Financial Services & E-Commerce

Anna Nicole Smith Goes Shopping: The New Forum Shopping Problem in Bankruptcy[1]

By G. Marcus Cole & Todd J. Zywicki***

Editor's Note

On March 19, 2010, just as this article was going to press, the U.S. Court of Appeals for the Ninth Circuit held, in *Marshall v. Stern* (formerly *Marshall v. Marshall*), that the bankruptcy court's decision below giving Anna Nicole Smith half of Marshall's estate was not a core proceeding and thus not a final judgment. Therefore, according to the Ninth Circuit, the bankruptcy court's decision took no precedence over the conflicting judgment of the Texas probate court, which had decided that Smith was entitled to nothing. The Ninth Circuit's decision can be found at http://www.ca9.uscourts.gov/datastore/opinions/2010/03/19/02-56002.pdf.

In the United States, relations between debtors and their creditors are governed by two distinct legal regimes. For the overwhelming majority of credit relationships, state law of contract, property, tort, and consumer protection establish the framework within which the debtor-creditor relationship is established, functions, and, in the end, is dissolved. In a smaller but significant number of these relationships, a different forum orchestrates the end of these relationships, namely, federal bankruptcy court. These two distinct forums for debtor-creditor relations exist side-by-side, with some relationships moving over time from one forum to the other. As with any system where dual regimes for dispute resolution exist, parties seeking resolution of debtor-creditor disputes can and will, under the right conditions, engage in "forum shopping." The "nightmare" forum-shopping scenario is the situation in which one dispute between two parties receives dramatically different treatment depending upon which forum was used to adjudicate the dispute.

The solution to the forum-shopping problem has been to craft a bankruptcy regime that treats creditors and debtors substantively the same inside the bankruptcy forum as they would be treated outside of it and to merely change the procedures by which those substantive rights are vindicated. In other words, bankruptcy has long served as a place with special procedures, but not, for the most part, with special substantive law. This principle of equilibrium between bankruptcy and non-bankruptcy treatment of claims and defenses has come to be known as the *Butner* principle, because of the Supreme Court's articulation of it in that case.[2] The *Butner* principle has been re-articulated by courts on numerous occasions, most importantly by the Supreme Court in *Granfinanciera v. Nordberg*.[3]

This separation of substantive and procedural law, which long served as the guiding principle of American bankruptcy, is threatened by a new type of forum shopping. In order to achieve outcomes unavailable outside of bankruptcy, some litigants have identified a nuance of bankruptcy jurisdiction that, if interpreted in a particular way, has the ability to overturn the substantive law of their cases.

This Article proceeds in two parts. Part I describes the "core" and "non-core" distinction in bankruptcy jurisdiction, and the significance of that distinction for final orders in bankruptcy. This section also describes the new forum shopping problem, and how bankruptcy courts and litigants might interpret section 157, to achieve outcomes dramatically different from what might occur outside of bankruptcy. The best example of this new forum-shopping problem is provided by *Marshall v. Marshall*, the famous "Anna Nicole Smith" case, in which a bankruptcy court in California set a Texas probate court judgment on its head.[4]

Part II explores the policy justifications for a limited bankruptcy jurisdiction, rooted both in the *Butner* principle as well as Congress's response to the Supreme Court's ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, in which the Court held the jurisdictional scheme provided by the Bankruptcy Code of 1978 to be unconstitutional.[5]

Part III concludes.

I. Forum Shopping Through Bankruptcy Jurisdiction

A. The New Forum Shopping Problem

The new forum-shopping problem is largely a creature of statute, or, more accurately, the vagaries of the statute. A confusing deployment of terms within Title 28 of the U.S. Code has permitted bankruptcy courts to assume jurisdiction and power that flaunts the longstanding respect for state law in a federalist system.

