
*Article III — Separation of Powers — Bankruptcy Jurisdiction —
Wellness International Network, Ltd. v. Sharif*

Over the past several Terms, the Supreme Court has struggled to define the limits that Article III of the Constitution places on Congress’s power under Article I to define the jurisdiction of the bankruptcy courts. In *Stern v. Marshall*¹ in 2011, the Court held that bankruptcy courts, as non–Article III courts,² were constitutionally prohibited from entering final judgment on certain state law claims raised in bankruptcy proceedings.³ But whether the consent of the parties could cure this constitutional infirmity remained an open question; in *Executive Benefits Insurance Agency v. Arkison*⁴ in 2014, the Court considered but did not decide this issue.⁵ Last Term, in *Wellness International Network, Ltd. v. Sharif*,⁶ the Supreme Court held that Article III is not violated when parties consent to bankruptcy court adjudication of *Stern* claims.⁷ The majority’s breezy pragmatism skirted several rigid, formalist approaches to defining the contours of Article III, suggesting that the Court will adopt a more flexible approach in considering future challenges to the constitutionality of non–Article III tribunals. But the Court’s less-than-satisfying consideration of the role of consent in the separation of powers calculus will likely limit the applicability of the decision outside the Article III context.

Wellness International Network, a manufacturer of health and nutrition products, entered into a contract with Richard Sharif for distribution of its products.⁸ It didn’t go well.⁹ Wellness ultimately secured

¹ 131 S. Ct. 2594 (2011).

² Bankruptcy judges are not Article III judges. Bankruptcy judges lack the constitutional protections of nonreducible salary and life tenure. *Cf.* U.S. CONST. art. III, § 1. Instead, bankruptcy judges have salaries set by Congress and serve fourteen-year terms, subject to removal for cause. *See* 28 U.S.C. §§ 152, 153 (2012). Federal district courts have “original and exclusive jurisdiction” over all cases in bankruptcy, *id.* § 1334(a), but may refer proceedings in such cases to the bankruptcy judges for the district, *id.* § 157(a).

³ So-called “*Stern* claims” are claims, like the debtor’s state law tortious interference counterclaim at issue in *Stern*, that bankruptcy courts were authorized by statute to finally determine until *Stern*, which held that they lacked the constitutional authority to do so. *See Stern*, 131 S. Ct. at 2608; *see also* 28 U.S.C. § 157(b)(1) (listing “core proceedings” that may be determined by bankruptcy judges).

⁴ 134 S. Ct. 2165 (2014).

⁵ *Compare id.* at 2170 n.4 (deflecting the consent question), *with* Transcript of Oral Argument at 18–24, 40–45, 50–59, *Arkison*, 134 S. Ct. 2165 (No. 12–1200) (considering the consent question).

⁶ 135 S. Ct. 1932 (2015).

⁷ *Id.* at 1947.

⁸ *Id.* at 1940.

⁹ *See id.* Sharif sued Wellness, claiming that Wellness was running a pyramid scheme, but then repeatedly ignored Wellness’s discovery requests. *See Wellness Int’l Network, Ltd. v. Sharif*, 727 F.3d 751, 755–56 (7th Cir. 2013).

a judgment against Sharif for over \$650,000 in attorneys' fees.¹⁰ In 2009, Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois, listing Wellness as a creditor.¹¹ During the bankruptcy proceeding, Wellness obtained evidence that suggested that Sharif had more than \$5 million in assets,¹² but Sharif claimed that the assets were unavailable in the bankruptcy as they were owned by a trust that he administered.¹³

Wellness sued in the bankruptcy court.¹⁴ Among other relief, Wellness sought a declaration that the trust was Sharif's alter ego and that its assets should be included in Sharif's bankruptcy estate.¹⁵ Sharif conceded that Wellness's alter ego claim was a "core proceeding," which could be finally determined by the bankruptcy court.¹⁶ The bankruptcy court ruled against Sharif, declaring the trust assets to be property of the bankruptcy estate and denying Sharif's request to discharge his debts.¹⁷

