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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

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1. George Wallace, *Picking Up the Pieces on Bankruptcy Reform*, AM. BANKR. INST. J. 1, 8-9 (1998-1999).

2. *See* Charles M. Tatelbaum, Testimony Before the House Judicial Committee's Subcommittee on Commercial Law on the Operation of the Bankruptcy Court System, 1997 ABI JNL. LEXIS 182 (June, 1997) (discussing the increased number of bankruptcy filings); Honorable Robert F. Hershner, Jr., *Incoming NCBJ President Looks Ahead At Issues*, 1997 ABI JNL. LEXIS 226 at 4 (Oct., 1997) (same).

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.[4] Given the bankruptcy system's inadequacies and escalating caseloads, pressure has been mounting for congressional action for decades.[5] 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.[6] Next, this Article examines the three most popular proposals for remedying the bankruptcy courts' ills: granting Article III status to bankruptcy court judges;[7] direct appeal of bankruptcy decisions to the courts of appeals;[8] and the implementation of bankruptcy appellate panels in all of the circuits.[9] Finally, this article concludes that, although the continuing deterioration of the bankruptcy court system demands profound change, it is within our

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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 JNL. 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).

5. Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J.L. & POL. 893, 908 (1997).

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]

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10. For a discussion of the conclusion to this article, see *infra* notes 185-89 and accompanying text.

11. Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1065 (1994).

12. U.S. CONST. art. I, § 8, cl. 4. As a result of this grant, bankruptcy is exclusively an area of federal law and states may not create any bankruptcy laws, nor may they exercise control over the field. *See* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991) ("Federal courts have exclusive jurisdiction over bankruptcy cases . . . ."); *In re* Bowers, 16 B.R. 298, 302 (Bankr. D. Conn. 1981) (stating that bankruptcy courts "take original and exclusive jurisdiction of bankruptcy cases").

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.

Id.

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.[15] Under the Bankruptcy Act of 1898, bankruptcy judges were referred to as "referees"[16] and performed only ministerial functions, such as the supervision and administration of bankruptcy cases.[17] 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.[18]

In 1978, based on the recommendation of the Commission on the Bankruptcy Laws of the United States,[19] Congress passed what is now referred to as the Bankruptcy Reform Act of 1978 ("1978 Act").[20] 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.[21] 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.[22] 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."[23] The United States Bankruptcy Courts were created as "courts of record" and were designated as "adjuncts to the district courts for such districts."[24]

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source.").

15. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979).

16. *See* H.R. REP. No. 95-598, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5969 (chronicling the history of the Bankruptcy Act of 1898).

17. *See id.* Referees served two-year terms by appointment and were paid by commission. *Id.* The duties of the referees were similar to that of a trustee in modern day practice. *Id.*

18. *See id.* at 9. The change in name was an attempt to recognize the judicial status of the referees. *Id.*

19. Congress created the Commission on the Bankruptcy Laws of the United States in 1970 to analyze current bankruptcy laws and recommend needed changes. *See id.* at 1.

20. *See id.*

21. *See* S. REP. No. 95-1106, at 1 (1978); *see also* STEPHEN E. SNYDER & LAWRENCE PONOROFF, COMMERCIAL BANKRUPTCY LITIGATION 2-3 (1992) (discussing the intended purpose of the 1978 Act). Under this broad jurisdictional grant, the bankruptcy court could decide debtor's claims against third parties that were based on state or federal non-bankruptcy law. *Id.*

22. *See* Lloyd D. George, *From Orphan to Maturity: The Development of the American Bankruptcy System During L. Ralph Mecham's Tenure as Director of the Administrative Office of the United States Courts*, 44 AM. U. L. REV. 1491, 1493 (1995).

23. 28 U.S.C. § 1471(b) (1988). Title 11 of the U.S. Code contains the laws relating to bankruptcy. *See* 11 U.S.C. § 101 (1978).

24. 28 U.S.C. § 151(a) (1978).

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.*,[25] 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.[26]

In *Northern Pipeline*, a debtor had filed for Chapter 11 reorganization in the bankruptcy court.[27] Later, the debtor filed a suit in the same court against a creditor for alleged breach of contract and warranty, misrepresentation, coercion, and duress.[28] The creditor moved for dismissal on the grounds that the 1978 Act "unconstitutionally conferred Article III judicial power" upon Article I judges.[29] The bankruptcy judge rejected this contention[30] but the district court reversed and the case went directly to the United States Supreme Court.[31] 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.[32] The Court first found that Congress did not create the bankruptcy courts as Article

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25. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

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.*

30. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 6 B.R. 928 (Bankr. D. Minn. 1980).

31. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 12 B.R. 946 (Bankr. D. Minn. 1981).

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.[33] 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."[34]

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,[35] Congress amended the 1978 Act with the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA").[36] BAFJA

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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 adjudication of public rights by 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).

36. For the legislative history of BAFJA, see Walter J. Taggart, *The New Bankruptcy Court System*, 59 AM. BANKR. L.J. 231, 237-38 (1985).

designated bankruptcy judges as a "unit of the district court to be known as the bankruptcy court for that district,"[37] to serve as "judicial officers of the United States district court established under Article III of the Constitution."[38] BAFJA also authorized the courts of appeals to appoint bankruptcy judges to fourteen-year terms[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."[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[41] arising under title 11 or arising in a case under title 11.[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.[43] With regard to non-core proceedings,[44] however, the bank-

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37. BAFJA § 104(a), 98 Stat. 333, 336 (1984) (current version at 28 U.S.C. § 151 (1988)).

38. 28 U.S.C. § 152(a)(1)(1988).

39. *Id.*

40. *Id.* § 152(e).

41. Core proceedings include, but are not limited to, the following:

(A) matters concerning the administration of the estate;
(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;
(C) counterclaims by the estate against persons filing claims against the estate;
(D) orders in respect to obtaining credit;
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;
(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmation of plans;
(M) orders approving the use or lease of property, including the use of case collateral;
(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
(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.

28 U.S.C. § 157(b)(2) (1988).

42. *Id.* § 157(a)-(b).

43. *Compare* Nationwide Mut. Ins. Co. v. Berryman Prods., Inc., 159 F.3d 941, 943 & n.6 (5th Cir. 1988) (reviewing bankruptcy court's findings of fact under clearly erroneous stan-

ruptcy judge may render a final judgment[45] only with the consent of the parties.[46] 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.[47]

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."[48] 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.[49] Congress also wanted to address concerns presented by several "problematic court opinions construing the Bankruptcy Code."[50] 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.[51] 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.[52]

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dard), *with* Daniels-Head & Assocs. v. William M. Mercer, Inc., 819 F.2d 914, 919 (9th Cir. 1987) (reviewing bankruptcy court's conclusion of law under *de novo* standard).

44. Non-core proceedings are state-law based claims that are independent of the title 11 claims. *See* Tisha Morris, Note, *The Establishment of Bankruptcy Appellate Panels Under the Bankruptcy Reform Act of 1994: Historical Background and Sixth Circuit Analysis*, 26 MEM. ST. L. REV. 1501, 1504 (1996).

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).

46. 28 U.S.C. § 157(c)(2) (1988).

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

48. Statement by President William Jefferson Clinton upon signing H.R. 5116, 30 WEEKLY COMP. PRES. DOC. 2129 (Oct. 22, 1994).

49. *See* H.R. REP. No. 103-835, at 32 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3340-41.

50. *Id.*

51. *See* 28 U.S.C. § 158(b)(1) (1994). For further discussion on bankruptcy appellate panels, see *infra* notes 127-84 and accompanying text.

52. *See* 28 U.S.C. § 157(b)-(c) (1994). For a discussion of the core and non-core distinction, see *supra* note 41 and accompanying text.

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.[53] 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.[54] 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.[55] 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.[56] Leading reformers believe that "much

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53. For a discussion of the disputed precedential value accorded to bankruptcy court decisions, see *infra* notes 67-68, 94-102, 172-83 and accompanying text.

54. For a discussion of the problem of having district court judges decide complex issues of bankruptcy law instead of bankruptcy judges, see *infra* notes 72-74, 104-05, 144-50 and accompanying text.

55. The legislative history of the 1978 Act embodies the constitutional benefits of the proposal to grant the bankruptcy court with Article III status:

> [T]he Constitution suggests that an independent bankruptcy court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions. . . . Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary.

H.R. REP. No. 95-598, at 390 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6000.

