Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century

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We certainly agree that the problems are there—the bankruptcy system is broken, it's been broken for years; an attempt was made in 1978 to repair it. That attempt, it has been shown over the last 20 years, just hasn't worked out right and it needs to be readjusted to a fairer system—fairer to consumers, fairer to debtors, fairer to creditors.¹

I. INTRODUCTION

For the last century, the institutional characteristics of the United States bankruptcy system have been studied and debated. As a result, the system has been overhauled numerous times, but with only limited success. The present bankruptcy court structure fails to provide legal clarity and inflicts a great social cost, both in time and money on the American people. While the few critics of bankruptcy reform indicate that the bankruptcy courts are functioning and will continue to function in the manner in which they were developed over a century ago, the great majority of opinion holds that the bankruptcy courts are embroiled in a potential disaster which threatens their institutional framework.

Bankruptcy filings are “booming in America like never before.”² Filings have been intensifying as individuals and businesses continue to increase their debt load. Incredibly, in 1996 over one million bankruptcy cases were filed and the statistics suggest that filings will continue to increase at a staggering twenty-seven percent per year.³ This

³ Tatelbaum, supra note 2, at 182. See also Administrative Office of the U.S. Courts,
radical escalation in the volume of bankruptcy filings exacerbates the troubles now confronted daily by practitioners and jurists with the current inadequate structure of the bankruptcy court system.

The need for reform is clear, and has been for some time. Given the bankruptcy system’s inadequacies and escalating caseloads, pressure has been mounting for congressional action for decades. Commentators, policy makers, and judges have proposed a variety of solutions to the problems faced by the bankruptcy courts, but few have been adopted. The purpose of this Article is to provide a comprehensive survey and critique of the most effective proposals for reform to deal with the difficulties now faced by the bankruptcy courts. This Article first provides an overview of the current structure of the bankruptcy court system and highlights many of its flaws. Next, this Article examines the three most popular proposals for remedying the bankruptcy courts’ ills: granting Article III status to bankruptcy court judges; direct appeal of bankruptcy decisions to the courts of appeals; and the implementation of bankruptcy appellate panels in all of the circuits. Finally, this article concludes that, although the continuing deterioration of the bankruptcy court system demands profound change, it is within our

Bankruptcy Filings Pass One Million Mark (Aug. 28, 1996) (noting the fact that one million bankruptcy cases are filed each year and the number continues to increase); Chief Justice William H. Rehnquist, Remarks at Annual Spring Meeting of the American Bankruptcy Institute (May 18, 1992), reprinted in 138 CONG. REC. S7396 (daily ed. June 3, 1992) (“In 1992, one million bankruptcy cases were expected to be filed, which is tremendous when only 250,000 civil cases and 50,000 criminal cases were estimated.”).

4. See Stephen Gerling, Suggestions for the National Bankruptcy Review Commission and Congress, 4 AM. BANKR. INS. L. REV. 519 (1996) (“The recently released statistics stating that for the twelve month period ending June 30, 1996 there were 1,042,110 bankruptcy filings will cause, once again, a heightened awareness by Congress focused on the need for bankruptcy reform.”); Hon. Leif M. Clark, Reprise on Article III Status for Bankruptcy Judges, 1997 ABI INL. LEXIS 148, at 2 (May, 1997) (noting need for reform); Michael Denhem, A Call For Bankruptcy Reform: The Fifth Circuit Limits The Texas Homestead Exemption And Further Complicates The Exemption Controversy, 30 TEX. TECH L. REV. 269, 291 (1999) (“There is a substantial need for bankruptcy reform, which may include adopting a purely uniform federal bankruptcy law or revising the Code language . . . .”); Rehnquist, supra note 3, (advocating reform based, at least in part, on the increasing number of bankruptcy filings); Bankruptcy Needs Reform, N.Y. TIMES, April 14, 1993, at A20 (editorial) (promoting bankruptcy court reform).


6. For a discussion of the current structure of the bankruptcy court system and its flaws, see infra notes 11-54 and accompanying text.

7. For a discussion of the proposal to grant Article III status to bankruptcy court judges, see infra notes 55-83 and accompanying text.

8. For a discussion of the proposal to allow direct appeal of bankruptcy decisions to the courts of appeals, see infra notes 84-126 and accompanying text.

9. A bankruptcy appellate panel is a panel of three bankruptcy judges who hear all first-level appeals. For a further discussion on bankruptcy appellate panels, see infra notes 127-84 and accompanying text.
reach and steps must be taken to ensure that substantial justice is not sacrificed as we begin the twenty-first century.10

II. BACKGROUND

The current bankruptcy court system has been described as a system of “remarkable complexity.”11 To fully understand exactly why the bankruptcy courts are in such dire need of reform and to better assess the merits of the reforms discussed in this Article, a brief description of the development and the jurisdictional limitations of the bankruptcy courts is helpful.

A. History of the Bankruptcy Court—Pre-Northern Pipeline

Article I, Section 8 of the United States Constitution authorizes Congress “to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”12 Because the Constitution grants this power to the legislative branch, bankruptcy courts are considered Article I (legislative) courts rather than Article III (judicial) courts. As a result, bankruptcy courts and judges are not conferred with the same scope of powers as their Article III counterparts. Bankruptcy courts only have the authority that is vested through congressional action.13 In other words, each power exercised by the bankruptcy courts must be linked to a statute granting that power.14

10. For a discussion of the conclusion to this article, see infra notes 185-89 and accompanying text.
13. See 28 U.S.C. § 151 (1988). Section 151, “Designation of Bankruptcy Courts,” states: In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.
14. See Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929) (holding that the authority of non-Article III courts is not only circumscribed by the Constitution, but limited as well by the powers given to it by Congress); Taxel v. Marine Midland Bus. Loans, Inc., 138 B.R. 959, 963 (Bankr. S.D. Cal. 1992) (“Bankruptcy court judges cannot conduct jury trials . . . unless they have a statutory basis for such authority.”); Plastiras v. Idell, 827 F.2d 1281, 1284 (9th Cir. 1987) (“Congress vests bankruptcy courts with their jurisdiction and their authority has no ‘inherent’
The first grant of authority to the bankruptcy courts was over a century ago with the enactment of the Bankruptcy Act of 1898. Under the Bankruptcy Act of 1898, bankruptcy judges were referred to as “referees” and performed only ministerial functions, such as the supervision and administration of bankruptcy cases. In 1973, the Rules of Bankruptcy Procedure were promulgated wherein the title of referee was changed to “bankruptcy judge,” but the powers of the office were not significantly altered.

In 1978, based on the recommendation of the Commission on the Bankruptcy Laws of the United States, Congress passed what is now referred to as the Bankruptcy Reform Act of 1978 (“1978 Act”). The 1978 Act was one of the first substantial overhauls in bankruptcy law since the inception of the bankruptcy system. The primary purpose of the 1978 Act was to modernize the bankruptcy laws and to provide bankruptcy courts with jurisdiction over all disputes that could affect the debtor’s bankruptcy. Perhaps the most significant reform created by the 1978 Act was the transformation in bankruptcy litigation from the federal district courts to the revamped bankruptcy courts. Under the newly-fashioned bankruptcy court system, Congress conferred upon bankruptcy judges the broad power to hear and make final decisions in “all civil proceedings arising under Title 11 or arising in or related to cases under Title 11.” The United States Bankruptcy Courts were created as “courts of record” and were designated as “adjuncts to the district courts for such districts.”
B. The United States Supreme Court Levels a Blow to the Jurisdiction of the Bankruptcy Courts

Only four years after passage of the 1978 Act, the United States Supreme Court issued a landmark decision on the power of the bankruptcy courts that left their future in doubt. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that the broad jurisdictional grant to bankruptcy courts under the 1978 Act was unconstitutional because it impermissibly gave Article III judicial powers to bankruptcy judges.