Sharif appealed to the U.S. District Court for the Northern District of Illinois.¹⁸ Though Sharif did not mention *Stern* in his briefs,¹⁹ after briefing was complete, Sharif moved for supplemental briefing in light of *Stern* and its progeny.²⁰ The district court denied Sharif's motion as untimely and affirmed the judgment of the bankruptcy court.²¹

The Seventh Circuit affirmed in part and reversed in part, vacating the judgment on Wellness's alter ego claim.²² Writing for the panel, Judge Tinder²³ held that the bankruptcy court lacked constitutional authority to enter final judgment on Wellness's alter ego claim, even with Sharif's consent.²⁴ The court discussed the "two separate interests" protected by Article III: litigants' rights to impartial adjudication

¹⁰ *Wellness*, 135 S. Ct. at 1940.

¹¹ *Id.*

¹² *Wellness*, 727 F.3d at 756.

¹³ *Id.* at 757.

¹⁴ *Wellness*, 135 S. Ct. at 1940.

¹⁵ *Wellness*, 727 F.3d at 757.

¹⁶ *Wellness*, 135 S. Ct. at 1941.

¹⁷ *Id.*

¹⁸ *Id.* Federal district courts have jurisdiction over appeals from bankruptcy court decisions. See 28 U.S.C. § 158 (2012).

¹⁹ *Wellness*, 135 S. Ct. at 1941. Sharif filed his opening brief in August of 2011; *Stern* had been decided that June. See *Wellness*, 727 F.3d at 759; *Stern v. Marshall*, 131 S. Ct. 2594, 2594 (2011).

²⁰ *Wellness*, 135 S. Ct. at 1941. Sharif's sister had filed a motion in the district court arguing that, under *Stern*, the bankruptcy court lacked jurisdiction to enter final judgment on Wellness's claim. *Wellness*, 727 F.3d at 760.

²¹ *Wellness*, 135 S. Ct. at 1941.

²² *Wellness*, 727 F.3d at 782. The court affirmed the denial of the discharge of Sharif's debts, reversed the judgment on the calculation of fees, and remanded the case to the district court. *Id.*

²³ Judge Tinder was joined by Judges Flaum and Sykes.

²⁴ *Wellness*, 135 S. Ct. at 1942.

and the judiciary's freedom from encroachment by the political branches.²⁵ The court found that the first protection was waivable but that the second, structural protection, also implicated here, was not.²⁶

The Supreme Court reversed. Writing for the Court, Justice Sotomayor²⁷ opened the majority opinion with a discussion of the history and contemporary practice of bankruptcy adjudication outside of Article III.²⁸ The opinion then discussed the history of adjudication by consent,²⁹ focusing on two earlier cases where the Court had permitted such adjudication by non–Article III tribunals: *CFTC v. Schor*,³⁰ which involved an independent agency,³¹ and *Peretz v. United States*,³² which involved a magistrate judge.³³ The majority read these cases to demonstrate that the personal right to Article III adjudication is waivable,³⁴ and that the separation of powers is not offended where the violation is “*de minimis*”³⁵ and Article III courts “retain supervisory authority over the process.”³⁶

Quoting at length from *Schor*, the Court described the factors that courts must balance to determine whether allowing bankruptcy courts to decide *Stern* claims by consent would violate Article III.³⁷ Applying this test, the Court found that allowing bankruptcy court jurisdiction over Wellness's alter ego claim did “not usurp the constitutional prerogatives of Article III courts.”³⁸ The majority then handily distinguished *Wellness* from both *Stern* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³⁹ focusing on the element of consent

²⁵ *Wellness*, 727 F.3d at 768.

²⁶ *Id.* at 768–69.

²⁷ Justice Sotomayor was joined by Justices Kennedy, Ginsburg, Breyer, and Kagan. Justice Alito joined in part.

²⁸ *Wellness*, 135 S. Ct. at 1939–40.

²⁹ *Id.* at 1942.

³⁰ 478 U.S. 833 (1986).

³¹ *Id.* at 836.

³² 501 U.S. 923 (1991).

