doctrinal developments in both cases, and articulates the implications of the two courts' different holdings.[470] In *Purdue Pharma*, Judge Colleen McMahon of the Southern District of New York vacated the bankruptcy judge's confirmation of a Chapter 11 plan that released members of the Sackler family from personal liability on the ground that the statute did not authorize it and that *Stern* prohibited such nonconsensual third-party releases.[471] The Second Circuit reversed on statutory grounds, but upheld the constitutional holding.[472] According to the Second Circuit, this means that *Stern* requires the bankruptcy judge to propose findings regarding the

464. *See* Brubaker, *supra* note 56, at 29 ("[N]on Article III bankruptcy referees under the 1898 Act system *did* enter final orders and judgements with consent of the litigants . . . ."); *Stern*, 546 U.S. at 503.

465. *See* Pfander, *supra* note 86, at 660–61.

466. *See, e.g.*, *Stern*, 546 U.S. at 503 (articulating formalism); *see Logan*, 11 F.2d at 369–70 (articulating functionalism).

467. *See supra* Part III.C.

468. *See* Weidhorn v. Levy, 253 U.S. 268, 271–74 (1920).

469. *See* Louisville Tr. Co. v. Comingor, 184 U.S. 18, 26 (1902); *Levy*, 253 U.S. at 268.

470. *See infra* Part IV.

471. *See In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 78–79, 89–90, 118 (Bankr. S.D.N.Y. 2021).

472. *See* Purdue Pharma L.P. v. City of Grande Prairie, 69 F.4th 45, 68, 82–85 (2d Cir. 2023).

nonconsensual third-party releases to the district court, but that it cannot enter final judgments on them.[473] In *Boy Scouts of America*, Judge Richard Andrews upheld the bankruptcy judge's confirmation of a Chapter 11 plan that released regional affiliates of the national Boy Scouts nonprofit from any direct liability.[474] As they currently stand, both cases have upheld bankruptcy judges' decisions to release third parties from direct liability.[475] This outcome implies that even a categorical rule like the one in *Stern* cannot achieve the Court's goal of reigning in the power of the bankruptcy court where the Code itself seems to authorize broad exercises of power.[476] In giving the Sacklers and the Boy Scouts a global peace that they could not get elsewhere, these two rulings suggest that if Article III is meant to be a guardian of individual liberty, the Court's formalism may be an inapposite method to achieve such a goal.[477] Also, to the extent that consent is meant to be a release valve for concerns about the constitutionality of a bankruptcy court's exercise of jurisdiction, the *nonconsensual* release of direct claims against third parties suggests that the Court may need to reach beyond consent and articulate a more robust functionalism.

A circuit split exists regarding the bankruptcy court's power to authorize nonconsensual third-party releases.[478] The major disagreement concerns questions of statutory authority.[479] The majority view, espoused by the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits,[480] is that bankruptcy courts have such statutory authority based on a fact-intensive analysis that closely

473. *See generally* Stern v. Marshall, 546 U.S. 462 (2011).

474. Nat'l Union Fire Ins. v. Boy Scouts of Am. & Del. BSA, LLC (*In re* Boy Scouts of Am. & Del. BSA, LLC) (*Boy Scouts of Am. II*), 650 B.R. 87, 134–35 (D. Del. 2023).

475. *See City of Grande Prairie*, 69 F.4th at 68, 85; *Boy Scouts of Am. II*, 650 B.R. at 134–35.

476. *See City of Grande Prairie*, 69 F.4th at 68, 85; *Boy Scouts of Am. II*, 650 B.R. at 134–35.

477. *See City of Grande Prairie*, 69 F.4th at 45; *Boy Scouts of Am. II*, 650 B.R. at 87.

478. *See, e.g.*, Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir. 2005). *But see, e.g.*, Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm., 584 F.3d 229, 252 (5th Cir. 2009).

479. *See City of Grande Prairie*, 69 F.4th at 64.

480. *See Metromedia Fiber Network*, 416 F.3d at 141; Gillman v. Cont'l Airlines, 203 F.3d 203, 214–18 (3d Cir. 2000); Menard-Stanford v. Mabey, 880 F.2d 694, 702 (4th Cir. 1989); Class Five Nev. Claimants v. Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); Aradigm Commc'n, Inc. v. Fed. Commc'n Comm'n, 519 F.3d 640, 657 (7th Cir. 2008); Blixseth v. Credit Suisse, 961 F.3d 1074, 1081–82 (2020); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078 (11th Cir. 2015).

examines "the nature of the reorganization."[481] Most of them have situated the statutory authority of the court in 11 U.S.C. § 105(a), which permits the bankruptcy judge to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code.[482] They have resolved an apparent conflict with 11 U.S.C. § 524(e), which provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt[,]" by reading the latter section narrowly.[483] The minority view, held by the Fifth and Tenth Circuits, is that nonconsensual third-party releases are unavailable except where expressly authorized by the Bankruptcy Code; which is to say, only in asbestos cases.[484] The constitutional dimension of this question has not been explored in equal depth. However, there have been two developments. First, since *Stern*, courts have reasoned about this question of constitutional power separately from the question of subject matter jurisdiction. This is a departure from historical practice.[485] Second, only the Second and Third Circuits appear to have reached the constitutional question. The Second Circuit rule prohibits bankruptcy judges from entering final judgments on nonconsensual third-party releases.[486] The Third Circuit rule is that bankruptcy judges can approve such releases in connection with plan confirmation.[487] This "split within a split" illustrates the unsettled nature of the doctrine, even 12 years after *Stern*.[488]

A. Purdue Pharma

The efforts to reason in a formalist way about bankruptcy jurisdiction are on full display in the diverging opinions in *Purdue Pharma*.[489] In arguably the most famous bankruptcy in history, the pharmaceutical company filed a Chapter 11 petition in September 2019 after being faced with a "veritable tsunami of

481. *See Aradigm Commc'n*, 519 F.3d at 657 (describing the fact-intensive nature of the analysis).