In *Northern Pipeline*, a debtor had filed for Chapter 11 reorganization in the bankruptcy court. Later, the debtor filed a suit in the same court against a creditor for alleged breach of contract and warranty, misrepresentation, coercion, and duress. The creditor moved for dismissal on the grounds that the 1978 Act “unconstitutionally conferred Article III judicial power” upon Article I judges. The bankruptcy judge rejected this contention but the district court reversed and the case went directly to the United States Supreme Court. The Supreme Court, in a four-justice plurality opinion by Justice Brennan, affirmed the district court’s decision and held that it was unconstitutional for a bankruptcy judge to hear and decide the estate’s action. The Court first found that Congress did not create the bankruptcy courts as Article

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26. Id. at 87 (plurality opinion); Id. at 91-92 (concurring opinion).
27. Id. at 56.
28. Id.
29. Id. at 56-57. There was also a question as to whether the bankruptcy court could even exercise jurisdiction because the breach of contract claim was a state-based claim. Id.
32. *Northern Pipeline Construction Co.*, 458 U.S. at 86-87. Joining Justice Brennan in the plurality opinion were Justices Marshall, Blackmun and Stevens. Justices Rehnquist and O’Connor concurred in the judgment but did not agree with Justice Brennan’s constitutional analysis. Id. at 90-91 (Rehnquist, J., concurring). Justice White, who was joined by Chief Justice Burger and Justice Powell in his dissent, also rejected the constitutional analysis posited by Justice Brennan. Id. at 103 (White, J., dissenting). Justice White argued that Justice Brennan should have confined his holding of invalidity to the specific jurisdiction exercised by the bankruptcy court. See id. (“Even if there are specific powers now vested in bankruptcy judges that should be performed by Article III judges, the great bulk of their functions are unexceptionable and should be left intact.”). Writing his own dissent, Chief Justice Burger stated that the lower court had not held that Congress’ broad grant of jurisdiction to the bankruptcy courts was inconsistent with Article III of the Constitution. Rather the holding was limited to the proposition that “a traditional state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an Article III court.” Id. at 92 (Burger, C.J., dissenting).
III courts, nor could the precedents for the creation of Article I "Legislative" courts (i.e. territorial courts, the courts of the District of Columbia, courts martial, and administrative agencies adjudicating cases involving "public rights") support the extensive grant of jurisdiction to the bankruptcy courts. The Court then concluded that granting power to the bankruptcy courts to hear all civil proceedings arising under title 11 or arising in or related to cases under title 11 was constitutionally flawed because it "impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article III district court and has vested those attributes in a non-Article III adjunct." 

C. The Fallout After Northern Pipeline

The Northern Pipeline decision dealt a heavy blow to the constitutional status of the bankruptcy courts and Congress was forced to restructure the courts as well as several sections of the United States Code as a result. Two years after Northern Pipeline was decided, Congress amended the 1978 Act with the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA").

33. Id. at 63. The plurality opinion explained that congressional control over territories and the District of Columbia rested on the absence of a state government in these geographical areas. Congress has "complete power of government" in these locations under Article IV of the Constitution. Id. at 64. Congress has the authority to provide for courts martial under Article I, Section 8, Clauses 13 and 14 of the Constitution, which give Congress the power to "make Rules for the government and Regulation of the land and naval Forces." Id. at 66. The plurality also concluded that the right to recover contract damages involved "the adjudication of state-created private rights," rather than "the restructuring of debtor-creditor relations." Id. at 71. Thus, the Court concluded that bankruptcy court jurisdiction over such a right could not be justified by cases involving "public rights" in legislative courts or administrative agencies. Id.

34. Id. at 87.

35. Because the Supreme Court had held that the grant of authority to the bankruptcy courts was unconstitutional, upon motion of the Solicitor General, the Supreme Court stayed its judgment until December 24, 1982. See United States v. Marathon Pipeline Co. (Northern Pipeline II), 458 U.S. 50 (1982). The stay was ordered to give Congress some time to remedy the legislation so that the effect of declaring the bankruptcy system unconstitutional would not be catastrophic. George, supra note 22, at 1494-95. The Court denied a subsequent motion to extend that stay past that date, but did allow for prospective application so that cases filed before that date could proceed without disruption. See Northern Pipeline II, 458 U.S. at 88. At this point, the Judicial Conference of the United States proposed a draft "Emergency Rule" to be adopted by the district courts which it thought would enable the bankruptcy court system to continue to operate in a constitutional fashion. The Emergency Rule referred to the bankruptcy courts "all cases under title 11 and all civil proceedings arising under title 11 or arising in or related to cases under title 11," but permitted the district court to withdraw the reference at any time. The Emergency rule gave the bankruptcy courts authority to perform "all acts and duties necessary" to handle referred cases and proceedings, but it barred them from conducting (i) proceedings to enjoin a court; (ii) proceedings to punish criminal contempt not committed in the presence of the bankruptcy judge; (iii) appeals from a decision of a bankruptcy judge; or (iv) jury trials. For the complete text of the Emergency Rule, see appendix to White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983).

designated bankruptcy judges as a "unit of the district court to be known as the bankruptcy court for that district,"\textsuperscript{37} to serve as "judicial officers of the United States district court established under Article III of the Constitution."\textsuperscript{38} BAFJA also authorized the courts of appeals to appoint bankruptcy judges to fourteen-year terms\textsuperscript{39} and provided that a bankruptcy judge could be removed during that fourteen-year term "only for incompetence, misconduct, neglect of duty, or physical or mental disability."\textsuperscript{40} Most notably, however, BAFJA permitted the district courts to refer to the bankruptcy courts all cases arising under title 11 and all core proceedings\textsuperscript{41} arising under title 11 or arising in a case under title 11.\textsuperscript{42}

Thus, under BAFJA, Congress vested the bankruptcy court with two distinct kinds of judicial power dependent upon the subject matter before the court. With regard to cases arising under title 11 and core proceedings, the bankruptcy court has the same power to determine both the law and facts as the federal district court. The district court's review of these types of cases is analogous to ordinary appellate review.\textsuperscript{43} With regard to non-core proceedings,\textsuperscript{44} however, the bank-

\textsuperscript{39} Id.
\textsuperscript{40} Id. § 152(e).
\textsuperscript{41} Core proceedings include, but are not limited to, the following:
\textsuperscript{A} matters concerning the administration of the estate;
\textsuperscript{B} allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter Eleven, Twelve, or Thirteen of Title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under Title 11;
\textsuperscript{C} counterclaims by the estate against persons filing claims against the estate;
\textsuperscript{D} orders in respect to obtaining credit;
\textsuperscript{E} orders to turn over property of the estate;
\textsuperscript{F} proceedings to determine, avoid, or recover preferences;
\textsuperscript{G} motions to terminate, annul, or modify the automatic stay;
\textsuperscript{H} proceedings to determine, avoid, or recover fraudulent conveyances;
\textsuperscript{I} determinations as to the dischargeability of particular debts;
\textsuperscript{J} objections to discharges;
\textsuperscript{K} determinations of the validity, extent, or priority of liens;
\textsuperscript{L} confirmation of plans;
\textsuperscript{M} orders approving the use or lease of property, including the use of case collateral;
\textsuperscript{N} orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
\textsuperscript{O} other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.
\textsuperscript{43} Compare Nationwide Mut. Ins. Co. v. Berryman Prods., Inc., 159 F.3d 941, 943 & n.6 (5th Cir. 1998) (reviewing bankruptcy court's findings of fact under clearly erroneous stan-
ruptcy judge may render a final judgment only with the consent of the parties. Absent consent, in a non-core proceeding, the bankruptcy court may only submit proposed findings of fact and conclusions of law, which are subject to de novo review by the district court.

D. Congress’ Most Recent Attempt at Bankruptcy Reform—The 1994 Act

The most recent significant bankruptcy reform legislation was the Bankruptcy Reform Act of 1994 (the “1994 Act”). President Clinton stated that the 1994 Act was “the most broad-based bankruptcy reform measure to be signed into law in sixteen years.” Congress’ motive for passing the broad reform legislation was clear: a concern about the tremendous number of bankruptcy filings in the 1990’s and the strain they placed on the system. Congress also wanted to address concerns presented by several “problematic court opinions construing the Bankruptcy Code.” One of the most significant provisions in the 1994 Act was the requirement that judicial councils within a circuit consider establishing a bankruptcy appellate panel to decide bankruptcy appeals in all cases where a party has not opted-out. However, the power of bankruptcy judges to enter final judgments only in “core” proceedings but not in “non-core” proceedings remained unchanged by the 1994 Act.


45. An interlocutory decision of the bankruptcy court is also reviewable by the federal district court. See 28 U.S.C. § 158(a) (1988). The statute provides that appeals to the district court from interlocutory bankruptcy court orders require “leave of the court.” It is unclear, however, whether that leave is sought from the district court, the bankruptcy court or both. Compare In re United Press Int’l Inc., 60 B.R. 265, 276 (Bankr. D.C. 1986) (requiring certification by the bankruptcy judges as well as the district judge) and Connelly v. Shatkin Inv. Corp., 57 B.R. 794, 796 (Bankr. N.D. Ill. 1986) (same), with Bertoli v. D’Avella, 812 F.2d 136, 140 (3d Cir. 1987) (no certification by the bankruptcy judge is required).


47. See Id. § 157(c)(1) (1988) (providing that a bankruptcy judge cannot enter a final judgment on a non-core case).


50. Id.


E. The Current Structure is Inadequate

Although the creation of bankruptcy appellate panels was a significant step toward reform, the 1994 Act fell painfully short of solving the problems faced by the bankruptcy courts. Under the current deficient structure, the precedential value accorded to bankruptcy court decisions is largely disputed, leading to unsettled rules of law and unnecessary appeals. Moreover, district court judges, instead of specialized bankruptcy judges who are more qualified to deal with the highly technical and specialized field of bankruptcy law, are rendering opinions on complex issues of bankruptcy law resulting in the unnecessary expenditure of the most precious judicial resource—the judges' time. Thus, the bankruptcy courts continue to languish under an antiquated system whereby litigants, practitioners, and even jurists lack a clear construction of the law. Moreover, as the number of litigants in the bankruptcy courts continues to mount at an alarming rate, the ills now plaguing the bankruptcy system are exacerbated. Therefore, the present structure of the bankruptcy courts merits immediate attention by Congress. Implementation of any of the following proposals would be a good start.