56. In 1978, the Senate refused to bestow bankruptcy judges with Article III protections and the resulting 1978 Act was a compromise in order to allow the judges to hold broad authority. *See* 40 CONG. Q. WKLY. REP. 2200-01 No. 36 (1982).

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,[57] and then again in 1994."[58]

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.[59] 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."[60] 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.[61] Thus, the "Good Behavior Clause" and the "Compensation Clause" provide life tenure and an irreducible salary.[62] These clauses serve both to protect "the role of the independent judiciary within the constitu-

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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).

58. Anthony Michael Sabino, *Suggestion for the National Bankruptcy Review Commission and Congress: Article III Status*, 4 AM. BANKR. INST. L. REV. 545 (1996) (footnotes added).

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: "[O]ur 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. Instromedix, 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.

66. *See* Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 GEO. MASON L. REV 1, 15 (1995).

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.[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."[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."[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.[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.'"[75] Other critics of the proposal contend that the

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in non-core matters."); *In re* United Mo. Bank of Kansas City, N.A., 901 F.2d 1449, 1457 (8th Cir. 1990) ("We find no statutory authorization afforded bankruptcy judges or courts to conduct jury trials on legal proceedings.").

70. *See* Laura B. Bartell, *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).

71. Donald A. Brittenham, Jr., *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).

72. Clark, *supra* note 4, at 3-4. *See* Thomas B. Bennett, *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").

73. Jeffrey J. Brookner, *Bankruptcy Courts and Stare Decisis: The Need for Restructuring*, 27 U. MICH. J.L. REFORM. 313, 330 (1993).

74. *See* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997).

75. Clark, *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.[76]

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.[77] Moreover, the proponents argue that specialization would also give judges a more systematic insight into the impact of

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> 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 apprehension 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 seclusiveness 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.

Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425-26 (1951).

77. *See* Clark, *supra* note 4, at 3; Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863 (1994) (discussing theory of specialized courts); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989) (discussing idea of reducing judicial burdens by reorganizing federal court system with use of specialty courts).

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

78. *See* Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1155-56 (campaigning for specialty courts). Professor Bator concludes:

> 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.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4147 (1994).

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.*

82. Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 29-32 (1985).

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-

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83. Sabino, *supra* note 58, at 545.

84. Daniel J. Bussel, *Bankruptcy Appellate Reform: Issues and Opinions*, NORTON ANNUAL SURVEY OF BANKR. L. 257 (1995-96) (Professor of Law); Nathan B. Feinstein, *The Bankruptcy System: Proposal to Restructure the Bankruptcy Court and Bankruptcy Appellate Processes*, NORTON ANN. SURV. BANKR. L. 517 (1995-96) (legal practitioner); Honorable Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Cases*, 67 AM. BANKR. L.J. 287, 296 (1993) (United States Bankruptcy judge). Several others have reached the same conclusion. *See, e.g.*, Memorandum from Timothy P. Branigan to the American Bar Association Joint Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes (July 12, 1996) (proposing reformation of current structure in favor of direct appellate review); National Bankruptcy Review Commission Appellate Structure Proposal (Adopted June 21, 1996) (same).

85. *See* Lissa Lamkin Broome, *Bankruptcy Appeals: The Wheel is Come Full Circle*, 69 AM. BANKR. L.J. 541, 543 (Fall 1995); Judy Beckner Sloan, *Appellate Jurisdiction of Interlocutory Appeals in Bankruptcy under 28 U.S.C. Section 158(d): A Case for Lapsus Calami*, 40 CATH. U. L. REV. 265, 272 (1991).

86. H.R. REP. NO. 595, at 39-43 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6000-04.

87. *Id.* For a discussion of granting Article III status to bankruptcy court judges, see *supra* notes 55-83 and accompanying text.

88. S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.A.A.N. 5787.

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

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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.

90. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a), 92 Stat. 2549, 2667 (codified at 28 U.S.C. § 1293(b)), provided:

> [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.").

93. 28 U.S.C. § 158(d) (1994) ("The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees . . . ."); Fed. R. App. P. 6(a)-(b).

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.[95] 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.[96] 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.[97]

By issuing contradictory opinions, the present bankruptcy appeals system fails to perform one of the primary functions of an appellate court—"law declaration."[98] 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.[99] The law declaration function is critical in view of the fact that the bankruptcy courts are the country's most significant commercial courts.[100] Although bankruptcy court and

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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.

