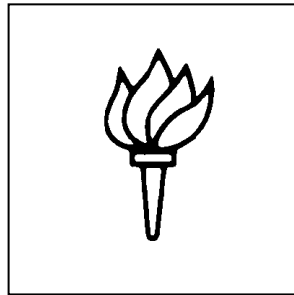


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## JUDICIAL INDEPENDENCE, AUTONOMY, AND THE BANKRUPTCY COURTS

*Troy A. McKenzie*

April 2010



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# JUDICIAL INDEPENDENCE, AUTONOMY, AND THE BANKRUPTCY COURTS

Troy A. McKenzie\*

*Bankruptcy judges enjoy neither of the twin structural protections provided by Article III of the Constitution: life tenure and compensation that cannot be diminished. Yet, they exercise broad adjudicatory powers. This Article questions whether the conventional justifications for non-Article III tribunals should apply to the bankruptcy courts and offers alternative rationales for the current system of bankruptcy courts that are absent from the literature.*

*The first conventional justification for non-Article III tribunals—a balancing test crafted by the Supreme Court—holds that they may handle specialized matters whose substance is narrow and technical, with limited prospects for generating the political heat from which Article III is supposed to insulate the federal judiciary. But bankruptcy adjudication is not narrow and technical. Bankruptcy courts routinely decide matters covering a range of subjects as broad as the civil docket of the Article III district courts, often with the potential to spark considerable political interest. Bankruptcy cases may involve a specialized process, but their substance is not specialized.*

*The second conventional justification assumes that appellate review by Article III courts will be sufficient to check the power of a non-Article III tribunal. Bankruptcy cases, however, generate relatively few appeals, and those cases that do make it out of the bankruptcy courts to Article III courts face a variety of constraints as vehicles to control bankruptcy judges. Bankruptcy judges remain largely autonomous from the Article III courts that supposedly superintend them.*

*In spite of the inadequacy of these standard justifications, this Article makes a tentative case for non-Article III adjudication in bankruptcy. First, the autonomy of bankruptcy judges comes in part from the appointment process to the bankruptcy bench and their lack of promotion to the Article III courts. That autonomy gives them, paradoxically, a layer of insulation from outside political pressure that is the core value of Article III. Second, the process for appointing bankruptcy judges has created a bench that remains oriented toward an audience—the bankruptcy bar—that holds in highest esteem professionalism,*

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*creativity, and nonideological adjudication, which are also key values associated with Article III.*

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## INTRODUCTION

How much power should we grant to bankruptcy judges? That question has taken on new prominence as lawmakers and commentators consider responses to the financial crisis that contemplate an active role by bankruptcy courts. Recently, proposals to allow bankruptcy judges to restructure mortgages on primary residences have generated heated debate.<sup>1</sup> For millions of homeowners

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1. See, e.g., Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 577 (arguing that allowing the bankruptcy courts to modify home mortgages would provide the best and least disruptive path for staving off foreclosures and stabilizing the mortgage markets); Joseph E. Stiglitz, *We Aren't Done Yet: Comments on the Financial Crisis and Bailout*, ECONOMISTS' VOICE, Oct. 2008, at

who cannot meet the obligations of their current loan terms, those proposals might avert foreclosure, but they would also give bankruptcy judges a prominent role in, essentially, restructuring substantial parts of the residential real estate market. Bankruptcy judges similarly took center stage in debates about restructuring another swath of the national economy—the domestic automobile industry—as Chrysler and General Motors filed for reorganization under Chapter 11 of the Bankruptcy Code.<sup>2</sup> Beyond their massive size, the automakers' bankruptcies were remarkable for the active role of the federal government in encouraging the filings and charting the course of the proceedings—circumstances leading to concerns that their bankruptcy cases were unduly influenced by political actors.<sup>3</sup>

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2-3, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1425&context=ev> (proposing that bankruptcy judges be allowed to modify principal and interest terms of mortgages on debtors' primary residences to prevent foreclosures); see also Rich Leonard, Editorial, *A Win-Win Bankruptcy Reform*, WASH. POST, Nov. 28, 2008, at A29 (same). But see Alan Schwartz, Editorial, *Don't Let Judges Fix Loans*, N.Y. TIMES, Feb. 27, 2009, at A27 (criticizing proposals to allow bankruptcy judges to modify mortgages). Although the Bankruptcy Code permits bankruptcy judges to restructure the terms of secured loans in business cases (such as commercial mortgages) and in certain personal bankruptcy cases involving secondary residences, bankruptcy judges do not have the power to do so for mortgages on primary residences. 11 U.S.C. § 1322(b)(2) (2006) (permitting a debtor to file a plan that may “modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence” (emphasis added)). Several recent legislative proposals would have removed that restriction on the power of bankruptcy judges. Helping Families Save Their Homes Act of 2009, H.R. 1106, 111th Cong. § 103 (proposing to amend Bankruptcy Code to permit judicial modification of mortgages on primary residences); Emergency Home Ownership and Equity Protection Act, H.R. 225, 111th Cong. § 3 (2009) (same); Helping Families Save Their Homes in Bankruptcy Act of 2009, S. 61, 111th Cong. § 4 (same). None of those proposals has been enacted with an intact provision permitting bankruptcy judges to modify primary residential mortgages. See Helping Families Save Their Homes Act of 2009, S. 896, 111th Cong. (enacting H.R. 1106 without provision permitting judicial modification of primary residential mortgages in bankruptcy); Stephen Labaton, *Senate Refuses to Let Judges Fix Mortgages in Bankruptcy*, N.Y. TIMES, May 1, 2009, at B3 (reporting defeat of proposed amendment to S. 896 that would have authorized bankruptcy judges to order such modification).

2. See Jim Rutenberg & Bill Vlasic, *Chrysler Files for Bankruptcy; U.A.W. and Fiat to Take Control*, N.Y. TIMES, May 1, 2009, at A1; David E. Sanger et al., *G.M. Heads to Bankruptcy Protection as U.S. Steps in: Obama Makes a Bet that the Carmaker Can Recover*, N.Y. TIMES, June 1, 2009, at A1. The desirability of a bankruptcy filing for one or more of the “Big Three” domestic automakers had been bruited about in legal and policy circles for some time before the General Motors and Chrysler bankruptcies. E.g., Michael E. Levine, *Why Bankruptcy Is the Best Option for GM*, WALL ST. J., Nov. 17, 2008, at A19 (arguing that bankruptcy is the only viable route for restructuring General Motors' labor and dealership contracts); see also Daniel Kahneman & Andrew M. Rosenfield, Editorial, *Sync, and Swim Together*, N.Y. TIMES, Nov. 25, 2008, at A31 (proposing that the federal government facilitate the simultaneous filing of all three American automakers for reorganization under Chapter 11 of the Bankruptcy Code in order to allow industry-wide restructuring of contractual arrangements with investors, employees, suppliers, distributors, dealers, and others).

3. Accusations that undue political considerations had overridden the ordinary

Left unasked in these debates, however, is the necessarily antecedent question: how much power *can* we grant to bankruptcy judges? Article III of the Constitution would appear to require that all federal judges share twin guarantees—undiminishable salary and secure tenure during good behavior.<sup>4</sup> But bankruptcy judges lack those protections, which are the conventional foundations on which an independent federal judiciary rests.<sup>5</sup> Instead, they

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operation of the Bankruptcy Code lay at the heart of the objection lodged by one group of creditors in the Chrysler bankruptcy. *See* Motion to Withdraw the Reference, para. 62, *In re Chrysler*, 2009 WL 1490990 (Bankr. S.D.N.Y. May 20, 2009) (No. 09-50002) (seeking to have the United States District Court, rather than the Bankruptcy Court, adjudicate portions of the bankruptcy case on the ground, among others, that the Treasury Department was “dictat[ing] the course of Chrysler’s restructuring”); *see also* Jeffrey McCracken & Neil King, Jr., *Lawyer Who Slowed Chrysler Deal May Take On GM*, WALL ST. J., June 10, 2009, at A12 (quoting the lawyer for the objecting creditors as worrying that “there is something very wrong with the system,” and wondering “whether our judiciary is today able to fulfill its constitutional mission to ensure that the rule of law prevails—particularly in the face of perceived crisis”).

4. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”). The reference to tenure during good behavior is usually termed “life tenure” on the assumption that an Article III judge can be removed only through impeachment by the House and conviction by the Senate, although that assumption has been challenged. *See, e.g.*, Raoul Berger, *Impeachment of Judges and “Good Behavior” Tenure*, 79 YALE L.J. 1475, 1477 (1970) (arguing that, at common law, judges could be removed by their peers for bad behavior in a forfeiture proceeding, rather than by impeachment); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (arguing that the original meaning of good behavior tenure did not preclude removal from office by means other than impeachment).

5. *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582-83 (1985) (“Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation. These requirements protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts.”); *United States v. Will*, 449 U.S. 200, 217-20 (1980) (explaining English, colonial, and Founding-era understanding of tenure and compensation protections as “essential” to an independent judiciary); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 258 (1990) (describing the protections of Article III as “meant to insulate the independent judiciary from the power of the other branches”); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937-43 (1988) (describing Article III values as: (1) the separation of powers, (2) fairness to litigants, and (3) judicial integrity, or the legitimacy and respect commanded by the courts); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 588 (1985) (“It is accepted wisdom that life tenure and salary guarantees are important to preserve judicial independence by freeing judges from fears of being fired.”); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 789 (1986) (“Article III vests the judicial power of the United States in a politically insulated judiciary.”); *see also* Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 836 (1995) (“‘Judicial independence’ is an umbrella term covering several partially overlapping categories of activity within the judicial role and judicial branch organization: decisional, personal, procedural, and administrative. . . .

serve for a term of fourteen years, and can be removed from office for cause.<sup>6</sup> How, then, can we entrust them with broad powers to adjudicate important disputes without undermining the core values of the federal judiciary?

There are, of course, accounts of why departures from the requirements of Article III are sometimes permissible. The first rationale—a balancing test adopted by the Supreme Court in a series of landmark cases—assumes that non-Article III adjudication is typically appropriate to resolve disputes in discrete, specialized areas of the law. The second, grounded in the Court’s doctrine and advanced by scholars, holds that appellate review by Article III courts is generally sufficient to control subordinate non-Article III adjudicators.<sup>7</sup>

This Article questions the application of those rationales to the bankruptcy courts. Simply put, neither one supports the continued practice of non-Article III adjudication in bankruptcy.

First, although conventional wisdom holds that bankruptcy is a highly specialized area of the law,<sup>8</sup> thereby justifying adjudication by non-Article III judges, that wisdom is deeply flawed. Bankruptcy may be a specialized *process*, with its own rhythms that differ from litigation in other forums, but the *substance* of bankruptcy cases is not specialized. Bankruptcy judges hear disputes from across the legal spectrum, confronting matters sounding in contract, tort, property, labor, and almost every other area of civil law. It makes little sense to talk of “specialized” or “technical” bankruptcy adjudication when the matters decided by a typical bankruptcy judge are often indistinguishable from the civil disputes on the docket of a federal district judge.

Second, appellate review by Article III courts does not serve as an effective check on non-Article III judges in bankruptcy cases. Bankruptcy judges, perhaps more so than any other non-Article III adjudicators in the federal system, are largely autonomous. Bankruptcy cases generate very few appeals, the structure of appellate review in bankruptcy cases complicates the generation of binding precedent to guide the resolution of future disputes, and the Article III courts have little appetite for entertaining those appeals that do make it out

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Decisional independence is the sine qua non of the judicial function.” (numbering omitted)).

6. 28 U.S.C. § 152(e) (2006). Section 152(e) provides that cause for removal of a bankruptcy judge includes only “incompetence, misconduct, neglect of duty, or physical or mental disability.”

7. In addition, there is a longstanding doctrine that so-called “public rights” may be adjudicated outside of the Article III courts. *See* *Crowell v. Benson*, 285 U.S. 22, 50 (1932). The Court has also accepted non-Article III adjudication by military tribunals and territorial courts. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 65-67 (1857) (military tribunals); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (territorial courts). This Article does not focus on these exceptions because their applicability to bankruptcy cases is questionable.

8. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004) (describing bankruptcy and admiralty as “specialized” areas of law). *See generally* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109 (1997) (discussing the vices and virtues of having specialized bankruptcy courts).

of the bankruptcy courts.<sup>9</sup> In bankruptcy, the model of a non-Article III tribunal wholly subordinated to a reviewing Article III court is elegant in theory but unavailing in practice.

Does the inadequacy of the standard justifications for non-Article III adjudication in bankruptcy mean that our current system of bankruptcy courts and judges must be abandoned? This Article makes a tentative, and perhaps uneasy, case for continued non-Article III adjudication in bankruptcy by offering an alternative justification for why the current system does not raise serious Article III concerns. Despite their non-Article III status, the bankruptcy bench nevertheless exhibit the “Article III values” we attribute to the life-tenured judiciary. The process of their selection and their continued connection to an audience—the bankruptcy bar—that holds in high esteem professional, creative, and non-ideological resolution of complex disputes explains their pronounced autonomy. But those same factors provide the kind of insulation from political pressures for which Article III is totemic.

This Article proceeds in three Parts. Part I briefly traces the development of the modern bankruptcy courts and the lingering doubts about the non-Article III status of bankruptcy judges. There is a long history of adjudication by non-Article III judges in the federal system. There is also a long history of concern by the Supreme Court and scholars who study the federal courts that the proliferation of non-Article III adjudicators threatens to erode the independence of the federal courts.<sup>10</sup> For that reason, both the Supreme Court and scholars have attempted to police the boundary between the exercise of the “judicial Power of the United States”<sup>11</sup> reserved for the Article III courts and the appropriate resolution of disputes by non-Article III tribunals. Bankruptcy has been central to the story of that attempt at line drawing. Twice, the Supreme Court has acted to limit the power of bankruptcy judges out of concern that they do not enjoy the tenure and compensation protections of Article III—with a fractured decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* going so far as to require Congress to restructure the entire bankruptcy

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9. See *infra* Part II.B.

10. See, e.g., Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 292 (1990) (“I suspect that judicial independence is less likely to be subverted by ‘wholesale transfers of jurisdiction’ or by a Congress with destructive intent than by the accretion of measures, each of which creates a significant jurisdiction in a non-article III tribunal.”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 661-64 (2004); Judith Resnik, “Uncle Sam Modernizes His Justice”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 642 (2002) (“Initial fact-finding and law application at the trial level are increasingly the purview of a judiciary lacking life tenure. The result of these decades of case law and statutory revisions is a rereading of the Constitution that distances Article III from the center of federal judging.”).

11. U.S. CONST. art. III, § 1, cl. 1 (“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.”).



court system.<sup>12</sup>

Part II explains the Court's balancing test approach to policing the boundaries of Article III adjudication and the scholarly substitute of appellate review theory. But Part II documents that neither justification for non-Article III adjudication persuasively supports the current workings of the bankruptcy courts.<sup>13</sup> The assumption that the specialization and political unimportance of

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12. 458 U.S. 50, 84-88 (1982) (plurality opinion). After invalidating the system of federal bankruptcy adjudication in *Northern Pipeline*, the Court later ruled that parties holding claims that could have been adjudicated at common law before a jury could not be made to forfeit their jury-trial rights in bankruptcy. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 (1989).

13. The status of bankruptcy judges has generated a fair amount of comment from scholars and others since the adoption of the Bankruptcy Code in 1978. Much early scholarship criticized, on Article III grounds, the bankruptcy court system erected before *Northern Pipeline*. See, e.g., David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983) (concluding that bankruptcy courts created under the 1978 Code are unconstitutional due to their lack of Article III tenure and salary protections); Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297 (1981) (same); Lucinda M. Finley, Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980) (same). More recent work focused on the current system of bankruptcy courts erected after *Northern Pipeline* echoes those earlier criticisms, see, e.g., Pfander, *supra* note 10, at 770 (concluding that "the case for bankruptcy courts outside of Article III grows more difficult to sustain" and suggesting that Congress either grant bankruptcy judges Article III status or transfer their work back to district judges), or makes the largely pragmatic criticism that the post-*Northern Pipeline* structure of the bankruptcy court system is unnecessarily complicated by lingering concerns about the non-Article III status of bankruptcy judges, see, e.g., NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 711-12 (1997), available at <http://govinfo.library.unt.edu/nbrcreport/17ajuris.html> ("The Commission recommends that Congress establish the bankruptcy court as an Article III court that would decrease delay and expense as well as raising, inevitably, the quality of the entire judicial system."); Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529 (1998) (presenting the case for a bankruptcy court system staffed by Article III judges on the ground that the current system incurs excessive costs because of its non-Article III status). One scholar has also questioned the constitutionality of bankruptcy judges on Article II, rather than Article III, grounds. Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 234 (2008) (arguing that the process for appointment of bankruptcy judges violates Article II's Appointments Clause).

This Article enters the debate in a different manner, by closely examining the fit (or lack thereof) between rationales used to justify a non-Article III bankruptcy system and the actual features of the bankruptcy courts, and also by considering in turn whether those features may instill some of the values that Article III protections are supposed to provide. Although others have occasionally matched particular features of the current bankruptcy system to some aspects of Article III theory, much of the discussion in the Article III literature does so sparingly, if at all. See Resnik, *supra* note 10, at 640 & n.131 (noting the tension between the low rate of appeals in bankruptcy cases and "appellate review" theory of non-Article III adjudication in the federal courts). Similarly, bankruptcy scholars have drawn attention to some of the aspects of the bankruptcy system that inform this Article. See, e.g., Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401 (2006) (applying the literature on judicial behavior to explain possible motivations of bankruptcy judges). But they have not linked those insights to the

bankruptcy cases excuse the use of non-Article III adjudicators on closer inspection. Given the vast number of disputes that bankruptcy judges resolve every year<sup>14</sup> and the broad subject matter of those disputes,<sup>15</sup> the Court's balancing test fits uneasily with the work of bankruptcy judges. In reality, bankruptcy cases routinely involve a wide range of subject matters beyond technical parsing of the Bankruptcy Code. Bankruptcy judges are often called upon to decide sensitive questions of social and economic policy that garner the attention of the public and political actors. It is therefore unsurprising that questions about the status of bankruptcy judges trigger deep concerns about the need to preserve the "essential attributes" of the judicial power under Article III.<sup>16</sup>

Part II also questions the basic assumption of appellate review theory—that Article III courts will exercise effective control, particularly through the process of post-adjudication appeals, over the work of non-Article III tribunals. That assumption does not fit comfortably with the life of even the most sensitive matters in the bankruptcy courts. There are important structural and doctrinal limitations on the effectiveness of bankruptcy appeals. But more importantly, the realities of bankruptcy litigation place constraints on the frequency and effectiveness of appeals to Article III courts. A bankruptcy case is largely a space for negotiated resolution of disputes. Concerns about delay and cost increase the pressure to settle well before a bankruptcy judge's ruling can be challenged on appeal, and often before a bankruptcy judge has issued a formal ruling at all. Those proceedings that do make it up to the Article III courts often face indifference by the life-tenured judiciary.

Part III attempts to fill the void left by the demonstrable weaknesses of the balancing approach and appellate review theory. Despite the unpersuasiveness of the dominant explanations for non-Article III adjudication, Part III suggests that there are alternative reasons to believe that the current bankruptcy system

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Article III literature this Article explores.

14. According to statistics compiled by the Administrative Office of the U.S. Courts, approximately 11.5 million bankruptcy petitions were filed from 2000 to 2007—compared to fewer than two million non-prisoner civil suits in the district courts in the same period. *See infra* notes 191-193 and accompanying text.

15. Bankruptcy courts handle as broad a range of non-federal case law as, and probably a greater proportion than, the Article III courts. As one commentator has noted, although some provisions of the Bankruptcy Code are substantive, much of the Code is interstitial, permitting many of the substantive rights of debtors and creditors to be determined by state, not federal, law. Thus, state laws governing contracts, property, tort, secured transactions, and landlord-tenant relations, and state laws identifying property exempt from the reaches of creditors and subject to avoidance by creditors, are frequently in play in bankruptcy cases. Block-Lieb, *supra* note 13, at 554. The breadth of subject matter decided by bankruptcy judges has generated much of the concern over restraining their powers. It is not surprising that *Granfinanciera* and *Northern Pipeline* both involved bankruptcy judges' adjudication of state-law claims. *See Granfinanciera*, 492 U.S. at 36-37; *N. Pipeline*, 458 U.S. at 56-57 (plurality opinion).