III. GRANT BANKRUPTCY JUDGES ARTICLE III STATUS

A proposal that has been advocated for decades as a cure-all to the problems faced by the bankruptcy courts is to grant them Article III status. Although the 1978 Act greatly expanded the jurisdiction of the bankruptcy courts by conferring virtually independent judicial power upon the bankruptcy judges, the 1978 Act did not provide bankruptcy judges with Article III status. Leading reformers believe that “much
of the hard and winding road of bankruptcy jurisprudence, as trailblazed since 1978, could have been avoided if Congress followed its original plan and bestowed Article III status on bankruptcy jurists. Shamefully, it missed the opportunity to do so in 1984, and then again in 1994.

Granting Article III status to the bankruptcy courts is a necessary predicate to increase the powers of bankruptcy judges under the Constitution. Article III protection has always been regarded as fundamental to ensuring the separation of powers vital to our system of government. Article III provides that 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." Article III further mandates that these federal courts be staffed by judges who hold their offices during good behavior and receive a compensation which shall not be diminished during their time in office. Thus, the "Good Behavior Clause" and the "Compensation Clause" provide life tenure and an irreducible salary. These clauses serve both to protect the role of the independent judiciary within the constitu-

57. In 1984, the House of Representatives sought to confer Article III status on bankruptcy judges but the Senate favored reducing the independence and power of the bankruptcy judges. See H.R. 6978, 97th Cong., 128 CONG. REC. H5871 (bill that proposed to elevate bankruptcy judges to Article III status).


59. The framers of the United States Constitution were steadfast in their conviction that Article III status was an essential institutional safeguard. As the 9th Circuit has noted: "Our own experience attests to the substance and reality of [Article III's] guarantees. A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas." Pacemaker Diagnostic Clinic of Am. v. Instrumedix, 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

60. U.S. CONST. art. III, § 1.

61. Id.

62. THE FEDERALIST NOS. 78, 79 (Alexander Hamilton) specifically addressed the purposes of these clauses: to remove the federal judiciary from potential domination by the executive and legislative branches, and to guarantee the protection of individual rights through an independent judiciary. Hamilton wrote the following about the Good Behavior Clause:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.

FEDERALIST No. 78. With respect to the Compensation Clause, Hamilton wrote:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

FEDERALIST No. 79.
tional scheme of tripartite government” and “to safeguard litigants’ rights to have claims decided before judges who are free from potential domination by other branches of government.” 63 The United States Supreme Court, in Northern Pipeline, 64 reiterated the importance of the separation of powers function of Article III requirements, and found that the federal judiciary was “designed. . . to stand independent of the Executive and Legislature - to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.” 65

The need for an Article III bankruptcy court is instantly recognizable. The bankruptcy courts are now encumbered with certain constitutional limitations that prevent the courts from efficiently fulfilling their intended role. Granting bankruptcy judges with Article III status would allow the bankruptcy courts to decide all bankruptcy cases, both core and non-core; thereby eliminating the need for appellate review by the district courts. 66 Moreover, in order for the bankruptcy courts to be totally effective, it is essential that the decisions rendered by the bankruptcy courts be given finality. Under the current court structure, the precedential value accorded to bankruptcy court decisions and district court decisions deciding issues of bankruptcy law is uncertain. 67 If given Article III status, jurisprudential certainty would ensue as the decisions rendered by the bankruptcy courts would be binding precedent and the need for review by the district court would be eliminated. 68 Also, the bankruptcy courts would have the power to conduct jury trials 69 and issue contempt orders, 70 both of which the bankruptcy courts

63. Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 848 (1986) (citing United States v. Will, 449 U.S. 200 (1980)). See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 181 (1989) (stating that Article III protections were “intended to insulate federal judges from direct political pressure and ensure that they would uphold the Constitution and federal laws without regard to the popularity of their actions.”); MARTIN H REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 53 (2d ed. 1990) (“The essential characteristic of the Article III courts . . . is the independence their judges possess with respect to the executive and legislative branches of the federal government.”).

64. 458 U.S. at 64 (plurality opinion).

65. Id. at 58.


67. For a discussion of the precedential value of bankruptcy court opinions and district court opinions deciding issues of bankruptcy law, see infra notes 95-98, 172-84 and accompanying text.

68. See Wiseman, Jr., supra note 66, at 15.

69. See, e.g., Official Comm. of Unsecured Creditors v. Schwartzman, 13 F.3d 122, 128 (4th Cir. 1993) (“We hold that bankruptcy judges are not authorized to conduct jury trials; where the Seventh Amendment provides the right to a jury trial in a core proceeding in bankruptcy, it must take place in the district court.”); Orion Pictures Corp. v. Showtime Networks, Inc., 4 F.3d 1095, 1101 (2d Cir. 1993) (“the constitution prohibits bankruptcy courts from holding jury trials
are arguably not constitutionally competent to do under the current system. Still another benefit of conferring Article III status to bankruptcy court judges is that the district courts would be unchained from their bankruptcy case-loads. Not only would this free up valuable judicial resources, but it would also provide greater uniformity by having fewer courts and fewer judges dealing with a particular issue.\textsuperscript{71}

Article III status would also ensure that bankruptcy cases are heard by the judges most qualified to render an informed and reasoned decision. Unlike most other areas of the federal law, the bankruptcy laws are so complex that there is a "unique need for a specialized tribunal."\textsuperscript{72} The fact that under the current regime Article I bankruptcy judges, who are ostensibly experts on bankruptcy issues, are subject to review by the district courts is mystifying. It is nonsensical to place "the best decision makers at the bottom of the decision-making hierarchy."\textsuperscript{73} Granting Article III status to bankruptcy judges would allow the bankruptcy court judge, who has a specialized background and has developed a certain level of expertise in the field, to resolve the complex issues that often arise in a bankruptcy proceeding.\textsuperscript{74} This is not to say that the district court judges cannot master complicated issues of bankruptcy law and render an informed decision on a timely basis, rather, it would be more efficient for the bankruptcy judges to hear such cases thereby conserving precious judicial resources.

The critics of the proposal argue that "the elevation in status threatens the status of the present Article III judiciary, primarily by diluting its membership and opening the door to the creation of a plethora of 'specialized courts.'"\textsuperscript{75} Other critics of the proposal contend that the

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\textsuperscript{70} See Laura B. Bartell, \textit{Contempt of the Bankruptcy Court—A New Look}, 1996 U. ILL. L. REV. 1 (1996) (concluding that bankruptcy judges lack the contempt power and vesting the non-Article III bankruptcy courts with such power would violate the Constitution).

\textsuperscript{71} Donald A. Brittenham, Jr., \textit{The Pros and Cons Behind the First Circuit’s Decision to Establish Bankruptcy Appellate Panels and the Growing Question of Whether the Panels Will Last}, 32 NEW ENG. L. REV. 215, 255 (1997).

\textsuperscript{72} Clark, \textit{supra} note 4, at 3-4. See Thomas B. Bennett, \textit{Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!}, 27 CUMB. L. REV. 1037, 1104 (1996) (noting the "overly complex and technical arena of bankruptcy").


\textsuperscript{75} Clark, \textit{supra} note 4, at 3-4. The Honorable Lief M. Clark of the Western District of Texas refutes this argument and advocates the need for Article III status:

Those critics who equate the issue of status with social status most certainly miss the point, because it is only legal status that has ever been at issue in this debate. The fear
“specialized” court would create a stratified bar with specialist attorneys having peculiar relationships with their bench and that the court would be a target to special interests that would acquire and maintain an undue influence in the context of bankruptcy law.  

The great weight of opinion, however, holds that the numerous positive aspects of granting Article III status greatly outweigh the negatives. Countering the critic’s aspersions that the bankruptcy judges would become “too specialized,” the proponents argue that judges dealing solely within one area of the law would become more familiar with the subjects before them resulting in a substantial increase in the number of cases they are able to handle as well as the sophistication of their judgments. Moreover, the proponents argue that specialization would also give judges a more systematic insight into the impact of

of increased specialization in the federal judiciary has somewhat greater force, at least if one accepts as correct the proposition that there is a positive intrinsic value to the preservation of courts of general jurisdiction. But the bankruptcy system has created an especially unique need for a specialized tribunal, and it is difficult to conceive of another area of federal law that would call for such a structure. For it is not so much the uniqueness of bankruptcy law per se that has compelled the creation of a free-standing bankruptcy judicial system, but rather its combination of volume, speed and unique procedures.