³³ *Id.* at 925; *Wellness*, 135 S. Ct. at 1942. In *Schor*, the Court found no violation of Article III in allowing a party to consent to adjudication of state law counterclaims by the Commodity Futures Trading Commission. See 478 U.S. at 857. And in *Peretz*, the Court allowed a magistrate judge to preside over jury selection in a felony trial with party consent. See 501 U.S. at 933.

³⁴ *Wellness*, 135 S. Ct. at 1944.

³⁵ *Id.* at 1945 (quoting *Schor*, 478 U.S. at 856).

³⁶ *Id.* at 1944.

³⁷ First, the court must consider “the extent to which the essential attributes of judicial power are reserved to Article III courts”; second, “the extent to which the non–Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts”; third, “the origins and importance of the right to be adjudicated”; and fourth, “the concerns that drove Congress to depart from the requirements of Article III.” *Id.* (quoting *Schor*, 478 U.S. at 851).

³⁸ *Id.* at 1944–45.

³⁹ 458 U.S. 50 (1982). In *Northern Pipeline*, a plurality of the Court held that Congress could not constitutionally vest bankruptcy judges with jurisdiction over state law contract claims against entities that were not otherwise part of the bankruptcy. *Id.* at 87 (plurality opinion).

as the dispositive, distinguishing factor in both cases.⁴⁰ Justice Sotomayor downplayed the concerns voiced by the dissents,⁴¹ emphasizing the narrowness of the majority's holding.⁴²

The opinion concluded by holding that consent to bankruptcy court adjudication need not be express and instead can be implied by a litigant's actions, provided that such consent is knowing and voluntary.⁴³ The Court remanded the case to the Seventh Circuit to determine whether Sharif had knowingly and voluntarily consented to bankruptcy court adjudication and whether he had already forfeited his *Stern* argument below.⁴⁴

Justice Alito concurred in part and concurred in the judgment. He wrote separately to emphasize his view that there was no need to decide whether consent must be express or implied.⁴⁵ And in joining the Court's approval of jurisdiction-by-consent, Justice Alito likened bankruptcy court judgments to arbitration decisions — an analogy not invoked by the majority — noting that, under *Schor*, any distinctions between the two would likely be rejected as “formalistic and unbending.”⁴⁶

Chief Justice Roberts dissented.⁴⁷ Situating *Wellness* among the Court's monumental separation of powers decisions,⁴⁸ the Chief Justice lamented that the majority's “acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret.”⁴⁹ First, he argued that the Court could have decided the case on narrower grounds, as *Wellness*'s alter ego claim was not a *Stern* claim at all.⁵⁰ The Chief Justice then discussed at length why Sharif's consent to bankruptcy court adjudication could not cure the separation of powers

⁴⁰ *Wellness*, 135 S. Ct. at 1946–47.

⁴¹ *See id.* at 1947 (“To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court.”).

⁴² *Id.* (“Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception. Reaffirming that unremarkable fact, we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise.”). Justice Sotomayor was responding to the concerns voiced in dissent by Chief Justice Roberts that the majority would “assign away our hard-won constitutional birthright so long as two private parties agree.” *See id.* at 1960 (Roberts, C.J., dissenting).

⁴³ *Id.* at 1947–48 (majority opinion). The majority reasoned from an analogous case in the context of magistrate judges, which found that implied waiver “substantially honored” litigants' Article III rights. *Id.* at 1948 (quoting *Roell v. Withrow*, 538 U.S. 580, 590 (2003)).

⁴⁴ *Id.* at 1949.

⁴⁵ *Id.* (Alito, J., concurring in part and concurring in the judgment).

⁴⁶ *Id.* (quoting *CFTC v. Schor*, 478 U.S. 833, 851 (1986)).

⁴⁷ Chief Justice Roberts was joined by Justice Scalia and joined in part by Justice Thomas.

⁴⁸ *Wellness*, 135 S. Ct. at 1954–55 (Roberts, C.J., dissenting).

⁴⁹ *See id.* at 1950.