16. *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

provides a sufficient level of the attributes valued in Article III courts: principally—but not only—insulation from political pressures. By looking chiefly at the process of appointment to the bankruptcy courts and the resulting makeup of the bankruptcy bench, Part III makes a qualified case that we need not fear bankruptcy judges’ succumbing to undue extrajudicial pressure or influence more readily than their Article III counterparts. Bankruptcy judges are largely appointed from the bankruptcy bar and remain highly responsive to it. The courts of appeals run the appointment process, and they have tended to appoint bankruptcy practitioners through a merit selection system that depends heavily on the input of the bankruptcy bar. For related reasons, few bankruptcy judges expect (or even desire) to move to the Article III bench, which reduces their incentive to please the outside political actors who control promotion to those courts. Moreover, the status and quality of the bankruptcy bar in general, and the bankruptcy courts in particular, have risen in tandem in the last thirty years as bankruptcy has regained its place of prominence in law practice. The reputational interests of bankruptcy judges are therefore inward-looking, with the creative handling of complex cases viewed favorably by bankruptcy lawyers.

While there is plausible concern that some bankruptcy judges may be unduly responsive to the desires of the bankruptcy bar, such responsiveness is a far cry from capture. First, the organized bankruptcy bar tends to have significant overlap and cohesiveness in its outlook on the proper operation of the bankruptcy courts. That outlook reflects a long history of the bar’s role in superintending reform in bankruptcy law and the bankruptcy process for much of the last century. Bankruptcy judges are responsive to the bankruptcy bar in much the same way that Article III judges are responsive to the politicians, academics, and commentators who are *their* “audience.” No class of judges is entirely immune from sociopolitical influence, nor is it clear that such extreme detachment would be preferable, even if it were possible.

#### I. JUDICIAL INDEPENDENCE AND ARTICLE III VALUES

The phrase “judicial independence” does not appear in the Constitution,<sup>17</sup> but it plays a central role in the history of the federal courts.<sup>18</sup> In Professor

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17. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 321 (1999) (observing that the absence of the phrase “judicial independence” from the Constitution was noted by the Jeffersonians seeking to discipline the Federalist-dominated courts of the early nineteenth century).

18. See *id.* at 315-17 (noting that the perception that judicial independence is at risk has recurred throughout American history). The historical contest between the political branches and the courts over the “countermajoritarian” exercise of judicial review has typically called into question the nature and extent of judicial independence. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 343 (1998) (tracing the history of concern about the countermajoritarian difficulty, the growth of judicial supremacy, and “the deep roots of

Bator's description, judicial independence embodies, at its core, a desire that in the federal court system, "judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law (including the Constitution)."<sup>19</sup>

Although that goal is clear enough, the attributes of the protections necessary for judicial independence are frustratingly difficult to define. As an initial matter, a literal reading of Article III strongly suggests that "the judicial [p]ower of the United States" can be exercised only by judges who enjoy the tenure and pay protections of Article III.<sup>20</sup> But a literal reading of the text has not prevailed in the courts<sup>21</sup> or among scholars.<sup>22</sup> More pointedly, past practice has firmly established the use of non-Article III adjudicators in the federal system.<sup>23</sup>

Instead of insisting on the literal requirements of Article III, the Supreme Court has attempted to create various checks on the exercise of power by non-Article III adjudicators. As the Court itself has admitted, its precedents defining the line between those non-Article III arrangements that are permissible and those that encroach too far into the domain of Article III are difficult to

popular respect for constitutionalism and an independent judiciary").

19. Bator, *supra* note 5, at 268.

20. See U.S. CONST. art. III, § 1 (vesting the judicial power of the United States in courts with judges who "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office" (emphases added)); *id.* art. I, §§ 2-3 (regulating the process of impeachment).

21. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986) ("Although our precedents in this area do not admit of easy synthesis, they do establish that the resolution of claims such as Schor's cannot turn on conclusory reference to the language of Article III."); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) ("An absolute construction of Article III is not possible in this area of frequently arcane distinctions and confusing precedents. '[N]either this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Art. III court before a judge enjoying life tenure and protection against salary reduction.'" (quoting *Palmore v. United States*, 411 U.S. 389, 407 (1973)) (alteration in original)).

22. See, e.g., Bator, *supra* note 5, at 235 (describing the "Simple Model" of an all-Article III judiciary but observing that it "has utterly failed to withstand the test of time"); Pfander, *supra* note 10, at 656 ("Most everyone agrees that a literal interpretation of Article III will not do."). Although some scholars have attempted to chart a path back to a more literal reading of Article III's text, see, e.g., David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 718-20 (1982); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 878-94 (1990), the courts have abandoned any sustained attempt to revive Article III literalism. See, e.g., *Schor*, 478 U.S. at 851-52 (approving the exercise of jurisdiction by an administrative agency over a common law counterclaim because the "essential attributes of judicial power" had been preserved for Article III courts).

23. The literature on the historical development of non-Article III adjudication is deep. For a concise summary of that history, see Pfander, *supra* note 10, at 656-60 (describing the history of the resort to legislative courts, administrative agencies, and executive branch administration of the laws, all outside the strictures of Article III).

reconcile under a coherent and persuasive theory.<sup>24</sup> Two major themes, however, emerge from the Court's repeated attempts to police the power of non-Article III adjudicators.

#### A. *From Formalism to Balancing*

At times, the Court has taken a formalist or "categorical" approach to non-Article III adjudication.<sup>25</sup> *Northern Pipeline* remains the high-water mark of that approach. Faced with Congress's expansion of the powers of bankruptcy judges in the Bankruptcy Reform Act of 1978 (the Code or 1978 Act),<sup>26</sup> which created the Bankruptcy Code and new non-Article III bankruptcy courts, a plurality of the Court at first attempted to place the new powers of bankruptcy judges into previously recognized exceptions to Article III.<sup>27</sup> A description of the road to the 1978 Act and its frosty reception at the Court will serve to set out the difficulties presented by autonomous bankruptcy courts outside the orbit of Article III. A discussion of the aftermath of *Northern Pipeline*, however, demonstrates the unstable (and unresolved) status of the current system of bankruptcy judges.

##### 1. *The Bankruptcy Code and the rise of the autonomous bankruptcy court*

The 1978 Act granted bankruptcy judges jurisdiction over all "civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under" the Code.<sup>28</sup> With limited exceptions, the statute vested bankruptcy judges with all the "powers of equity, law, and admiralty."<sup>29</sup> It also permitted bankruptcy judges to hold jury trials,<sup>30</sup> issue writs of habeas corpus in some cases,<sup>31</sup> and to "issue any order, process, or judgment that is necessary

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24. See, e.g., *Schor*, 478 U.S. at 847 (acknowledging the difficulty of synthesizing the Court's precedents on the limits of non-Article III adjudication in the federal system); *N. Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring in the judgment) ("The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis.").

25. Bator, *supra* note 5, at 243-46 (describing *Northern Pipeline* as a categorical approach to the question of non-Article III adjudication in the federal system); Pfander, *supra* note 10, at 660-61 (describing the Court's attempt at a "categorical approach"); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 204-14.

26. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 254.

27. *N. Pipeline*, 458 U.S. at 64-70 (plurality opinion) (assessing three traditional situations in which Article III does not bar the creation of legislative courts: territorial courts, courts-martial, and the so-called "public rights" cases).

28. 28 U.S.C. § 1471(b) (Supp. IV 1976).

29. *Id.* § 1481.

30. *Id.* § 1480.

31. *Id.* § 2256. The *Northern Pipeline* plurality apparently found it odd that Congress gave bankruptcy judges the authority to grant habeas relief, but the ability to issue writs of

or appropriate to carry out the provisions” of the Code.<sup>32</sup>

Congress had acted to create a new system of bankruptcy adjudication in large part because the previous one was deemed insufficiently robust to handle the increasing number of bankruptcies and insufficiently prestigious to attract the ablest bench. By the 1970s, criticism of the bankruptcy process was widespread in academic and policymaking circles.<sup>33</sup> Criticism was also widespread among the actors in the bankruptcy system, including referees in bankruptcy (later called bankruptcy judges).<sup>34</sup> Much of the criticism focused on structural concerns contributing to the unsavory reputation that day-to-day bankruptcy practice had difficulty shedding. One point of concern was that referees in bankruptcy wore too many hats in the process—both as administrators and adjudicators. Referees, who were appointed by district judges,<sup>35</sup> were responsible for such administrative tasks as confirming the appointment of a trustee to take charge of the debtor’s assets and initiating creditors’ meetings. Referees therefore learned substantial information about the legal and financial issues facing a debtor, sometimes on an ex parte basis. Yet referees also had to adjudicate legal disputes later arising in cases and implicating the same information. That perceived conflict of roles particularly disturbed leaders of the bankruptcy bar.<sup>36</sup>

Chief among the critics calling for reform was the National Bankruptcy Conference (hereafter “the Conference”), a group of leading bankruptcy academics, practitioners, and judges.<sup>37</sup> The Conference called for wide-ranging

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habeas corpus had been a recognized aspect of the power conferred by the Constitution’s Bankruptcy Clause. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373-78 (2006) (describing the Bankruptcy Act of 1800’s grant of authority to issue writs of habeas corpus to release debtors from state prisons).

32. 11 U.S.C. § 105(a) (Supp. IV 1976). The broad grant of equitable authority remains in the Code. 11 U.S.C. § 105(a) (2006).

33. *See* DAVID A. SKEEL, JR., DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 136-47 (2001) (recounting criticism of bankruptcy law and describing reform proposals leading up to the 1978 Act).

34. For a detailed account of the role of referees in bankruptcy in encouraging the long campaign to reform and raise the status of the bankruptcy system, see Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1 (2007).

35. *See id.* at 3.

36. SKEEL, *supra* note 33, at 138-39 (describing concerns about the conflict of interest inherent in the dual roles of referees in bankruptcy).

37. The Conference was founded in 1932 and played an active role in shaping bankruptcy law. At the time of the 1977 congressional hearings on the overhaul of the bankruptcy laws, the Conference comprised about sixty members and a dozen associate members, including such leading bankruptcy academics as Professors Vern Countryman of Harvard and Lawrence P. King of New York University, as well as Charles A. Horsky of the Covington & Burling law firm in Washington, D.C., *Bankruptcy Reform Act of 1978: Hearing on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in the Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. 831-38 (1977) [hereinafter *Bankruptcy Reform Act Hearing*] (statement of Charles A. Horsky, Chairman, National Bankruptcy Conference); *see also* SKEEL, *supra* note 33, at 134-35 (describing the

reform of the bankruptcy laws, including rectifying “irrationally drawn” jurisdictional provisions, which led to wasteful litigation, and other provisions that were deemed outdated and deficient.<sup>38</sup> But beyond changes to the bankruptcy laws, the Conference sought to raise the power and profile of the bankruptcy courts. They described the bankruptcy court as “a step child” so lacking in prestige that it could not attract highly qualified attorneys to the bench.<sup>39</sup> The Conference summed up its overarching concerns succinctly: “The need, perhaps most pressing, is for an independent, prestigious bankruptcy court with broad jurisdiction and powers.”<sup>40</sup> The description of the desired status of the bankruptcy courts was almost militant, with the Conference calling on Congress to “arm” bankruptcy courts with adequate powers.<sup>41</sup>

To that end, the Conference sought an increase in the jurisdictional reach of bankruptcy courts, the longest possible term for bankruptcy judges, appointment by the President, and preferably Article III status for bankruptcy judges. Throughout the discussion of the proposed reforms of the bankruptcy courts, the Conference invoked the need to bolster the status of bankruptcy courts and ensure the equal “dignity” of bankruptcy cases with other cases.<sup>42</sup> Separating the administrative and judicial functions of the bankruptcy courts also became a goal of the Conference. Such a separation would, its members maintained, allow bankruptcy judges to be *judges*—free of the often conflicting obligation of actively administering bankruptcy estates.

The Conference’s call for change helped spur the legislative debate that led to the enactment of the Code in 1978. By the closing days of the debate over the Code, however, the greatest structural question facing lawmakers remained the status of bankruptcy judges.<sup>43</sup> Two competing bills in Congress contained different answers to the question.

The House of Representatives identified the low status and lack of autonomy of bankruptcy judges as one of the major problems with the bankruptcy system.<sup>44</sup> The House bill proposed to remedy those deficiencies by abolishing the old referee system and granting bankruptcy judges full Article III status—with presidential appointment and good-behavior tenure—as well as the power to decide cases in law, equity, and admiralty, and to hold jury trials. Appeals from bankruptcy judges would go directly to the courts of appeals

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membership of the Conference in the years before the 1978 Act).

38. *Bankruptcy Reform Act Hearing*, *supra* note 37, at 838.

39. *Id.* at 832.

40. *Id.*

41. *Id.*

42. *Id.*

43. SKEEL, *supra* note 33, at 157.

44. See H.R. REP. NO. 95-595, at 4 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965. The House report asserted that the lack of autonomy and low status of bankruptcy judges impaired the quality of bankruptcy adjudication. *Id.*

rather than through the district courts.<sup>45</sup> Administrative powers in bankruptcy cases would devolve to a new agency, the Office of the U.S. Trustee in the Department of Justice, to handle tasks (such as appointing trustees and monitoring groups of creditors) that were previously handled by referees in bankruptcy.<sup>46</sup>

The Senate bill denied bankruptcy judges the full powers and prestige of Article III status. Instead, it retained bankruptcy judges as appendages of the district courts, appointed by the courts of appeals, but with a relatively long tenure of twelve years.<sup>47</sup> Instead of a U.S. Trustee agency in the executive branch, the Senate's bill retained the trustee appointment system within the judiciary.<sup>48</sup>

Because the status of bankruptcy judges owes much to their powers, the question of their status became intertwined with the extent of their powers under the proposed reforms.<sup>49</sup> Bankruptcy judges, lawyers, and even the creditors' lobby all favored elevating bankruptcy judges to Article III status with life tenure and extended powers. Bankruptcy judges and lawyers had an obvious interest in elevating the status of their professional practice. Creditors, on the other hand, favored more autonomous, more powerful, and more prestigious bankruptcy courts, believing that they would be more efficient and therefore promote greater recovery on debts. They reasoned that higher-status bankruptcy courts would attract better judges and that more powerful bankruptcy courts would avoid the delays from jurisdictional disputes and time-wasting reversals by higher courts.<sup>50</sup>

Article III judges, unsurprisingly, were fiercely opposed.<sup>51</sup> They worried that creating a new wave of Article III judges would dilute the status of the Article III bench.<sup>52</sup> One witness during the hearings leading up to the passage

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45. *See id.* at 7.

46. *See id.* at 88. Referees in bankruptcy were renamed bankruptcy judges in 1973. *Id.* at 9.

47. *See* S. REP. NO. 95-989, at 16-18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5802-04.

48. *See id.* at 4.

49. *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 82-83 (1997).

50. *Id.* at 84.

51. SKEEL, *supra* note 33, at 157-58. The opposition to making bankruptcy judges Article III judges had been led from the early 1970s by the influential Judge Edward Weinfeld of the Southern District of New York, who had served on the National Bankruptcy Review Commission, which was authorized by Congress in 1970 to study the bankruptcy system. WILLIAM E. NELSON, IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFELD AS LAWYER AND JUDGE 201-03 (2004); SKEEL, *supra* note 33, at 139. Some of the opposition by the Article III judiciary to elevating the status of bankruptcy judges was expressed in words and deeds that bordered on pettiness. *See generally* Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Two: The Third Branch Reacts*, 81 AM. BANKR. L.J. 165, 188-89 (2007).

52. *See* SKEEL, *supra* note 33, at 157; Posner, *supra* note 49, at 79-80.



of the 1978 Code, former federal district judge Simon Rifkind, candidly admitted that he was opposed to the elevation of bankruptcy judges to Article III status because the resulting increase in the number of Article III judges “would dilute the significance, and prestige, of district judgeships.”<sup>53</sup> “Prestige,” he continued, “is a very important factor in attracting highly qualified men and women to the federal bench, from more lucrative pursuits.”<sup>54</sup>

After a last-minute intervention by Chief Justice Warren Burger, Congress settled on a compromise proposal giving bankruptcy judges substantial autonomy and power—but not Article III status.<sup>55</sup> The resulting legislation made bankruptcy judges Article I judges, appointed by the President, with fourteen-year terms.<sup>56</sup> Although bankruptcy courts would be separate from the district courts, appeals would go from bankruptcy courts to district courts, and then on to the courts of appeals.<sup>57</sup>

## 2. Northern Pipeline and the “demise” of the autonomous bankruptcy court

The 1978 compromise quickly unraveled in *Northern Pipeline*. The debtor in *Northern Pipeline* had filed a petition for reorganization under the new Code. It then filed suit in bankruptcy court against another company for claims sounding in contract and tort. The defendant sought to dismiss the suit on the ground that the 1978 Act unconstitutionally conferred the judicial power of the United States on non-Article III bankruptcy judges.<sup>58</sup>

The Supreme Court agreed, although the Justices could not muster a single opinion for the Court. Justice Brennan, writing for a plurality, reasoned that the bankruptcy judges’ newfound authority could be justified only by some recognized category outside the requirements of Article III or some other “exceptional grant of power” to Congress.<sup>59</sup> The Court had previously recognized three such exceptions: territorial courts, courts-martial, and

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53. *Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 9 (1977) (statement of Judge Simon H. Rifkind, American College of Trial Lawyers).

54. *Id.*

55. Posner, *supra* note 49, at 90.

56. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

57. See 28 U.S.C. §§ 1293, 1334 (Supp. IV 1976). The new law also provided for the designation of three-judge panels of bankruptcy judges to hear appeals from bankruptcy court and for direct appeal to the courts of appeals on consent of the parties. *Id.* §§ 160(a), 1293(b), 1482.

58. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56-57 (1982) (plurality opinion).

59. *Id.* at 70 (“Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.”).

adjudication of disputes under the so-called “public rights” doctrine.<sup>60</sup>

But none of the recognized exceptions to the requirements of Article III applied. The power of the bankruptcy judges was obviously not geographically limited to the territories such that Congress’s power to create non-Article III territorial courts could be invoked.<sup>61</sup> The bankruptcy courts bore no resemblance to courts-martial.<sup>62</sup> And the broad range of subject matter adjudicated by the bankruptcy courts (including core private rights such as state common law claims) did not justify application of the public rights doctrine, under which Congress may deny an Article III forum to the adjudication of congressionally created benefits or disputes “between the government and others.”<sup>63</sup>

Unable to find a suitable, previously recognized categorical exception to Article III,<sup>64</sup> the Court also considered the government’s alternative argument to justify the powers of the bankruptcy courts. The government attempted to describe bankruptcy judges as mere “adjuncts” of the district courts, subject to the review of those courts.<sup>65</sup> That theory had been blessed by the Court in the New Deal-era case of *Crowell v. Benson*,<sup>66</sup> which rejected an Article III challenge to the adjudication by an administrative agency of claims by injured workers against their employers.<sup>67</sup> It had become firmly entrenched by the time the Court upheld the 1976 amendments to the Federal Magistrates Act, which allowed district court judges to refer matters to magistrates for the preparation of proposed findings and recommendations.<sup>68</sup>

Justice Brennan rejected the argument that bankruptcy judges were merely adjuncts subordinate to the district courts. The Court had approved the use of non-Article III adjuncts only if the institutional arrangements limited the

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60. See Young, *supra* note 5, at 772-840 (tracing the development of the public-rights exception to Article III).

61. *N. Pipeline*, 458 U.S. at 71 (plurality opinion).

62. *Id.*

63. *Id.* at 69-72; see also *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932) (explaining the distinction between public rights and private rights for purposes of non-Article III adjudication).

64. The lack of fit between the previously recognized categories of Article III exceptions and the post-1978 bankruptcy courts was not as self-evident as the Court asserted. As Professor Bator observed, Congress’s constitutional power over bankruptcy law appears to be as plenary as its power over the territories. Bator, *supra* note 5, at 245; see also U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States”); *id.* art. IV, § 3, cl. 2 (granting Congress the power to make “all needful Rules and Regulations respecting” the territories); *cf.* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 375-79 (2006) (holding that Congress’s power under the Bankruptcy Clause is sufficient to subordinate the states’ Eleventh Amendment immunity against suits by private parties).

65. *N. Pipeline*, 458 U.S. at 76-77 (plurality opinion).

66. 285 U.S. 22.

67. *Id.* at 64-65.