Id. See Robert Stern, Remedies for Appellate Overload: The Ultimate Solution, 72 JUDICATURE 103, 109 (1988-1989). Stern advocates the use of specialized courts to reduce court congestion stating: [I]t is time for American legislators, judges and lawyers to recognize that a single group of judges always acting as a unit cannot by itself dispose of an increasing number of thousands of cases per year, even when a large part of the work consists of determining which cases should be accorded plenary review.

Id.

76. Ben F. Overton, A Prescription for the Appellate Caseload Explosion, 12 FLA. ST. U. L. REV. 205, 221-22 (1984). Overton states: “For very good reasons, the creation of specialized courts has not been favored for addressing the problems created by expanding caseloads.” Id. The following comment by Simon Rifkind accurately explains the apprehensions the skeptics carry toward specialized courts:

A body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law. . . . . Once you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the exclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law.


their decisions on the field as a whole and provide a practical way to attain decisions that are more contemplative as well as more uniform. 78

If Congress wants to confer bankruptcy judges with Article III status, it may clearly do so. The Constitution leaves to Congress the ability to make most of the important decisions about the workload of the federal courts. Congress is constrained only by the liberal jurisdictional limits of Article III, Section 2 of the Constitution. 79 Indeed, in December 1996, the National Bankruptcy Review Commission ("the Commission") 80 recommended to Congress that the bankruptcy courts be staffed by judges holding a life-term tenure and salary protection—the necessary predicate of a judicial officer under Article III of the United States Constitution. 81 Congress has already twice declined to grant Article III status to the bankruptcy courts. 82 The advocates of the proposal all agree, however, that Article III status is a "critical and


It is inevitable that we will soon have to augment substantially our institutional capacity for authoritative decisions of national law; the system is choking at the top. There are two ways to achieve this. One is to increase specialization at the court of appeals level.

Id. at 1155.

79. See Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 BYU L. REV. 67, 75 (discussing the generous grant of authority over the lower courts to Congress). Professors Chemerinsky & Kramer state:

Within the limits of Article III, however, the Constitution establishes no objectively "correct" role for the lower federal courts. On the contrary, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress, essentially making the lower federal courts a resource to be used as Congress deems necessary.

Id. (footnote omitted).

80. The National Bankruptcy Review Commission is an independent commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). The Commission was created to:

(1) investigate and study issues relating to title 11 of the United States Code (the "Bankruptcy Code");
(2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
(3) to prepare and submit to the Congress, the Chief Justice and the President a report in accordance with section 608; and
(4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.


81. Clark, supra note 4, at 1-2. The Commission's approach toward transitioning to an Article III bankruptcy court would be accomplished mainly by attrition. Id. The currently appointed bankruptcy judges would be replaced after completion of their current fourteen-year term by newly appointed Article III bankruptcy judges. Id. During the interim, bankruptcy jurisdiction would be with the Article III bankruptcy judge who would refer cases to the remaining non-Article III judges who would continue to function as adjuncts of the new Article III bankruptcy court. Id. Further, the Commission recommended that if a district did not have an Article III bankruptcy judge, a judicial council for each circuit could designate an Article III bankruptcy judge from another district to function as the Article III bankruptcy judge for the district. Id.

all agree, however, that Article III status is a "critical and long overdue first step in the right direction" of bankruptcy court reform. 83

IV. DIRECT APPEAL TO THE COURT OF APPEALS

Another proposal that has been recommended by legal scholars, practitioners and jurists is the concept that bankruptcy appeals should go directly to the circuit courts of appeals, thereby bypassing the district courts. 84 A movement for this proposal has quickly been gaining momentum as the number of bankruptcy filings continues to grow at a torrid pace.

A. Development of the Current Path of Review of Bankruptcy Court Decisions

Under the Bankruptcy Act of 1898, a decision from the bankruptcy judge, (called a referee at the time) was appealable to the district court, and following the district court's decision, appealable to the court of appeals. 85 In the debate preceding the enactment of the 1978 Act, the United States House of Representatives proposed an alternative appellate scheme that called for appeals from the bankruptcy courts to proceed directly to the courts of appeals. 86 Under this proposal, judges had Article III status. 87 The United States Senate's alternative proposal, however, provided that the first level of appeal of a bankruptcy court decision would continue to be in the district court. 88

A compromise was reached between these two bills in the 1978 Act which provided that the initial appeal of a decision of the bankruptcy court would be to a district court or a bankruptcy appellate panel in cir-
cuits where one had been established,89 or directly to the court of appeals if both parties consented to circumvent the initial review by the district court or the bankruptcy appellate panel.90 The optional direct review to the court of appeals upon consent of the parties was eliminated in BAFJA.91 Thus, under the current structure of the judicial system, the initial appeal from a bankruptcy court decision can only be to a district court or to a bankruptcy appellate panel if one has been adopted in the circuit in which the bankruptcy court sits.92 Appeals from both the district court and the bankruptcy appellate panel go to the court of appeals.93

B. The Need for Direct Appeal

The need for direct appeal of bankruptcy court opinions to the circuit courts of appeals has never been more apparent. There are approximately ninety-four district courts and 650 district court judges. None of the district judges is bound by a bankruptcy appeals decision of a district judge from one of the other 93 district courts.94 For example, a district judge in the Southern District of New York is not bound by a district judge in Pennsylvania or by a bankruptcy appeals decision of a district judge in the Northern District of New York. Moreover, district

89. A bankruptcy appellate panel is a panel of three bankruptcy judges who hear all first-level appeals. Appeals can go directly to a bankruptcy appeals panel only if the Judicial Council in the circuit has established a bankruptcy appellate panel, if the district judges for the district in which the appeal arises have voted to authorize appeals to go to panels of the bankruptcy appellate panel service; and, finally, if all parties consent to take the appeal to a bankruptcy appellate panel. See 28 U.S.C. § 158(b)(1), (b)(6), (c)(1) (1994). For a further discussion on bankruptcy appellate panels, see infra notes 127-84 and accompanying text.


[A] court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

Id.

91. For a further discussion of BAFJA, see supra notes 36-47 and accompanying text.

92. Lawrence P. King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 VAND. L. REV. 675, 708 (1985) ("Section 158 does not sanction direct appeal to the court of appeals from the bankruptcy court under any circumstances.").


94. See, e.g., Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 n.7 (3d Cir. 1991) (citing authorities that stand for proposition that there is no such thing as the law of the district); In re Coffman, 125 B.R. 238, 239 (Bankr. W.D. Mo. 1991) (noting difficulty in "pick[ing] a confident path through the minefield of the conflicting decisions, not only in other circuits, but in the Western District of Missouri . . . ."); Newton v. Essres, 122 B.R. 422, 424-25 (Bankr. D. Colo. 1990) (noting conflict between various district court opinions in Colorado).
judges in multi-judge districts are not bound by the bankruptcy appeals decisions rendered by other district judges from that same district. Incredibly, there are reported cases holding that in a multi-judge district, a bankruptcy judge is not even bound by the bankruptcy appeals decision of one of the district judges in his or her own district. Thus, considering the number of district courts and the number of district judges, the number of potentially contradictory decisions grows exponentially with each passing day.

By issuing contradictory opinions, the present bankruptcy appeals system fails to perform one of the primary functions of an appellate court—"law declaration." Law declaration is the pronouncement of a rule of law that serves to guide prospective behavior and ensure that all cases receive the same treatment. The law declaration function is critical in view of the fact that the bankruptcy courts are the country’s most significant commercial courts. Although bankruptcy court and

95. *In re Gaylor*, 123 B.R. 236, 242 (Bankr. E.D. Mich. 1991) (noting “that the decision of any one district judge is not binding on other district judges”). “Of course, an *en banc* decision of the district court should be binding on each judge in the district.” *Id.* See also, *Thomas Bartels, United States District Courts En Banc – Resolving the Ambiguities*, 73 JUDICATURE 40, 42 (1989). For a comprehensive study of precedential value of bankruptcy decisions, see *Bussel*, *supra* note 11, at 1063-66.


97. *See Wiseman, Jr.*, *supra* note 66, at 15 (“There is no justification for affording two levels of appellate review as cf right.”).


100. *See Nancy C. Dreher, One Judge’s View of the Uniform Commercial Code in Bank-
district court decisions carry persuasive weight, because the decisions have no precedential effect, these courts serve only the most basic functions of appellate review and fail to cultivate much needed predictability in the law. As a result, bankruptcy practitioners have sparse guidance in advising their clients because many of even the most basic issues in bankruptcy law have no authoritative resolution.

Reforming the current bankruptcy appeals process so that bankruptcy appeals are directly resolved at the circuit level, by a three judge panel of Article III judges with the power to bind all of the courts below it, will advance the development of bankruptcy precedent and concomitantly satisfy the "law declaration" function now lacking in the current system. The American people deserve rules and legal constructs to guide private and commercial decisionmaking. Even the bankruptcy court judiciary has been vocal on this issue recognizing that "[t]he goal of predictability is not well-served when one lower court judge must look to the decisions of two or . . . as many as twenty different higher courts." Direct review of a bankruptcy decision by a circuit court would create a body of law that is binding on the lower courts, at least those within its jurisdiction, thereby creating much needed legal certainty.