In the hands of an activist bankruptcy judge this development threatens to undo the careful balance between federal and state law crafted over the past 110 years of American bankruptcy law and to spawn a race to the courthouse that could upset long-established principles of tort, property, and contract law that underlie our legal system. There is no evidence that Congress intended the stability of the American legal system and the law of testamentary succession to turn on the whim of Article I bankruptcy judges and a naked hope that judges would use this proffered power responsibly. Instead, although bankruptcy judges' authority is broad, it is not unlimited. There are clear constitutional and statutory limits

** The Wm. Benjamin Scott & Luna M. Scott Professor of Law, Stanford Law School, and Visiting Professor of Law & Economics, Universiteit van Amsterdam.*

*** George Mason University Foundation Professor of Law, George Mason University; Searle Fellow, George Mason University School of Law (Fall 2008).*

to rein in bankruptcy judges who exceed their authority, and it is essential that those restraints be enforced. Otherwise *every* probate court case could be subject to a race to the courthouse as disgruntled claimants seek a rehearing of their state law rights before a bankruptcy judge. Moreover, strategic forum shopping might not be limited only to debtors, but might also include opportunities for creditors to trigger involuntary bankruptcy proceedings if they believe that the bankruptcy court will provide a more favorable forum.

The dangers of the new forum-shopping problem are dramatically demonstrated in the recent tabloid-fodder case of *Marshall v. Marshall*.[6]

B. Forum shopping in Marshall v. Marshall

If pulp-fiction novelists or Hollywood screenwriters were engaged to craft an example of pernicious forum shopping from scratch, they would be hard-pressed to envision a more troubling story than *Marshall v. Marshall*. The case is famous, not because of its legal complexities or nuances, but rather for its celebrity litigant. It revolved around the financial affairs of the widow of the late J. Howard Marshall II, namely, Vickie Lynn Marshall, popularly known as Anna Nicole Smith.[7]

The case, which is more accurately characterized as "cases," began shortly before the death of J. Howard Marshall II. Marshall had been a successful law professor, lawyer, public servant, and oil company executive over a long and distinguished career.[8] Marshall met Smith shortly after the second of his two 30-year marriages ended with the death of his second wife.[9] Smith, an exotic dancer, actress, and 1993 Playboy Magazine Playmate of the Year, met Marshall in 1991 in the Houston club where she performed.[10] The two married in June 1994, and the sixty-three year difference in their ages gave rise to public speculation that Smith had married Marshall for his money.[11] The marriage was short-lived. Just thirteen months after marrying Smith, Marshall died, leaving an estate valued by some estimates at over a billion dollars.[12]

The litigation over Marshall's estate actually began before his passing and has lasted almost ten times longer than the star-crossed marriage that spawned it. Four months before his death, Smith filed an action in Texas probate court seeking to invalidate Marshall's estate plan.[13] Marshall, a former professor at Yale Law School, had crafted in 1982 an estate plan consisting of a "pour-over" will and a living trust which provided for the disposition of Marshall's property.[14] Marshall gave Smith millions of dollars worth of gifts while he was living, but he never designated her as a beneficiary of the trust.[15] Smith brought the Texas probate action in an attempt to invalidate the trust.[16]

Three days after Marshall's death, Smith contested the validity of the will and the entire estate plan.[17] She further claimed that Marshall had orally promised to give her much more of his estate, and had instructed his attorneys to construct a "catch-all" trust for her benefit, but that this plan was thwarted by Marshall's son, E. Pierce Marshall, leading Smith to subsequently file a charge of tortious interference with an *inter vivos* gift.[18]

The Texas probate case was pending when Smith's activities in another forum interrupted the proceedings. Maria Antonia Cerrato, a former housekeeper and nanny to Smith's child from a prior marriage, filed suit against Smith for sexual harassment and received a default judgment for $850,000. In January 1996, in response to the judgment, Smith filed for bankruptcy in the U.S. Bankruptcy Court for the Central District of California.[19] Smith then filed suit in the bankruptcy case against E. Pierce Marshall, again alleging, as she had in her Texas probate court action, that he had tortiously interfered with the fulfillment of his father's promise to her.[20]

The initial judgment for alleged sexual harassment was entered as a default judgment; Smith and the purported victim later settled the suit for an amount that was small enough to relieve her of any further need of bankruptcy to satisfy her creditors.[21] In fact, the combination of the initial default judgment and the subsequent settlement has raised concerns that the initial suit was manufactured collusively just to create bankruptcy court jurisdiction. And even if this was not actually a collusive bankruptcy filing, the facts illustrate the ease by which bankruptcy potentially could be manufactured through collusion.