482. 11 U.S.C. § 105(a); *see, e.g.*, *Aradigm Commc'n*, 519 F.3d at 657.

483. 11 U.S.C. § 524(e); *see, e.g.*, *Class Five Nev. Claimants*, 280 F.3d at 657.

484. *See* 11 U.S.C. § 524(g) (allowing third-party releases in asbestos bankruptcies); Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm., 584 F.3d 229, 252 (5th Cir. 2009); Lansing Diversified Props. v. First Nat'l Bank & Tr. Co., 922 F.2d 592, 601 (10th Cir. 1990).

485. *See supra* notes 166–75 and accompanying text.

486. *See* Purdue Pharma L.P. v. City of Grande Prairie, 69 F.4th 45, 68 (2d Cir. 2023).

487. *See In re* Millennium Lab Holdings II, LLC., 945 F.3d 126, 137 (3d Cir. 2019).

488. *See* Stern v. Marshall, 546 U.S. 462, 503 (2011); *see also City of Grande Prairie*, 69 F.4th at 68. *But see In re Millennium Lab Holdings II*, 945 F.3d at 137.

489. *In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26 (Bankr. S.D.N.Y. 2021).

litigation."[490] The claims arose out of Purdue's 2007 and 2020 plea agreements with the United States, in which the company admitted to marketing its proprietary drug OxyContin as non-addictive, submitting false claims to the federal government for reimbursement of medically necessary opioid prescriptions, and other substantial deliberate wrongful conduct.[491] The goal of the bankruptcy petition was to resolve both existing and future claims against the company arising from the prescription of OxyContin.[492] Pursuant to the automatic stay provision of the Bankruptcy Code, all civil litigation against Purdue ceased immediately.[493] Judge Robert Drain of the United States Bankruptcy Court for the Southern District of New York also issued an additional stay that halted litigation against non-debtor parties including the Sackler family, who had long owned Purdue Pharma, and whose collective net worth was higher than the capitalization of the debtor in possession.[494] The parties included the debtor in possession—the Sackler family—and scores of various creditor committees including local and state governments, Native tribes, individuals, and even future creditors like children who would be born with addiction.[495] For two years the parties negotiated the terms of the plan, in which the Sacklers hoped to include a series of nonconsensual third-party releases.[496] These would shield the members of the family from direct liability arising from the sale, marketing, and distribution of OxyContin.[497] This type of plan, modeled after the one previously approved by the Second Circuit,[498] allowed for broad releases of the Sacklers and their associates from any civil liability stemming from Purdue Pharma's OxyContin operation.[499] This plan, however, was more aggressive because it required the release of direct claims against the Sacklers, separate and distinct from the derivative liability that claimants could assert against them through the Sacklers' work for Purdue.[500] These were claims

490. *Id.* at 26, 35.

491. *Id.* at 34–35.

492. *Id.* at 35.

493. *Id.*; *see also* 11 U.S.C. § 362(a) (providing for the automatic stay).

494. *Purdue Pharma I*, 635 B.R. at 35.

495. *See id.* at 58.

496. *See In re* Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53, 59–60 (Bankr. S.D.N.Y. 2021).

497. *See id.* at 58–60.

498. *See* Johns-Manville Corp. v. Chubb Indem. Ins. Co., 600 F.3d 135, 153 (2d Cir. 2010) (holding that there is no independent jurisdictional requirement that third-party claim can only be barred by a plan if it is derivative of the estate's rights).

499. *See Purdue Pharma II*, 633 B.R. at 97–98.

500. *See* Purdue Pharma L.P. v. City of Grande Prairie, 69 F.4th 45, 72 (2d Cir. 2023).

that "could not be released if the Sacklers were themselves debtors in bankruptcy."[501]

Creditors objected to the plan on three grounds, and Judge Drain disposed of all of them. First, they argued that the bankruptcy court lacked subject matter jurisdiction to impose the release on those who did not consent to it.[502] Judge Drain held that third-party releases directly affected the res of the estate.[503] The analysis turned on the "effect of the claims on the estate rather than on whether the claims [were] 'derivative.'"[504] Because the claims would definitely have an effect on the estate, it was insignificant whether they were direct or derivative.[505] The bankruptcy court therefore had subject matter jurisdiction.[506] Second, creditors argued that an imposition of third-party releases would violate the due process rights of those not before the court.[507] They reasoned that the releases were claim adjudications in the absence of affected parties.[508] The plan thus failed the constitutional floor of procedural due process under *Mullane v. Central Hanover Bank and Trust Co*.[509] Judge Drain held that due process was not violated because the release was not an adjudication of a claim under Second Circuit case law and because the *Mullane* standard was met by the debtor's compliance with a bankruptcy rule that requires the prominent display of the plan's release language.[510] Third, and most important for our purposes, creditors argued that the bankruptcy court lacked the constitutional power to issue a final order confirming a plan that contains third-party releases under *Stern* and its progeny.[511] Judge Drain held that third-party releases were not only core under the Bankruptcy Code, but also "constitutionally core" under *Stern*.[512] He described the bankruptcy court's power to enter final judgments on third-party releases as part of a request for confirmation of a Chapter 11 plan as "central to the bankruptcy court's adjustment of the debtor/creditor relationship."[513] Judge Drain distinguished this

501. *See In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 36 (Bankr. S.D.N.Y. 2021).