Another justification for direct review advanced by various legal scholars is the belief that the circuit courts are better suited to decide issues of law than the district courts because "trial courts are not well-suited institutionally to have the final (or, more nearly, the 'final-as-a-practical-matter') word on questions of law." The proponents of direct review contend that the courts of appeals are better equipped than the district courts to handle appeals because they are commonly asked to reconcile the decisions of specialized agencies and courts resulting in a coherent body of law. Furthermore, because other cases have statutory priority on the district court dockets, such as criminal prosecutions, petitions for writs of habeas corpus, civil discrimination suits and the like, the district courts lack the opportunity to develop the level

ruptcy Court: Why it Doesn't Work the Way You Thought it Would, 79 MINN. L. REV. 777, 783 (1995) (stating that the "bankruptcy courts are the commercial courts in this country").

101. See Hershner, Jr., supra note 2, at 4 (stating that "direct appeals will add some certainty to the law that is not now present").


103. Bussel, supra note 11, at 1086 ("An appellate decision is generally endorsed by two or more appellate judges. The issues on appeal are almost always few and legal in nature and the judicial energies are concentrated on those narrow, focused questions."). See also Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817 (1994) (noting the superiority of the courts of appeals to hear appeals).

of expertise that would make them effective as appellate courts.\textsuperscript{105} Another benefit flowing from direct review is the benefit of the collaborative and deliberative effort offered by a multi-judge panel.\textsuperscript{106} The advantages of direct appeal are lost when a bankruptcy case is first appealed to a single district court judge.\textsuperscript{107}

\textbf{C. Impediments to Change}

The major negative effect articulated by commentators of eliminating the intermediate appellate tier in conjunction with the establishment of direct appeals is the increased burden on the circuit courts of appeals.\textsuperscript{108} Statistics reveal that circuit court bankruptcy caseloads would increase from three percent of all appeals filed in the circuits to seven percent.\textsuperscript{109} Although a four percent increase in circuit court bankruptcy appeals on its face may not appear to be a dramatic increase, in light of the fact that bankruptcy filings are escalating at a rapid pace,\textsuperscript{110} critics argue that the circuit courts need to identify mechanisms that will reduce their caseloads, not increase them.\textsuperscript{111}

An increase in appellate court workload has obvious adverse implications.\textsuperscript{112} Time is especially critical in bankruptcy matters where there


\textsuperscript{106} See Caminker, supra note 103, at 847.

\textsuperscript{107} See Commission Considers Venue, Jurisdiction, Appellate Changes at February Meeting, AM. BANKR. INST. J., April 1996, available at 1996 ABI JNL. Lexis 662 (stating that the "consensus among Commissioners [Bankruptcy Review Commissioners] was to favor providing direct appeal to the circuit courts, eliminating district court review"). Federal Appeals Court Judge Richard Arnold argues that there should be a change in the current system of two appeals as of right because some district courts neglect their bankruptcy appeals and others rubber stamp the bankruptcy court. \textit{Id.}


\textsuperscript{109} Brittenham, Jr., supra note 71, at 257. For the one year period beginning July 1, 1994, out of a total of 49,671 appeals that were filed in the circuit courts of appeals, 1675 (three percent of all appeals) were bankruptcy appeals. \textit{Id.} at 257 n.365. It is estimated that if direct review were implemented, approximately 3,652 additional cases would be sent to the circuit courts of appeals.

\textsuperscript{110} See Administrative Office of the U.S. Courts, supra note 3 (noting the quickly escalating number of bankruptcy filings).

\textsuperscript{111} See Charles W. Nihan & Harvey Rishikof, \textit{Rethinking the Federal Court System: Thinking the Unthinkable}, 14 MISS. C. L. REV. 349, 365-66 (1994) (noting the need to reduce the appellate court caseload); Brittenham, Jr., supra note 71, at 257-58 (same).

\textsuperscript{112} See Hersnher, Jr., supra note 2, at 4 (stating that "whether the courts of appeal can handle the extra workload, I don’t know, and it will be up to Congress and the appeals courts to
is a dearth of assets and the existence of continuing appeals threatens
the debtor's prospects for rehabilitation. The delay attendant to
lengthy appeals is harmful to all parties which explains why few cases
are litigated beyond the bankruptcy court and even fewer, one out of
every five, bankruptcy appeals to the district court ultimately reach a
court of appeals. Thus, the pressure created by trying to stay abreast
of a congested docket threatens the successful performance of the law
declaration function of the federal courts of appeals. Therefore, there
is a paradoxical likelihood that increased appellate activity may impair
the very quality of the process that justifies its use.

Another impediment to implementation of direct review is that the
proposal might intensify the current Article III constitutional concern
that the bankruptcy courts are wielding powers beyond those granted to
them under the Constitution. In other words, some critics of the pro-
posal would argue that giving de facto responsibility for both the fact-
finding and law-making functions to the bankruptcy judge would place
too much power in the hands of a non-Article III judge. However,
proponents counter this theory by arguing that the elimination of the
first layer of bankruptcy appellate review would not affect the propriety
of a non-Article III bankruptcy court because the availability of review
by the Article III circuit court would provide the constitutionally man-
dated oversight. As one legal scholar commented: "[t]o the extent
assess itatcher.

113. The median time for disposition in the district court for a bankruptcy appeal is slightly
less than five months while in the court of appeals the average is 10.9 months. Bussel, supra note
11, at 1092-93.

114. Fletcher Magnum, Memorandum to the Long Range Planning Committee of the Federal
Judicial Center 19 (Dec. 23, 1993).

115. Dorothy W. Nelson, Why Are Things Being Done This Way?: Reflections of a Former
Law School Dean on Becoming a Judge, 19 JUDGES' J. 13, 15 (1980). See Charles W. Wolfram,
Notes from a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statis-
tics on Pressures and Responses, 53 MINN. L. REV. 939, 941 (1969) ("There seems to be rather
general agreement among lawyers who follow the work of the Court that the caseload battle has
recently reached a crisis stage."); Jack Leavitt, The Yearly Two Foot Shelf: Suggestions for
Changing Our Reviewing Court Procedures, 4 PAC. L.J. 1, 2 (1973) ("If we continue the present
system without appreciable changes, it will be hopelessly mired down in its own workload, or must
be expanded to such huge size that it will be unworkable.").

(stating that "to state the obvious, the quality of judges, their workload, their work practices, and
their attitudes have a material, sometimes even decisive impact on the quality of justice they dis-
pense").

117. For a further discussion on the constitutionality of the bankruptcy courts, see supra
notes 25-34 and infra notes 167-71 and accompanying text.

118. Brittenham, Jr., supra note 71, at 256.

119. See Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article
III, 101 HARV. L. REV. 916 (1988) (arguing that the constitutional requirements are satisfied by
circuit court review).
that the current bankruptcy system is constitutionally sound, the Proposal [direct review] is constitutionally sound."

D. Implementation of Direct Review

Implementation of direct review is not as difficult as it may appear at first blush. In fact, Congress implemented a similar proposal in the 1978 Act which provided that the initial appeal of a decision of the bankruptcy court could go directly to the court of appeals if both parties consented to bypassing the initial review by the district court. Inexplicably, the optional direct review provision was eliminated in BAFJA.

Direct review to the courts of appeals would require a change to the current definition of appealability of bankruptcy orders. Presently, circuit courts have jurisdiction to hear appeals only from final decisions, yet many of the orders issued in bankruptcy are interlocutory rulings. A refinement to the current definition of appealability, however, is not believed to be an insurmountable hurdle because "[f]inality is a creature of statute and rule; statutes and rules can be amended." Congress would also have to amend 28 U.S.C. § 158 that grants to the district courts, as opposed to the courts of appeals, the power to hear bankruptcy court appeals.

It is time for Congress to take action. To be sure, on June 21, 1996, the National Bankruptcy Review Commission unanimously voted to recommend to Congress the elimination of the first layer of bankruptcy appellate review. Congress must recognize that the costs and

120. Brittenham, Jr., supra note 71, at 256-57 (quoting Memorandum from Professor Lawrence P. King & Elizabeth I. Holland to Professor Elizabeth Warren, Discussing the Issues Raised by the proposal to Eliminate the First Layer of Review from the Bankruptcy Appellate Process (July 15, 1996)).


123. See Reforming the Bankruptcy Code: The National Bankruptcy Conference's Code Review Project, Final Report 53 (1994) ("It is unclear whether there was a reason for the repeal or whether its elimination was due to oversight."); Frank Kennedy, The Bankruptcy Court and Its Jurisdiction, 1995-96 ANN. SURV. BANKR. L. 485, 506 (stating that the optional path for direct review was withdrawn in 1984 without explanation).