⁵⁰ Rather, the Chief Justice argued that it was merely a claim seeking to identify property that constitutes the bankruptcy estate, which is a central role of the bankruptcy court. *See id.* at 1952–54.

violation that the Court had identified in *Stern*.⁵¹ The Chief Justice reasoned that “[i]f a branch of the Federal Government may not consent to a violation of the separation of powers, surely a private litigant may not do so.”⁵² He criticized the majority’s reading of *Stern* as turning on the absence of consent⁵³ and challenged the majority’s reliance on supervision of bankruptcy courts by Article III courts.⁵⁴ Finally, the Chief Justice dismissed the majority’s analogy to magistrates and Justice Alito’s analogy to arbitrators as inapt⁵⁵ and concluded with a dire warning about the consequences of the majority’s decision, painting it as a “blueprint for extensive expansion of the legislative power.”⁵⁶

Justice Thomas also dissented. Justice Thomas focused his discussion on a question antecedent to that analyzed by the other opinions: “whether a violation of the Constitution has actually occurred.”⁵⁷ According to Justice Thomas, though consent “may not authorize a constitutional violation,” it may “prevent one from occurring in the first place.”⁵⁸ Justice Thomas suggested, without concluding, either that consent may have the effect of allowing non–Article III adjudication by “lifting” the “‘private rights’ bar,”⁵⁹ or that bankruptcy adjudication outside Article III may, like territorial and court-martial jurisdiction, enjoy a “unique, textually based exception” to mandatory Article III jurisdiction.⁶⁰ Justice Thomas concluded by noting that it remained necessary to identify a positive grant of constitutional authority for bankruptcy court jurisdiction.⁶¹

The Court in *Wellness* rejected several formalist approaches to evaluating separation of powers limitations on non–Article III adjudication. It avoided an exclusive reliance on constitutional text, instead

⁵¹ *Id.* at 1954–60.

⁵² *Id.* at 1955.

⁵³ *Id.* at 1956–57.

⁵⁴ *Id.* at 1957. The Chief Justice suggested that bankruptcy court jurisdiction over *Stern* claims, even with district court supervision, was an impermissible delegation of judicial power to non–Article III judges. *See id.*

⁵⁵ *Id.* at 1958–59.

⁵⁶ *Id.* at 1959 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3144 (2010)).

⁵⁷ *Id.* at 1961 (Thomas, J., dissenting).

⁵⁸ *Id.* Justice Thomas described the example of the waiver of a jury trial as “a form of consent that lifts a limitation on government action by satisfying its terms — that is, the right is exercised and honored, not disregarded.” *Id.* at 1962.

⁵⁹ *Id.* at 1968. While an exercise of the judicial power is required for cases acting upon private rights, “the legislative and executive branches may dispose of public rights at will — including through non–Article III adjudications.” *Id.* at 1965.

⁶⁰ *Id.* at 1967.

⁶¹ *See id.* at 1969. Justice Thomas suggested that an interpretation of the Bankruptcy Clause informed by historical understanding might provide such a hook. *See id.* at 1969–70 (discussing U.S. CONST. art. I, § 8, cl. 4).

relying on the gloss of historical and contemporary practice. The Court also refused to draw a sharp separation between the legislative and judicial branches. And it declined to add bankruptcy to a rigid list of exceptions to mandatory Article III adjudication. The Court instead adopted a pragmatic balancing test, incorporating some of the concerns motivating each of these spurned formalisms. However, the Court's adoption of yet another formalism — a strict separation of the personal and structural protections afforded by Article III — led to a less-than-clear consideration of the role of consent in avoiding or remedying a separation of powers violation. The Court's formalism shopping perhaps points the way to a normalization of Article III jurisprudence for other non-Article III tribunals; however, its thin analysis of the consent issue will likely limit the decision's applicability to other separation of powers questions.

The Court first, quietly, rejected the formalism of text. Notably absent from the majority opinion in *Wellness* was an analysis of the text of Article III.⁶² This text-lite interpretation of the contours of Article III is consistent with precedent,⁶³ as attempts to shoehorn non-Article III bankruptcy jurisdiction into the Constitution's text tend to be awkward at best.⁶⁴ In place of textual formalism, the Court found validation of non-Article III bankruptcy jurisdiction in the gloss of historical and modern practice.⁶⁵ This rejection of textual formalism in favor of interpretation inflected by historical and contemporary practice resonates with a series of Roberts Court separation of powers decisions addressing conflicts between the political branches.⁶⁶ The

⁶² Article III provides: "The 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." U.S. CONST. art. III, § 1. The Court opened its opinion by quoting the Constitution's text, but it is a Chekhovian rifle that never fires. See *Wellness*, 135 S. Ct. at 1938.