502. *See Purdue Pharma II*, 633 B.R. at 95.

503. *See id.* at 97–98.

504. *See id.* at 98.

505. *See id.* at 97–98.

506. *Id.*

507. *See id.* at 98–99.

508. *See id.* at 98.

509. *Id.* at 98–99; *see* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

510. *Purdue Pharma II*, 633 B.R. at 98–99.

511. *Id.* at 99–100.

512. *Id.*

513. *Id.* at 100.

nonconsensual third-party release from the releases and injunctions under the Federal Rule of Bankruptcy Procedure 7065, which allows for preliminary injunctions of third-party claims, and which was not constitutionally core.[514] In other words, the confirmation proceeding itself, and not the underlying claim, was what gave the bankruptcy court the power to enter a final judgment that would shield the Sacklers from liability.[515]

It is worth pausing here to consider the unexpected consequence of this reasoning, especially as it pertains to the creditors' first and third arguments.[516] By the bankruptcy court's logic, nearly any claim resolved in a confirmation plan would directly affect the res of the estate so long as some element of privity between the estate and the non-debtor seeking release could be established.[517] The categorical rule, which is meant to limit the power of the bankruptcy court, instead enlarges it by far. Also, any claim resolved in the confirmation proceeding would automatically be within the bankruptcy court's constitutional power *because* it was resolved in the confirmation proceeding. A preliminary injunction of a third-party claim, certainly a less aggressive remedy, on the other hand, would not be part of the constitutional power of the bankruptcy court. This is an intense formalism: the category of the proceeding rather than the substance of the claim determines the constitutional power and its limit. Ironically, the formalist outcome bestows upon the court powers broader than *Stern* itself seems to contemplate.[518]

The District Court reversed.[519] Judge McMahon held that "[d]ebtors and their affiliated non-debtor parties cannot manufacture constitutional authority to resolve a non-core claim by the artifice of including a release of that claim in a plan of reorganization."[520] She reasoned further that "extinguishing a non-core claim and enjoining its prosecution without an adjudication on the merits" was a final determination equivalent to a dismissal of that claim.[521] If allowed to stand, third

514. *Id.*

515. *See id.* at 99–100.

516. *See id.* at 95–98, 99–100.

517. *See id.* at 97–98. The Third Circuit test asks whether such releases are fair and necessary to the restructuring of debtor/creditor relations supported by specific factual findings. *See In re* Millennium Lab Holdings II, LLC., 945 F.3d 126, 139 (3d Cir. 2019) ("The hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings to support these conclusions[.]") (quoting Gillman v. Cont'l Airlines, 203 F.3d 203, 214 (3d Cir. 2000)).

518. *See generally* Stern v. Marshall, 546 U.S. 462 (2011).

519. *See In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 118 (Bankr. S.D.N.Y. 2021).

520. *Id.* at 81.

521. *Id.* at 82.

parties could not pursue the Sacklers because of "principles of former adjudication."[522] While plan confirmation was a core function of the bankruptcy court, nonconsensual releases of third parties' claims against the Sacklers neither stemmed from the bankruptcy nor would necessarily be resolved in the claims allowance process.[523] In fact, any finding on the third-party releases here would be a conclusion of law, subject to de novo review under any standard, thus limiting the practical import of the *Stern* issue.[524] Therefore, Judge McMahon concluded, Congress may not allow a bankruptcy court to enter such an order without the parties' consent, which was absent here.[525]

The District Court's holding exemplifies in miniature the disarray caused by the Supreme Court's ruling in *Stern*.[526] First, it adds further evidence to the hypothesis that bankruptcy jurisdiction in the constitutional sense differs from subject matter jurisdiction. Judge McMahon's opinion suggests as much in its disaggregation of the analyses of subject matter jurisdiction and due process from the analysis under *Stern*.[527] Whatever bankruptcy jurisdiction is in *Stern*, it is not only subject matter jurisdiction or a matter of due process.[528] It is a distinct test of authority and its contours remain unclear. Second, the formal rule of *Stern* itself seems to come with a major functional caveat.[529] Judge McMahon explained that Congress could not authorize a bankruptcy court to enter a final judgment, including a paradigmatically nonconsensual release of liability for the Sacklers, absent the consent of the parties.[530] Functionalism again: the litigants could ostensibly waive a constitutional right by the power of some combination of actions and forbearances that were absent from this case. Third, and equally crucial, the categorical *Stern* rule is powerless to preserve the individual liberty of thousands of claimants, who may wish to pursue their own individual claims against the Sacklers. To be sure, after *Stern*, parties cannot be deemed to consent to the bankruptcy tribunal's jurisdiction simply by filing a proof of claim.[531] But neither *Stern* nor *Wellness* gives us a clear indication about what consent actually