96. *See In re* Shattuc Cable Corp., 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992) (holding that in a multi-judge district, the bankruptcy courts are not bound by a bankruptcy appeals decision of a single district court judge, although deference should be given to such opinions.); First of Am. Bank v. Gaylor, 123 B.R. 236, 241 (Bankr. E.D. Mich. 1991) (same); Pereira v. Centel Corp., 134 B.R. 776, 786 n.9 (Bankr. S.D.N.Y. 1991) (same); *In re* Goode, 131 B.R. 835, 840 n.2 (Bankr. N.D. Ill. 1991) (same). Bankruptcy judges reason that because bankruptcy courts are "units of the district court," *see* 28 U.S.C. § 151 (1988), they are not inferior courts but are courts on the same level. *See, e.g.*, Coyne v. Westinghouse Credit Corp., 149 B.R. 614, 619 (Bankr. C. D. Cal. 1993) (stating that the court was not bound by the district court because bankruptcy court on same level as district court).

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

98. *See* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts-Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2479 (1998) (noting the "law declaration" function of the courts of appeals); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 917 (1994) (same); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993-98, 1038 (1986) ("law declaration is the special province of the appellate level"); *see also* Marbury v. Madison, 5 U.S. 137, 175 (1803) (noting the importance of appellate review within the American judicial system, as it "revises and corrects the proceedings in a case already instituted").

99. *See* Richard A. Mochonkin, Markman v. Westview Instruments, Inc., *and* Hilton Davis Chemical Co. v. Warner-Jenkinson Co.: *The Federal Circuit Gets Its Laws and Its Facts Straight*, 9 HARV J.L. & TECH. 181, 183 (1996) ("The purpose of law declaration is to formulate standards of general applicability . . . ."); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1938 (1966) (law declaration "involves the formulation in general terms of principles potentially applicable to many civil cases . . . .") (citation omitted).

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.[101] 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."[102] 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."[103] 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.[104] 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

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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").

102. First of Am. Bank v. Gaylor, 123 B.R. 236, 242 (Bankr. E.D. Mich. 1991).

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).

104. *See* Caminker, *supra* note 103, at 847-48.

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

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.[108] Statistics reveal that circuit court bankruptcy caseloads would increase from three percent of all appeals filed in the circuits to seven percent.[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,[110] critics argue that the circuit courts need to identify mechanisms that will reduce their caseloads, not increase them.[111]

An increase in appellate court workload has obvious adverse implications.[112] Time is especially critical in bankruptcy matters where there

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105. Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 145 (1997).

106. *See* Caminker, *supra* note 103, at 847.

107. *See Commission Considers Venue, Jurisdiction, Appellate Changes at Februrary 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. *Id.*

108. *See* Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 KANS. J. L. & PUB. POL'Y 1 (1997) (discussing the crisis of volume now plaguing the federal courts); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 890 (1983) (discussing the increasing number of cases filed in the federal court system); Martha J. Dragich, *Once A Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25 (stating that between 1960 and 1994 filings in the courts of appeals have "soared" 1139%).

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. *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.

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

111. *See* Charles W. Nihan & Harvey Rishikof, *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).

112. *See* Hershner, 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.[113] 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.[114] 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.[115] Therefore, there is a paradoxical likelihood that increased appellate activity may impair the very quality of the process that justifies its use.[116]

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.[117] In other words, some critics of the proposal 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.[118] 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 mandated oversight.[119] As one legal scholar commented: "'[t]o the extent

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assess it").

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 Statistics 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 it its own workload, or must be expanded to such huge size that it will be unworkable.").

116. *See* Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955 (1991) (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 dispense").

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.'"[120]

D. Implementation of Direct Review

Implementation of direct review is not as difficult as it may appear at first blush.[121] 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.[122] Inexplicably, the optional direct review provision was eliminated in BAFJA.[123]

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.[124] 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."[125] 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.[126] Congress must recognize that the costs and

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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)).

121. A procedure utilizing direct appeals is currently used by the United States Tax Court. *See* 26 U.S.C. § 7482 (1988).

122. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a). For the language of the relevant provision in the 1978 Act, see *supra* note 90. *See also* Life Ins. Co. of Va. v. Barakat, 173 B.R. 675, 676 n.1 (Bankr. C.D. Cal. 1994) (noting that prior to BAFJA, the 1978 Act "included a third option of direct appeal to the circuit court of appeals, if the parties consented").