In early March 1999, the bankruptcy court confirmed Smith's Chapter 11 restructuring plan, effectively ending the bankruptcy case.[22] Nevertheless, even though the Chapter 11 case was concluded and the Texas case was about to commence, the bankruptcy court proceeded to adjudicate Smith's tortious interference suit against E. Pierce Marshall. In October 1999, the bankruptcy court determined that Pierce Marshall had engaged in discovery abuse and as a sanction barred him from introducing evidence at trial to contradict Smith's assertions. After conducting a five day summary trial and waiting almost a year to issue its decision in September 2000, the bankruptcy court held in favor of Smith, concluding that E. Pierce Marshall had fraudulently altered his father's trust, and that as a result Smith "would have received half of the community property but for [his] actions in making . . . the Trust irrevocable."[23] The bankruptcy court reasoned that under its interpretation of Texas law, Marshall's failure to include Smith in his will entitled her to a "widow's election," comprised of "half of the community property that passes through the estate."[24] Meanwhile, jury selection was about to begin in the Texas probate court case.

One month after its initial judgment, the bankruptcy court issued a revised opinion, again resting upon the discovery sanction.[25] Contrary to the court's initial determination, it now found that Marshall had intended to transfer a substantial portion of his wealth to Smith, but that, as a discovery sanction, E. Pierce Marshall had tortiously interfered with that plan by firing the lawyer hired to draft the "catch-all" trust for Smith.[26] With this new ruling, the bankruptcy court awarded Smith $449,754,134 on her Texas law-based tortious interference claim, relying, in part, on the court's own estimates as to increases in the price of oil.[27]

E. Pierce Marshall appealed these determinations to the U.S. District Court for the Central District of California.[28] The district court vacated the bankruptcy court's judgment, agreeing that the Texas law tortious interference lawsuit did not fall within the bankruptcy court's "core" bankruptcy jurisdiction under 28 U.S.C. §157.[29] The district court rejected E. Pierce Marshall's argument that it lacked jurisdiction under

the "probate exception" to federal jurisdiction, and proceeded to adjudicate the Texas law claims *de novo*.[30]

Meanwhile, in Texas, the probate court proceeded to adjudicate the dispute regarding Marshall's will, including Smith's tortious interference claim against E. Pierce Marshall.[31] After five months of testimony from over 40 witnesses, including witnesses that E. Pierce Marshall was precluded by sanctions from introducing in the bankruptcy court hearings, a Texas jury returned a verdict upholding the validity of Marshall's estate plan, trust, and will.[32] The jury rejected all allegations of impropriety, including Smith's tortious interference claim against E. Pierce Marshall.[33] In December 2001, the Texas probate court entered its final judgment, admitting Marshall's will to probate, finding the trust valid, and dismissing Smith's counterclaims against E. Pierce Marshall.[34]

Shortly after the Texas probate court entered its judgment, E. Pierce Marshall filed a motion in the U.S. District Court for the Central District of California to dismiss the Texas-law-based probate claims prior to the start of the trial in Santa Ana.[35] The district court in California denied the motion, holding that even though the Texas state court proceedings had concluded with a judgment resting upon Texas law, that judgment was not entitled to any preclusive effect on the same claims in federal court.[36]

Three months after the Texas probate court entered its judgment, the U.S. district court entered its own decision on Smith's Texas-law-based tortious interference claim.[37] Although the district court acknowledged that Texas courts had never recognized a claim for tortious interference with an "expectancy of an *inter vivos* gift," the district court in Santa Ana nevertheless determined that it would be the first court to so find under Texas law.[38] The district court found that Marshall had intended to create a "catch-all" trust for Smith, and that E. Pierce Marshall had tortiously interfered with that plan.[39] With these findings, directly contradicting the findings of the Texas probate court jury on the same issues, the district court awarded Smith $88,585,534.66 in compensatory and punitive damages.