522. *Id.*
523. *Id.*
524. *Id.*
525. *Id.* at 81–82.
526. *Id.*; Stern v. Marshall, 546 U.S. 462 (2011).
527. *See Purdue Pharma I*, 635 B.R. at 73–74.
528. *See Stern*, 546 U.S. at 462.
529. *See id.* at 503–05.
530. *Purdue Pharma I*, 635 B.R. at 81–82.
531. *Stern*, 564 U.S. at 493–99.

looks like, or why it should allay concerns about the bankruptcy judge's competence.[532]

What exactly constitutes consent under *Stern* and *Wellness* remains unclear in the current legal landscape.[533] In the case of *In re Kirwan Offices S.À.R.L.*, the Second Circuit held that the third party had consented to the bankruptcy judge's exercise of jurisdiction for two reasons.[534] First, he presented his shareholder claims to the court when he moved to dismiss the bankruptcy petition and compel arbitration.[535] Second, he declined to participate in the confirmation hearing despite having notice of it.[536] These two facts, put together, constituted implied consent.[537] The litigant voluntarily presented claims before the bankruptcy court and only objected to the plan after the confirmation order was entered.[538] The policies of "increasing judicial efficiency and checking gamesmanship" being implicated, the Second Circuit found implied consent.[539] It is difficult to imagine that that these factors would be relevant in the resolution of thousands of claims in *Purdue Pharma*.[540] To the extent that consent is meant to be a release valve for concerns about the competence of the bankruptcy judge to adjudicate certain claims, the fact that the Second Circuit ultimately allowed the nonconsensual release of direct claims against third parties suggests that the Court must move beyond consent and articulate a more robust functionalism.[541]

The Second Circuit was right to defuse the constitutional question by upholding the plan on statutory grounds. Its articulation of a seven-factor test that courts should deploy before imposing nonconsensual third-party releases in a Chapter 11 plan will give helpful guidance to lower courts and practitioners alike.[542] As a matter of public policy, it may not only resolve the reorganization of

532. *See generally id.*; Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

533. *See generally Stern*, 564 U.S. at 462; *Wellness*, 575 U.S. at 665. *See also* Lynch v. Mascini Holdings Ltd. (*In re* Kirwan Offices S.À.R.L.), 792 F. App'x 99, 103–04 (2d Cir. 2019) (discussing *Stern* and *Wellness*).

534. *Lynch*, 792 F. App'x at 103.

535. *Id.*

536. *Id.*

537. *Id.* at 103–04.

538. *Id.* at 103.

539. *Id.* at 103–04 (quoting Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015)).

540. *See In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 34 (Bankr. S.D.N.Y. 2021).

541. *See* Purdue Pharma L.P. v. City of Grande Prairie, 69 F.4th 45, 57 (2d Cir. 2023).

542. *See id.* at 19–21 (articulating the seven factors: (1) "whether there is an identity of interests between the debtors and the released third parties, including indemnification

a beleaguered corporate entity, but also give much-needed relief to thousands of claimants.[543] While it is true that the confirmation of Purdue Pharma's Chapter 11 plan will achieve a number of benefits for dozens of affected communities, it is also true that the Sacklers will now get a release that would not be available even if they were themselves debtors in bankruptcy.[544] If there are concerns about constitutional policy that the line of cases starting with *Northern Pipeline* and concluding with *Wellness* were supposed to resolve, including the imperative that Article III be a guardian of individual liberty, then *Purdue Pharma* demonstrates that the formalist approach has been found lacking.[545] Perhaps the Second Circuit's statutory approach is right for this case, but as more major companies seek bankruptcy protection as a way to minimize their liability,[546] a more comprehensive solution may be necessary. It is disturbing that nonconsensual third-party releases are available on a massive scale in bankruptcy but not elsewhere. This reality raises questions about how our society distributes the consequences of harm and how it regulates consent. However, it is not obvious that a categorical constitutional rule will solve the most serious problems that such a rule is meant to address. It is perhaps because of the underlying constitutional issues raised by nonconsensual third-party claims releases that the Supreme Court stayed the *Purdue Pharma* plan of reorganization and granted certiorari to resolve the following question: "Whether the Bankruptcy Code authorizes a court to

relationships[;]" (2) "whether claims against the debtor and non-debtor are factually and legally intertwined, including whether the debtor and the released parties share common defenses, insurance coverage, or levels of culpability[;]" (3) "whether the scope of the releases is appropriate[;]" (4) "whether the releases are essential to the reorganization, in that the debtor needs the claims to be settled in order for the *res* to be allocated, rather than because the released party is somehow manipulating the process to its own advantage[;]" (5) "whether the non-debtor contributed substantial assets to the reorganization[;]" (6) "whether the impacted class of creditors 'overwhelmingly' voted in support of the plan with the releases[;]" and (7) "whether the plan provides for the fair payment of enjoined claims") (citations omitted).

543. *See Purdue Pharma I*, 635 B.R. at 115 ("I also acknowledge that the invalidating of these releases will almost certainly lead to the undoing of a carefully crafted plan that would bring about many wonderful things, including especially the funding of desperately needed programs to counter opioid addiction.").

544. *See id.* at 36.

545. *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015); *Purdue Pharma I*, 635 B.R. at 26.

546. *See, e.g.*, Adam Levitin, *The Texas Two-Step's New Key*, CREDIT SLIPS (Feb. 20, 2023, 11:53 PM), https://www.creditslips.org/creditslips/2023/02/the-texas-two-steps-new-key.html [https://perma.cc/PH4E-A45H] (describing the divisional merger and Chapter 11 petition of Tehum Care Services, one of the nation's largest providers of healthcare for incarcerated individuals, which now seeks to shield itself from lawsuits regarding its inadequate provision of care).

approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent."[547] Even though the question presented turns on statutory questions, the litigation in the lower courts suggests that the matter of consent will be the agon of a new drama in the history of bankruptcy jurisdiction.