⁶³ See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918–26 (1988) (describing Article III literalism as "untenable," *id.* at 919).

⁶⁴ See *id.* at 926–27; see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion).

⁶⁵ See *Wellness*, 135 S. Ct. at 1939–40 (historical practice); *id.* at 1942–44 (modern practice); *cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

⁶⁶ See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); see also John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 31 (2014) (describing the Roberts Court's invocation of structural principles over constitutional text). The majority, however, elided the distinction between the relevance of historical practice in adjudicating conflicts between the political branches — where historical practice may represent the result of a political compromise — and its importance in the Article III context, where the risk is substantially greater that historical practice is merely an (Article) One-Two punch on the judiciary from the political branches. Compare Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412 (2012) (describing historical practice as an indication of interbranch compromise), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflec-*

extension of this pragmatism to the Article III context represents a marked departure from *Stern*'s formalism.⁶⁷

The *Wellness* majority also rejected rigidly enforced interbranch boundaries. The dissents articulated different rationales justifying a strict separation.⁶⁸ But contrary to Chief Justice Roberts's suggestion that "[g]ood fences make good neighbors,"⁶⁹ the Court instead found that the borders between branches are often porous and their interactions collaborative — our constitutional system "blends, as well as separates, powers."⁷⁰ The Court in *Wellness* recognized that the bankruptcy system represents one such tight braid of Article I and Article III powers.

Finally, the majority in *Wellness* resisted adding bankruptcy jurisdiction to a rigid list of exceptions to mandatory Article III adjudication, an approach also rejected by the plurality in *Northern Pipeline*,⁷¹ yet suggested here in dissent by Justice Thomas.⁷² Rejecting this path leaves unclarified the somewhat "muddle[d]" public-rights doctrine and its application to bankruptcy proceedings.⁷³ But resisting the allure of bankruptcy exceptionalism, and categorical exceptions to Article III more generally, leaves more room for the application of *Wellness*'s pragmatism to future challenges to other non-Article III tribunals.⁷⁴

The majority in *Wellness* eschewed these formalisms in favor of applying the pragmatic, multifactor standard announced in *Schor* — a

tions on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221, 1280 (1995) (cautioning against overreliance on historical practice).

⁶⁷ See *Stern v. Marshall*, 131 S. Ct. 2594, 2600–01 (2011).

⁶⁸ Compare *Wellness*, 135 S. Ct. at 1961 (Thomas, J., dissenting) (treating separation of powers violations as overreaching by the government vis-à-vis the people), with *id.* at 1960 (Roberts, C.J., dissenting) (treating separation of powers violations by one branch as necessarily encroaching on the prerogatives of another branch).

⁶⁹ *Id.* at 1960 (Roberts, C.J., dissenting) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (invoking a poem by Robert Frost)). But see *Plaut*, 514 U.S. at 245 (Breyer, J., concurring in the judgment) ("[O]ne might consider as well that poet's caution, for he . . . also writes, 'Before I built a wall I'd ask to know/ What I was walling in or walling out.'" (quoting Robert Frost, *Mending Wall*, in THE NEW OXFORD BOOK OF AMERICAN VERSE 395–96 (Richard Ellmann ed., 1976))).

⁷⁰ *Plaut*, 514 U.S. at 245 (Breyer, J., concurring in the judgment).

⁷¹ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 72–76 (1982) (plurality opinion).

⁷² See *supra* notes 59–60 and accompanying text.

⁷³ Jonathan C. Lipson & Jennifer L. Vandermeuse, *Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1194 ("While the public rights analysis asks us to classify causes of action as wholly private or public, the modern bankruptcy process — especially corporate reorganization — cannot be so simply pigeonholed.")