E. Pierce Marshall appealed the district court judgment, arguing that probate cases were excepted from federal jurisdiction, and that the Full Faith and Credit Act required the district court to give preclusive effect to the Texas probate court judgment.[40] The U.S. Court of Appeals for the Ninth Circuit reversed the district court judgment.[41] Smith then appealed the case to the Supreme Court.[42]

The Court reversed the Ninth Circuit's dismissal of Smith's Texas law claim, holding that the "probate exception" did not permit a state court to grant itself exclusive jurisdiction over a state-law-based claim.[43] The Court remanded the case on the question as to whether the bankruptcy court had core jurisdiction over the state law claim, and, in turn, whether it had the power to issue final orders in the case.[44]

In short, *Marshall v. Marshall* is the prototype of a new forum-shopping problem in bankruptcy. As a state court proceeding was underway, one of the parties to that proceeding filed a bankruptcy petition 1,500 miles away. After the bankruptcy case had ended, the bankruptcy court then exercised jurisdiction over the state-law-based claims, and reached a judgment diametrically opposed to that entered by the state court applying its own law. The ruling was unnecessary both as a matter of administration of the bankruptcy estate or as an expedient to avoid undue delay. The case is particularly strange in that the result in the bankruptcy court case was determined by the imposition of sanctions for the failure to cooperate in an action that the bankruptcy court should not have heard in the first place. As a result of hearing the case under these terms, the bankruptcy court reached a result that was almost certainly incorrect on both the law and the facts, as demonstrated by the contrary result in the fully-litigated state case.

Marshall v. Marshall can accurately be characterized as one dispute between two parties, in two different courts, purportedly applying the same state law but having dramatically different outcomes.[45]

This result is possible, perhaps even likely, if the bankruptcy court jurisdiction over the claim is rendered equal to that of the state court, or an Article III federal court. The conclusive and dispositive effect of final orders governing discovery and sanctions produce a potential, as in *Marshall*, for dramatically different outcomes with respect to the same dispute. This "final order" question gives rise to the new forum shopping problem in bankruptcy, and a new question: "When can a bankruptcy court enter final orders?"

II. The Logical Limits of Bankruptcy Jurisdiction

Strong policy considerations, reflected in the plain language of the jurisdictional statutes governing bankruptcy courts, support the proposition that certain matters are properly heard by an Article III judge (or the state equivalent) rather than by a bankruptcy judge. The Framers showed great care in designing the Article III federal judiciary and particularly the structural protections for individual rights and the effective administration of justice embedded therein, including life tenure and undiminishable remuneration. Article I bankruptcy judges, by contrast, lack both of these protections. This distinction is not trivial—the Framers plainly understood that the protections of judicial independence and competence were essential to the proper and unbiased administration of justice.

Article III establishes a particular, albeit an admittedly imperfect, incentive structure for judges exercising the judicial power. In Federalist 78, Alexander Hamilton referred to the judiciary as the "least dangerous" branch of government because it held the least capacity to infringe upon individual constitutional rights.[46] He reasoned that its power to do harm was limited to the authority of its judgments.[47] This characterization of the judiciary turned, in part, upon Hamilton's vision of an independent judiciary. By independence, Hamilton insisted that it was necessary that judges serve during good behavior, and as explained in Federalist 79, without risk to their fiscal support.[48] According to Hamilton, "the power over a man's subsistence amounts to a power over his will."[49]

Article III prevents certain considerations from influencing the judgment of judges. Judges and courts created pursuant to Congress's authority under Article I, by contrast, lack these protections. And even when parties consent to jurisdiction, some courts have recently limited the decision–making authority of Article I courts under the Constitution.[50]

There are several notable differences between Article I and Article III judges.