B. Boy Scouts of America

In the *Boy Scouts of America* case, the District of Delaware upheld the confirmation of a plan that involved third-party releases.[548] The debtor, the national Boy Scouts organization, was created by Congress as a District of Columbia corporation in 1915 "to promote . . . the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues[.]"[549] To accomplish this mission, the nonprofit relies on 250 Local Councils, separate and independent nonprofit entities organized under the laws of the state in which they are located.[550] It also relies on thousands of Chartered Organizations: religious, civic, or community institutions that provide facilities for Scout meetings and occasionally also help select troop leaders and volunteers.[551] Finally, it receives services from six non-debtor affiliates: an investment management company, an endowment fund, a fundraising organization, a career education program, an "Adventure Base" in West Virginia, and a Canadian arm.[552] The national organization and its affiliates are all substantially insured.[553] Prepetition, the Boy Scouts of America, the Local Councils, and the chartered organizations were all named as defendants in hundreds of sexual abuse actions.[554] The kinds of harm alleged in these complaints ranged "from harassment to inappropriate touching to penetration."[555] Some

547. Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031, at *1 (U.S. Aug. 10, 2023).

548. *See* Nat'l Union Fire Ins. v. Boy Scouts of Am. & Del. BSA, LLC (*In re* Boy Scouts of Am. & Del. BSA, LLC) (*Boy Scouts of Am. II*), 650 B.R. 87, 135 (D. Del. 2023) ("D&V and Lujan Claimants argue that there is no statutory authority for the Bankruptcy Court to grant non-consensual third-party releases. They are wrong.").

549. *See In re* Boy Scouts of Am. & Del. BSA, LLC (*Boy Scouts of Am. I*), 642 B.R. 504, 521 (Bankr. D. Del. 2022).

550. *Id.* at 522.

551. *Id.* at 523–24.

552. *Id.* at 524.

553. *See id.* at 526–31 (describing the prepetition insurance litigation).

554. *Id.* at 525, 525 n.41 (citing the confirmation plan's definition of sexual abuse).

555. *Id.* at 525.

described "a protracted 'grooming' process."[556] Yet others spoke of patterns of abuse within Scouting ranks since at least 1920, and further alleged that the national nonprofit kept secret records of volunteers who were alleged to have molested Scouts in "so-called ineligible volunteer files or perversion files."[557] The plaintiffs' theories of liability included various forms of negligence, fraud, and breach of fiduciary duty.[558] The remedies sought included economic, non-economic, and punitive damages, as well as non-monetary relief such as publicizing the names of known abusers, creating a toll free number to report abuse, and orders for letters of apology.[559]

Chief Judge Laurie Silverstein, the bankruptcy judge, began her 185-page opinion by remarking that it was "a case about trust–or more accurately–lack of trust."[560] Boy Scouts and their parents had trusted this "lionized institution" that betrayed them.[561] She acknowledged that "[t]hese boys–now men–seek *and deserve* compensation" for the sexual abuse that they endured.[562] She also said that "no compensation will ever be enough."[563] Indeed, this "emotionally charged" case saw 82,209 claimants file proofs of claim asserting sexual abuse.[564] Claimants sent more than 1,000 letters to Chief Judge Silverstein, each with a "story to tell, many for the first time."[565] Their views of the appropriate remedy differed.[566] Some believed that the national organization and its affiliates should cease to exist[567] At the same time, Chief Judge Silverstein acknowledged the interest of the Boy Scouts of America in continuing its mission.[568]

In order to enable the Boy Scouts of America to actualize its interest, the court ordered the organization, the non-debtor affiliates, and all creditors into mediation.[569] The mediation produced a confirmation plan that would see the Boy Scouts of America contribute approximately $2.5 billion in cash to a settlement

556. *Id.*
557. *Id.*
558. *Id.* at 526.
559. *Id.*
560. *Id.* at 518.
561. *Id.*
562. *Id.* (emphasis added).
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.*
568. *Id.*
569. *Id.* at 534.

trust,[570] and an additional $4 billion in unallocated insurance.[571] The plan would also reform the organization by giving abuse survivors a proverbial seat at the table.[572] These reforms would include staffing the Youth Protection Program with experts in child abuse, implementing organization-wide routine criminal background checks in hiring, expanding the representation of sexual assault survivors on the national and Local Council executive boards, establishing a place of remembrance for all child abuse survivors at prominent locations at each adventure base, and more.[573] Because the Bankruptcy Code allows for the classification of substantially similar creditors in the same class,[574] the plan divides the claimants into one class of direct abuse claims and another class of indirect abuse claims.[575] Direct abuse claims are those claims by individuals for sexual abuse.[576] Indirect claims, generally, are claims for contribution, indemnity, reimbursement, or subrogation that insurance companies, Local Councils, and chartered organizations could assert.[577] Both kinds of claims would be channeled to a trust, where they would be processed, liquidated, and paid.[578] Based on the uncontested testimony of two valuation experts, Chief Judge Silverstein found, as a matter of fact, that "if the plan is confirmed, Direct Abuse Claims will more likely than not be paid in full."[579] In exchange for these contributions, the plan sought the release of a series of claims against the Boy Scouts of America, the Local Councils, and the chartered organizations.[580] These included "nonconsensual" third-party releases of claims against settling insurance companies, Local Councils, and chartered organizations, and "consensual" third-party releases of claims against the same parties and the national nonprofit.[581] To revoke consent, depending on whether the class was impaired, the holder of a claim would have to opt out affirmatively by checking a box on his ballot or file an objection with the trust.[582] Nonvoting claimants would not be deemed to consent to the release.[583]