68. *United States v. Raddatz*, 447 U.S. 667, 683-84 (1980).

adjuncts' power so as to retain "the essential attributes" of judicial power in the Article III courts.<sup>69</sup> Protecting the "essential attributes," Brennan made clear, served to protect the federal judiciary from encroachment by the political branches. In order to prevent such encroachment, the adjunct had to be sufficiently subordinate to the Article III judiciary so that it could not fall under excessive control by the political branches.<sup>70</sup>

Unlike the agency permitted to adjudicate claims in *Crowell*, however, the new bankruptcy judges had too broad a jurisdiction and too much autonomy from the Article III judiciary to satisfy the adjunct theory.<sup>71</sup> Brennan catalogued the ways in which bankruptcy judges under the 1978 Act could decide more matters, with less supervision by the Article III courts, than the agency in *Crowell*.<sup>72</sup> He also explained the ways in which the former pre-Code bankruptcy referees, which were "subordinate adjuncts of the district courts,"<sup>73</sup> had now been elevated to be "independent of the United States district courts."<sup>74</sup>

The plurality opinion suggested that the new autonomy of bankruptcy judges from the district courts, when combined with their lack of Article III tenure and compensation guarantees, posed an inchoate threat to judicial independence. In particular—and in response to Justice White's dissent<sup>75</sup>—the

69. *N. Pipeline*, 458 U.S. at 81 (plurality opinion).

70. *Id.* at 84-85.

71. *Id.* at 84-86.

72. Brennan's opinion lists five distinctions between the agency in *Crowell* and the bankruptcy courts created by the 1978 Act. First, the bankruptcy courts possessed broad jurisdiction over both matters arising under the Bankruptcy Code and also matters "related to" bankruptcy cases, while the agency in *Crowell* "made only specialized, narrowly confined factual determinations regarding a particularized area of law." *Id.* at 85. Second, the bankruptcy courts could exercise all of the bankruptcy jurisdiction conferred on the district courts by Congress, unlike the restraints of the "statutorily channeled factfinding functions" in *Crowell*. *Id.* Third, bankruptcy courts could issue wide-ranging and far-reaching orders, including writs of habeas corpus, and preside over jury trials, while the *Crowell* agency was limited to issuing compensation orders in worker-employer disputes. *Id.* Fourth, review of bankruptcy decisions on appeal to the Article III courts occurred under the deferential "clearly erroneous" standard, while orders of the agency in *Crowell* could be set aside if "not supported by the evidence." *Id.* Lastly, Justice Brennan observed that the bankruptcy courts could issue final orders enforceable even in the absence of appeal, while the *Crowell* agency's decisions could only be enforced by order of the district court. *Id.* at 85-86.

73. *Id.* at 79 n.31 (quoting H.R. REP. NO. 95-595, at 7 (1977) (internal quotation marks omitted)).

74. *Id.* (quoting 1 W. COLLIER, BANKRUPTCY ¶ 1.03, at 1-9 (15th ed. 1982) (internal quotation marks omitted)). Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment. Without accepting the categorical treatment of exceptions to Article III proposed by the plurality opinion, he agreed that the new bankruptcy courts were too autonomous to survive an Article III challenge. *Id.* at 91 (Rehnquist, J., concurring in the judgment) ("I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the bankruptcy court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell v. Benson*.").

75. Justice White relied on his belief that immediately before the adoption of the

plurality opinion noted that even though pre-1978 bankruptcy judges (the former bankruptcy referees) had been vulnerable to congressional diminution of their salaries, they “were not dependent on the political Branches of Government for their appointment,” as were the new bankruptcy judges.<sup>76</sup>

Justice Brennan also portrayed the Article III protections as serving “other institutional values” beyond guarding against simple brute-force control of the judiciary by the political branches.<sup>77</sup> As he explained, Article III helps to guarantee public confidence in judicial determinations<sup>78</sup> and provides security that attracts well-qualified applicants to the bench.<sup>79</sup> It also insulates individual judges “from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism.”<sup>80</sup>

Brennan’s invocation of this broader view of Article III indicated that beneath the formalist shell of the *Northern Pipeline* decision<sup>81</sup> lay a more nuanced set of instrumental institutional concerns. The “Article III values” that the Court attempted to guarantee reflected the character of a federal judiciary secure in its high public reputation, its professional prestige, and its composition of semi-autonomous actors. The formal protections of Article III helped to catalyze those values, which in turn served the greater end of a judiciary independent of excessive political interference.<sup>82</sup>

In dissent, Justice White rejected the categorical approach put forward by the plurality. As he saw it, “[t]here is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts.”<sup>83</sup> He would not, however, always defer to Congress’s judgment as to which kinds of bodies could adjudicate claims.<sup>84</sup> Instead, he would have balanced the structural protections of Article III against the legislative interests justifying the use of non-Article III adjudicators.<sup>85</sup>

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Bankruptcy Code in 1978, bankruptcy judges had exercised powers almost as broad as the judges created after 1978. *Id.* at 98-99 (White, J., dissenting).

76. *Id.* at 79-80, 79 n.31 (plurality opinion) (“[T]he primary danger of a threat to the independence of the adjunct came from within, rather than without, the judicial department.” (internal quotation marks omitted) (quoting *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring))).

77. *Id.* at 59 n.10.

78. *Id.*

79. *Id.*

80. *Id.*

81. The literature typically casts Justice Brennan’s *Northern Pipeline* opinion as a belated attempt by the Court to construct a formalist barrier to non-Article III adjudication, and a failed one at that. *See, e.g.*, Redish, *supra* note 25, at 202-04; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 515-16 (1987) (observing that the formalism of *Northern Pipeline* has been eclipsed by functionalist approaches to Article III).

82. *N. Pipeline*, 458 U.S. at 59-60 (plurality opinion).

83. *Id.* at 113 (White, J., dissenting).

84. *Id.*

85. *Id.* at 115.

Weighing in the balance would be, among other considerations, the availability of appellate review in an Article III court, which he believed would provide “a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority.”<sup>86</sup>

Justice White’s application of this balancing test pointed in favor of the constitutionality of the bankruptcy court system. The creation of non-Article III bankruptcy courts appeared to be a legitimate solution to the need for flexibility and creativity in handling a large increase in bankruptcy filings.<sup>87</sup> A non-Article III court staffed with specialists in bankruptcy law could be expected to respond to fluctuations in bankruptcy cases without altering the character of the federal bench or creating “the prospect of large numbers of idle federal judges” should the number of bankruptcies decline.<sup>88</sup> More importantly, Congress had made “ample provision” for appellate review of bankruptcy court decisions in the Article III courts.<sup>89</sup>

Justice White’s crucial assessment—and the explicit animating principle behind his weighing of factors—was more direct. He could not find any evidence of self-aggrandizement by the political branches or “an attempt to undermine the authority of constitutional courts in general” by creating non-Article III bankruptcy courts.<sup>90</sup> He described bankruptcy law as an area of “extreme specialization.”<sup>91</sup> More pointedly, he viewed the disputes that arose in bankruptcy, which he labeled “private adjudications of little political significance,” as having minor potential for stirring the kind of controversy against which the structural protections of Article III might be needed.<sup>92</sup> He conceded that there might be some bankruptcies presenting “politically controversial circumstances or issues.”<sup>93</sup> Nevertheless, he maintained that Congress had more direct ways to involve itself in politically charged bankruptcy matters than the subtle pressures that Article III was designed to prevent. He also suggested that the Due Process Clause might require adjudication before an Article III judge in those circumstances.<sup>94</sup>

In response to *Northern Pipeline*, Congress replaced the system of stand-alone bankruptcy courts enacted by the 1978 Code with a system of bankruptcy judges that, at least formally, are wholly subservient to the Article III courts.

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86. *Id.*

87. *Id.* at 117 & n.16 (noting that the number of bankruptcy cases filed annually had increased from 10,000 to more than 254,000 over a thirty-year period).

88. *Id.* at 118.

89. *Id.* at 116.

90. *Id.*; *see also id.* at 117-18 (“The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Art. III bankruptcy court.”).

91. *Id.* at 118.

92. *Id.* at 116.

93. *Id.* at 117.

94. *Id.* at 117 & n.15.

Now, unlike other specialized non-Article III courts, such as the Tax Court or the Court of Federal Claims, bankruptcy courts are not formally distinct entities, but part of the district courts.<sup>95</sup> Like magistrate judges, bankruptcy judges hear cases only by “reference” from district judges—essentially at the pleasure of the district judges in each district.<sup>96</sup> Decisions of bankruptcy judges are subject to appeal before district judges and then the courts of appeals.<sup>97</sup>

As a formal matter, *Northern Pipeline* marked the end of the autonomous bankruptcy court. That demise, however, was less complete than one might have imagined from the Court’s treatment of the case. The doctrinal developments after *Northern Pipeline*,<sup>98</sup> as well as the de facto development of bankruptcy court practice since that time,<sup>99</sup> have resurrected much of the autonomy that Congress granted to bankruptcy judges in 1978 and that the Supreme Court had attempted to quash.

### 3. *The retreat from formalism toward pragmatic balancing*

The Court quickly abandoned Justice Brennan’s categorical approach to non-Article III adjudication in favor of the balancing of factors proposed by Justice White in his dissent in *Northern Pipeline*. In *Thomas v. Union Carbide Agricultural Products Co.*,<sup>100</sup> and more fully in *Commodity Futures Trading Commission v. Schor*,<sup>101</sup> a majority of the Court adopted an approach that weighed the lack of Article III protections against the legitimacy of efficient resolution of disputes outside an Article III forum. If that balance indicated that Congress had not aggrandized its own power or undermined the power of the judiciary as a whole, then a non-Article III scheme could be acceptable.

The first departure from the rigid framework of *Northern Pipeline* came only three years after that decision. Justice Brennan’s plurality opinion in *Northern Pipeline* had stressed both the importance of insulating an independent judiciary through the structural protections of Article III and the need to retain judicial involvement in the resolution of “private rights” disputes.

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95. 28 U.S.C. § 151 (2006).

96. *Id.* § 157(b)(1) (“Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.”); *id.* § 1334(b) (“[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”). Core proceedings include, among others, counterclaims by a debtor against a creditor filing claims against the estate, the confirmation of a plan of reorganization, and proceedings to determine, avoid, or recover fraudulent conveyances. *Id.* § 157(b)(2).

97. *Id.* § 158.

98. *See infra* Part I.A.3.

99. *See infra* Part II.B.2.

100. 473 U.S. 568 (1985).

101. 478 U.S. 833 (1986).

It had similarly attempted to cabin the types of disputes that could be described as “public rights” cases open to non-Article III adjudication. *Thomas* appeared to destabilize those categories.

The dispute facing the Court in *Thomas* arose out of Congress’s creation of a specialized adjudicatory system in connection with an environmental regulatory statute. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) required pesticide producers to submit health and safety information about their products when registering for the necessary regulatory approvals.<sup>102</sup> That information was then shared among subsequent registrants, who in turn were to help bear the costs of generating the data.<sup>103</sup> A subsequent amendment to FIFRA referred to binding arbitration disputes between registrants over the appropriate compensation to be paid for data, with very limited judicial review of the arbitrator’s decision.<sup>104</sup>

In the ultimate decision to uphold this scheme against an Article III challenge, Justice O’Connor, writing for the Court, cast doubt on the limited category of “public rights” cases that *Northern Pipeline* had recognized as outside the scope of Article III.<sup>105</sup> The Court also counseled attention to the “concerns guiding the selection by Congress of a particular method for resolving disputes” when “assessing the degree of judicial involvement required by Article III.”<sup>106</sup> The decision paid little attention to drawing careful categorical lines among various acceptable and unacceptable shades of non-Article III adjudication. Rather, the Court adopted a highly pragmatic approach to the inquiry, noting the limited nature of the disputes assigned to binding arbitration,<sup>107</sup> the paramount importance to the larger administrative scheme of resolving those disputes efficiently,<sup>108</sup> and the availability of “appropriate” judicial review.<sup>109</sup>

The suggestive discussion in *Thomas* developed into a more complete recognition of the propriety of pragmatic balancing in *Schor*. In *Schor*, the Court rejected an Article III challenge to an agency’s adjudication of a common law counterclaim that arose in the course of administrative proceedings. The counterclaim appeared to be, by any measure, a core private rights claim that would ordinarily be adjudicated only in the federal system with the protections of Article III under the reasoning of *Northern Pipeline*. The *Schor* Court, however, was not swayed by the categorization of the claim as a public or private right.

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102. 7 U.S.C. § 136a(a) (2006).

103. *Thomas*, 473 U.S. at 571-72.

104. The arbitrator’s decision could be disturbed only for “fraud, misrepresentation, or other misconduct.” *Id.* at 573-74.

105. *Id.* at 585-86.

106. *Id.* at 587.

107. *Id.* at 589-90.

108. *Id.* at 590.

109. *Id.* at 592-93.

Disavowing bright-line rules, the Court counseled attention to the “unique aspects” of the particular congressional adjudicatory plan at issue “and its practical consequences in light of the larger concerns that underlie Article III.”<sup>110</sup> Essentially, this pragmatic approach rested on the Court’s assessment of whether Congress had acted in good faith to assign specialized (and less important) determinations to a non-Article III adjudicator suited to those determinations, and whether any resulting diminution of the role of the Article III judiciary was *de minimis*.<sup>111</sup>

The move away from categorical limitations did not necessarily cast a more favorable light on the portions of the Bankruptcy Reform Act of 1978 struck down in *Northern Pipeline*. The *Schor* Court conceded that there was some loss of “Article III values” in the scheme at issue. But the Court stressed the limited nature of the role of the non-Article III adjudicators as evidence that they posed little danger of an erosion of the role of the Article III courts. The agency dealt “only with a ‘particularized area of law’” as opposed to the broader jurisdiction of the bankruptcy courts challenged in *Northern Pipeline*.<sup>112</sup> The *Schor* Court also invoked the possibility of plenary appellate review of the agency’s decisions in Article III courts as guarding against movement down “some hypothetical ‘slippery slope’”<sup>113</sup> toward impermissible intrusion on the province of the Article III judiciary, unlike the deferential standard of review of bankruptcy courts found lacking in *Northern Pipeline*.<sup>114</sup>

#### 4. *Lingering questions*

Admittedly, the *Schor* Court’s preservation of *Northern Pipeline*’s invalidation of the 1978 Act’s bankruptcy courts reflected a traditional judicial desire to avoid the unnecessary destabilization of prior precedent. Perhaps when confronted directly with another challenge to non-Article III adjudication in bankruptcy, the Court would be inclined to bury *Northern Pipeline* completely—rather than merely abandon its conceptual framework. But the Court’s next (and, to date, last) pronouncement on the permissible role of bankruptcy judges in the adjudication of private rights disputes belies that prediction.

Proof that the softening of the Court’s categorical approach to non-Article III adjudication did not necessarily bless the breadth of jurisdiction exercised

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110. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986).

111. *Id.* at 856. As Professor Pfander has aptly described, the Court evidently viewed the arrangement in question in *Schor* as “a small bite out of the judicial power.” Pfander, *supra* note 10, at 663.

112. *Schor*, 478 U.S. at 852-53 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (plurality opinion)).

113. *Id.* at 852.

114. *Id.* at 853 (“The legal rulings of the CFTC, like the legal determinations of the agency in *Crowell*, are subject to *de novo* review.”).



by the bankruptcy courts came in *Granfinanciera, S.A. v. Nordberg*.<sup>115</sup> That case arose in bankruptcy proceedings after a trustee brought a fraudulent conveyance action. The defendants—recipients of the allegedly fraudulent transfer—sought a jury trial on the fraudulent conveyance claim.<sup>116</sup> The bankruptcy court denied the motion for a jury trial. The district court and the court of appeals later affirmed with little fanfare.<sup>117</sup>

The Supreme Court reversed upon concluding that the defendants' jury trial rights had been infringed. Although the case did not involve a direct challenge to the non-Article III nature of the post-*Northern Pipeline* bankruptcy courts created by Congress, it provided occasion for Justice Brennan, speaking for the Court, to suggest that Congress had allocated, once again, too much power to bankruptcy judges.<sup>118</sup> Brennan reconceived the defendant's Seventh Amendment jury trial right on the common law claim at issue in *Granfinanciera* as more than an abstract entitlement. Rather, juries could serve to superintend "judges who are appointed for fixed terms [who] may be beholden to Congress or Executive officials and thus . . . juries [may] exercise beneficial restraint on their decisions."<sup>119</sup>

Even under the Article III balancing regime that had emerged by the time *Granfinanciera* was decided, the Court retained its suspicion about the threat that bankruptcy judges might pose to the traditional role of the Article III courts. But nowhere did the Court attempt to assess whether bankruptcy judges might demonstrate the "other institutional values" Justice Brennan had invoked as the hallmarks of the Article III judiciary.<sup>120</sup> The Court did not examine the relative strength and professional status of the bankruptcy bench, whether its judges tended to be insulated from influences by the other branches, or whether it could be expected to generate public confidence in its determinations. Perhaps those assessments required too much abstract speculation.<sup>121</sup> But the

115. 492 U.S. 33 (1989).

116. *Id.* at 36-37. A fraudulent conveyance is a pre-bankruptcy transfer of assets by the debtor either made with the actual intent to hinder, delay, or defraud creditors or deemed constructively fraudulent under certain circumstances. The Code permits these transfers to be avoided in bankruptcy for the benefit of the estate's creditors. 11 U.S.C. § 548 (2006).

117. *Nordberg v. Granfinanciera, S.A.*, 835 F.2d 1341 (11th Cir. 1988).

118. The Court stated, albeit in dicta, that "the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Granfinanciera*, 492 U.S. at 53.

119. *Id.* at 62-63. The Court reserved decision, however, on the questions whether the relevant statute, the Seventh Amendment, or Article III permitted jury trials on common law claims before non-Article III adjudicators. *Id.* at 64.

120. See *supra* notes 77-82 and accompanying text.

121. Cf. *Granfinanciera*, 492 U.S. at 70 (Scalia, J., concurring in part and concurring in the judgment) ("I do not think one can preserve a system of separation of powers on the basis of such intuitive judgments regarding 'practical effects,' no more with regard to the assigned functions of the courts than with regard to the assigned functions of the Executive.")

Court appeared to have made them implicitly (and reached a negative conclusion) in curbing the exercise of power by bankruptcy judges in *Northern Pipeline* and again in *Granfinanciera*.

### B. Appellate Review Theory

Scholarly treatment of *Northern Pipeline*, *Thomas*, *Schor*, and *Granfinanciera* has generally been critical. At a mundane level, the cases do not sum up easily as a matter of doctrine. Although *Schor* sets out the most comprehensive framework in the area, the metes and bounds of the law have been left unclear—especially after *Granfinanciera* suggested that the Court would remain vigilant in enforcing the distinction between Article III and non-Article III adjudication.

On a more theoretical level, the scholarly literature has chewed over the Court's conceptual treatment of Article III and found it wanting. The categorical reasoning of *Northern Pipeline* has been judged harshly in light of the apparent arbitrariness of the exceptions carved out by Justice Brennan's plurality opinion and the difficulty of reconciling them with historical practice.<sup>122</sup> The balancing approach adopted by the Court in *Thomas* and *Schor* has been criticized on grounds that it lacks predictability in application<sup>123</sup> and inevitably will lead to an increase in non-Article III adjudicators.<sup>124</sup> The search for a means of distinguishing when adjudication outside of Article III courts is permissible and impermissible thus has as its goal a rule that ensures predictability while remaining faithful to historical practice and past precedent.

In the course of that search, commentators have looked to alternative justifications for non-Article III adjudication that can also prevent the feared threat to the place of the Article III judiciary. Building on suggestions in the Supreme Court's cases,<sup>125</sup> the leading alternative framework posits that

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(citations omitted)).

122. See, e.g., Bator, *supra* note 5, at 248-51; Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 101-06 (1988) (comparing the pragmatic approach taken in *Thomas v. Union Carbide Agricultural Products Co.* with the overly formalistic treatment of Article III in *Northern Pipeline*).