First, bankruptcy cases are often more abbreviated than non-bankruptcy proceedings. Bankruptcy judges are often more sensitive to the typically limited resources at issue in bankruptcy, which may give rise to more streamlined, summary processes. As noted, this is an accommodation to the needs of speedy and final resolution in bankruptcy, but it is not ideal when no such haste and informality is necessary. There is no reason to substitute the summary proceedings of bankruptcy courts when a more thorough and accurate process is available with minimal delay.

Second, bankruptcy judges are appointed by the United States court of appeals for the circuit in which they sit, and not by the President upon the advice and consent of the Senate. Bankruptcy judges serve for a term of 14 years, and though they may be reappointed, the term is limited nevertheless.[51] Moreover, the process for reappointment of bankruptcy judges is highly opaque and depends on currying favor with the local bankruptcy bar. In general, of course, local bankruptcy lawyers are going to prefer judges who assert their jurisdiction authority broadly, thereby bringing major high-profile—and large-fee generating—cases (such as *Marshall*) to their district.[52] And unlike Article III judges who serve for life subject to their "good Behaviour" and cannot have their salary reduced during their time in office, bankruptcy judges may be removed for "incompetence, misconduct, neglect of duty, or physical or mental disability."[53]

All of these characteristics could conceivably cause the incentive structure of bankruptcy judges to differ in unfavorable ways from that of Article III judges. Term judges could be seeking reappointment, promotion to an Article III judgeship, fame for purposes of post-judicial employment, or other goals unrelated to an unbiased judgment of the cases before them.[54] Scholars have argued that bankruptcy judges have an incentive to compete to hear high-profile cases even when those cases and the justice system would benefit from having those cases heard elsewhere.[55]

And while bankruptcy judges possess the expertise essential to the efficient operation of the bankruptcy system, their narrow focus and specialized jurisdiction may blind them to the larger social and legal context in which they operate, causing them to overweigh bankruptcy concerns and policies relative to other social, economic, and judicial values. Supervision by Article III judges of general jurisdiction provides a broader perspective on such issues, thereby counterbalancing a tendency toward a parochial "bankruptcy-centric" perspective that can arise and lead bankruptcy judges to undervalue other important systemic and substantive values of the legal system. The accommodation of comity for state courts, for instance, is reflected in a variety of limits on the power of federal courts to resolve disputes grounded in state law, such as limitations on diversity jurisdiction and the highly-circumscribed grounds for pendent jurisdiction over state law claims. Various abstention doctrines further illustrate this principle of deference to state courts in matters of state law.

Bankruptcy jurisdiction, by contrast, is very broad as a matter of statutory grant. And, as the Supreme Court held in the *Marshall* appeal in narrowly construing the probate exception to the bankruptcy laws, as a matter of plenary power bankruptcy courts must have broad power to resolve matters affecting the administration of the estate. But that a broad grant of jurisdiction may be necessary does not mean that bankruptcy judges *should* interfere in every dispute that could conceivably affect the administration of an estate. Rather it highlights the fundamental question raised by the bankruptcy judge's actions in *Marshall*—the crucial need for self-restraint by bankruptcy judges to respect other values in the American legal system, such as comity for other actors and the prevention of improper forum-shopping. Where self-restraint is lacking and bankruptcy judges overreach to address issues that fundamentally relate to the private rights of individuals rather than the timely administration of the bankruptcy estate and unduly infringe on state court interpretations of their own laws, the constitutional and statutory scheme renders these judgments advisory only, not final orders. Indeed, the Constitution itself compels this.