⁷⁴ Cf. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 637–60 (2008) (discussing the structural constitutional exceptionalism of bankruptcy).

standard that captures, but does not exclusively rely on, many of the concerns motivating these spurned formalisms.⁷⁵

And yet in doing so, the *Wellness* majority invoked another formalist boundary line: a rigid division between the personal and structural protections afforded by Article III. The majority found that the personal protections were freely waivable,⁷⁶ and that the structural infringement resulting from bankruptcy court jurisdiction over *Stern* claims with party consent did not “impermissibly threate[n] the institutional integrity of the Judicial Branch.”⁷⁷ The majority only barely⁷⁸ considered the role of consent in the structural analysis, treating the presence of consent as evidence that no structural violation had occurred.⁷⁹

The majority’s drive-by analysis of the role of consent in the structural separation of powers calculus gave insufficient weight to the connection between structural safeguards and individual rights — Article III’s double helix.⁸⁰ A protected, independent judiciary is a prerequisite for impartial adjudication, and it is often through litigant intervention that structural constitutional protections are enforced.⁸¹ The *Wellness* majority minimized the structural violation identified in *Stern* by suggesting that mutual consent by adverse parties is alone sufficient to indicate that the structural protections afforded by an independent judiciary are not infringed.⁸² This unexamined conclusion is especially troubling given that forum-selection decisions for specific claims in a bankruptcy proceeding are likely determined by a variety of considerations that do not necessarily reflect the values underlying

⁷⁵ See *Wellness*, 135 S. Ct. at 1944 (quoting *CFTC v. Schor*, 478 U.S. 833, 851 (1986)). The test is sensitive to the separation of Article III courts from non-Article III fora and also considers the nature of the rights at issue. See *supra* note 37.

⁷⁶ See *Wellness*, 135 S. Ct. at 1944–45.

⁷⁷ *Id.* (alteration in original) (quoting *Schor*, 478 U.S. at 851).

⁷⁸ And only in a footnote. See *id.* at 1945 n.10.

⁷⁹ See *id.*

⁸⁰ See Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 302 (1990). Justice Brennan, dissenting in *Schor*, argued that “the structural and individual interests served by Article III are inseparable,” rendering consent “irrelevant to Article III analysis.” *Schor*, 478 U.S. at 867 (Brennan, J., dissenting).

⁸¹ See Meltzer, *supra* note 80, at 302; cf. THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁸² To untie this knot in its argument, the majority characterized *Stern* as turning exclusively on the absence of consent. See *Wellness*, 135 S. Ct. at 1946–47. However, the Chief Justice argued (compellingly) that this “is not a proper reading of the decision,” *id.* at 1957 (Roberts, C.J., dissenting), as *Stern* expressly concluded that, in deciding *Stern* claims, the bankruptcy court “exercises ‘the essential attributes of judicial power [that] are reserved to Article III courts,’” *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (alteration in original) (quoting *Schor*, 478 U.S. at 851).

the separation of powers, and where litigant consent can be influenced, if not coerced, by conditions imposed by Congress.⁸³

The Court in *Wellness* thus rejected some formalisms while preserving another, playing the tune of pragmatism in interpreting the limits of Article III, while barely addressing the role of individual consent in separation of powers disputes. As a result, *Wellness*'s impact is likely to be strongest in analogous challenges to non–Article III tribunals but less meaningful for broader separation of powers doctrine.

Most directly, in the realm of bankruptcy jurisdiction, *Wellness*'s blessing of jurisdiction-by-consent is likely to dramatically minimize the “potential systemic impact” that might have resulted from a broad interpretation of *Stern*.⁸⁴ Uncertainty over district court review of potential *Stern* claims led to costly, docket-delaying caution among bankruptcy judges.⁸⁵ Of course, objecting litigants can still gum up the works by withholding consent, and nonconsenting parties must become newly vigilant to ensure that their actions are not later interpreted as implied consent.⁸⁶ But after *Wellness*, consenting litigants need not be so burdened.