123. Fallon, *supra* note 5, at 917; Saphire & Solimine, *supra* note 122, at 86-87.

124. See Resnik, *supra* note 10, at 664-67.

125. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) (weighing as one factor in favor of the permissibility of agency adjudication the availability of review in Article III courts); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.23 (1982) (plurality opinion) ("Moreover, when Congress assigns . . . matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review."); *id.* at 115 (White, J., dissenting) ("[T]he presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers."); *Crowell v. Benson*, 285 U.S. 22, 53 (1932) (citing the availability of review by a federal district court as grounds for upholding the constitutionality of an administrative adjudication scheme). These "suggest[ions]," *N.*

Congress may assign the initial adjudication of disputes to bodies that lack the tenure and compensation protections of Article III, so long as Article III courts retain the ability to engage in “sufficiently searching review” of the resulting decisions.<sup>126</sup> Under this theory, the composition of the decisionmaking body to which Congress has assigned disputes falls from prominence, so long as that body’s decisions can be subjected to searching review in the Article III courts.<sup>127</sup> Maintaining a meaningful place for the Article III courts, the argument goes, serves to ensure a check against self-aggrandizement by the political branches, arbitrariness and self-aggrandizement by agencies and legislative courts, and unfairness to individual litigants.<sup>128</sup> On this account, for both constitutional questions and other questions of law, the Court requires at a minimum some further review by Article III courts of the decisions of non-Article III adjudicators.<sup>129</sup>

This “appellate review theory” requires a meaningful inquiry by the Article III courts into the work of non-Article III adjudicators. Exactly what “meaningful” review entails is debatable, but the prevailing view holds that Article III courts must be able to exercise independent judgment concerning questions of law.<sup>130</sup> That may allow some grant of discretion to the non-Article III adjudicator when acting reasonably within its area of specialty.<sup>131</sup> But it envisions Article III courts with a powerful grasp on the reins of their non-Article III subordinates. Proponents of the appellate review theory thus express some sympathy for the concerns expressed by the Court in *Northern Pipeline* while disagreeing with the reasoning and the result.<sup>132</sup>

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*Pipeline*, 458 U.S. at 70 n.23 (plurality opinion), have not been completely consistent. *See id.* at 86 n.39 (“Our precedents make it clear that the constitutional requirement for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal . . . .”); *see also* Redish, *supra* note 25, at 219 n.143, 227 n.172 (noting internal inconsistency in Justice Brennan’s plurality opinion in *Northern Pipeline* as to the relevance of appellate review).

126. Fallon, *supra* note 5, at 933. Fallon’s proposal, which attempts to synthesize the Court’s doctrine, past practice, and normative concerns, forms the leading account of the appellate review theory.

127. *See* Pfander, *supra* note 10, at 647 (“Perhaps most successfully, some scholars have argued that the Court should focus not on the makeup of the tribunal that decides matters in the first instance, but on the availability of sufficiently searching review before an Article III court.”).

128. *See* Fallon, *supra* note 5, at 975-79.

129. *See id.* at 981-82. Although some scholars have suggested that constitutional and non-constitutional questions should be distinguished for purposes of further review by Article III courts, that distinction has been rejected by the leading exponents of the appellate review theory. *See, e.g., id.* at 976-82 (advancing policy arguments for maintaining Article III appellate review over non-constitutional questions of law); Redish, *supra* note 25, at 225-26 (demonstrating the textual difficulty of separating constitutional questions from other questions of law for purposes of review by Article III courts).

130. Fallon, *supra* note 5, at 983.

131. *Id.* at 984.

132. *See, e.g., id.* at 991 (“The available appellate review by article III courts [under

At bottom, the appellate review account of Article III rests principally on the perceived importance of the Article III courts' maintaining control over non-Article III adjudicators.<sup>133</sup> The correctness of the non-Article III tribunal's decisionmaking is a secondary concern. In that respect, the "adjunct" argument advanced unsuccessfully in *Northern Pipeline* but heavily relied on by Congress in its attempt to reconfigure the bankruptcy courts after *Northern Pipeline* is a sub-species of appellate review theory. An autonomous non-Article III adjudicator poses a danger to the integrity of the federal courts, the thinking goes, because it threatens to cut into the monopoly on "judicial" power conferred by the Constitution on the Article III judiciary.<sup>134</sup> For that monopoly to be maintained, then, the Article III courts must have a realistic ability to review and control the functions of their non-Article III subordinates.

## II. ARTICLE III THEORY AND THE REALITY OF BANKRUPTCY ADJUDICATION

When viewed in light of the operation of the bankruptcy courts, however, both the balancing approach adopted by the Court after its retreat from *Northern Pipeline* and the appellate review theory advanced by scholars leave much to be desired. Each rests on a number of assumptions out of sync with the real-world operation of the modern system of bankruptcy adjudication. To approve the continued use of non-Article III bankruptcy judges, the balancing approach must assume that bankruptcy adjudication will be limited, technical, and specialized, when in fact its reach is far more expansive. The appellate review theory, on the other hand, assumes a bankruptcy system that will be held in firm check by the availability of appeals to Article III courts, when in fact bankruptcy cases generate very few appeals that could achieve that kind of control for reasons that go beyond the particular statutory framework governing appellate review of bankruptcy court decisions.<sup>135</sup>

### A. *Beyond Balancing*

The pragmatic balancing approach assumes that non-Article III adjudication in the first instance will be limited to specialized fields abounding in apolitical technical questions—and perhaps to some core private-rights matters ancillary to those technical questions. Balancing seeks to permit flexibility in the adjudication of matters that, although susceptible to adjudication by the Article III judiciary, could be decided elsewhere more

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the 1978 Code] offered sufficient protection for article III values.”).

133. Pfander's account of the relationship between Article III courts and non-Article III tribunals goes further to require that the inferiority of the non-Article III decisionmaker to any Article III courts must be maintained. See Pfander, *supra* note 10, at 671-97.

134. Pfander, *supra* note 10, at 722.

135. See *infra* Part II.B.

efficiently. Thus, the Court in *Thomas* approved Congress's decision to locate the resolution of disputes in connection with a complex federal regulatory scheme for pesticides outside the Article III courts.<sup>136</sup> In *Schor*, the Court permitted agency adjudication of common law counterclaims as part of a "specific and limited federal regulatory scheme" because counterclaim jurisdiction was deemed necessary to make the procedures of that scheme workable and was considered a minimal threat to the Article III judiciary's power.<sup>137</sup>

In his dissent in *Northern Pipeline*, which laid the groundwork for the Court's doctrinal evolution in *Thomas* and *Schor*, Justice White applied that assumption of technical specialization to bankruptcy cases. Although chiding the Court's majority for adopting "an abstract theory that has little to do with the reality of bankruptcy proceedings," White's balancing test itself rested on a questionable assessment of the nature of bankruptcy adjudication.<sup>138</sup> He indicated that bankruptcy cases present largely technical questions given to "extreme specialization."<sup>139</sup> He also described bankruptcy matters as, for the most part, private adjudications unlikely to attract the attention of the political branches.<sup>140</sup> Those assumptions are not, of course, peculiar to Justice White.<sup>141</sup>

In reality, bankruptcy is a specialized process for dispute resolution in connection with firms and individuals in financial or economic distress, but it is hardly narrow, technical, or specialized in substance. Bankruptcy cases frequently raise a broad range of legal issues beyond the intricacies of bankruptcy-specific doctrine. They routinely implicate non-bankruptcy-specific rules of decision and have done so throughout the modern history of federal bankruptcy law.<sup>142</sup> Both as a matter of doctrine<sup>143</sup> and theory,<sup>144</sup> bankruptcy

136. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571, 590 (1985).

137. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986).

138. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 98 (1982) (White, J., dissenting).

139. *Id.* at 118.

140. *Id.* at 117.

141. See sources cited in *supra* note 8; see also SKEEL, *supra* note 33, at 141-59 (describing attempts to promote the dramatic 1978 reforms as technical matters that need not concern most political actors).

142. See Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part I)*, 47 N.Y.U. L. REV. 407, 408 (1972) ("[I]n its substantive provisions the Bankruptcy Act [of 1898] frequently incorporates, or is read as incorporating, substantive rules of state law for application in bankruptcy cases.").

143. *Butner v. United States*, 440 U.S. 48, 55-57 (1979) (holding that, with respect to property interests in bankruptcy, "the basic federal rule is that state law governs").

144. See Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1035 (1953) (stating that the "apparent purpose" of bankruptcy is "to provide a system for the effectuation of what are for the most part state-created rights"). See generally Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) (providing a normative justification for honoring non-bankruptcy

law aims to honor to the greatest extent possible the parties' non-bankruptcy entitlements. Typically, state common law or statutory rights make up those non-bankruptcy entitlements, and bankruptcy courts therefore must decide matters that require application of non-bankruptcy-specific common law or statutory provisions. State law questions saturate the bankruptcy process to such an extent that bankruptcy courts are perhaps the most frequent and significant adjudicators of state law questions among the federal courts.<sup>145</sup>

The breadth and importance of matters decided in the first instance by bankruptcy courts also undermine the assumption that bankruptcy cases are limited to matters with little social or political salience. A large business bankruptcy, for example, may call on the bankruptcy court to consider such sensitive actions as terminating the pension plan of thousands of employees,<sup>146</sup> reducing health benefits for the debtor's retirees,<sup>147</sup> or approving a plan of reorganization that may contemplate the termination of a large portion of its workforce.<sup>148</sup> The resolution of mass tort claims in bankruptcy can affect the lives and fortunes of thousands of workers, shareholders, and claimants (including future claimants).<sup>149</sup> Bankruptcy courts have been called upon to

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entitlements in bankruptcy).

145. Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 636 (2004).

146. See, e.g., *Pension Benefit Guar. Corp. v. United Air Lines, Inc. (In re UAL Corp.)*, 332 B.R. 858, 864 (Bankr. N.D. Ill. 2005) (ordering termination of United pilots' pension plan), *rev'd* 337 B.R. 904 (N.D. Ill. 2006); see also 29 U.S.C. §§ 1342 & 1348(a) (2006). Termination of an employee pension plan under federal law is not strictly a bankruptcy-specific matter. See *In re UAL Corp.*, 337 B.R. at 910-11 (concluding that termination of a defined benefit plan pursuant to ERISA is a "non-core" proceeding in bankruptcy). But the question typically arises in the context of a financially distressed company's bankruptcy. See David A. Skeel, Jr., *Employees, Pensions, and Governance in Chapter 11*, 82 WASH. U. L.Q. 1469, 1469 n.5 (2004) ("Pension plans can be terminated outside of bankruptcy as well as in, and the principal concerns are the same in both contexts. But bankruptcy is often the field on which the crisis unfolds.").

147. The Code permits the bankruptcy court to enter an order modifying payment of retiree benefits if, among other things, "such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities." 11 U.S.C. § 1114(g)(3) (2006).

148. See, e.g., Constance L. Hays, *Kmart to Close 284 Stores; 22,000 Jobs Will Be Cut*, N.Y. TIMES, Mar. 9, 2002, at C1 (describing Kmart's 2002 bankruptcy filing, store closings, and mass layoffs).

149. See *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986) (approving plan of reorganization creating a trust for asbestos-related tort claimants and enjoining future asbestos-related suits against the debtor); RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 174-76 (2007) (arguing that mass tort settlements and Chapter 11 bankruptcies work in tandem to undermine the rights of future claimants); G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge,"* 84 IOWA L. REV. 753, 765-83 (1999) (explaining third party non-debtor discharge and its effect on future claimants); Mark L. Desgrosseilliers, *Gimme Shelter: The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims in Bankruptcy*, 18 J. BANKR. L. & PRAC. 19, 21 (2009) (describing the debtor-driven

resolve disputes arising from clergy sexual abuse scandals in Catholic dioceses.<sup>150</sup> Although infrequent, bankruptcies of political subdivisions such as county and city governments have arisen in the recent past and are likely to arise again in times of severe economic disruption.<sup>151</sup> All of these cases touch on issues that attract widespread public concern and garner the accompanying attention of political actors.

In truth, “bankruptcy has become the forum of choice for resolving social issues that can’t easily be handled elsewhere, particularly when these issues give rise to widespread litigation.”<sup>152</sup> Examples of the use of bankruptcy courts

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shift to bankruptcy as a preferred forum for resolving mass tort claims, and discussing the mechanics of handling such claims in bankruptcy proceedings). *See generally* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2048 (2000) (advocating the use of bankruptcy courts as an effective forum for resolving mass-tort liability).

Asbestos cases remain the leading example of the use of bankruptcy courts to resolve mass tort claims. Beginning with the Johns-Manville corporation, which filed for bankruptcy in 1982, companies facing mounting asbestos liabilities have turned to the bankruptcy courts to mitigate them. After the Supreme Court’s rejection of the use of class actions in the Article III courts to achieve global peace in asbestos cases, bankruptcy courts became the preferred forum for handling the millions of asbestos cases flooding the civil justice system. *See NAGAREDA, supra*, at 161-62. Indeed, the Supreme Court essentially invited parties to asbestos litigation to leave the Article III courts and turn to the bankruptcy courts to resolve their disputes. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.34, 864 (1999) (rejecting certification of a settlement class that attempted a global resolution of asbestos manufacturers’ liability and noting, without deciding, that the proposed class threatened to undermine the protections of the Bankruptcy Code).

150. In 2004, the Catholic dioceses of Portland, Oregon; Tucson, Arizona; and Spokane, Washington, filed Chapter 11 petitions because of mounting liability for sexual abuse by clergy members. *See generally* David A. Skeel, Jr., “Sovereignty” *Issues and the Church Bankruptcy Cases*, 29 SETON HALL LEGIS. J. 345 (2005) (charting how Chapter 11 bankruptcy can, with some deference to Establishment Clause concerns, effectively manage the reorganization of religious institutions). Since then, four more dioceses have filed for bankruptcy. Jacqueline L. Salmon, *Diocese of Wilmington Files for Bankruptcy*, WASH. POST, Oct. 20, 2009, at B3. Church bankruptcy cases present complicated questions of bankruptcy law, corporations law, and constitutional law, as well as more general questions of morality and social policy. *See generally* Catharine Pierce Wells, *Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy*, 29 SETON HALL LEGIS. J. 375 (2005) (discussing how charitable bankruptcies differ from commercial bankruptcies, and considering how bankruptcy and canon law interact to determine ownership of religious property).

151. Bridgeport, Connecticut, which filed for bankruptcy in 1991, and Orange County, California, which filed in 1994, are two of the more notable municipal bankruptcies since the enactment of the Bankruptcy Code. *See* Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 456 (1993) (criticizing the standards used to determine municipal insolvency); Tim Jones, *Three Oaks Goes Broke*, CHI. TRIB., Dec. 14, 2008, at C1 (reporting the bankruptcy of Three Oaks, Michigan, and discussing other municipalities facing similar economic and financial pressures); Jessee McKinley, *City Council in Bay Area Declares Bankruptcy*, N.Y. TIMES, May 8, 2008, at A24 (reporting the Vallejo City Council’s decision to file for bankruptcy).

152. David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1181

to resolve difficult, politically fraught disputes are not hard to find. Unable to craft a comprehensive approach to the millions of asbestos cases in the federal and state courts, Congress instead blessed the use of the bankruptcy courts as a second-best option for mass resolution of those cases.<sup>153</sup> The current financial crisis and use of the bankruptcy courts to restructure much of the domestic automobile industry has spurred discussion of whether bankruptcy courts are the appropriate forum for restructuring residential mortgages.<sup>154</sup>

To describe bankruptcy cases as inconsequential disputes unlikely to attract the attention of political actors, then, is to ignore the magnitude and variety of questions those cases present. To be sure, as Erwin Chemerinsky has observed, most bankruptcy court decisions are less likely to be as controversial as a high-profile constitutional decision of an Article III court.<sup>155</sup> But the day-to-day work of a district judge is decidedly less earth-shattering than adjudicating the most controversial constitutional issues of the age.

Moreover, even if it is a fair generalization to say that the work of an individual bankruptcy judge may be less politically fraught than the work of an individual Article III judge, bankruptcy law and the bankruptcy process itself have drawn intense political interest.<sup>156</sup> The long struggle in Congress (and on K Street) over the most recent amendments to the Bankruptcy Code<sup>157</sup> exposed the ideological salience of bankruptcy law. Who seeks the protection of the bankruptcy courts and how the bankruptcy courts respond to debtors are topics that do not, in other words, go unnoticed by the political branches.<sup>158</sup> How

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(2003).

153. See 11 U.S.C. § 524(g) (2006). Section 524(g) essentially codified a series of judicially crafted innovations that attempt to channel the assets of bankrupt asbestos manufacturers toward claimants alleging asbestos-related injuries. See NAGAREDA, *supra* note 149, at 162-66.

154. See *supra* notes 1-2.

155. Chemerinsky, *supra* note 8, at 118.

156. Although unusual in the modern era of bankruptcy law, heated political interest in debtor-creditor law has a firm place in American legal history. See BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 166-220 (2003) (describing the politics of debtor-creditor law during the Founding period); see also Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. 633, 643 (2009) (noting the potential for political interest in bankruptcy law and the bankruptcy process); Theodore W. Ruger, "A Question Which Convulses a Nation": *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004) (recounting the divisive debate in 1820s Kentucky over the life-tenured state judiciary's invalidation of a debtor-creditor law). See generally SKEEL, *supra* note 33.

157. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of Titles 11, 12, 15, 18, and 28 of the United States Code).

158. Bankruptcy judges have been critical of the 2005 amendments in part because of the view that one motivation for the statute was political distrust of the bankruptcy bench. See, e.g., Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 1, 69 ("Together with anti-debtor . . . and anti-lawyer . . . themes, BAPCPA arrived on a wave of anti-bankruptcy judge rhetoric.").



bankruptcy judges respond in turn to the changes in social and economic policy enacted by Congress will no doubt gain the attention of political actors.<sup>159</sup>

### B. *The Limitations of Appellate Review*

Reliance on searching appellate review by Article III courts of bankruptcy court decisions poses similar problems of mismatch between theory and reality. In reality, very few bankruptcy cases generate appeals.<sup>160</sup> If regular, searching appellate review is expected to ensure “Article III values,” it appears to be a poor guarantor in bankruptcy cases.

There are at least three reasons for the low rate of bankruptcy appeals. As an initial matter, the standard of review in appeals of bankruptcy decisions is deferential to bankruptcy judges on key—and often determinative—questions. Second, the constraints of bankruptcy litigation, with its ever-present pressures of time and concerns about draining the debtor’s estate by litigation costs, also limit the likelihood of frequent and effective appellate review. In addition, the Article III judiciary does not have a keen appetite for bankruptcy cases, a fact that tends to dampen the impact of bankruptcy appeals.

#### 1. *The Code and doctrine*

On bankruptcy-specific questions, bankruptcy judges enjoy significant discretion. The case law gives bankruptcy judges broad discretion over such central tasks, for example, as evaluating and estimating the value of claims filed against a debtor.<sup>161</sup> Bankruptcy judges also have broad discretion to approve settlement agreements in litigation involving the debtor’s estate, so long as the settlement is in the best interests of the estate.<sup>162</sup> On appeal,

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159. A number of bankruptcy decisions have lambasted the 2005 bankruptcy amendments as inartfully drafted or even incoherent—criticisms that explicitly invite the attention of Congress. *See, e.g., In re TCR of Denver, L.L.C.*, 338 B.R. 494, 495-96 (Bankr. D. Colo. 2006) (“This is a case where the language of BAPCPA passed by Congress tends to defy logic and clash with common sense.”); *In re McNabb*, 326 B.R. 785, 791 (Bankr. D. Ariz. 2005) (encouraging Congress to “fix” the statute).

160. *See infra* notes 190-195 and accompanying text.

161. 11 U.S.C. § 502(c)(1) (2006) (permitting estimation of claims); *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 136 (3d Cir. 1982) (reciting congressional intent to “accord wide latitude” with respect to bankruptcy court’s estimation decisions). Estimation of claims can prove important because the voting power of a creditor in the decision whether or not to approve a plan of reorganization in Chapter 11 depends on the size of the creditor’s claim.

162. *See* FED. R. BANKR. P. 9019; *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991) (“[Rule 9019] empowers the Bankruptcy Court to approve compromises and settlements if they are in the best interests of the estate.”); *see also In re Healthco Int’l, Inc.*, 136 F.3d 45, 51 (1st Cir. 1998); *In re Zale Corp.*, 62 F.3d 746, 754 (5th Cir. 1995); *In re Energy Coop., Inc.*, 886 F.2d 921, 926 (7th Cir. 1989) (“Because the bankruptcy judge is ‘uniquely positioned to consider the equities and reasonableness of a particular compromise,’ [this court on appellate review] will not reverse that determination

reviewing courts grant these kinds of decisions great deference.<sup>163</sup> There is no explicit command in the Code requiring such deference, but it is taken to be implicit in the generalized, open-textured instructions the Code gives to bankruptcy judges.<sup>164</sup>

The law of asset sales in bankruptcy, a frequent and sometimes decisive occurrence in Chapter 11 cases, provides a common example of the extent to which reviewing courts will defer to bankruptcy judges on key decisions in bankruptcy cases. The Code allows for the sale (with approval of the bankruptcy court) of a debtor's assets outside the ordinary course of business free and clear of liens.<sup>165</sup> Asset sales have become a common feature of large modern Chapter 11 cases—so much so that Douglas Baird and Robert Rasmussen have suggested that asset sales have replaced traditional corporate reorganization.<sup>166</sup> And yet Article III courts have been reluctant to exercise anything more than deferential review of bankruptcy courts' decisions with respect to those sales.<sup>167</sup> In effect, a bankruptcy judge's decision with respect to a major asset sale, which might be *the* crucial decision in a debtor's case, is immune from attack in all but the most extraordinary circumstances.<sup>168</sup> Even during the bankruptcy cases of Chrysler, in which the sale of essentially the entire enterprise proved to be the defining transaction, the Article III courts invoked the strong presumption of deference to the bankruptcy court's approval of such sales.<sup>169</sup>

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unless the bankruptcy judge abused his discretion." (citing *In re Am. Reserve Corp.*, 841 F.2d 159 (7th Cir. 1987)).