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. Branigan, *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."[127] 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.[128] 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,[129] BAP,[130] or the courts of ap-

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the 12 Regional Circuit Courts, NAT'L L.J. B 5-6 (Sept. 16, 1996).

127. *See* Michael A. Berch, *The Bankruptcy Appellate Panel and its Implications for Adoption of Specialist Panels in the Court of Appeals*, RESTRUCTURING JUSTICE 165 (Arthur D. Hellman ed., 1990).

128. The number of bankruptcy judges serving in the BAP will be determined by local rules and will vary by circuit. The Bankruptcy Code only requires that three judges from each district, other than the one from which the appeal originated, sit on each reviewing panel. *See* 28 U.S.C. § 158(D)(5) (1999).

129. Section 1334(a) of 28 U.S.C. stated: "The district courts for districts which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts." 28 U.S.C. § 1334(a) (1978) (repealed 1984).

130. Section 160(a) of 28 U.S.C. stated:

> If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(c) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

peals if all the parties to the appeal consented.[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.[132] Another major change was that the district court must by majority vote authorize an appeal to be heard and determined by a BAP.[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.[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."[135] Several influential members of Congress took heed of the Committee's recommendations[136] and finally, as part of the 1994 Act, Congress made BAPs the presumptively preferred method for reviewing appeals from orders of bankruptcy judges.[137] The 1994 Act required the judicial council[138] within each circuit to establish a BAP that

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Id. (repealed 1984).

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.

Id. § 1293(b) (repealed 1984).

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(e), 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.

133. 28 U.S.C. § 158(B)(2) (1994).

134. *See* Report of the Federal Courts Study Committee 74-76 (1990) at 74-75.

135. *Id.*

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).

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) . . . .

28 U.S.C. § 158(b)(1) (1994).

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.[139] 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.[140] If either of these circumstances is present, the judicial council may refuse to implement a BAP.[141] Furthermore, individual districts may opt-out of the use of the BAPs by a majority vote of the district court judges of the district.[142] Currently, BAPs have only been implemented in six circuits.[143]

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 consequential 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.[144] The rationale

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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).

142. 28 U.S.C. § 104(C)(4) (1994).

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-

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Fenning continued: "District judges are reluctant to publish opinions of bankruptcy matters because they are overworked and don't necessarily have time to write them and because they are not confident of their analysis of bankruptcy issues." *Id.*

145. Brittenham, Jr., *supra* note 71, at 244-45. *See* Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. REV. 545, 559 (noting the highly complex nature of bankruptcy law); Judicial Conference of the U.S., *Report To The Federal Courts Study Committee Of The Subcommittee On The Role Of The Federal Courts And Their Relation To The States* 358, 362 (1990) (noting that "even the most diligent district court judges cannot acquire the same expertise in bankruptcy matters" as BAP judges).

146. Brittenham, Jr., *supra* note 71, at 244-45 (footnote omitted). *See* Chemerinsky, *supra* note 74, at 128 ("[T]he BAP is desirable because it allows specialist bankruptcy judges to replace nonspecialist federal district court judges.").

147. Brookner, *supra* note 73, at 327-28 (footnotes omitted). Critics that oppose BAPs usually favor a generalist court because in their view it is preferable to have a judge with a "broad general understanding of the law rather than a myopic view that might have come from a specialized, elitist group of practitioners and judges who come from that group of practitioners." *See* Thomas A. Wiseman, Jr., Address at the Meeting of the Third Circuit Judicial Conference on BAPs (Apr. 2-4, 1995).

148. Fed. Jud. Center, Plan. & Tech. Div. Progress Rep., Dec. 23, 1993, at 14-15.

149. *Id.*

150. *See* Broome, *supra* note 85, at 548 (stating that the use of a BAP panel is "attractive in cases where the parties believe that the expertise of a panel of judges knowledgeable in the specific operation of the Bankruptcy Code would be preferable to an appeal to a generalist judge.").

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.[151] It is estimated that BAPs in the Ninth Circuit have reduced the appellate court's workload by 135 filings.[152] 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.[153]

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.[154] 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.[155] 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.[156]

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.[157] Thus, the implementation of BAPs would most cer-

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151. *See* Gordon Bermant & Judy B. Sloan, *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).

152. *Id.* at 210.