570. *Id.* at 561.
571. *Id.*
572. *Id.* at 549.
573. *Id.*
574. *See* 11 U.S.C. § 1122(a).
575. *See Boy Scouts of Am. I*, 642 B.R. at 536.
576. *Id.*
577. *Id.*
578. *See id.*
579. *Id.* at 560.
580. *See id.* at 595, 674–77.
581. *Id.* at 586, 674.
582. *See id.* at 674.
583. *Id.*

One might expect from these facts that the survivors of sexual assault would oppose a bankruptcy court's resolution of their claims. One would be mistaken. In the end, 85.72 percent of direct abuse claims and 82.41 percent of indirect abuse claims voted to accept the plan.[584] It is difficult to say for certain why so many claimants found the confirmation plan to be their preferred mechanism to vindicate their rights, but Chief Judge Silverstein's opinion suggests at least three reasons. First, Boy Scouts of America presented the undisputed testimony of a mass torts valuation expert, whose opinions suggested that this mechanism would offer the direct abuse claimants full recovery, while the tort system would not.[585] Adjusting for the likelihood of success on the merits, the expert arrived at a valuation range of $2.4 billion to $3.6 billion for the direct abuse claims.[586] The expert also concluded that the abuse claims would not be brought in the tort system unless the reward was high enough for plaintiffs' law firms to make a reasonable return on investment.[587]

Second, survivors seemed to prefer the mechanism of the bankruptcy proceeding because they could participate without exposing themselves to the vagaries of tort litigation.[588] The expert testified as to why so few abuse claims had been filed prepetition.[589] Chief Judge Silverstein then accepted his conclusion that the proof of claim mechanism in bankruptcy afforded the claimants a degree of privacy.[590] Ninety-eight percent of direct abuse claimants refused to check a box that would make their proof of claim public, and more than 85 percent of them said that they had never told anyone of their abuse.[591] The privacy rationale seems to have brought scores of people into the dispute resolution process.

Third, the mechanism enabled certain survivors to participate in the crafting of the confirmation plan while also impressing on them the long timescale of litigation.[592] Two witnesses "offered moving, and sometimes painful, testimony in support of the plan."[593] They entered the process with "a healthy dose of skepticism" but emerged from the negotiations supportive of the plan with "an

584. *Id.* at 619.
585. *See id.* at 553–57.
586. *Id.* at 557.
587. *Id.* at 556–58.
588. *See id.* at 556.
589. *Id.*
590. *Id.*
591. *Id.*
592. *See id.* at 617–20.
593. *Id.* at 618.

awareness of . . . the need for global resolution."[594] One of them testified to the desire to afford some degree of relief to over 12,400 and 2,200 claimants who might never see any resolution because they are now over the ages of 70 and 80, respectively.[595] The other, a pro se claimant, testified to his eagerness to see the Youth Protection Program redesigned with the input of embedded survivors.[596] He also shared that after two years of negotiations, "with all the machinations, all the money spent, all the pain of ripping off [his and his fellow survivors'] scabs to file those proofs of claim and watch this slog on," it was "time" for a final resolution.[597] All that the claimants had to do was release the inferior organizations from any liability.[598]

In the end, the bankruptcy court approved this plan, including the nonconsensual releases.[599] Chief Judge Silverstein found that the court had jurisdiction to authorize such a plan for the same reason that Judge Drain in the Purdue Pharma case found that he had the same authority.[600] These releases were "fair and necessary to the reorganization."[601] Judge Andrews of the District Court for the District of Delaware upheld the bankruptcy court's ruling on the same rationale.[602]

It is worth pausing here to consider a counterfactual. How could this litigation have concluded if the court found that it lacked the authority to grant these third-party releases? Although the bankruptcy court likely lacked the authority to dissolve the Boy Scouts of America and its related entities, it could, under 28 U.S.C. § 1334, refuse to confirm a plan that included third-party releases and shielded every non-debtor entity, including the Local Councils, from liability.[603] The rationale would be that there was no "related-to" jurisdiction to

594. *Id.*

595. *Id.*

596. *Id.* at 619.

597. *Id.*

598. *Id.* at 595.

599. *Id.* at 595, 619.

600. *Id.* at 588–95; *see In re* Purdue Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53, 97–98 (Bankr. S.D.N.Y. 2021).

601. *Boy Scouts of Am. I*, 642 B.R. at 594.

602. *See* Nat'l Union Fire Ins. v. Boy Scouts of Am. & Del. BSA, LLC (*In re* Boy Scouts of Am. & Del. BSA, LLC) (*Boy Scouts of Am. II*), 650 B.R. 87, 136–43 (D. Del. 2023).