163. See, e.g., *Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994) (affirming a bankruptcy judge's approval of a settlement agreement after reciting that "review of the bankruptcy court's approval of the extant settlement agreement is restricted to determining whether there was a clear abuse of discretion").

164. See, e.g., *Consumer News & Bus. Channel P'ship v. Fin. News Network Inc. (In re Fin. News Network Inc.)*, 980 F.2d 165, 169 (2d Cir. 1992) (eschewing rules that are "blindly applied so as to reduce the broad discretion and flexibility a bankruptcy court must necessarily have to enhance the value of the estates before it").

165. 11 U.S.C. § 363(b) (2006). Essentially, assets sales are permissible if they satisfy the business judgment rule. *In re Global Crossing Ltd.*, 295 B.R. 726, 729-30 (Bankr. S.D.N.Y. 2003).

166. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002) (arguing that the rise of major asset sales in Chapter 11 cases has made traditional corporate reorganization increasingly irrelevant).

167. *In re Lionel Corp.*, 722 F.2d 1063, 1069 (2d Cir. 1983) ("To further the purposes of Chapter 11 reorganization, a bankruptcy judge must have substantial freedom to tailor his orders to meet differing circumstances."). See generally Rachael M. Jackson, Note, *Responding to Threats of Bankruptcy Abuse in a Post-Enron World: Trusting the Bankruptcy Judge as the Guardian of Debtor Estates*, 2005 COLUM. BUS. L. REV. 451 (reviewing treatment of bankruptcy judges' decisions with respect to the sale of assets in Chapter 11 cases).

168. See Jackson, *supra* note 167, at 501-07.

169. See *In re Chrysler L.L.C.*, 576 F.3d 108, 117 (2d Cir. 2009) ("[T]he size of the transaction . . . is, under our precedent, just one consideration for the exercise of discretion by the bankruptcy judge(s), along with an open-ended list of the salient factors."), *vacated*

Open-ended substantive provisions that relate directly to a bankruptcy case are not the only provisions of the Code tending to insulate the decisions of bankruptcy judges from appellate review. The Code's jurisdictional provisions are far-reaching and can sweep into a bankruptcy case issues and disputes beyond the central questions of approving or disallowing creditors' claims and granting a debtor a discharge.

The Code divides the bankruptcy court's jurisdiction into "core" bankruptcy matters and proceedings "related to" the debtor's case.<sup>170</sup> Core proceedings are matters that are tied to the bankruptcy case itself, such as confirmation of a plan of reorganization, or proceedings to recover fraudulent conveyances.<sup>171</sup> A bankruptcy judge may enter final orders in core proceedings, subject to appellate review by the district court.<sup>172</sup> "Related to" (or non-core) proceedings extend even further to include any matter in which "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."<sup>173</sup> These proceedings push at the constitutional boundaries of a bankruptcy court's jurisdiction because some courts have deemed disputes that involve neither the debtor nor any creditor to be related to the debtor's case.<sup>174</sup> A bankruptcy judge can make recommended findings in such related to proceedings but cannot enter a final order without the consent of the parties.<sup>175</sup>

This jurisdictional division responded to *Northern Pipeline*. In theory, it allows bankruptcy judges to determine matters that are bankruptcy specific, but it also requires an Article III judge's supervision for final determination in matters beyond the core of the bankruptcy proceedings. In practice, however, the scopes of both "core" and "related to" proceedings have tended to drift so as to reinforce the autonomy of bankruptcy judges. Because the list of "core" proceedings described in the statutes is not exhaustive, there often is an

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*on other grounds sub nom.* Ind. State Police Pension Trust v. Chrysler L.L.C., 130 S. Ct. 1015 (2009).

170. See *supra* note 96.

171. 28 U.S.C. § 157(b)(2)(H), (L) (2006); see *Halper v. Halper*, 164 F.3d 830, 836 (3d Cir. 1999) (defining core proceeding as "a proceeding that, by its nature, could arise only in the context of a bankruptcy case").

172. See *supra* note 96.

173. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). *Pacor* provides the dominant test, although various definitions of "related to" jurisdiction sometimes appear in the cases. See *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 317-21 (S.D.N.Y. 2003). The Supreme Court has recognized the dominance of the *Pacor* test without specifically adopting it. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995); see also Radha A. Pathak, *Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction*, 85 OR. L. REV. 59, 83-84 (2006) (criticizing the Court's decision in *Celotex* for endorsing "related to" jurisdiction without properly considering its constitutionality).

174. See *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996) (finding related to jurisdiction over tort claims by non-debtor plaintiffs against non-debtor defendants).

175. 28 U.S.C. § 157(b)(3), (c)(1), (c)(2) (2006).

arguable case to be made that a matter is a core proceeding that can be finally determined by the bankruptcy judge.<sup>176</sup> Because there are no bright-line rules, the scope of jurisdiction remains uncertain and is thus more likely to need case-by-case litigation to be tested.<sup>177</sup>

Even where the Code appears to place discretion in the hands of other actors in a bankruptcy case, such as the U.S. Trustee, discretion has tended to drift back into the hands of bankruptcy judges as the case law develops.<sup>178</sup> That drift is probably inevitable in a system that purports to divide administrative responsibility from judicial responsibility but also gives judges great authority in how to run their cases.

Further evidence of the relative autonomy of bankruptcy courts from the tethers of appellate review comes from the heated scholarly debate about forum shopping in large Chapter 11 cases. The generous bankruptcy venue statute often permits prospective business debtors to choose among a large number of judicial districts in which to file a petition.<sup>179</sup> That flexibility has permitted

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176. There is a vast literature noting and criticizing the amorphous nature of “core” and “related to” jurisdiction. See Thomas Galligan, Jr., *Article III and the “Related to” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 11 n.40 (1987) (charting how courts have struggled with delineating the boundaries of “related to” jurisdiction in bankruptcy proceedings); Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 681 (1985) (describing the ambiguity in a district judge’s duty to “review” non-core proceedings and the incentives that may lead district judges to perform a more cursory review than the matter deserves); Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 277, 283-84 & n.48 (1996) (noting the “fragmented and constitutionally suspect jurisdictional system imposed on the bankruptcy judges” after *Northern Pipeline*); see also Pathak, *supra* note 173, at 74-84 (tracking the Supreme Court’s treatment of the issue).

177. See Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 754 (2000) (criticizing the current standard for determining related to jurisdiction for causing uncertainty and fostering “endless jurisdictional litigation”).

178. Compare 11 U.S.C. § 1102(a) (2006) (vesting the U.S. Trustee with power over the composition of committees of creditors or equityholders), with *In re Mercury Fin.*, 240 B.R. 270, 277-78 (N.D. Ill. 1999) (holding that the bankruptcy court may review a decision of the U.S. Trustee with respect to the composition of a creditor’s committee), *In re Columbia Gas Sys. Inc.*, 133 B.R. 174, 175-76 (Bankr. D. Del. 1991) (same), and *In re Texaco Inc.*, 79 B.R. 560, 565-66 (Bankr. S.D.N.Y. 1987) (reviewing de novo whether the U.S. Trustee’s appointments to a creditor’s committee adequately represented creditors).

179. Bankruptcy venue lies in any of four places: (1) the debtor’s domicile or residence, (2) the debtor’s principal place of business, (3) the location of the debtor’s principal assets, or (4) where the bankruptcy case of one of the debtor’s affiliates is already pending. 28 U.S.C. § 1408 (2006). In practice, the statute and case law interpreting it leave enough flexibility to allow debtors in corporate cases a choice of courts in which to file for bankruptcy. For example, since most large publicly held companies are chartered in Delaware or have a significant presence in New York, venue for many corporate bankruptcies will lie in those jurisdictions, giving debtors (or their lawyers) a choice of courts. Moreover, although bankruptcy courts retain the power to transfer a case, even if venue is proper, in the interest of justice or for the convenience of the parties, they rarely do so. 28 U.S.C. § 1412 (2006); see M. Natasha Labovitz & Craig A. Bruens, *You Can Still*

companies to file bankruptcy petitions even when they have few apparent ties to the chosen forum. Enron and WorldCom—companies based in Houston, Texas, and Jackson, Mississippi, respectively—filed their Chapter 11 petitions in the bankruptcy court for the Southern District of New York. The bankruptcy court for the District of Delaware has similarly attracted a disproportionate number of high-profile filings.

The rise of Delaware and New York as favored forums for large Chapter 11 cases has attracted widespread attention.<sup>180</sup> Some scholars, notably Lynn LoPucki, have recommended new restrictions on the bankruptcy venue provisions to curb forum shopping, a move opposed by commentators who have suggested that venue competition may lead to benefits in case management and expertise.<sup>181</sup>

Evidence of venue competition reinforces the fact that the Code and case law effectively grant broad autonomy to bankruptcy judges. What is common to scholars on opposing sides of the debate, however, is an implicit understanding that the choice of forum in bankruptcy owes less to divergence in the case law between one place or another than to a mix of factors centered on the bankruptcy professionals (both judges and lawyers).<sup>182</sup> Outside of bankruptcy, the gravest concerns about forum shopping arise when substantive

*Shop After Winn-Dixie*, AM. BANKR. INST. J., July-Aug. 2005, at 16 (describing a rare decision in which a bankruptcy court transferred a case in light of the debtor's "manufacturing" venue by incorporating a subsidiary solely in contemplation of bankruptcy venue).

180. See, e.g., LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 97-122 (2005) (attributing the failure of several corporate debtors after emerging from bankruptcy protection to competition for large cases among venues, especially Delaware and New York). But see, e.g., Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawareization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 286-88 (2001) (criticizing Eisenberg & LoPucki's 2001 study of venue choice, discussed *infra* note 181, and providing alternative hypotheses to explain their data); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 328 (2001) (arguing that venue competition may lead to increased expertise and efficiency in bankruptcy case management).

181. See Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in the Bankruptcy Reorganization of Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999) (casting doubt on the speed or efficiency of Delaware bankruptcy courts relative to other districts, and suggesting that incorporation in a particular state should not create a right to file for bankruptcy in that state). But see Marcus Cole, *'Delaware Is Not a State': Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002) (finding that the increase in bankruptcy filings in Delaware is a function of competition between judges rather than venues and has in fact furthered the professionalization of the bankruptcy bench); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000) (arguing that forum shopping in bankruptcy is a largely positive phenomenon but suggesting that business managers should select, ex ante, an appropriate bankruptcy forum while their incentives are better aligned with those of the corporation).

182. Much of the debate focuses on the effect of the practices of individual judges or the procedural rules of different bankruptcy courts.

law governing primary behavior differs between alternative forums.<sup>183</sup> The venue choice between Delaware and New York—or New York and Houston—for large bankruptcies, however, is not usually driven by such considerations. Other than the few circumstances in which there is strong, clear, and controlling circuit precedent disfavoring a potential debtor’s strategic position, different concerns are at play.

What does drive the choice of debtors’ forum in large bankruptcy cases are considerations of judges’ sophistication, predictability, and efficiency, and whether there are sufficient gaps in settled law to allow counsel and the courts to fashion creative solutions to problems presented by cases.<sup>184</sup> In other words, the Article III courts superintending the forum matter less than its professional qualities—judicial sophistication, individualism, and creativity.<sup>185</sup>

## 2. *Constraints of bankruptcy litigation*

Beyond the presence of open-ended discretionary standards and ambiguous jurisdictional provisions, there are other factors that tend to insulate bankruptcy judges’ decisionmaking from appellate review. The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation.

### a. *The preference for negotiation over extended litigation*

It takes sustained litigation to generate and resolve novel legal questions that, through the appellate process, clarify the law.<sup>186</sup> It therefore stands to reason that disputes that settle before a judicial decision will have no effect on the content of the “law on the books” and limited effect on the law as

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183. See *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (“[T]here should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.”); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 348-49 (2006) (“A choice of forums invoking different substantive laws is perhaps the classic forum shopping paradigm, and the one most likely to stir incendiary debate.”).

184. See generally Cole, *supra* note 181. Based on a survey of leading bankruptcy practitioners and judges, Professor Cole reports that outside certain limited categories of cases that are driven by differences in law among the circuits, the choice of forum is influenced by (among other things) lawyers’ assessment of the sophistication of bankruptcy judges and the judges’ ability to resolve cases efficiently. Lawyers also value the absence of “real law”—that is, noted gaps in the law that allow novel and creative solutions to debtors’ financial crises. *Id.* at 1859-71.

185. *Id.* at 1859-71.

186. See Keith N. Hylton, *Information, Litigation, and Common Law Evolution*, 8 AM. L. & ECON. REV. 33, 35-38 (2006) (summarizing the literature on theories of legal evolution, all of which stress the need for sustained litigation). See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897) (ascribing most significant legal change to evolution taking place over generations, fuelled by generations of litigants).

understood or practiced more informally.<sup>187</sup> Similarly, disputes that are resolved at the bankruptcy court level and go no further may create formal legal rules but ones with a reach limited to the local bankruptcy court.<sup>188</sup> Only when disputes move to the courts of appeals can they create binding precedent governing more than local bankruptcy courts.<sup>189</sup>

But almost no bankruptcy litigation goes farther than the bankruptcy court, and only the rare case will make it all the way to decision in a court of appeals.<sup>190</sup> Between 2000 and 2007, 11,224,562 bankruptcy petitions were filed in the federal courts.<sup>191</sup> During the same period, the courts of appeals received only 7106 bankruptcy appeals—or approximately one appeal for every 1580 bankruptcy cases filed below.<sup>192</sup> By comparison, 1,637,700 non-prisoner civil suits were filed in the federal district courts and 132,439 appeals in civil cases in the courts of appeals—or approximately one appeal for every twelve

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187. Disputes that settle before decision will have some legal effect in a more informal and diffuse way than law created by a formal judicial opinion. For example, knowledge of the general settlement terms of a novel litigation may signal to other similarly situated parties how to evaluate their potential claims or defenses. So long as that knowledge can be discerned by the legal community, it can operate as a kind of legal guidepost, although not as definitive a rule as a formal judicial opinion. The effect, however, will be limited by the size and cohesiveness of the relevant legal community.

188. Of course, a particular judicial decision may exert greater influence because of the persuasiveness of its reasoning or the reputation of the bankruptcy judge rendering the decision.

189. See *infra* notes 197-200 and accompanying text (discussing weak status as binding precedent of district court opinions in bankruptcy cases).

190. See Resnik, *supra* note 10, at 639; Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 496-98 (reporting data showing that “nearly all bankruptcy cases terminate in bankruptcy court,” thereby decreasing the likelihood of making binding precedent through appeals).

191. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.7.1 (2007), <http://www.uscourts.gov/judicialfactsfigures/index.html> [hereinafter JUDICIAL FACTS AND FIGURES]. The data are compiled by fiscal year. Data from 2005 and 2007 were combined to generate aggregate totals from 2000-2007, the longest continuous data period available.

192. See *id.* tbl.2.3. Excluding non-business bankruptcy petitions, which are low-value cases unlikely to generate appeals, the rate of appeals in bankruptcy cases is still significantly lower than in other civil litigation in the federal courts. Between fiscal years 2000 and 2007, the bankruptcy courts received 272,095 business bankruptcy case filings. Even assuming that all the bankruptcy appeals filed in the courts of appeals during that period were business bankruptcy appeals, that corresponds to one appeal for approximately every thirty-eight business bankruptcy cases. See *id.* tbl.7.3. The actual numbers are likely to reflect an even lower rate of appeals in business bankruptcy cases, as there is reason to believe that the Administrative Office’s statistics substantially undercount the number of bankruptcy cases that should be categorized as business bankruptcies. See Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743, 747-50 (2005) (finding that a significant number of what are functionally small business bankruptcies are officially recorded as personal bankruptcies, thereby accounting for the discrepancy between the then-current data that showed decreases in business bankruptcies and historical data that featured a much higher percentage of filings).

cases filed.<sup>193</sup>

The data comport with the understanding that bankruptcy is largely a space for negotiation and not formal judicial resolution and lawmaking. As Douglas Baird has observed, negotiations remain the “lifeblood of bankruptcy,” and much of what occurs in those negotiations remains “invisible to the appellate courts that interpret the Bankruptcy Code.”<sup>194</sup> In other words, the true work of day-to-day bankruptcy case resolution lies outside the channels of Article III appellate review that should, in theory, superintend the bankruptcy system.

b. *The structure of appellate review in bankruptcy cases*

The low frequency of bankruptcy appeals means that there is often a gap between appellate decisionmaking and the law as applied in the bankruptcy courts. The disputes that generate reported opinions in bankruptcy cases tend not to be ordinary disputes involving somewhat unsettled areas of law. Rather, they tend to be decisions that are notable outliers, with resulting interpretations of the law that are, as Baird has observed, “often out of sync with long-standing practice.”<sup>195</sup>

The disconnect between appellate adjudication and the work of bankruptcy judges explains the thinness of precedent on important bankruptcy law issues. Basic questions of bankruptcy law remain unresolved in most circuits for lack of settled precedent,<sup>196</sup> a perception shared by bankruptcy practitioners and scholars alike.<sup>197</sup>

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193. See JUDICIAL FACTS AND FIGURES, *supra* note 191, tbls.2.3, 4.1 & 4.6.

194. Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 92 (2004).

195. *Id.*

196. See *Life Ins. Co. v. Barakat (In re Barakat)*, 173 B.R. 672, 680 (Bankr. C.D. Cal. 1994) (lamenting that “wide gaps exist in the areas of settled law” in bankruptcy); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525, 525-28 (1995) (observing that there is “conflict and lack of direction in the reported case law” on important questions of substantive bankruptcy law). For a more recent discussion of how the 2005 Code amendments permitting direct appeals to the courts of appeals in certain circumstances may have affected the generation of precedent, see David George, *Direct Appeals from Bankruptcy Courts to the Courts of Appeals: The Experience After Two Years*, 9 J. APP. PRAC. & PROCESS 219, 225 (2007) (concluding that *Weber v. United States Trustee*, 484 F.3d 154 (2d Cir. 2007), has established a national consensus on how the procedures for direct review by appellate courts should be interpreted, but that this new procedure has so far led to the generation of little new precedent).

197. According to one extensive survey of bankruptcy judges and district judges, participants attributed gaps in the law to a “dearth of binding [bankruptcy] precedent from the courts of appeals or the Supreme Court.” Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627-28 (2002). The survey also identified unresolved issues of bankruptcy law on which bankruptcy and district court opinions conflict, concluding that “[t]he bankruptcy appellate system is not well structured to produce binding precedent.” *Id.*



If a case makes it out of the bankruptcy court to the district court on appeal and results in an opinion, its precedential value will be limited. As an initial matter, district judges in one district are not bound by the bankruptcy decisions of district judges in any other district.<sup>198</sup> Moreover, in multi-judge district courts, there is no “law of the district” binding district judges, so one district judge’s decision in a bankruptcy appeal might not be followed by another district judge in the same district.<sup>199</sup>

Once a district judge’s bankruptcy appellate decision is issued, it may have limited effect on future decisions by bankruptcy judges because there is no consensus answer to the question whether bankruptcy judges are bound by precedent from district judges, even in their own judicial district.<sup>200</sup> Only a court of appeals’s bankruptcy decision (requiring two levels of appellate review) would produce the prospect of binding precedent.