124. The circuit courts of appeals have jurisdiction over appeals from final decisions, orders, judgments and decrees under 28 U.S.C. § 158(a) and (d). See 1 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY p. 5.07 (15th ed. rev. 1996) (discussing the "final order" requirement).

125. Crabb, supra note 105, at 146 (footnote omitted).

126. See Nathan V. Feinstein & Timothy P. Brangan, Review Commission Recommends Eliminating District Court-Level Appeals in Favor of District Appeals From Bankruptcy Judges to
delay necessarily involved in the current two-stage review process grossly disserves litigants and the judicial system as a whole. Forcing litigants to undergo a preliminary review at the district court level merely adds to the costs of appeal and increases the period of uncertainty while providing only a nominal benefit to future litigants and the public. By issuing opinions that are binding on the lower courts, the courts of appeals would bring a measure of certainty and predictability to the bankruptcy law and would reduce the number of issues that are needlessly being litigated by courts within the same jurisdiction. Although the increased workload to the courts of appeals is the regrettable price of implementing direct review, it is greatly outweighed by the numerous advantages of eliminating the middle layer of appeal.

V. THE IMPLEMENTATION OF BANKRUPTCY APPELLATE PANELS IN EVERY CIRCUIT

Another proposal strongly advocated by numerous legal reformers since the 1978 Act is the use of the Bankruptcy Appellate Panel or “BAP.” A BAP consists of a panel of three Article I bankruptcy judges who hear all first-level appeals from every bankruptcy court in the circuit. Thus, under the current system, a BAP would take the place of the district court.

A. History of Bankruptcy Appellate Panels

Under the 1978 Act, appeals of orders entered by bankruptcy judges could be heard by a district judge, BAP, or the courts of ap-
peals if all the parties to the appeal consented.\textsuperscript{131} With the passage of BAFJA, although the circuits continued to have the power to establish BAPs, there were numerous revisions regarding their implementation. One major change was that the parties were required to consent to having a BAP hear and determine an appeal.\textsuperscript{132} Another major change was that the district court must by majority vote authorize an appeal to be heard and determined by a BAP.\textsuperscript{133}

In 1990, the Federal Courts Study Committee (the “Committee”) proposed to change the law to require mandatory use of BAPs thereby eliminating the consent requirement.\textsuperscript{134} The Committee advocated the use of BAPs claiming that they “foster expertise, and increase the morale, of bankruptcy judges, in part by offering them an opportunity for appellate work.”\textsuperscript{135} Several influential members of Congress took heed of the Committee’s recommendations\textsuperscript{136} and finally, as part of the 1994 Act, Congress made BAPs the presumptively preferred method for reviewing appeals from orders of bankruptcy judges.\textsuperscript{137} The 1994 Act required the judicial council\textsuperscript{138} within each circuit to establish a BAP that

\textsuperscript{Id.} (repealed 1984).

\textsuperscript{131.} Section 1293(b) of 28 U.S.C. stated:
Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

\textsuperscript{Id.} § 1293(b) (repealed 1984).

\textsuperscript{132.} See 28 U.S.C. § 158(b)(1) (1987). The statute does not specify whether the consent must be expressed or implied. Federal Rule of Bankruptcy Procedure 8001(c), which became effective in August 1987, states that each circuit may determine what constitutes consent. FED. R. BANKR. P. 8001(e) and the accompanying 1987 Advisory Committee Note.


\textsuperscript{134.} See Report of the Federal Courts Study Committee 74-76 (1990) at 74-75.

\textsuperscript{135.} Id.

\textsuperscript{136.} United States Senator Howell Heflin (the former Chief Justice of the Alabama Supreme Court) announced his support of the use of BAPs on the Senate floor stating that “the intent of section 104(c) [implementing broad use of BAPs] is to require the judicial council of each circuit to establish a bankruptcy appellate panel service.” 140 CONG. REC. S14463 (daily ed. Oct. 6, 1994).

\textsuperscript{137.} Those amendments provide, in relevant part:
The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial Council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) . . . .


\textsuperscript{138.} Congress created an administrative judicial council in each regional circuit, composed of an equal number of court of appeals and district judges and presided over by the chief judge of the court of appeals. The judicial council is charged with “mak[ing] all necessary orders for the effective and expeditious administration of the business of the courts in its circuit.” 28 U.S.C. § 332 (1982).
would decide bankruptcy appeals in all cases where a party has not opted-out. The requirement that each circuit implement a BAP came with two significant exceptions. The judicial council for each circuit must evaluate (1) whether the circuit has sufficient judicial resources for the establishment of BAPs, and (2) whether implementation would cause "undue delay" upon bankruptcy litigation or heightened cost for the parties involved. If either of these circumstances is present, the judicial council may refuse to implement a BAP. Furthermore, individual districts may opt-out of the use of the BAPs by a majority vote of the district court judges of the district. Currently, BAPs have only been implemented in six circuits.

B. Advantages of BAPs

The primary advantages of implementing BAPs most often cited by legal scholars, judges and attorneys are the quality of the decisions produced and the consequent reduction of the workload in the district courts and the courts of appeals.

1. Quality of decisions

The advantage most often noted of implementing BAPs is that the quality of the decisions produced by the panels would be of higher quality than decisions rendered by district court judges. The rationale

139. Id.
140. Id. § 158(b)(1)(A)-(B) (1994). Senator Heflin noted the purpose of the opt-out provisions:

We also recognize that there will be some circumstances in individual circuits where the establishment of a bankruptcy appellate panel service would not be a benefit to the parties or to the system. Therefore, we have included language that permits a judicial council to determine that there are insufficient judicial resources available in the circuit to create a bankruptcy appellate panel service or that creation of such a service will result in undue delay or increased cost to the parties. There may be situations where the number of bankruptcy appeals filed do not warrant the creation of this new system. In some districts, the medium disposition time for disposing of bankruptcy appeals is efficient under the current system. It should be recognized that the creation of a bankruptcy appellate panel service can help to establish a dependable body of bankruptcy case law.

140 CONG. REC. S14463 (daily ed. Oct. 6, 1994).
141. Id. § 158(b)(1).
143. See Crabb, supra note 105, at 139 n.12. Only the First, Second, Sixth, Eighth, Ninth and Tenth Circuits have implemented bankruptcy appellate panels. Id.
144. See Chemerinsky, supra note 74, at 130 ("In this context, the Article I BAP seems superior in determining questions of bankruptcy law to the nonexpert federal district court."); Lisa Hill Fenning, a bankruptcy judge in California, advocates BAPs stating that "the development of [bankruptcy] law in this circuit has been largely advanced by the BAPs." How the Ninth Circuit Made BAPs Work, Bankr. Ct. Dec. (LRP), Dec. 6, 1994, Vol. 26, Issue 6, A1, at A11. Judge
underlying this theory is that bankruptcy judges are more uniquely qualified to deal with the highly technical and specialized field of bankruptcy law than district court judges. 145 Therefore, "[a]ttorneys working in the field of bankruptcy believe that BAPs are more likely to correctly decide a complex case than a district court, partly because BAPs give closer study to the appeals." 146 As a commentator recently noted: "[B]ankruptcy judges are better equipped to decide bankruptcy matters than are district judges. Bankruptcy law is highly specialized and intricate. Most district court judges are relatively unfamiliar with bankruptcy law and have no time to learn it." 147

The statistics clearly indicate that generally bankruptcy judges are better able to correctly apply the Bankruptcy Code than district court judges. For instance, in a recent year, courts of appeals affirmed BAP decisions at a rate of fifty-one percent, compared to only thirty-five percent for district court decisions. 148 Moreover, reversals were at a rate of five percent for BAPs and eleven percent for district courts. 149 Thus, as a result of the "expert" appellate review provided by BAPs, the law would become more settled and the parties would be more confident in the decisions rendered. 150

2. Reduction of workloads in the district courts and the courts of appeals

Those circuits choosing to implement BAPs would realize a much-
needed reduction of the workloads in the district courts as well as the circuit courts of appeals. In the Ninth Circuit, where BAPs have been utilized by all districts since 1982, the number of appeals filed in the court of appeals and the percentage of decisions on the merits have been significantly reduced.\footnote{See Gordon Bermant & Judy B. Sloan, \textit{Bankruptcy Appellate Panels: The Ninth Circuit's Experience}, 21 Ariz. St. L.J. 181, 192-93, 205, 210 (1989) (providing an excellent discussion of the effect of implementation of BAPs in the Ninth Circuit).} It is estimated that BAPs in the Ninth Circuit have reduced the appellate court's workload by 135 filings.\footnote{Id. at 210.} This net savings, a remarkable fifteen percent, is a result of only approximately ten percent of the decisions of BAPs being appealed as compared to the district court rate of twenty-five percent.\footnote{Id. at 209.}