More fundamentally, it is crucial to enforce the boundary between the authority of Article I and Article III judges to prevent Congress from circumventing the structural protections created by the Constitution by assigning authority to Article I judges to resolve issues properly reserved to Article III judges. Similarly, appellate courts must enforce this boundary to prevent circumvention by Congress or judges such as essentially interpreting private rights by recharacterizing them as public rights or inherent judicial powers.[56]

The outcome of *Marshall v. Marshall* provides an instructive example of the ways in which the incentive structure associated with Article I might dramatically affect the outcome of a dispute rooted in state law. For instance, the bankruptcy judge in the case held what has been characterized as a press conference in open court, fielding questions from the media.[57] Of course, the media attention was largely a product of the celebrity status of the debtor, Anna Nicole Smith. It may not be unusual for a bankruptcy judge to field questions from the press in open court—although the authors have never heard of it— but it would be naïve to suggest that such behavior was unrelated to the celebrity of the debtor. Many cases, both in district as well as bankruptcy court, receive substantial media attention, but the judge's behavior in catering to and apparently seeking this attention is nonetheless unusual.

Second, the court in *Marshall* issued discovery sanctions upon the less celebrated party in the case, sanctions that were ultimately overturned on appeal, but were nevertheless dispositive in establishing the factual predicate upon which legal determinations in favor of the celebrity debtor were reached. While sanctions are occasionally overturned, their severity and conclusory nature, when coupled with other questionable judicial conduct, undermine the authority underlying the exercise of judicial power in the case.

A third example of behavior uncharacteristic of Article III judges is less obvious, but telling. In *Marshall*, the Texas probate jury had handed down its findings after five months of deliberations, based upon determinations of Texas law made by a Texas court.[58] Nevertheless, the bankruptcy court in *Marshall* refused to abstain or give deference to the state court

adjudication already concluded. Instead, the bankruptcy court thought it an appropriate use of judicial and debtor resources to adjudicate the dispute anew, with limited evidence, all while making path-breaking, unprecedented determinations of Texas law. While the court arguably was under no obligation to abstain from the matter, it *unarguably* was under no obligation to decide the matter either, and the arguments for refusing to abstain well after the close of the underlying bankruptcy case are unpersuasive, at best. At worst, they appear to stem from the court's dissatisfaction with the outcome of the state court proceedings.

Under *Marshall* every probate dispute could be swept into warring judicial processes to be manipulated by savvy bankruptcy filers. There is no reason to believe that, in establishing the jurisdiction of the federal bankruptcy courts, Congress intended for the resolution of multi-billion dollar probate disputes to turn on the relative speed by which they are resolved, rather than the thoroughness, accuracy, and expertise of the court hearing it. In fact, upon learning of the determination of the California bankruptcy court to rush forward with its trial, Judge Mike Wood, who presided over the probate trial in Texas state court, told the attorneys, "If this were a bankruptcy court in Texas that judge would send you back to probate court and say, 'Let me know when you are finished.'"[59] Such deference is typical in such situations, which explains why the bankruptcy judge's behavior in this case can be seen as so unusual.

Rather than relying on Texas courts to administer Texas law in a forum with Texas witnesses and judges, a federal bankruptcy judge over a thousand miles away issued an order after a summary hearing and a series of questionable interpretations of Texas probate law. *Marshall* potentially raises the specter of such a race to the courthouse in every probate case—and the principle potentially extends beyond probate to all issues of traditional state law including tort, contracts, and property. Bankruptcy law and state probate law have peacefully coexisted for over a century, and it is difficult to believe that Congress intended such a radical departure from this harmony, especially when doing so would create such perverse policy results for little obvious advantage.[60]

Professor Troy McKenzie recently has pointed to many of these same factors and concluded that bankruptcy judges increasingly act with a degree of authority and discretion more fitting of Article III judges.[61] He notes, for instance, the vast powers carried out by bankruptcy judges and their relative immunity to review by superior Article III courts.[62] He also argues that because bankruptcy judges are chosen by a merit-selection process rather than a political process, bankruptcy judges may be even more insulated from political pressures.[63] McKenzie argues that the Supreme Court should retreat from its efforts to police the boundaries of the powers reserved to the Article III courts (and implicitly, the core versus non-core distinction).