Even an opinion out of the court of appeals has limited effect in guiding bankruptcy courts. To take a prominent example, the practice of “substantive consolidation” in large corporate bankruptcies has developed apart (and is largely unmoored) from the appellate case law discussing the concept. Substantive consolidation is a bankruptcy-law analogue of corporate veil-piercing.<sup>201</sup> In complicated reorganization cases, the debtor may have dozens of subsidiaries or other affiliated entities that are also brought down into bankruptcy proceedings.<sup>202</sup> Because each co-debtor is a separate legal entity, its creditors are entitled to share only in its assets. When the co-debtors are substantively consolidated, however, the assets of each debtor entity are pooled with the assets of the others, and the general creditors of each will take their pro rata share from the consolidated pool.<sup>203</sup> Some creditors will obviously fare

198. Baisier & Epstein, *supra* note 196, at 529; Jeffrey J. Brookner, Note, *Bankruptcy Courts and Stare Decisis: The Need for Restructuring*, 27 U. MICH. J.L. REFORM 313, 318, 322 (1994) (describing leading cases on district judges’ consideration of prior bankruptcy rulings by fellow district judges and concluding that such rulings are not binding but are generally followed).

199. *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956, 965 (11th Cir. 2001); Baisier & Epstein, *supra* note 196, at 529 & n.18.

200. See Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1063 n.1 (1994) (citing examples of such cases); see also *U.S. Fire Ins. Co. v. Harris (In re Harris)*, 155 B.R. 135, 136 (Bankr. E.D. Va. 1993) (citing but choosing to disregard the holding in *In re Scialdone*, Civ. No. 88-189-N, 1988 U.S. Dist. LEXIS 18645 (E.D. Va. June 9, 1988) (unpublished decision)). Interestingly, one recent survey of bankruptcy and district judges reported that about half of the bankruptcy judges did not feel bound by the decisions of district judges. George W. Kuney, *Where We Are and Where We Think We Are: An Empirical Examination of Bankruptcy Precedent*, 28 CAL. BANKR. J. 71, 84 (2005). A similar fraction of district judges reported that they also did not believe bankruptcy judges were bound by district judges’ decisions. *Id.* at 94-96.

201. Douglas G. Baird, *Substantive Consolidation Today*, 47 B.C. L. REV. 5, 11-12 (2005).

202. The bankruptcy proceedings of the debtor and its co-debtor affiliates are typically procedurally consolidated before the same judge.

203. See Baird, *supra* note 201, at 6-8 (describing mechanics of substantive

better than others under substantive consolidation.<sup>204</sup>

Despite the well-established use of substantive consolidation in complex Chapter 11 cases,<sup>205</sup> there is limited precedent at the court of appeals level blessing the practice as it has developed in the bankruptcy courts. As Baird has observed, substantive consolidation “lacks the solid foundation one usually expects of doctrines so firmly embedded in day-to-day practice.”<sup>206</sup> Only with difficulty can the practice at the bankruptcy court level be reconciled with the doctrine as recited by appellate decisions.<sup>207</sup>

Pointing out the gap between appellate decisionmaking and the law on the ground in bankruptcy court is not meant to impugn the integrity of bankruptcy judges, or to suggest that they have acted as deliberate scofflaws.<sup>208</sup> Rather it highlights the autonomy, as a practical matter, the current structure of appellate review gives to bankruptcy judges. It also underscores the implausibility of justifying the non-Article III status of bankruptcy judges by their (theoretical) subordination to rigorous appellate oversight by Article III courts. Other aspects of the bankruptcy process that are not discussed in the broader Article III literature also contribute to this mismatch between theory and practice.

*c. Fees and bankruptcy litigation*

Factors unique to bankruptcy litigation limit the ability of disputes to make their way to the courts of appeals.<sup>209</sup> One attribute of bankruptcy that tends to discourage sustained litigation—that is, litigation carried through to a formal judicial decision—is the fee system. The Code provides that trustees (or debtors

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consolidation).

204. For example, the general creditors of a co-debtor that has few assets to go into the consolidated “pool” may recover more under a substantive consolidation scenario if other debtors contribute significant assets.

205. A recent example of substantive consolidation in a large Chapter 11 case is the WorldCom bankruptcy. *See In re WorldCom, Inc.*, No. 02-13533, 2003 WL 23861928 (Bankr. S.D.N.Y. Oct. 31, 2003).

206. Baird, *supra* note 201, at 15.

207. *Id.* at 19.

208. Indeed, the 2005 amendments to the Bankruptcy Code, which much of the bankruptcy bench and bar have opposed, nevertheless generally have been faithfully applied by bankruptcy judges. *See, e.g., In re Kane*, 336 B.R. 477, 481 & n.7 (Bankr. D. Nev. 2006) (lamenting “one of many examples of poor drafting” in the 2005 Code amendments but applying the contested provision).

209. The focus of this discussion is corporate bankruptcies and not consumer bankruptcies, which are typically routine, low-value cases resulting in a discharge of debt or the debtor’s enrollment in a repayment plan and, therefore, provide little incentive for litigation beyond the bankruptcy court by any party. Even within the universe of corporate bankruptcies, most bankruptcy litigation raising novel questions is generated by the relatively few large Chapter 11 cases, not the thousands of routine Chapter 7 and Chapter 11 cases involving individuals and small businesses. *See Baird, supra* note 194, at 69 (“A single Enron or WorldCom generates more legal work than a thousand small cases combined.”).

in possession<sup>210</sup>) may retain and pay professionals, including lawyers.<sup>211</sup> Creditors committees are similarly entitled to retain professionals.<sup>212</sup> Professionals' fees are paid out of the bankruptcy estate<sup>213</sup> and receive priority in payment as "expenses of administration" of the estate (coming ahead of, for example, claims for taxes and employee wages).<sup>214</sup> The fact that attorneys are paid out of the estate, and paid first, would seem to provide an incentive to litigate even borderline disputes vigorously and at length.

But with the preferred treatment of attorney's fees comes greater scrutiny, which decreases the incentive to carry on litigation beyond the bankruptcy court. Fee payments require court approval of applications that must be documented in detail.<sup>215</sup> And any party in interest in a bankruptcy can object to an attorney's fee application, as can the U.S. Trustee or the court on its own motion.<sup>216</sup> A fee request may be cut or denied outright if the court determines

210. In a Chapter 11 case, the debtor may act with the powers and duties of a trustee in bankruptcy as a "debtor in possession." 11 U.S.C. §§ 1101, 1107(a) (2006).

211. *Id.* § 327(a).

212. *Id.* § 328(a). Under some circumstances, secured creditors may also recover attorney's fees. *Id.* § 506(b).

213. *Id.* § 503(b).

214. *Id.* § 507(a).

215. *Id.* § 330; FED. R. BANKR. P. 2016. In addition to the generic reporting requirements of the Bankruptcy Code and Rules, local rules or standing orders often require additional information on applications. *See, e.g.*, U.S. BANKR. COURT, S. DIST. N.Y., ADMIN ORDER M-104, GUIDELINES FOR FEES AND DISBURSEMENTS FOR PROFESSIONALS IN SOUTHERN DISTRICT OF NEW YORK BANKRUPTCY CASES (1991), available at <http://www.nysb.uscourts.gov/orders/m104.pdf> (listing thirteen pages of guidelines for fee applications, including the requirement that timekeeping be recorded in tenths of an hour with narrative detail and time for each specific task, and describing when timekeeping for particular matters must be recorded separately), *superseded by* U.S. BANKR. COURT, S. DIST. N.Y., ADMIN ORDER M-389, AMENDED GUIDELINES FOR FEES AND DISBURSEMENTS FOR PROFESSIONALS IN SOUTHERN DISTRICT OF NEW YORK BANKRUPTCY CASES (2009). Seven other administrative orders govern fee applications in the Southern District of New York. *See* U.S. Bankruptcy Court for the Southern District of New York Administrative Orders, <http://www.nysb.uscourts.gov/orders/orders2.html> (click on pull-down menu under "Fee Orders" for full list); *see also* GUIDELINES FOR REVIEWING APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED UNDER 11 U.S.C. § 330, 28 C.F.R. § 58 app. A (2009) (guidelines promulgated by U.S. Trustee Program).

216. 11 U.S.C. § 330(a)(2) (2006) ("The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested."); *see also* 28 U.S.C. § 586(a)(3)(A) (2006) (giving the U.S. Trustee authority to monitor requests for professional fees under § 330). The Office of the U.S. Trustee takes particular pride in policing the fee system. The Office boasts that it successfully sought reductions in the amount of approximately \$213 million in attorney's fee requests during Fiscal Years 2006 to 2008 and forced the disgorgement of approximately \$14 million more. U.S. DEP'T OF JUSTICE, U.S. TR. PROGRAM, TRUSTEE PROGRAM, ANNUAL REPORT OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2006, at 20, 39, available at [http://www.usdoj.gov/ust/eo/public\\_affairs/annualreport/docs/ar2006.pdf](http://www.usdoj.gov/ust/eo/public_affairs/annualreport/docs/ar2006.pdf); U.S. DEP'T OF JUSTICE, U.S. TR. PROGRAM, TRUSTEE PROGRAM, ANNUAL REPORT OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2007, at 18, 28, available at

that fees have been requested for services that took excessive amounts of time, or that were not “necessary . . . or beneficial” to the bankruptcy case.<sup>217</sup> As a result, unlike ordinary civil litigation, in which the attorney’s fee is governed solely by agreement with the client,<sup>218</sup> bankruptcy litigation includes the real risk that the attorney’s fee may be denied or reduced—or, at least, subject to the threat of an objection and subsequent litigation to resolve it. That threat imposes a discipline on the lengths to which counsel will carry disputed matters.

Most studies of professional fees in Chapter 11 cases report that such fees consume between 3% to 6% of the debtor’s estate.<sup>219</sup> Although those percentages may appear minor at first, it is important to keep in mind that a substantial portion of the assets of an estate are typically pledged to secured creditors, who cannot be compelled to contribute to the payment of professional fees.<sup>220</sup> Fees therefore impose a greater burden than the overall percentage might suggest on unsecured creditors and equity holders who, understandably, wish to keep them cabined in order to maximize their return from the estate.<sup>221</sup>

d. *The problem of delay*

Another feature of bankruptcy litigation that limits the number of appeals

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[http://www.usdoj.gov/ust/eo/public\\_affairs/annualreport/docs/ar2007.pdf](http://www.usdoj.gov/ust/eo/public_affairs/annualreport/docs/ar2007.pdf); U. S. DEP’T OF JUSTICE, U.S. TR. PROGRAM, TRUSTEE PROGRAM, ANNUAL REPORT OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2008, at 14, 22, available at [http://www.usdoj.gov/ust/eo/public\\_affairs/annualreport/docs/ar2008.pdf](http://www.usdoj.gov/ust/eo/public_affairs/annualreport/docs/ar2008.pdf).

217. 11 U.S.C. § 330(a)(3)(A), (C), (D) (2006).

218. An exception to this rule is class action litigation, in which settlements and attorney’s fees also require court approval. See FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”); FED. R. CIV. P. 23(h) (permitting an award of reasonable attorney’s fees).

219. See, e.g., Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 730 n.6 (“The direct costs of bankruptcy, primarily professional fees, are enormous.”).

220. *Id.*

221. Although there is renewed debate in the literature about the magnitude of professional fees attributable directly to bankruptcy-specific costs in Chapter 11 (as opposed to fees generated by the ordinary operation of the debtor’s enterprise), that distinction should not matter for purposes of determining the level of scrutiny that will be placed on litigation in bankruptcy. See Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77 (2008) (finding that bankruptcy is relatively inexpensive compared to many other corporate legal services, and that larger Chapter 11 cases enjoy certain economies of scale); Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509 (2000) (challenging contention by other scholars that the bankruptcy process is more expensive than alternative methods of resolving a firm’s financial distress). From the perspective of creditors seeking to squeeze the greatest possible recovery from the estate, it is immaterial whether or not an attorney’s fee request relates to services that would have been undertaken in any event outside of bankruptcy. The fee request still represents a potential reduction in the size of the estate.

is the problem of delay and the reaction to it. A persistent criticism of Chapter 11, especially after a wave of large cases in the 1980s, has been that it is too complicated and too slow. Particularly in large corporate bankruptcies, commentators often have complained that the Code required too many hearings leading to too much delay in the resolution of the overall case.<sup>222</sup> Delay typically benefits debtors, who can squeeze concessions from creditors desperate to collect on their claims without further loss from expenses draining the estate and from the decreasing time-value of money.<sup>223</sup> Creditors in turn resist delay in the hopes of closing the case as quickly as possible.<sup>224</sup>

The delay game plays out at the bankruptcy court level, however, and rarely goes further. The decisions by bankruptcy courts most likely to generate disputes that would justify further appeals are often not rendered until the late phases of a bankruptcy case.<sup>225</sup> By that time, the main disputes before the bankruptcy court (such as the confirmation of a plan of reorganization in Chapter 11 cases) have been finally concluded, and parties in interest may seek to appeal; few disputes will be left for further judicial resolution. Having concluded the case, debtors have little incentive to engage in further delay by appealing, and creditors are eager, as always, to settle any remaining litigation, take their payoff, and move on.

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222. Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 315-18 (1993) (describing costs in bankruptcy from, among other things, strategic delay by debtors' management); Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 318-22 (1993) (elaborating on how complex and redundant procedural requirements in bankruptcy filings lead to delay and wasted legal resources).

223. See Adler, *supra* note 222, at 315-18.

224. Recent scholarship supports the conclusion that creditors have become more successful at wresting control of the Chapter 11 process from debtors, thereby forcing quicker resolutions of large bankruptcy cases, typically by a sale of the debtor's assets. See Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11* (Columbia Law & Econ. Research Paper No. 321; Northwestern Law & Econ. Research Paper Series No. 08-16, 2008), available at <http://ssrn.com/abstract=1081661>.

225. Those decisions include orders confirming a debtor's Chapter 11 or Chapter 13 plan and orders upholding objections to creditors' claims. See, e.g., *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083, 1087 (9th Cir. 1999) (declining to depart from the "well-settled policy that confirmation orders are final orders"); *Walsh Trucking Co. v. Ins. Co. of N. Am.*, 838 F.2d 698, 701 (3d Cir. 1988) (bankruptcy court order expunging creditor's claim is final order). Interlocutory orders may be appealed to the district court, but only by leave of the district court. 28 U.S.C. § 158(a)(3) (2006). In addition, whether a bankruptcy judge's decision can be appealed immediately as a final order or as an exception to the usual prohibition on interlocutory appeals is not always clear. That uncertainty is compounded when a party wishes to appeal further to the court of appeals. Compare *Official Comm. of Unsecured Creditors of Life Serv. Sys., Inc. v. Westmoreland County MH/MR*, 183 F.3d 273, 276-77 (3d Cir. 1999) (district court's order affirming a bankruptcy court's decision and remanding for further fact-finding is not an appealable final order), with *In re Mkt. Square Inn, Inc.*, 978 F.2d 116, 120 (3d Cir. 1992) (district court's order is a final order despite additional proceedings remaining in bankruptcy court).

e. *Equitable mootness*

An additional feature of bankruptcy practice that inhibits the resort to appeals up through the Article III courts is the doctrine of equitable mootness. Under that doctrine, appellate courts will not disturb transactions that have been consummated during or after a bankruptcy case.<sup>226</sup> The doctrine applies to the implementation of a plan of reorganization, and similar considerations (as explicitly provided by the Code) prevent the later unwinding of a bankruptcy court-approved sale of the debtor's assets.<sup>227</sup>

Equitable mootness poses a substantial barrier to appeals brought by dissenters from the resolution of a bankruptcy case. Unlike ordinary mootness doctrine, which turns on a court's inability to grant relief in a live controversy, equitable mootness can defeat appeals involving active disputes in which relief may be granted. The doctrine applies to disputes in which "even though effectual relief could conceivably be fashioned, implementation of that relief would be inequitable."<sup>228</sup> Essentially, the Article III courts invoke prudential considerations to avoid entertaining appeals due to "concerns unique to bankruptcy proceedings" in bankruptcy cases.<sup>229</sup>

The concerns unique to bankruptcy should be familiar by now: delay and cost. One justification for equitable mootness doctrine is that it serves the parties' interest in expeditious resolution of bankruptcy cases.<sup>230</sup> Another related justification rests on judicial concern that unraveling substantially consummated transactions threatens to impose risk costs on a bankruptcy estate and therefore reduce the recovery for creditors.<sup>231</sup> Thus, even a meritorious appeal may fail because a reviewing court determines that, for prudential reasons, it will not disturb the resolution of the bankruptcy case.<sup>232</sup> Mootness

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226. The emphasis in the case law has been on the equitable, not the mootness, portion of the phrase. The doctrine represents a prudential determination by appellate courts not to unwind consummated transactions rather than any inherent inability to do so under Article III. *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.).

227. See 11 U.S.C. § 363(m) (2006) (providing that the reversal or modification on appeal of an authorization to sell or lease the debtor's property does not affect the validity of a sale or lease under such authorization); *UNR Indus.*, 20 F.3d at 769 (finding authorization to apply equitable mootness beyond the explicit text of the Bankruptcy Code).

228. Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (*In re Chateaugay Corp.*), 988 F.2d 322, 325 (2d Cir. 1993).

229. *Cont'l Airlines*, 91 F.3d at 559.

230. See *id.* at 565.

231. See *UNR Indus.*, 20 F.3d at 770 ("By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate.").

232. See Ross E. Elgart, Note, *Bankruptcy Appeals and Equitable Mootness*, 19 CARDOZO L. REV. 2311, 2313-14 (1998) (citing the Third Circuit's dismissal of an otherwise meritorious claim because subsequent investment decisions had been based on the bankruptcy court's approval of a plan of reorganization).

doctrine in bankruptcy cases should not be discounted as a trivial or obscure area of the law; it can be dispositive in even the most important bankruptcy matters. To name one prominent recent example, objectors in the Chrysler bankruptcy—a large, politically salient case—were turned away by the Supreme Court on mootness grounds once the transactions contemplated in the case had been consummated.<sup>233</sup>

### 3. Article III judges and bankruptcy cases

A final consideration tending to diminish the appellate process in bankruptcy cases is the disinclination of Article III courts toward matters arising from the bankruptcy courts. Judging the intensity of this sentiment is difficult, because doing so relies less on doctrinal analysis than on admittedly indeterminate sociolegal assessments.

Justice White's dissent in *Northern Pipeline* observed, in defense of an autonomous non-Article III bankruptcy court system, that Congress evidently perceived that Article III judges had little interest in bankruptcy matters.<sup>234</sup> That lack of interest, Congress feared, would lead to the district courts' failure to deal with bankruptcy matters with the speed and efficiency they required.<sup>235</sup> The Judicial Conference—the organ of the Article III judiciary—had made clear to Congress as it considered the 1978 Act that district judges wanted little more to do with the superintending of bankruptcy cases.<sup>236</sup> Congress responded accordingly.

There is little evidence to suggest that the disinclination of Article III judges to take an active involvement in bankruptcy matters has changed. Many circuits, for example, have held that appeals from bankruptcy matters may be referred to magistrate judges before resolution by a district judge.<sup>237</sup> This

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233. *Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S. Ct. 1015 (2009) (granting certiorari but vacating judgment below on mootness grounds). The respondents in the case invoked 11 U.S.C. § 363(m) in successfully urging the Court to reject the petitioners' challenge to the sale of Chrysler's assets. See Brief for the Federal Respondent in Opposition at 9-13, *Ind. State Police Pension Trust*, 130 S. Ct. 1015 (No. 09-285); Respondent Chrysler's Brief in Opposition at 10-16, *Ind. State Police Pension Trust*, 130 S. Ct. 1015 (No. 09-285).

234. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 116 (1982) (White, J., dissenting) (“[T]he congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts . . .”).

235. *Id.*

236. See H.R. REP. NO. 95-595, at 14 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 5976. The House Report accompanying the Bankruptcy Reform Act of 1978 discussed this lack of interest in bankruptcy matters by Article III courts. The Report traces formal indications of that lack of interest back to at least 1959, when the Judicial Conference recommended legislation that would reduce one of the few remaining functions of district judges in the handling of bankruptcy cases—making an order of reference. *Id.*

237. See ADMIN. OFFICE OF THE U.S. COURTS, INVENTORY OF UNITED STATES

procedure provides a further layer of separation between the Article III judiciary and bankruptcy judges. It also suggests that the Article III courts do not view bankruptcy matters as central to the duties of the life-tenured judiciary.