In the sphere of non–Article III adjudication, the willingness of two Justices in the *Stern* majority, Justice Kennedy and Justice Alito, to sign on to *Wellness*'s pragmatism suggests that a majority of the Court is open to a flexible approach in future cases challenging the constitutionality of other non–Article III tribunals. Contrary to the fear that the constitutional status of such tribunals would be upended by decisions in the spirit of *Stern*, *Wellness* should provide some comfort that the Court will respect practical realities over interpretive formalisms.⁸⁷ Following *Wellness*, the careful balance of the non–Article III adjudi-

⁸³ The Chief Justice was particularly sensitive to this possibility. See *Wellness*, 135 S. Ct. at 1960 (Roberts, C.J., dissenting). See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

⁸⁴ See JONATHAN M. LANDERS, BRADY C. WILLIAMSON & S. ELIZABETH GIBSON, *WELLNESS INTERNATIONAL LTD. V. SHARIF: STERN AND STATE LAW CLAIMS AND THE CONSTITUTIONAL VALIDITY OF CONSENT* 13 (2014), <http://www.nationalbankruptcyconference.org/images/NBC%20Wellness%20report%20December%202014.pdf> [<http://perma.cc/M3U6-XV96>]; Tyson A. Crist, *Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627, 627–28 (2012). *Arkison*, which allowed bankruptcy courts to all but decide *Stern* claims, contingent only on district court approval, may have already gotten most of the way there. See *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170, 2172–73 (2014).

⁸⁵ See Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of Stern v. Marshall*, 86 AM. BANKR. L.J. 357, 358 (2012) (“*Stern* has driven the bankruptcy system into a state of confusion. . . . Wasteful litigation . . . has exploded.”).

⁸⁶ Parties might also consider dickering ex ante over this aspect of forum selection in bankruptcy.

⁸⁷ The *Wellness* majority recognized that “without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.” 135 S. Ct. at 1938–39.

catory galaxy — Bankruptcy Appellate Panels,⁸⁸ magistrate judges,⁸⁹ arbitrators,⁹⁰ and even agencies⁹¹ — will likely be respected and preserved by the Court.⁹²

But in the wider universe outside Article III, the reasoning of the *Wellness* majority may have only limited applicability. The majority's footnote-only analysis of the consent issue is unclear at best. It does not describe the degree to which litigant consent can influence the structural separation of powers analysis, nor does it provide a coherent theory of the connection between the structural and personal protections provided by Article III. The majority does not respond at all to the Chief Justice's analogy to situations where the consenting entity is a branch of the government.⁹³ Nor does it provide any guidance for separation of powers questions in the vertical dimension, where the consenting entity might be a state.⁹⁴

With *Wellness*, the Supreme Court resolved, at least for now, its sonata in the key of bankruptcy jurisdiction. *Stern*'s formalist restrictions on adjudication outside Article III have modulated into *Wellness*'s permissive pragmatism, which should provide comfort in future challenges to the constitutional status of bankruptcy courts and other non-Article III tribunals. But the majority's half-hearted engagement with the issue at the core of the case — individual consent and its role in defining and policing the structural separation of powers — may limit the opinion's broader resonance.

⁸⁸ Cf. *In re Ortiz*, 665 F.3d 906, 915 (7th Cir. 2011) (discussing appellate jurisdiction over bankruptcy).

⁸⁹ Cf. *Peretz v. United States*, 501 U.S. 923, 932 (1991) (explaining a magistrate judge's powers).

⁹⁰ Cf. *Wellness*, 135 S. Ct. at 1949 (Alito, J., concurring in part and concurring in the judgment) (analogizing to arbitrators).

⁹¹ Cf. *CFTC v. Schor*, 478 U.S. 833, 835 (1986) (reviewing an agency's authority); *Crowell v. Benson*, 285 U.S. 22, 56–57 (1932).

⁹² Though as the Chief Justice cautioned, Congress may well view *Wellness* as an open invitation to devise ever more constitutionally suspect opt-in tribunals. See *Wellness*, 135 S. Ct. at 1960 (Roberts, C.J., dissenting).

⁹³ Cf. *id.* at 1955.

⁹⁴ The horizontal separation of powers concerns at issue in *Wellness* likely translate into the vertical dimension as well. Cf. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (distinguishing state and federal criminal powers); *New York v. United States*, 505 U.S. 144, 182 (1992) (drawing limits on Congress's powers to mandate state action).