603. *See Boy Scouts of Am. I*, 642 B.R. at 610 n.495 (quoting a declaration of a member of the Local Council committee stating that "if a Local Council were to dissolve or file for bankruptcy, it would be difficult for National BSA to reestablish the community ties necessary for a successful Scouting program").

confirm a mass tort Chapter 11 plan.[604] Such a refusal would likely disable the Local Councils from reestablishing the requisite community ties required to run a successful operation and topple the whole hierarchy of the organization.[605] The reason why neither court ruled this way is that the benefits of keeping the national nonprofit afloat seemed to outweigh the benefits of dissolving it.[606] This is functionalism again: the court's balancing prizes adaptability, efficacy, and a utilitarian vision of justice.

In the *Boy Scouts of America* bankruptcy, neither court made much of *Stern* and *Wellness*.[607] Both courts accepted as a given that bankruptcy courts had the constitutional authority to approve non-consensual third-party releases in a plan.[608] No party disputed that authority.[609] It is not certain that the issue will be raised on appeal. What is certain, however, is that thousands of sexual abuse survivors thought that a bankruptcy court was their best chance of getting relief for their suffering.[610] One survivor who testified in favor of the plan said that he felt compelled to vote in favor of it because he and his peers had invested two years of their lives in this litigation.[611] "We have a survivor on the [Committee of Tort Claimants] who is pushing 80 years old," he said, "and is out driving for Door Dash to make ends meet."[612] Consent was neither litigated nor disputed.[613] This is functionalism once again: the tort claimants just wanted a swift resolution that they felt that they could not get elsewhere, and when left to its own devices, the Bankruptcy Code gave them just that.

C. *Implications*

These two cases, informed by the doctrinal landscape and history developed in Parts I and II, permit me to synthesize seven theses about the role of functional and formal constitutional rules in the context of bankruptcy jurisdiction.[614]

604. *See id.* at 588–94.

605. *Id.* at 610 n.495.

606. *See id.*; *Boy Scouts of Am. II*, 650 B.R. at 135.

607. *See Boy Scouts of Am. I*, 642 B.R. at 504; *Boy Scouts of Am. II*, 650 B.R. at 87; Stern v. Marshall, 564 U.S. 462 (2011); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

608. *See Boy Scouts of Am. I*, 642 B.R. at 595; *Boy Scouts of Am. II*, 650 B.R. at 135.

609. *See Boy Scouts of Am. I*, 642 B.R. at 504; *Boy Scouts of Am. II*, 650 B.R. at 87.

610. *See Boy Scouts of Am. I*, 642 B.R. at 617.

611. *Id.* at 618.

612. *Id.*

613. *See id.* at 674–77.

614. *See supra* Parts I, II; *Boy Scouts of Am. I*, 642 B.R. at 504; *In re* Purdue Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

First, because formalism and functionalism are antagonistic in more ways than they are complementary, any attempt to synthesize them at the granular level of bankruptcy jurisdiction will need to foreground one method at the expense of the other.[615] In the context of bankruptcy jurisdiction, the benefits of functionalism outweigh the benefits of formalism. The Bankruptcy Code itself seems to imagine that the bankruptcy judge will solve every problem that comes their way and gives them provisions like § 105(a) and § 524(h) to enable their problem-solving.[616] Additionally, functionalism's impetus to balance varied interests in a dynamic way fits the demands of mass tort bankruptcies. Its focus on efficiency allows courts to resolve thousands of claims and give litigants like those in *Boy Scouts of America* a degree of privacy, dignity, and peace, that they may be unlikely to get elsewhere.[617] Whatever else may be true in the broader doctrines of public rights, bankruptcy jurisdiction requires a functionalist revival.

Second, functionalism remains deeply embedded in the traditions of bankruptcy law.[618] The history uncovered in Part II shows that whatever public rights may look like in other corners of the non-Article III tribunal doctrine, consent and other functional considerations were essential to the constitutional analysis under the nation's first long-standing bankruptcy statute.[619] The Lochner-era constitutional consensus, which saw a judiciary eager to protect what it perceived as the economic rights of individuals, had no objection to the referee's broad exercise of jurisdiction.[620] In fact, the history shows that a functional approach may be just as effective at policing the boundaries of Article III as any formal rule.[621]

Third, formalism and functionalism resist categorization along ideological lines. Not only have purported liberal and conservative judges found themselves on both sides of the apparent divide, but also, formalist reasoning may yield what those outside of bankruptcy might describe as plaintiff-friendly outcomes.[622] Those alarmed by the Sacklers' ability to walk away from the opioid epidemic with the protection of third-party releases acquired without those claimants' consent might

615. *See* Eskridge, *supra* note 109, at 21–22.
616. *See* 11 U.S.C. §§ 105(a), 524(n).
617. *See Boy Scouts of Am. I*, 642 B.R. at 504.
618. *See supra* Part II.
619. *See supra* Part II.
620. *See supra* Part II.B.
621. *See supra* Part II.
622. *See supra* Part II.A.

applaud the formalism of Judge McMahon's ruling.[623] Others might be shocked that the civil justice system convinced over 80,000 sexual assault survivors that their best hope of recovery is in a bankruptcy court; that they should take their chances with a judge who seemed both compassionate and eager to confirm a plan that would save the organization that they see as responsible for their trauma.[624]

Fourth, formalism may mistake categorical rules for predictability. As the procedural history of *Purdue Pharma* shows, a categorical rule like the one in *Stern* upends the long-established and predictable way of doing business in the world of bankruptcy.[625] Conceding the point that new categorical rules can initially upend longstanding practices before the dust settles, it has now been 12 years since the Court's handing down of *Stern* and 40 years since its opinion in *Northern Pipeline*.[626] The dust should have settled, and litigants should be able to rely on the protections that Article III is supposed to give them. In *Purdue Pharma*, the categorical rule did precious little to stop the Second Circuit from affirming the plan that released the Sacklers from direct liability.[627] We are left to wonder if a more adaptable functional rule would have fared better.