Further evidence of that disinclination comes from district judges' treatment of the process of referring and withdrawing cases from bankruptcy judges.<sup>238</sup> In practice the reference system borders on fiction. Every federal judicial district has a standing order or local rule automatically referring bankruptcy cases to the bankruptcy judges of the district.<sup>239</sup> District courts almost never "withdraw the reference" to the bankruptcy judges on their own motion<sup>240</sup> and are infrequently asked to do so at the request of parties before the bankruptcy court.<sup>241</sup>

This apparent lack of interest in bankruptcy matters, it stands to reason, will greatly dampen the desire of Article III judges to superintend the work of bankruptcy judges with vigor. To be sure, it could be argued that this state of affairs represents no threat to the independence of the judiciary, because it arises from the actions of Article III judges themselves. But the structural protections of Article III do not mean that Article III judges are free, on their own motion, to abdicate their role in favor of non-Article III adjudication.<sup>242</sup>

### III. BANKRUPTCY COURTS AND ARTICLE III VALUES

If neither the Supreme Court's balancing approach nor appellate review theory gives a satisfactory justification for the use of non-Article III adjudicators in bankruptcy cases, is there an alternative account that can legitimize the current bankruptcy system? Specifically, taking the reality of bankruptcy adjudication into account, is there evidence in the bankruptcy court system of sufficient "Article III values" despite the non-Article III status of bankruptcy judges? To press further, does the current working of the bankruptcy courts suggest a judiciary with the pedigree, reputation, and professional autonomy to garner public confidence in its decisionmaking and to resist potential encroachments by political actors?

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MAGISTRATE JUDGE DUTIES (1991); *see also* Resnik, *supra* note 10, at 639.

238. *See* 28 U.S.C. § 157(d) (2006) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown."); *see also* FED. R. BANKR. P. 5011 (setting procedures for motions to withdraw the reference).

239. *See* Rasmussen & Thomas, *supra* note 181, at 1379.

240. Until January 1997, when the Chief Judge of the District of Delaware withdrew the reference for all Chapter 11 cases there, no district court had done so, except for isolated orders related to specific cases. LOPUCKI, *supra* note 180, at 83-85.

241. *See id.* at 85.

242. *Cf.* *Nguyen v. United States*, 539 U.S. 69 (2003) (vacating a federal court of appeals judgment solely because the judges of the court had erroneously invited a non-Article III judge to sit by designation on a panel of the court).



This Part argues that bankruptcy judges do indeed reflect those values. It finds a bankruptcy bench drawn from the best local bankruptcy lawyers, with little motivation for promotion to the Article III courts and an audience of the bankruptcy bar, which prefers precisely those qualities we associate with Article III: professional, creative, and nonideological adjudication. This Part also considers the claim that the bankruptcy bench has a too-cozy relationship with the bar, but concludes that external checks on that relationship and the interests of both the bench and bar mitigate concern that this closeness will be exploited.

#### A. *Autonomy and Independence from Political Pressure*

Despite lacking the structural protections of tenure during good behavior and undiminished salary, bankruptcy judges are, perhaps counterintuitively, *more* insulated from the legislative and executive branches than most federal district judges. Two factors combine to create this insulation. First, the courts of appeals control the process of appointment of bankruptcy judges. Bankruptcy judges are selected from the bankruptcy bar on their professional merits, not their political leanings. Second, bankruptcy judges do not generally seek elevation to “higher” judicial office. Thus, they are not beholden to the political interests that act as gatekeepers to the offices of federal district or circuit judge. The forces that serve to make bankruptcy judges relatively autonomous from the Article III courts—a phenomenon that should cause alarm to those relying on close supervision of bankruptcy judges by the life-tenured judiciary to ensure the maintenance of Article III values—also serve to insulate them from undue political pressure.

##### 1. *The insulation of the appointment process*

Each court of appeals, not the President, appoints bankruptcy judges in its circuit.<sup>243</sup> The courts of appeals generally choose nonpolitical, established bankruptcy practitioners for the position,<sup>244</sup> not the prosecutors or politically

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243. 28 U.S.C. § 152(a)(1) (2006) provides:

Each bankruptcy judge to be appointed for a judicial district . . . shall be appointed by the court of appeals of the United States for the circuit in which such district is located. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b).

The appointment is made by majority vote of the members of the court of appeals. *Id.* § 152(a)(3).

244. Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the “Units” Faring?*, 47 B.C. L. REV. 105, 106-07 (2005) (reciting statistics on professional backgrounds of bankruptcy judges based on data compiled by the Administrative Office of the United States Courts). Most bankruptcy judges were bankruptcy practitioners before their elevation to the bench. *See id.*; *see also* Resnik, *supra* note 10, at 669-72 (observing that the Article III judiciary has exercised its appointment power over magistrate and bankruptcy judges by selecting “a high-quality and relatively nonpolitical corps of judges”).

connected lawyers who ordinarily garner nomination to Article III courts.<sup>245</sup> Throughout their selection process, bankruptcy judges are more sheltered from day-to-day politics than the Article III judges who survive the Constitution's nakedly political appointment process.<sup>246</sup> The bankruptcy judge appointment process has no politically charged gatekeepers analogous to the political actors who promote, review, and confirm Article III judges.

Two organs of the federal judiciary—the Judicial Conference of the United States and the Administrative Office of the United States Courts—craft the regulations guiding the appointment process for bankruptcy judges. In a typical process, publication of notice (in local bar journals, newspapers, and national and local legal publications<sup>247</sup>) occurs when there is a vacancy in a bankruptcy judgeship, and a merit screening panel in the circuit suggests names of individuals best qualified for the position.<sup>248</sup> The screening panel in turn takes input from those interested in the operation of the bankruptcy courts, including from the chief judge of the bankruptcy court to which an appointment is to be made.<sup>249</sup> The screening committee then submits the names of applicants for consideration by a committee of the court of appeals.<sup>250</sup> The appointment of a finalist requires a majority vote of the court of appeals.<sup>251</sup> The process of reappointment follows a similar path, but does not include the initial step of consideration by a screening panel.<sup>252</sup> No approval from legislative or executive branch officials is required at any step.<sup>253</sup>

The appointment process for bankruptcy judges results in bankruptcy judgeships' being filled without significant input from the political

245. See WALTER F. MURPHY, C. HERMAN PRITCHETT & LEE EPSTEIN, *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 142 (5th ed. 2002) (“Nominees to the lower federal courts have usually been judges, prosecuting attorneys, legislators, administrators, or lawyers in private practice who have been politically active.”).

246. See generally David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (describing the Article III appointments process as “high-stakes, explosively partisan, and often nasty”).

247. See, e.g., JUDICIAL COUNCIL OF THE NINTH CIRCUIT, REGULATIONS GOVERNING THE APPOINTMENT OF U.S. BANKRUPTCY JUDGES § 2.01 (2001) [hereinafter NINTH CIRCUIT GOVERNING REGULATIONS]. The Third Circuit's process for selecting bankruptcy judges is similar. The court relies on the recommendation of a merit selection panel, which in turn publicizes a vacancy on the bankruptcy bench and interviews candidates for the position. After soliciting public comments about the finalist who emerges from that process, the court confirms the appointment. See, e.g., OFFICE OF THE CIRCUIT EXECUTIVE, U.S. THIRD CIRCUIT, PUBLIC NOTICE: U.S. BANKRUPTCY JUDGESHIP VACANCIES, DISTRICT OF DELAWARE (2005), available at <http://www.deb.uscourts.gov/What%27s%20New/Judgships.pdf>.

248. See, e.g., NINTH CIRCUIT GOVERNING REGULATIONS, *supra* note 247, § 3.01.

249. See, e.g., *id.* § 3.03(b).

250. See, e.g., *id.* § 3.01.

251. See, e.g., *id.* § 4.01.

252. See, e.g., JUDICIAL COUNCIL OF THE NINTH CIRCUIT, BANKRUPTCY JUDGE REAPPOINTMENT REGULATIONS § 2 (2001).

253. For a detailed discussion of the path of a typical appointment, see Pardo, *supra* note 156, at 645-47.

branches.<sup>254</sup> The judicial appointments process is contained within the judiciary and relies heavily on the bankruptcy bar—from which bankruptcy judges are typically selected and whose opinions about judicial performance are strongly considered by courts of appeals in the reappointment process. If the primary value we attach to Article III is adjudication before a neutral decisionmaker who does not owe allegiance to a political patron for continued employment, it seems well served by the current structure of appointment to the bankruptcy courts.<sup>255</sup> In other words, the very autonomy of bankruptcy judges that belies the effectiveness of appellate review in controlling them also serves to insulate them from undue political influence.

## 2. (Non)promotion of bankruptcy judges

Another common concern about the rise of non-Article III adjudication in the federal system is that the judiciary will develop into a bureaucratic caste. In that bureaucracy, the junior members inevitably vie for promotion, creating additional incentives for judges to please their superiors as well as external political actors who control nominations to higher courts. As Judith Resnik has cogently put the case, “[t]riers of judging . . . can undermine judicial independence” by introducing the specter of ambition into the federal courts.<sup>256</sup> A “bench climber” eager for promotion may distort her decisionmaking in service of promotion.<sup>257</sup>

Analysts of judicial behavior have detected a significant association between lower court judges’ decisionmaking and their perceived potential for elevation to a higher court.<sup>258</sup> District court judges’ decisions can serve as signals in a “market” for promotion to the authorities who nominate and

254. See Resnik, *supra* note 10, at 670 (noting that the merit selection and re-appointment system for bankruptcy judges has been notably free from political influence).

255. See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1765-69 (2008) (describing a variety of factors that suggest the appointment process for bankruptcy judges has led to the selection of an apolitical, high-quality bench).

256. Resnik, *supra* note 10, at 672-73.

257. See *id.*

258. See, e.g., Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT’L REV. L. & ECON. 13, 26-27 (1992) (finding that the “promotion potential” of federal district judges was statistically significant in explaining the variance in corporate criminal antitrust penalties judges meted out from 1955-1981); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 64 (2005) (finding that during the “sentencing guidelines crisis of 1988,” federal district judges used the issuing of detailed written opinions on the constitutionality of the Federal Sentencing Guidelines to signal their candidacy for promotion to the courts of appeals); see also Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1378 (1998) [hereinafter Sisk et al., *Charting the Influences*] (considering the correlation of a wide variety of factors to how federal district judges reacted to the “sentencing guidelines crisis” of 1988).

confirm judges to higher office. The more likely a judge considers her chances for promotion to be, the more likely her decisions will be tailored to send appropriate signals that would enhance (or at least not undermine) those chances.<sup>259</sup>

This fear of bureaucratic careerism appears to be misplaced with respect to bankruptcy judges. The “market” for promotion from bankruptcy judge to Article III judge is much weaker than from district judge to circuit judge. In fact, it is almost nonexistent. Of the 115 bankruptcy judges who left the bench between 1995 and 2004, only 8 did so due to elevation to the Article III bench.<sup>260</sup> Although the statistics are not definitive, this rate of promotion appears to be considerably lower than the rate of promotion of magistrate judges to the Article III bench, well over 100 of whom have been appointed Article III judges in the last twenty-five years.<sup>261</sup> Bankruptcy judges should understand that their chances of promotion to a district judgeship are exceedingly low. That understanding should tend to increase their level of decisional independence.<sup>262</sup>

Although there is little direct evidence to test the desire of bankruptcy judges to seek “elevation” to the Article III bench, the existing evidence suggests that most bankruptcy judges have little desire to do so. There are strong indications that bankruptcy judges enjoy their work and would be less likely to enjoy the work of the Article III federal trial bench. What limited

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259. See Sisk et al., *Charting the Influences*, *supra* note 258, at 1383-84, 1490-93.

260. Mabey, *supra* note 244, at 107. With approximately 350 bankruptcy judgeships, that signifies that fewer than two percent of bankruptcy judges were promoted to an Article III court in that decade. By contrast, during the 1990s, a district judge had a six percent chance of being elevated to a circuit judgeship. See Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455, 461 (1999). Similarly, magistrate judges stand a better chance of earning promotion to the Article III bench. See *infra* note 261.

261. According to statistics compiled by the Administrative Office of the Federal Courts, 126 magistrate judges were elevated to Article III courts between 1978 and 2006. Telephone Interview with Admin. Office of the Fed. Courts (July 31, 2006). In September of fiscal year 2008, there were 514 full-time, forty-three part-time, and two combination magistrate judgeships. ADMIN. OFFICE OF THE U. S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 40 tbl.14 (2009). Although this is not a direct comparison, it indicates that the rate of promotion of bankruptcy judges to the Article III courts is much lower than the rate for magistrate judges.

262. “Decisional independence” denotes the category of judicial independence that enables judges “to render decisions in the cases before them free from both threat of coercion and susceptibility to proffered favor.” Bermant & Wheeler, *supra* note 5, at 839. Some commentators criticize an overemphasis on decisional independence, citing the countermajoritarian nature of the judiciary and its ability to undermine socially desirable legislative action. See John Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 972-73 (2002) (describing judicial independence as a political and cultural interaction between the branches of government that evolves over time); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 628-32 (1999) (explaining the differences between decisional independence of judges and the institutional independence of the judiciary).

empirical data exists show that bankruptcy judges express a very high level of professional satisfaction with their work, which they describe as intellectually challenging and stimulating.<sup>263</sup> It stands to reason that former bankruptcy practitioners would enjoy the work of the bankruptcy courts more than the criminal, admiralty, and other matters that come before the district courts.<sup>264</sup>

### B. *Bankruptcy Judges and Their “Audience”*

Intuition—and the insights of political science—tell us that judges will be oriented toward particular audiences. That is, judges will be influenced by how their decisions are received by particular subsections of the public.<sup>265</sup> For a federal district judge, that audience is diverse: the circuit court above (and the Supreme Court above the circuit court) that will either endorse or condemn her work on appeal; the larger professional community of judges and legal scholars; and, for a “bench-climbing” judge, the political gatekeepers who control promotion to the circuit courts. If a particular audience external to the judiciary has too strong a pull, or a preference for certain legal outcomes, the fear of judicial bias may cast doubt over the integrity of the adjudicatory process.<sup>266</sup> The same fear of politicians’ pandering to interest groups for donations or votes can taint judges who are too eager to please particular groups.

The bankruptcy bar remains the chief audience of bankruptcy judges. Bankruptcy judges are drawn from the bankruptcy bar, and they remain responsive to it.<sup>267</sup> It is therefore unsurprising that the bankruptcy bar and bankruptcy judges tend to share similar views about the proper operation of the bankruptcy system—views that may differ from those of the Article III judges sitting further up in the judicial hierarchy as well as from political actors. Further, in light of the influence of bankruptcy lawyers in the process of

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263. Mabey, *supra* note 244, at 110, 117-19 (reporting the results of a survey of a randomly selected group of thirty-seven bankruptcy judges).

264. *See id.*

265. *See* LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 21-24 (2006) (positing a model of judicial behavior “based on judges’ relationships with their audiences, people whose esteem they care about”).

266. *See supra* text accompanying note 80. To the extent that one Article III value is a judge’s ability to decide cases at some remove from the views of her colleagues, even influence by an audience internal to the judiciary could undermine one pillar we associate with the federal judiciary.

267. *See* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 *FORDHAM L. REV.* 497, 498 n.8 (1998) (“[B]ankruptcy judges are drawn from the ranks of bankruptcy lawyers, and their interests continue to parallel those of the bar in most respects.”); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 *HARV. J.L. & PUB. POL’Y* 801, 841 (1994) (“[J]udges most often come out of the local bar socialized to conform by the small, specialized group of local lawyers and courthouse officials with whom they interact.”).

appointing bankruptcy judges, it should not be surprising that the bankruptcy bench is composed principally of those with an interest in, and connection to, the bankruptcy process.

Bankruptcy judges get recognition from the bankruptcy bar (and bankruptcy scholars) for creative and energetic management of cases. Bankruptcy judges are applauded for doing their jobs well when, for example, they correctly decipher which debtors can be successfully reorganized and which should be liquidated.<sup>268</sup> They gain prominence by corraling difficult cases and bringing them to a conclusion efficiently.<sup>269</sup> And they earn favorable notice by finding creative answers to novel bankruptcy problems.<sup>270</sup> This is not to say that bankruptcy judges wish to be scofflaws.<sup>271</sup> Rather, they share the outlook of the bar from which they were selected and to which they remain responsive—that of skilled professionals who place a high value on pragmatic solutions to financial distress.<sup>272</sup>

### 1. *The bench and the bar: cooperation or capture?*

If so much of the autonomy and insulation of the bankruptcy bench rests on judges' affiliation with, and responsiveness to, the bankruptcy bar, is there a danger that one form of undue influence is simply replaced by another form?

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268. See Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. & ECON. 381, 382-83, 406-11 (2007) (finding, contrary to anecdotal evidence, that bankruptcy judges are surprisingly good at differentiating between companies that will be worth more via liquidation and those that can be restructured or sold as going concerns).

269. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1809 (2002) (praising “the flexibility and creativity of the modern bankruptcy bench” as shown by the performance of the judge administering the Enron bankruptcy case); Cole, *supra* note 181, at 1864 (reporting that lawyers emphasize the high level of sophistication of Delaware’s bankruptcy judges in explaining why they choose that venue for complex Chapter 11 cases).

270. *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986) (Lifland, J.) (confirming a Chapter 11 plan of reorganization in an asbestos bankruptcy that was “by virtue of necessity, both creative and pragmatic in the solutions it proposes in response to the problems that afflict the Debtor, and indeed all parties in this reorganization”); LOPUCKI, *supra* note 180, at 45-47 (discussing the celebrity and controversy surrounding Judge Lifland and his approach to large bankruptcy cases).

271. Beyond the possibility of mandamus, a bankruptcy judge who presses beyond the bounds of acceptable judicial behavior runs the risk of being denied reappointment by the court of appeals. That sanction, however, is less threatening than it may seem at first, because bankruptcy judges can retire and collect their full federal pension after their first fourteen-year term as of age sixty-five. Retirement and Survivors’ Annuities for Bankruptcy Judges and Magistrates Act of 1988, Pub. L. No. 100-659, § 1-2, 102 Stat. 3910; see LOPUCKI, *supra* note 180, at 19-20. They may also move on to highly compensated positions in private practice or as court-approved mediators.

272. See Cole, *supra* note 181, at 1859-71; cf. Baird, *supra* note 194, at 99 (celebrating the sophistication, “skill and professionalism of the modern bankruptcy judge” while noting the “odd dance between appellate courts and the day-to-day practice of bankruptcy law”).

To put the matter in slightly more stark terms, does the bankruptcy appointment process facilitate capture by a self-interested group (the bankruptcy bar) that undermines an independent judiciary as much as direct meddling by the political branches?

The capture story has its adherents—most prominently, Lynn LoPucki. His account of the connection between the bench and bar in bankruptcy paints an unattractive picture. In particular, Professor LoPucki raises two concerns about the closeness of bankruptcy judges and the practitioners from whom they are drawn. First, he argues that bankruptcy judges, in order to please the local bankruptcy bar, are too generous in awarding fees to counsel from the debtor's estate. He also points to a second, and related, concern. In his view, bankruptcy judges compete for the biggest, most lucrative Chapter 11 cases, which will serve the financial self-interest of the local bankruptcy bar by generating large fees.<sup>273</sup> Since corporate debtors have a broad range of choices when selecting the venue for a bankruptcy filing,<sup>274</sup> bankruptcy judges face subtle pressure to twist their decisionmaking to be more debtor-friendly, according to LoPucki.<sup>275</sup> That, in turn, leads to inadequate scrutiny of debtors during the process of reorganization, leading to an increased risk of failure when those debtors reemerge from Chapter 11.

Other scholars have criticized LoPucki's thesis, and a further rehash of those arguments falls beyond the scope of this Article.<sup>276</sup> But the basic thrust

273. LOPUCKI, *supra* note 180, at 40-48.

274. *See supra* note 179.