The primary rationale for the reason why BAP decisions are appealed less often than district court decisions is that there is an increased level of attorney confidence in BAP decisions as opposed to district court decisions.\footnote{See Mark A. Cohen, \textit{Report Issued on Bankruptcy Panels}, MASS. LAW. Wkly. 40 (Apr. 1, 1996) (stating that attorneys are more comfortable with BAP decisions because BAPs use "collective wisdom").} In a survey of bankruptcy practitioners undertaken to investigate practitioners' views of BAPs, respondents indicated by the overwhelming margin of two-to-one that they considered BAP opinions to be "better products" than district court opinions.\footnote{Bermant & Sloan, supra note 151, at 215.} Based on this statistical differential, BAP proponents have extrapolated the numbers and have concluded that by implementing a BAP, the circuit court docket would be reduced by the equivalent of the workload of more than one circuit judge.\footnote{Wiseman, Jr., supra note 66, at 7.}

Likewise, the workload in the district courts would also be reduced by the use of BAPs. The district courts would have a reduced number of cases because each case that is heard by a BAP is one less case that the district court must decide. Even though only a small number of bankruptcy cases are appealed to the district courts each year, a substantial amount of the judges' time is devoted to resolving their bankruptcy caseload.\footnote{Carlson, supra note 145, at 561 n. 73 (noting reduction in district court caseload); see also Bussel, supra note 11, at 1993 n. 109 ("Preliminary figures also suggest that 10% of all district court bankruptcy appeals take over 608 days, and 5% over 822 days.") (citing Memorandum from Edward Flynn, Administrative Office of the United States Courts, to Francis F. Szcekab, Chief Bankruptcy Division, Administrative Office of United States Courts (July 7, 1993)); ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. CTS., APPENDIX I, 1993 U.S. Cts. Selected Reps tbl. C-2 at A1-54 to A1-55, and tbl. D at A1-105 (citing statistics of bankruptcy appeals commenced in U.S. district courts); Fed. Jud. Center, Plan. & Tech. Division Progress Rep., December 23, 1993, at 15 (demonstrating that each district court judge adjudicates, on
tainly be a step in the right direction toward ameliorating the "crises of volume" that now plague our federal courts. 158

C. Disadvantages of BAPs

While the advantages to creating BAPs are abundant, there are some disadvantages that are readily apparent such as the administrative costs, the increased workload on bankruptcy judges, the questionable constitutionality of BAPs and the uncertain precedential value to be accorded to BAP decisions.

1. Administrative costs

The primary disadvantage in creating BAPs is the additional resources that would be required for the new court. Creating a BAP requires additional personnel, automation support, procurement, space, equipment, maintenance and supplies. The costs to create and sustain a BAP are substantial. To support BAPs, the Ninth Circuit incurs expenses of approximately $1.5 million annually. 159 Salaries alone for the judges and secretaries of the Ninth Circuit BAPs amount to approximately $330,000 per year excluding fringe benefits. 160 Additionally, the clerks' and staff attorneys' salaries amount to $418,579 per year. 161 These increased costs, however, would be more than offset by the diminution in the volume of the district court and circuit court dockets and the value provided by the enhanced quality of the decisions rendered by the BAPs.

2. Increased workload on bankruptcy judges

A non-monetary disadvantage of implementing BAPs is the increased workload on the bankruptcy judges. Those bankruptcy judges that sit on BAPs must either shift their work to other bankruptcy judges to take up the slack or work longer hours. 162 Indeed, the central reason for including the statutory exception allowing the circuits to refuse to implement BAPs if there were insufficient judicial resources was because Congress was not sure whether bankruptcy judges would be

average, approximately two bankruptcy cases each year). But see Wiseman, Jr., supra note 66, at 6 ("Such a reduction [in district judges' workload] would occur, but it would not be significant."). 158. Report of the Federal Courts Study Committee, 1990 at 109-10.

159. Wiseman, Jr., supra note 66, at 4. See Crabb, supra note 105, at 141 n.23. (noting the "inevitability of increased costs that accompany" the implementation BAPs).


161. Id.

162. See Morris, supra note 44, at 1512 ("In effect, the bankruptcy judges must be willing to voluntarily accept additional work.") (footnote omitted).
willing to accept the increased workload.\footnote{163}{Chief Bankruptcy Judge Thomas E. Carlson, \textit{BAPs and Chapter 11 Status Conferences Under H.R. 5116, BANKR. CT. DEC. (LRP)}, Dec. 6, 1994, at A3-4. What exactly constitutes "insufficient judicial resources" is uncertain. Some argue that costs such as additional law clerks, BAP court clerks, deputy clerks and facilities must be included. Morris, supra note 44, at 1512. Others, however, argue that "judicial resources" only includes "human" resources. Id.}

As noted by the Federal Courts Study Commission, however, although BAPs increase the bankruptcy judges' workload,\footnote{164}{The Federal Courts Study Commission suggested appointing bankruptcy judges to sit on the BAP full time because it "would enhance the prestige of the job and create a career path that could reward good service at the trial level." Federal Courts Study Commission, Working Papers and Subcommittee Reports Vol. 1, at 364 (1990).} BAP judges view the work as an honor and a unique opportunity to "improve[] judicial service to the litigants who desire it."\footnote{165}{Id. See Morris, supra note 44, at 1523 (discussing the constitutional concerns of BAPs with regard to having non-Article III bankruptcy judges hearing appeals of the bankruptcy court decisions).} In fact, many bankruptcy judges sitting on BAPs state that they feel as though it is their judicial duty to shoulder the additional burdens imposed by BAPs in light of the substantial benefits that BAPs provide.\footnote{166}{Carlson, supra note 145, at 566-67. See Bussel, supra note 11, at 1095 (advocating the constitutionality of BAPs because "the BAP would be subject to supervision and control by higher Article III courts").}

3. Constitutional concerns

Critics of BAPs argue that they violate the Constitution because non-Article III bankruptcy judges constituting the BAPs would be reviewing the decisions of other non-Article III bankruptcy court judges.\footnote{167}{For an in-depth discussion of the constitutionality of BAPs, see Brittenham Jr., supra note 71, at 238-43.} Thus, the critics contend, the constitutional protections provided by Article III would be non-existent.\footnote{168}{Id. See Morris, supra note 44, at 1523 (discussing the constitutional concerns of BAPs with regard to having non-Article III bankruptcy judges hearing appeals of the bankruptcy court decisions).}

There are at least two counter-arguments that have been made as to why BAPs do not violate the Constitution. The first counter-argument is that BAPs are not outside their power as non-Article III judges because the circuit courts of appeals can exercise their Article III powers by reviewing the BAP decisions and substituting their own judgment if necessary.\footnote{169}{Bermant & Sloan, supra note 151, at 218. Many judges take the position that the BAP judges should choose to work more hours with no additional compensation while not reducing their workload. As Judge Lloyd George of the District of Nevada stated: "There's no question that it requires more work on the part of the bankruptcy judges, and if the bankruptcy judges are unwilling to recognize that it's going to take more time and it's going to require dedicated service, then it's foolish to start the process at all." Honorable Lloyd D. George, Address at the Meeting of the Third Circuit Judicial Conference on BAPs (Apr. 2-4, 1995).} Thus, the requirement of Article III review is preserved.
The second counter-argument is that because the 1978 Act included a BAP provision and the Supreme Court in *Northern Pipeline* did not hold the provision unconstitutional, the use of BAPs must logically be constitutional. In any event, several circuits have implemented BAPs and they continue to survive constitutional scrutiny.

4. Precedential value of BAP decisions

Although one of the primary advantages advocated by BAP advocates is the notion that BAPs provide a dependable body of bankruptcy case law because of the quality of the opinions, this concept must be tempered with the fact that neither Congress, the Supreme Court or the circuit courts have explicitly addressed the issue of the precedential effect to be accorded to BAP decisions by the bankruptcy courts.