Fifth, functionalism in the constitutional sense may mistake consent for agency. Consent may appeal to those worried about the constitutional value of due process. For instance, the District of Delaware's holding in *Boy Scouts of America* suggests that as long as sexual assault survivors have agreed to subject themselves to the jurisdiction of a bankruptcy judge, we can rest assured that no one was deprived of the opportunity to vindicate their rights.[628] But a lot of things can pass for consent in bankruptcy, and not all of them would make us feel good about allowing cases like the *Boy Scouts of America* to repeat themselves. Consent may be a valuable release valve for constitutional concerns about due process, ensuring as it does that litigants do not try to game the system in their favor. At the same time, consent does not look like a real affirmative decision when the alternative is no recovery. It is here, in the functionalism embraced by *Wellness*, that we can begin to see a glimpse of a bankruptcy jurisdiction doctrine that preserves the individual liberties that are guaranteed by Article III.[629]

623. *See generally In re* Purdue Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

624. *See generally In re* Boy Scouts of Am. & Del. BSA, LLC (*Boy Scouts of Am. I*), 642 B.R. 504 (Bankr. D. Del. 2022).

625. *See Purdue Pharma II*, 633 B.R. at 53; Stern v. Marshall, 564 U.S. 462 (2011).

626. *See Stern*, 564 U.S. at 462; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

627. *See* Purdue Pharma L.P. v. City of Grande Prairie, 69 F.4th 45, 72 (2d Cir. 2023).

628. *See generally Boy Scouts of Am. I*, 642 B.R. 504.

629. *See generally* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

Sixth, and related, the Court's formalist approach since *Northern Pipeline* has not succeeded at reigning in the bankruptcy tribunal where the Bankruptcy Code itself has seemed to authorize such broad exercises of power.[630] In allowing the Sacklers and the Boy Scouts affiliates to walk away from the catastrophes that they partially created with no personal liability, the current doctrine seems to have reached the opposite result of what it hoped to achieve.[631] If the current doctrine is meant to give us an Article III that works as a guardian of individual liberty, then the Court's formalism may be an inapposite method to achieve such a goal. Instead, a deeper functionalism might be needed. I am speaking here of a functionalism more robust than only the consent focused holding of *Wellness*.[632] Such a functionalism, one that considers the history of consent in bankruptcy jurisdiction, as well as the practical consequences of third-party releases, might prove to be more effective.

Seventh, as we see Americans turn to the bankruptcy system to resolve some of the most vexing questions of national policy, which now include the opioid epidemic,[633] long histories of sexual violence,[634] the healthcare rights of incarcerated individuals,[635] and climate change,[636] the need for a workable standard may be even more pressing. However, since the Court has repeatedly diminished the power of Congress to regulate the jurisdiction of the lower federal courts and to create tribunals alternative to those courts, the battle over bankruptcy jurisdiction may prove to be a battle over much more.[637]

630. *See supra* Part I.

631. *See Boy Scouts of Am. I*, 642 B.R. at 595; *In re* Purdue Pharma, L.P. (*Purdue Pharma I*), 635 B.R. 26, 36 (Bankr. S.D.N.Y. 2021).

632. *See Wellness*, 575 U.S. at 683–84 (referring to a lack of need of express consent for bankruptcy consent for bankruptcy court adjudication.)

633. *See In re* Purdue Pharma L.P. (*Purdue Pharma II*), 633 B.R. 53, 58 (Bankr. S.D.N.Y. 2021).

634. *See Boy Scouts of Am. I*, 642 B.R. at 525.

635. *See* Simmons v. Tehum Care Servs., Inc., No. 2:22-CV-4149-NKL, 2023 WL 3022516, at *1 (W.D. Mo. Apr. 20, 2023) (declining to extend the automatic stay to doctors who treated incarcerated individuals prior to medical provider's divisional merger and subsequent bankruptcy).

636. *See generally* Russell Gold, *PG&E: The First Climate-Change Bankruptcy, Probably Not the Last*, THE WALL ST. J. (Jan. 18, 2019, 9:00 AM), https://www.wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006.

637. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985) ("The Court's holding in [Northern Pipeline] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject

V. CONCLUSION

Forty years after *Northern Pipeline*, the contours of the doctrine of bankruptcy jurisdiction remain unknown.[638] At the same time, the stakes in this relatively obscure doctrine have never been higher. If recent developments are any indication, the era of mass tort bankruptcies is only just beginning.[639] Thousands of individuals will seek to have their rights vindicated before bankruptcy judges whose functionalist orientation may lead them toward the efficient resolution of disputes.[640] On its own, this development is neither good nor bad. I have argued, however, that if the Constitution must be involved in the policing of bankruptcy courts' jurisdiction, then a functional approach may be better equipped to handle the scale and variability of these disputes.[641] Such an approach may require the functionalists among us to reach beyond consent and fashion a standard informed by history, practice, and fact intensive reasoning.

only to ordinary appellate review.") (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)).

638. *See N. Pipeline Constr. Co.*, 458 U.S. at 50.

639. *See, e.g.*, *Boy Scouts of Am. I*, 642 B.R. at 525.

640. *See id.*

641. *See supra* Part III.