We agree with McKenzie's observation that bankruptcy courts today exercise a broad scope of authority in practice. But we disagree with his sanguinity toward this development. We instead support a greater degree of self-restraint by bankruptcy judges about the exercise of their powers and tighter oversight by Article III judges. For instance, McKenzie argues that bankruptcy judges are subject to an appointments process that may be less political in nature than that for Article III judges. This is not obvious—research indicates, for instance, that so-called "merit selection" of state judges does not remove political pressures on appointments but simply redistributes it to other venues (such as bar politics) that may be political as well, just in different ways.[64]

Even if true, it does not address the concern about the political issues involved in *reappointment* of bankruptcy judges or the potential for bankruptcy judges to leave the bench at the end of their term and enter private practice. McKenzie acknowledges that these pressures might lead to the capture of bankruptcy judges by the bankruptcy bar.[65] Scholars who have studied other specialized courts, such as the Federal Circuit, have found a tendency for those courts to succumb to capture by repeat-players that appear before them.[66] Once an Article III is appointed—even if the initial process is highly-politicized—the judge is immune from future political pressure. Bankruptcy judges, by contrast, know that they will be held accountable one way or the other at the end of their term and this fear casts a shadow over their behavior.

III. Conclusion: A Modest Approach to Bankruptcy Jurisdiction

The federal courts today are now confronted with a new form of forum shopping in bankruptcy. Litigants concerned with the likelihood of success in state or federal non-bankruptcy courts can race to the courthouse, file a bankruptcy petition, and take their chances in a more streamlined, less thorough, and often resource-constrained bankruptcy process, administered by Article I bankruptcy judges. The statutory grant of bankruptcy court jurisdiction can be construed broadly, and, as *Marshall*'s facts suggest, can be easily manipulated. Once jurisdiction is established, the primary restraint on strategic forum-shopping is the self-restraint of the bankruptcy judge. Where the bankruptcy judge fails to exercise proper restraint, however, it is the duty of Article III judges to intervene to enforce those limitations. As the Framers implicitly understood, there are sound reasons for vesting the federal judicial power in the hands of Article III judges. It is precisely for these reasons that Article III judges serve as "backstops" to the rulings of Article I judges on matters involving private rights, treating such rulings as non-core matters to be treated as something less than the final judgment of a case.

Endnotes

1 This paper is adapted from a law review article of the same title, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417621.

2 Butner v. United States, 440 U.S. 48 (1979).

3 492 U.S. 300 (1989).

4 *In re* Marshall, 253 B.R. 550 (Bankr. C.D. Cal. 2000).

5 458 U.S. 50 (1982).

6 392 F.3d 1118 (9th Cir. 2005), *rev'd and remanded*, 547 U.S. 293.

7 Marshall v. Marshall, 547 U.S. 293 (2006).

8 Brief of Respondent, Marshall v. Marshall, S.Ct. case no. 04-1544.

9 Marshall v. Marshall, 275 B.R. 5, 21-22 (C.D. Cal. 2002).

10 *Id.*

11 Marshall v. Marshall, 547 U.S. at 300.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 Marshall v. MacIntyre (*In re* Estate of Marshall), prob. juris. noted, no. 276,815-402.

17 Marshall v. Marshall, 547 U.S. at 300.

18 *Id.* at 300-01.

19 *In re* Marshall, 275 B.R. 5, 8 (Bankr. C.D. Cal. 2002).

20 *Id.*; *see* App. 23-25.

21 Ronald A. Cass, *Marshall v. Marshall and the Probate Exception to Federal Court Jurisdiction*, http://www.fed-soc.org/doclib/20070322_MarshallvMarshall.pdf.

22 *In re* Marshall, 253 B.R. 550, 558-59 (Bankr. C.D. Cal. 2000).

23 *Id.* at 561.

24 *Id.*

25 *In re* Marshall, 257 B.R. 35 (C.D. Cal. 2000).

26 *Id.* at 40.

27 *Id.*

28 *In re* Marshall, 275 B.R. 5 (C.D. Cal. 2002).