There is a wide range of decisions with regard to the precedential effect of BAP decisions on bankruptcy courts. Some courts have decided that BAP decisions are not binding on the bankruptcy courts, while other courts have announced that BAP decisions will have *stare decisis* effect. Furthermore, it is not even clear whether BAP opinions bind other BAPs. The uncertainty regarding the issue of *stare

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171. See Brittenham, Jr., *supra* note 71, at 231 (listing the circuits that have implemented BAPs). As Judge Conrad Cyr of the First Circuit stated: "I don't see the BAP provision as exacerbating any Constitutional problems. In that respect, I see this as pretty much a neutral development." Judge Conrad Cyr, *On BAPs and the Constitutionality of the Bankruptcy Courts*, BANKR., CT. DEC. (LRP), Dec. 6, 1994, at A6.
173. Although the United States Constitution permits Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States," the current bankruptcy appellate structure fails to produce these results. U.S. CONST. art. I, § 8, cl. 4.
174. See *In re Standard Brands Paint Co.*, 154 B.R. 563, 568 n.3 (Bankr. C.D. Cal. 1993) (stating that BAP decisions do not bind bankruptcy judges); Oregon v. Selden, 121 B.R. 59, 62 (Bankr. D. Or. 1990) (holding that BAP decisions from one district are not binding on bankruptcy courts of another district); Casc Corp. v. Milner, 180 B.R. 245, 254 (Bankr. C.D. Cal. 1995) (same); Homestate Ins. Brokers, Inc. v. Brosman, 119 B.R. 212, 213-14 (Bankr. D. Alaska 1990) (same); see also Kathleen P. March & Rigoberto V. Obregon, *Are BAP Decisions Binding on any Court?*, 18 CAL. BANKR. J. 189, 197-99 (1990) (arguing that BAP decisions are only persuasive authority and do not bind any court). Those that argue that the BAPs should not be given precedential value argue that because a single federal district court judge is not bound to follow the decisions of other district court judges, and a BAP exercises appellate authority similar to that of a district court judge reviewing bankruptcy court decisions, a BAP panel cannot bind other BAP panels or district courts. Id. at 197-99. Likewise, because bankruptcy courts are adjuncts to district courts, the bankruptcy courts are not bound by the BAP panel's decisions. Id.
176. Broome, *supra* note 85, at 542. In 1995, however, a BAP panel stated that BAPs in the
decisis is alarming because if BAP decisions are not binding on all the bankruptcy courts in the circuit, then BAPs will fail to serve their intended purpose of developing a uniform body of bankruptcy law.\(^{177}\)

Moreover, under the current statutory scheme, since BAPs sit in place of the district court, there will inevitably be a conflict between a district court decision and a BAP decision.\(^{178}\)

Because the district courts and the BAPs provide the same appellate function over bankruptcy cases, the varying viewpoints of the bankruptcy appellate court regime creates an uncertainty concerning the proper role of precedent within the bankruptcy court system.\(^{179}\) In order to accomplish one of the central purposes of BAPs, to create a uniform and consistent body of bankruptcy law,\(^{180}\) Congress or the circuit courts must step forward and pronounce that the inherent benefits of the doctrine of \textit{stare decisis} mandate that the decisions of BAPs be given binding effect by the bankruptcy and district courts.\(^{181}\) One solution is

Ninth Circuit will not overrule prior rulings of other BAP panels unless a Ninth Circuit decision, Supreme Court decision, or subsequent legislation has undermined those prior rulings. See Ball v. Payco-General Am. Credits, Inc., 185 B.R. 5895 (9th Cir. 1995); see also Life Ins. Co. of Va. v. Barakat, 173 B.R. 672, 677-79 (Bankr. C.D. Cal. 1994) ("For a multipanel system to work, it is necessary that all panels within a circuit be bound by the decisions of all other panels within the circuit . . . . One panel on a circuit cannot reverse the decision of another panel of the circuit, even if inclined to do so.").

177. See Coyne, 149 B.R. at 618 ("A uniform view of precedent in the bankruptcy system is necessary for efficient adjudication and development of bankruptcy law."); Bussel, supra note 11, at 1098 ("\textit{Stare decisis} is a logical imperative of the BAP and district court law-declaring role.").

178. While BAPs and district courts serve the same appellate function, several factors lead to the conclusion that BAP decisions should be given strict adherence while the district court decisions given persuasive authority. First, BAPs are composed of bankruptcy judges with expertise in the complex field of bankruptcy law. Second, because BAP judges serve as bankruptcy trial judges in addition to their duties as appellate judges, they remain current with new developments in the bankruptcy law. Carlson, supra note 145, at 558-59. Finally, BAP judges sit on three-judge panels and benefit from the collegiality of the panel. \textit{Id.} Conversely, the district court judges review relatively few bankruptcy appeals per year and are unaccustomed to the appellate role. Caminker, supra note 103, at 847.

179. Compare Chermerinsky, supra note 74, at 128 ("I think that BAP decisions clearly should be binding on bankruptcy courts."); and David A. Levin, \textit{Precedent and the Assertion of Bankruptcy Court Autonomy: Efficient or Arrogant?}, 12 BANK. DEV. J. 185, 202 (1995) ("\textit{BAP decisions can and should have binding precedential authority over all bankruptcy courts within the circuit . . . .} (footnote omitted), with March & Obregon, supra note 174, at 197-99 ("An emerging view, and possibly the better reasoned view, is that \textit{BAP} case law is not binding on any court.").

180. See 140 CONG. REC. S14,463 (daily ed. Oct. 6, 1994) (statement of Senator Heflin) ("It should be recognized that the creation of a bankruptcy appellate panel service can help to establish a dependable body of bankruptcy case law.").

181. Professor Chermerinsky noted the value of \textit{stare decisis}:

If appellate precedents are followed, there is no need to litigate the same issue repeatedly in different cases. The question is decided in an appellate court, and lower courts are then responsible for following that decision. Second, binding appellate precedents foster consistency. If each bankruptcy judge is free to decide an issue for himself or herself, varying results are inevitable. The outcome of the legal questions is likely to
to make the BAPs “adjuncts” of the United States Court of Appeals which have the power to bind the bankruptcy courts within the geographic area of the circuit. Another solution is to grant Article III status to bankruptcy judges which would mean that BAPs would necessarily become Article III tribunals since BAPs are composed of bankruptcy judges.

D. Implementation of BAPs

The creation of a BAP is a “sound and creative approach to appellate uniformity.” Each of the judicial circuits that have not already implemented BAPs should allocate the appropriate resources in order to ensure their implementation thus guaranteeing that the bankruptcy system does not falter as the increased burden on the system continues to mount. Although the implementation of BAPs comes at great cost, it is a small price to pay relative to the apparent and convincing benefits that BAPs provide.

VI. CONCLUSION

We have come to a critical crossroad in the history of the bankruptcy court. The current bankruptcy court structure is inconsistent with its intended function. The system should be reformed to allow the experts, the bankruptcy judges, to effectively make bankruptcy law that is accorded precedential value “within the confines of the Constitution and the common law.” The time is ripe for a fresh initiative and we must not wait until the crisis intensifies to such a level that our jurisprudential legacy is irrevocably destroyed.

The achievement of the objectives sought in this Article calls for, inter alia, effective leadership, the involvement of all three branches of the federal government, the active participation of lawyers and bar associations and even the general public. Any course of action to deal

depend on the identity of the judge. Binding appellate precedents thus foster fairness and equity among litigants. Third, binding appellate precedents foster predictability in the law. Individuals can know the law and base their conduct accordingly. Lawyers can know the law and advise their clients accordingly. Without binding precedent, the law is uncertain and the benefits of predictability are lost.

Chemerinsky, supra note 74, at 128.

182. See Coyne v. Westinghouse Credit Corp., 149 B.R. 614, 620 (Bankr. C.D. Cal. 1993) (advancing the argument that the jurisdictional statutes and Ninth Circuit rules make the BAP an adjunct of the United States Court of Appeals).


185. See Brookner, supra note 73, at 330 (1993).
with reforming the bankruptcy courts must have two objectives: first, 
the development of a system which can accommodate the rapidly in­
creasing flood of bankruptcy filings while still remaining consistent 
with historical jurisprudential values; second, the enactment of the pro­
posals by Congress. 186 One caveat for Congress; however, is that court 
reform is an area which dictates thoughtful reflection and planning be­
cause once structural changes in an institution take place, it is difficult 
to turn back.

As we enter into the twenty-first century we should remember that 
the appropriate role of the judiciary in American society is to dispense 
justice, for it is that role more than the condition of the courts that pre­
sents the greatest possibility for decisive change in response to the cri­
sis. 187 The bankruptcy courts are a major component of our commercial 
culture and must respond to changes in demographics, politics and the 
economy of this dynamic nation. 188

Congress must recognize that the demands on the bankruptcy courts 
are so numerous and complex that several proposals must be adopted 
that are consistent with enduring principles of justice. All of the pro­
posals in this Article are fraught with uncertainty and risk, but indi­
viduals both in the public and private sectors must band together as a 
catalytic force. Failing to put the bankruptcy courts in a position to per­
form their mission effectively would be a serious failure of public re­
sponsibility with catastrophic consequences. We must implement these 
plans so that “[w]e may look forward to a near future when our courts 
will be swift and certain agents of justice, whose decisions will be ac­
quiesced in and respected by all.” 189 This can be achieved only by de­
signing and implementing a long-range plan that will meet the needs of 
our bankruptcy system as we boldly enter the twenty-first century.

186. See Baker, supra note 77, at 912 (“The plea for Congress to “‘do more and do better’
seems to have some as yet unrealized potential.”).

187. See Warren E. Burger, American Law Institute Study on Paths to a “Better Way”: Litiga­
ery of justice is in the hands of the profession; lawyers and judges have a duty to make the system work better 
and the public has a right to look to us for some answers.”).

188. See Gerling, supra note 4, at 519 (“The bankruptcy court has become the repository of 
so many disputes between so many competing interests that affect the very fabric of the nation’s 
economic life.”).

189. Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 