153. *Id.* at 209.

154. *See* Mark A. Cohen, *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").

155. Bermant & Sloan, *supra* note 151, at 215.

156. Wiseman, Jr., *supra* note 66, at 7.

157. *See* Carlson, *supra* note 145, at 561 n. 73 (noting reduction in district court caseload); *see also* Bussel, *supra* note 11, at 1093 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. Szcebak, 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 plagues 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

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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).

160. Wiseman, Jr., *supra* note 66, at 4.

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.[163]

As noted by the Federal Courts Study Commission, however, although BAPs increase the bankruptcy judges' workload,[164] BAP judges view the work as an honor and a unique opportunity to "improve[] judicial service to the litigants who desire it."[165] 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.[166]

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.[167] Thus, the critics contend, the constitutional protections provided by Article III would be non-existent.[168]

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.[169] Thus, the requirement of Article III review is preserved.

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163. Chief Bankruptcy Judge Thomas E. Carlson, *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.*

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).

165. Federal Courts Study Commission, Working Papers and Subcommittee Reports Vol. 1, at 364 (1990).

166. 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).

167. For an in-depth discussion of the constitutionality of BAPs, *see* Brittenham Jr., *supra* note 71, at 238-43.

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).

169. 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").

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.[170] In any event, several circuits have implemented BAPs and they continue to survive constitutional scrutiny.[171]

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,[172] 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.[173]

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,[174] while other courts have announced that BAP decisions will have *stare decisis* effect.[175] Furthermore, it is not even clear whether BAP opinions bind other BAPs.[176] The uncertainty regarding the issue of *stare*

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170. *See* Morris, *supra* note 44, at 1522-1523.

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.

172. Carlson, *supra* note 145, at 559.

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); Case 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.*

175. *See* Philadelphia Life Ins. Co. v. Proudfoot, 144 B.R. 876, 878-79 (Bankr. 9th Cir. 1992); Muskin, Inc. v. Indus. Steel Co., 151 B.R. 252, 253-55 (Bankr. N.D. Cal. 1993); *In re* General Associated Investors Ltd. Partnership, 150 B.R. 756, 760-61 (Bankr. D. Ariz. 1993); *In re* Torrez, 132 B.R. 924, 943 (Bankr. E.D. Cal. 1991); Coq v. Hackenkamp, 110 B.R. 1, 3 (Bankr. C.D. Cal. 1989); *In re* Thunderbird Inn, Inc., 151 B.R. 224, 227 (Bankr. D. Ariz. 1993).

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 *stare decisis* mandate that the decisions of BAPs be given binding effect by the bankruptcy and district courts.[181] One solution is

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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 ("*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. *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, *Precedent and the Assertion of Bankruptcy Court Autonomy: Efficient or Arrogant?*, 12 BANK. DEV. J. 185, 202 (1995) ("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 ("[a]n emerging view, and possibly the better reasoned view, is that 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 Chemerinsky noted the value of *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.[182] 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.[183]

D. Implementation of BAPs

The creation of a BAP is a "sound and creative approach to appellate uniformity."[184] 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."[185] 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

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> 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).

183. *See* 28 U.S.C. § 158(b)(1) (1994).

184. Roger M. Whelan, *'Yes Virginia, There is a Santa Claus' (And a New Bankruptcy Bill): The Bankruptcy Reform Act of 1994*, 2 AM. BANKR. INST. L. REV. 401, 404 (1994).

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 increasing flood of bankruptcy filings while still remaining consistent with historical jurisprudential values; second, the enactment of the proposals by Congress.[186] One caveat for Congress; however, is that court reform is an area which dictates thoughtful reflection and planning because 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 presents the greatest possibility for decisive change in response to the crisis.[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 proposals in this Article are fraught with uncertainty and risk, but individuals both in the public and private sectors must band together as a catalytic force. Failing to put the bankruptcy courts in a position to perform their mission effectively would be a serious failure of public responsibility 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 acquiesced in and respected by all."[189] This can be achieved only by designing and implementing a long-range plan that will meet the needs of our bankruptcy system as we boldly enter the twenty-first century.

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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": Litigation, Alternatives, and Accommodation: Foreword*, 1989 DUKE L.J. 808 (1989) ("The machinery 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*, *reprinted in* 35 F.R.D. 273, 291 (1964).