29 *Id.* at 10.

30 *Id.* at 50.

31 *In re* Marshall, 392 F.3d 1118, 1124-25 (9th Cir. 2004).

32 Marshall v. Marshall, 547 U.S. 293, 294 (2006).

33 *In re* Marshall, 392 F.3d at 1129.

34 *Id.*

35 Marshall v. Marshall, 547 U.S. at 294.

36 *Id.*

37 *Id.*

38 *Id.* at 295.

39 *Id.* at 304.

40 *In re* Marshall, 392 F.3d 1118, 1121 (9th Cir. 2004).

41 *Id.* at 1137.

42 Marshall v. Marshall, 545 U.S. 1165 (2005).

43 Marshall v. Marshall, 547 U.S. 293, 313-14 (2006).

44 *Id.* at 315.

45 *Cf.* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

46 The Federalist No. 78 (Alexander Hamilton).

47 *Id.*

48 The Federalist No. 79 (Alexander Hamilton).

49 *Id.*

50 *See* United States v. Johnson, 258 F.3d 361 (5th Cir. 2001) (limiting the authority of Article I magistrate judges to review district court determinations in criminal proceedings under 28 U.S.C. §2255 as unconstitutional).

51 One study estimates that approximately 8% of bankruptcy judges were formally denied reappointment for a second term, but that the percentage may be as high as 26% when considering those who appear to have had reappointment denied informally or were induced to retire. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Geo. L. J. 607, 675 (citing Stan Bernstein, *The Reappointment of Bankruptcy Judges: A Preliminary Analysis of the Present Process* (unpublished manuscript)).

52 *See* Todd J. Zywicki, *Is Forum-Shopping Corrupting America's Bankruptcy Courts?*, 94 Geo. L. J. 1141, 1180-85 (2006).

53 28 U.S.C. §152(e).

54 Resnik, *supra* note 51, at 672-73. Resnik notes that it has become increasingly common for Article I bankruptcy and magistrate judges subsequently to be promoted to district and appellate judgeships.

55 *See* Lynn M. LoPucki, Courting Failure: How Competition of Big Cases is Corrupting the Bankruptcy Courts 20 (2005).

56 *See*, *e.g.*, Resnik, *supra* note 51, at 668-69.

57 Brief of Respondent at 6, Marshall v. Marshall, S.Ct. No. 04-1544 (noting that at one point, a reporter from *Newsweek* magazine took the podium and posed questions regarding the case); *id.* at 6 n.7.

58 *Id.* at 294.

59 Jill Smolowe, *Estate of the Union: Bereaved by Unbowed, Model Anna Nicole Smith Wages Battle to Claim a Portion of the Millions Left by Her Ninetysomething Oil-Tycoon Husband*, 52 People No. 19 (Nov. 15, 1999), *available at* http://www.people.com/people/archive/article/0,,20129774,00.html.

60 *Cf.* BFP v. Resolution Trust Corp., 511 U.S. 531, 542 (1994) (noting that courts should be reluctant to infer congressional intent to disrupt the "ancient harmony" between state debtor-creditor law and federal bankruptcy law).

61 Troy McKenzie, *Judicial Independence, Autonomy, and The Bankruptcy Courts*, working paper.

62 *Id.* at 29.

63 *Id.* at 45.

64 *See* Todd J. Zywicki, *Public Choice and Tort Reform* (working paper, George Mason University School of Law) (2000) (discussing state judicial "merit selection" programs).

65 McKenzie, *supra* note 61, at 50.

66 Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 Geo. Wash. L. Rev. 1, 17-18 (2008); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035, 1110 (2003); John R. Thomas, *Formalism at the Federal Circuit*, 52 Am. U. L. Rev. 771, 792-94 (2003) (discussing how the Federal Circuit's "jurisprudence increasingly reflects a trend towards adjudicative rule formalism," which is explained in part as a response to the "lawyers [who] draft the exclusionary rules that are patent claims").