275. LOPUCKI, *supra* note 180, at 41.

276. *See* Stephen J. Lubben, *Delaware's Irrelevance*, 16 AM. BANKR. INST. L. REV. 267 (2008) (finding that whether a firm files for bankruptcy in Delaware is not statistically significant in assessing the likelihood of the firm's later refiling); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309 (2001) (positing several alternative factors that might make Delaware a genuinely superior forum for the most difficult bankruptcy cases and why they might nevertheless experience a higher rate of relapse into bankruptcy); Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 489-92 (2006) (reviewing LOPUCKI, *supra* note 180) (observing that the negative effects attributed by LoPucki to the relationship between bankruptcy judges and the bar are difficult to prove); Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141 (2006) (reviewing LOPUCKI, *supra* note 180) (arguing that the 2005 Code amendments address many of LoPucki's earlier concerns, and that the evidence for most of his remaining concerns is ambiguous); *see also* Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 438-53 (2006) (finding evidence in LoPucki's data to support the proposition that forum shopping may often be an economically efficient phenomenon); Douglas G. Baird & Robert K. Rasmussen, *Beyond Recidivism*, 54 BUFF. L. REV. 343, 355-62 (2006) (questioning what societal function LoPucki and other critics believe Chapter 11 bankruptcies would play if they were as restricted as he would propose); Robert D. Martin, *Courting Failure? The Effects of Venue Choice on Big Bankruptcies—Comments*, 54 BUFF. L. REV. 503, 504-05 (2006) (claiming that LoPucki overestimates the power of bankruptcy judges in reorganizations that are primarily a negotiation between debtors and creditors). *But see* Lynn M. LoPucki, *Where Do You Get Off? A Reply to Courting Failure's Critics*, 54 BUFF. L. REV. 511 (2006) (responding to critics and arguing that even if some of their criticisms are

of his argument—that the connection between bench and bar can lead to pathologies that undermine the judicial process—should give pause when considering whether bankruptcy judges exhibit sufficient judicial independence. Nevertheless, it is easy to overstate the self-interested nature of the bankruptcy bar or the extent of their influence as a bankruptcy judge’s audience.

a. *The case of Judge Scholl*

A window into the real-world implications of this debate opened recently during litigation by a former bankruptcy judge who was denied another term on the bench. Alleging that he had a “firm right of reappointment,”<sup>277</sup> he sued for reinstatement. The substance of that particular claim is less important for present purposes than the description of the appointment process that the case provides.

David A. Scholl was a bankruptcy judge for the Eastern District of Pennsylvania. Scholl had served as a judge for fourteen years and had become chief judge of the court by the end of his initial term. As that term neared its end, he sought reappointment and, at first, it appeared that the Third Circuit would reappoint him. The Third Circuit initially voted, in accordance with the regulations promulgated by the Judicial Conference at that time, to proceed to a public comment period after determining that Scholl “appear[ed] to merit reappointment subject to public notice.”<sup>278</sup> At that point, however, Scholl’s request for reappointment was derailed.

Although notice of Scholl’s pending reappointment was distributed more widely, the Third Circuit targeted bankruptcy lawyers in the circuit. The court sent a detailed questionnaire to some 500 members of the Eastern District of Pennsylvania Bankruptcy Conference and supplemented that list with several hundred lawyers who had appeared before the judge, with a particular focus on those who had appeared before the judge in Chapter 11 and Chapter 13 cases. The questionnaire asked recipients to rate the judge’s performance.<sup>279</sup> The results included sufficient negative comments to persuade the Third Circuit not to reappoint Scholl.<sup>280</sup>

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plausible, his core thesis remains valid).

277. Scholl v. United States, 54 Fed. Cl. 640, 643 (2002).

278. *Id.* at 641.

279. *Id.* at 642.

280. Scholl received fifty-four negative comments out of the 316 comments received on questionnaires returned by 278 respondents. *Id.* Presumably the quality and not the quantity of the negative comments convinced a majority of the Third Circuit that Scholl should not be reappointed for an additional term. *Id.* The actual comments submitted during the reappointment process have not been publicly revealed. It appears, however, that Judge Scholl received a substantial number of negative comments on three questions (out of the twenty-four questions on the questionnaire). Approximately one-quarter of the respondents disagreed that his “[r]ulings are uninfluenced by the identity of the lawyers and parties



Scholl brought suit in the Court of Federal Claims, alleging that the failure of the court of appeals to reappoint him violated the Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges.<sup>281</sup> Scholl objected to the decision to send additional questionnaires to lawyers who had appeared before him in Chapter 11 and Chapter 13 cases but not in other kinds of cases.<sup>282</sup>

The Scholl case reinforces a crucial point: the appointment of bankruptcy judges relies heavily on the input of those closest to the bankruptcy adjudication process—bankruptcy lawyers. LoPucki cites Judge Scholl’s case as an example of the “corrupting” influence of the bankruptcy bar over bankruptcy judges.<sup>283</sup> The concerns raised by LoPucki and others focus on the self-interest of the bankruptcy bar as a guild—that is (to be crude), their interest in generous awards of attorney’s fees. A bench that lies too close to the bar whose fees the judges control faces an obvious conflict. It stands to reason that such a bench will have more difficulty checking the bar’s guild interest in outside fee awards.

But two aspects of the bankruptcy system counter that concern. First, the structure of bankruptcy adjudication incorporates a nonjudicial actor tasked

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involved”; almost forty percent disagreed that his “[r]ulings are free from any predisposition to decide for a particular party”; and approximately one-third disagreed that his “[a]wards of attorney’s fees in appropriate cases are fair and reasonable.” Letter from Toby D. Slawsky, Circuit Executive, Third Circuit, to David A. Scholl (May 10, 2000) (on file with author).

281. At the time Scholl sought reappointment, the regulations provided:

The court of appeals will decide whether or not to reappoint the incumbent judges. In making the decision, the court of appeals shall take into consideration the professional and career status of the incumbent. Reappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges.

*Scholl*, 54 Fed. Cl. at 645 (emphasis omitted) (quoting JUDICIAL CONFERENCE OF THE U.S., THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES § 5.01(b) (1997) [hereinafter SELECTION, APPOINTMENT, AND REAPPOINTMENT]). The procedure for reappointment provided for an initial vote by the court of appeals whether to proceed to a public comment period, followed by the ability of a circuit judge to request a second vote after public comments had been received. The Regulations provided that the court of appeals give “due consideration of the comments from the bar and public.” *Id.* (quoting SELECTION, APPOINTMENT, AND REAPPOINTMENT § 5.03(a)).

282. See *Scholl*, 54 Fed. Cl. at 642-43. The Court of Federal Claims denied the government’s motion to dismiss Chief Judge David Scholl’s claims, *id.* at 651, but the Federal Circuit eventually agreed with the government that Scholl had no right to reappointment. *In re United States*, 463 F.3d 1328, 1329 (Fed. Cir. 2006) (overturning the Court of Federal Claims’s finding that it had jurisdiction over the case).

283. Scholl was one of the two bankruptcy judges in Philadelphia who imposed a \$200-an-hour cap on fees, even for senior law firm partners, at a time when the bankruptcy court in New York routinely approved fees as high \$450 an hour. LoPucki strongly suggests that Scholl’s stance on fees angered the bankruptcy bar in Philadelphia, which exacted its revenge by objecting to his reappointment. LOPUCKI, *supra* note 180, at 44 (“One of the two Philadelphia judges who imposed the \$200 limit was denied reappointment in 2000, apparently solely on the basis of adverse comments received during the public comment period.”).

with scrutinizing overly generous fee applications by bankruptcy lawyers. More generally, the job of advocating issues neglected by the parties before the court falls to the Office of the U.S. Trustee. The U.S. Trustee, created as a means of separating the administrative functions of bankruptcy cases from “judicial” decisionmaking,<sup>284</sup> routinely objects to fee awards it deems unreasonable.<sup>285</sup> In other words, any concern about a conflict of interest between bench and bar with respect to fees should be decreased by the presence of another actor, separate from the bankruptcy bench and bar, to monitor fees.

## 2. *Guild interests and the public interest*

Second, and more importantly, the bankruptcy bar has historically been more unified and public-minded in its views about the core aims and operation of the bankruptcy process than LoPucki’s account would suggest. The intimate connection between bankruptcy law and the bankruptcy bar dates back at least to the creation of the 1898 Bankruptcy Act.<sup>286</sup> After passage of the 1898 Act, bankruptcy lawyers quickly became active and influential in the shaping of American bankruptcy law.<sup>287</sup> With limited exceptions, the bankruptcy bar was the principal voice shaping American bankruptcy law during most periods of twentieth century.

To be sure, the bar’s hegemony over bankruptcy law may have been interested, in part, by the desire to monopolize the bankruptcy process for lawyers rather than other professionals. But pure economic self-interest cannot fully explain the advocacy of the organized bar in shaping bankruptcy law. Notably, the bankruptcy bar has passed up obvious opportunities to shape the law in favor of easy self-enrichment. They did so based in large part on a belief that it was necessary to benefit and elevate the overall bankruptcy process.

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284. *See supra* text accompanying note 46 (discussing separation of administrative and judicial functions under the 1978 Act and the creation of the Office of the U.S. Trustee).

285. 28 U.S.C. § 586 (2006) (describing duties of the U.S. Trustee); *see also* 3 U.S. DEP’T OF JUSTICE, U.S. TR. PROGRAM, UNITED STATES TRUSTEE MANUAL chs. 3-6, 3-7 (1998), *available at* [http://www.justice.gov/ust/eo/ust\\_org/ustp\\_manual/docs/vol3.pdf](http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/vol3.pdf). The Executive Office of the U.S. Trustee, which has an oversight role in the running of regional U.S. Trustee offices, takes apparent pride in the value of fee applications to which they have successfully objected. *See supra* note 216.

286. Skeel, *supra* note 267, at 505-07.

287. Skeel observes that, as compared to other groups with an interest in bankruptcy law (debtors, nondebtors who are not creditors, secured creditors, and unsecured creditors), bankruptcy lawyers traditionally have maintained an interest in bankruptcy law more steadfastly and have been better organized in expressing that interest. *See* SKEEL, *supra* note 33, at 80-89. The chief organizations representing bankruptcy lawyers for much of the last century were the Commercial Law League (the oldest group) and the National Bankruptcy Conference, a group of judges, academics, and practitioners. The American Bankruptcy Institute and the National Association of Consumer Bankruptcy Attorneys, two of the prominent bar groups, were founded within the last twenty-five years. In addition, the National Conference of Bankruptcy Judges (formerly the National Conference of Referees in Bankruptcy) has long served as the principal organ of the bankruptcy bench.

The creation of the Code in 1978, the high-water mark of the influence of the organized bar on bankruptcy law, represents an example of that phenomenon. One of the most lucrative aspects of the bankruptcy process before that time involved the appointment of trustees in bankruptcy cases. The power to dole out those appointments rested with the bankruptcy referee (later judge). And yet, the organized bar advocated for the separation of that power from the decisional—more “judicial”—functions of the new bankruptcy judges to be created under the Code. That position flowed from a desire to remove the last hint of scandal that had attached to allegations of the “bankruptcy ring” of conflicted judges handing out lucrative appointments to favored lawyers.<sup>288</sup>

The passage of the 2005 amendments to the Bankruptcy Code<sup>289</sup> provides another example of a departure from the expectation of pure economic self-interest on the part of the bar. In large measure, the organized bankruptcy bar viewed the legislation with disdain. Indeed, even though the principal advocates for the statute included the clients of a good slice of elite bankruptcy lawyers (creditor interests generally, and banks more specifically, provided the major impetus for the reforms), most of the bar expressed full-throated opposition.<sup>290</sup> The bar’s opposition might seem especially puzzling in light of the fact that the most prominent voices in the bankruptcy bar represent clients who would not be adversely affected by the most objectionable portions of the statute.<sup>291</sup> Why, then, would the bar oppose even those parts of a bill that would not harm their economic interests?

One answer is that the organized bankruptcy bar hews more closely to a unified view of what the ideal bankruptcy process should be than might be the case among the bar in other areas of the law. There is a surprising amount of overlap and consensus among the most influential bankruptcy professionals on

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288. See SKEEL, *supra* note 33, at 76-77, 132, 158-59.

289. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of Titles 11, 12, 15, 18, and 28 U.S.C.).

290. See Justin H. Rucki, *Looking Forward While Looking Back: Using Debtors’ Post-Petition Financial Changes to Find Bankruptcy Abuse After BAPCPA*, 49 WM. & MARY L. REV. 335, 369 n.145 (2007) (noting that “[t]he changes made by the BAPCPA have been widely criticized by bankruptcy practitioners, and even many of the nation’s bankruptcy judges” who felt isolated from the legislative process and disappointed with the poor draftsmanship of the legislation); Megan A. Taylor, *Gag Me with a Rule of Ethics: BAPCPA’s Gag Rule and the Debtor Attorney’s Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 231 (2008) (“From the beginning, the bankruptcy bar uniformly criticized the ‘sweeping’ BAPCPA provisions as acquiescence to creditors with potentially dangerous repercussions for both attorneys and their clients.”).

291. The statute included provisions restricting certain aspects of business reorganizations, but the most drastic changes in the law affected cases involving consumer debts. The most prominent members of the bankruptcy bar represent clients in large business cases and not in consumer cases. Their clients would not be adversely affected by the 2005 amendments. Indeed, many of their large corporate clients in related matters (e.g., banks issuing credit cards) lobbied heavily in favor of the legislation.

the general aims of bankruptcy law and the ideal workings of the process. In other words, the bankruptcy bar, which one might expect to be easily cleaved into two warring factions—debtors and creditors—displays substantially more cohesion.<sup>292</sup>

Another answer lies in the persistence in the culture of the bankruptcy bar of the role of law as a public profession. The law as public profession, of course, represents a model of lawyering with well-established roots in American legal culture beyond bankruptcy practice. In that model, the profession's public role was twinned with its role as guardian, "in the face of threats posed by transitory political and economic powers, of the long-term values of legalism."<sup>293</sup> As Robert Gordon observes, this "republican" ideal of the bar incorporates negative and positive modes, both of which serve the independence of law and lawyers. On the one hand, lawyers will restrain the excesses of the moment because of their skepticism of forces that may achieve political dominance and seek to overturn the established legal order.<sup>294</sup> But the republican ideal also encourages lawyers to serve as superintendents of the "framework of legality"—that is, to recommend improvements in the law and to generate a "culture of respect" for, and compliance with, the law apart from considerations of politics, class, or faction.<sup>295</sup> These ideals may have eroded beyond recognition in the bar more generally, but their features remain in the bankruptcy bar. Perhaps the relative cohesion of the bankruptcy bar explains their persistence. Or, perhaps these ideals persist as a matter of historical path dependence—for much of the last hundred years, the most active and powerful voice in shaping bankruptcy law has been the organized bankruptcy bar.<sup>296</sup> It would be difficult for any group to abandon its intellectual (and ideological) investment in a century-old project.

Even if a more cynical story of economic self-interest explains the role of the bankruptcy bar, it is not unheard of for self-interested economic motives to dovetail with the public interest. In a way, the bar as "guild" has something like a monopolist's interest in seeing the practice of bankruptcy thrive.<sup>297</sup> If

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292. Most major law firms with bankruptcy practices do not exclusively specialize in representing debtors or creditors. In a sample of all Chapter 11 filings valued at over \$50 million from 1998-2007, almost ninety percent of law firms handling five or more cases represented at least one debtor and at least one creditor's committee during that period. (These data were compiled using Westlaw's "Bkr-filing-all" database and searching for law firms that had appeared at least five times in separate cases. Of the fifty-five firms that appeared at least five times in the data set, only six represented exclusively debtors or creditors.) One can infer that law firms with both debtors and creditors as clients are less likely to lobby for, or identify with, one group to the exclusion of the other.

293. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988).

294. *See id.*

295. *See id.*

296. SKEEL, *supra* note 33, at 44-47 (noting that since the creation of the first permanent federal bankruptcy law in 1898, "bankruptcy professionals have been the single most important influence on the development of bankruptcy law").

297. Skeel, *supra* note 267, at 510-12, 520-21 (pointing out that "all bankruptcy

bankruptcy is a product and the bankruptcy bar a monopolist, the bar has strong incentives to make bankruptcy as attractive a product as possible.<sup>298</sup> In tandem, it has a professional interest in maintaining the integrity of bankruptcy as a process, the status of the actors in that process, and the preservation of a certain ideal of bankruptcy law. Efforts to shed the former stigma associated with bankruptcy and practicing bankruptcy law, a stigma that was likely “bad for business” in earlier years, make perfect sense in this light. Some of the opposition to the 2005 amendments flowed, no doubt, from the attack on the integrity and status of bankruptcy courts (and bankruptcy professionals more generally) leveled by proponents of the legislation.<sup>299</sup>

This Article does not aim to give a complete sociology of the bankruptcy bar or to imply a conspiracy on the part of bankruptcy lawyers. Nor does it try to bless all aspects of the current structure and operation of the bankruptcy courts on the naïve view that all is for the best in the best of all possible worlds.<sup>300</sup> Rather, it points out that the same incentive structures that might encourage bankruptcy judges to give out unduly generous fee awards also push the other way by encouraging judges to view themselves as responsible for guarding the appeal of bankruptcy as a form of dispute resolution. The insulating effect of the connection between bench and bar is, on balance, a positive one. That does not mean that the relationship between the two will be a stable one, because changes to the bar, the economics of bankruptcy practice, or other factors could lead to strikingly different future outcomes. But a case—perhaps an uneasy case—can be made that the role of the bar in selecting bankruptcy judges, the connection between the bench and the bar, and the lingering desire for professional integrity, individualism, and reputation, provide the insulation from political actors expected of Article III courts.

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lawyers have an interest in increasing the use of bankruptcy” and thus their interest and the interests of their clients will never match perfectly, but also noting that, like “a monopolistic manufacturer,” the bar must keep its customers happy).

298. Even a monopolist fears losing business by producing a bad product that drives potential consumers to avoid making any purchase at all.

299. The statute was motivated in part by irritation with the perceived power and discretion of bankruptcy judges, who were viewed as too debtor-friendly in both consumer and business bankruptcy cases. One lobbyist influential in the creation of the new Code amendments commented that bankruptcy judges were “part of the . . . problem” that needed to be fixed because they are not “real judges.” Peter G. Gosselin, *Judges Say Overhaul Would Weaken Bankruptcy System*, L.A. TIMES, Mar. 29, 2005, at A1. The statute was certainly taken by some bankruptcy judges as an attack on their competence, judgment, and independence. See, e.g., Lundin, *supra* note 158; see also David G. Epstein, *BAPCPA and Commercial Credit: Who (Sic) Do You Trust?*, 10 N.C. BANKING INST. 57, 65 (2006) (discussing Congress’s suspicion of bankruptcy judges at the time of BAPCPA’s passage).

300. See VOLTAIRE, *CANDIDE* ch. 1 (David Wootton trans., Hackett Publ’g Co. 2000) (1759).

## CONCLUSION

The unease about the non-Article III status of bankruptcy judges is entirely understandable. The federal courts have employed a large group of adjudicators who do not enjoy either of the structural protections the Constitution otherwise requires for the federal judiciary: tenure during good behavior and compensation that cannot be diminished. Those adjudicators have been granted responsibility for a broad and important docket. Surely, the felt necessity of employing them is in real tension with the constitutional imperative to maintain a federal court system insulated from undue influence by political actors.

The standard doctrinal and theoretical responses to the problem of non-Article III adjudication in the federal system, however, do not persuasively answer the questions raised by the status of bankruptcy judges. It makes little sense to invoke the supposedly specialized and apolitical nature of bankruptcy cases when bankruptcy judges routinely entertain disputes from across the spectrum of federal and state law that generate strong political interest. The alternative response that bankruptcy judges are formally subordinated to, and supervised by, the Article III courts is equally unavailing. The reality of bankruptcy adjudication is that bankruptcy courts maintain a high degree of autonomy from the Article III courts to which they are supposedly inferior.

Indeed, it is easy to understand why some commentators have argued for returning the work of the bankruptcy courts to the Article III judiciary or granting Article III status to bankruptcy judges. The debate about the status of bankruptcy judges has often bounced between opposite poles—excusing their lack of Article III protections on fictional grounds or lamenting their lack of such protections on the ground that Article III status is indispensable for the continued independence of the federal judiciary.

That debate would benefit from more careful, detailed attention to the particular features of the bankruptcy system and how those features interact with the concerns that animate the judicial and scholarly interest in preserving the essential attributes of the Article III courts. This Article suggests that despite the features of the bankruptcy court system that would appear to call into question the non-Article III status of bankruptcy judges, the system has developed important stabilizing and insulating forces. A more full-bodied assessment of the bankruptcy courts suggests that the qualities of the bankruptcy bench and bar provide adequate substitutes for the qualities that courts and commentators reference when they invoke “Article III values.”

Perhaps the greater lesson to take away from this assessment of the bankruptcy courts is that the usual modes of analysis brought to bear on the structural aspects of the federal courts are insufficiently robust. The leading approaches in the case law and the literature have tended toward the abstract and the celestial, when the real concerns animating Article III require instead carefully considered judgments about the operation of the judicial process on the ground. At the same time, an assessment of whether an adjudicatory system

has run afoul of Article III must look beyond the judges to the full complement of voices in the judicial process—including the bar and other nonjudicial actors who play a role in appointing and interacting with the judiciary. We would do well to insist on approaches to Article III questions that look deeper and broader than our conventional accounts permit.

