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BANKRUPTCY COURTS AND STARE DECISIS: THE NEED FOR RESTRUCTURING

Jeffrey J. Brookner*

Under stare decisis,¹ a cornerstone of the common law,² courts must strictly follow previous decisions of higher courts and must give due deference to prior decisions of their own court.³ In the last decade, several bankruptcy judges have held—seemingly in contravention of stare decisis—that they are not strictly bound by domestic⁴ district court decisions even though bankruptcy decisions are appealed to the domestic district court. These decisions are improperly reasoned. Stare decisis demands that lower courts owe absolute obedience to higher courts. Thus, as the system is currently structured, bankruptcy courts should follow domestic district court precedent.

Requiring bankruptcy courts to obey district court precedent, however, would be bad policy. Bankruptcy judges are better

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1. Stare decisis is short for *stare decisis et non quieta movere* ("Let stand what has been decided and do not disturb what is settled."). 1B JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.402(1), at I-4 (2d ed. rev. 1993).

2. See *id.* at I-9; Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *PRECEDENT IN LAW* 9, 9 (Laurence Goldstein ed., 1987) (stating that precedent plays a pivotal role in common law systems). In contrast, civil law jurisdictions apply *jurisprudence constante*, under which only a multiplicity of decisions reaching the same result can establish a binding principle of law. See *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (finding stare decisis foreign to the civil law and instead relying on, though not being bound by, a number of appellate decisions that reached the same result). See generally Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. J. 11 (1929) (contrasting common law's stare decisis and civil law's *jurisprudence constante* in which the initial presumption is that precedent is not binding subject to certain exceptions); Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727 (1962) (discussing methods by which judges in Louisiana adjudicate disputes).

3. See *infra* Part I for further discussion of the stare decisis rules.

4. Domestic district courts are those district courts from the same jurisdiction as the bankruptcy judge. See *Carr v. Michigan Real Estate Ins. Trust (In re Michigan Real Estate Ins. Trust)*, 87 B.R. 447, 463 (E.D. Mich. 1988).

equipped to make bankruptcy decisions than district judges.⁵ Bankruptcy judges' refusal to obey district court precedent, albeit beyond their authority, ensures that bankruptcy decisions are made by judges with the greatest expertise in bankruptcy issues. Requiring bankruptcy judges to follow district court precedent would elevate form over substance.

By not following domestic district court precedent, bankruptcy judges go beyond valuing substance over form; they ignore form in pursuit of substance. Disregarding domestic district court precedent fails to acknowledge that the hierarchy of the judicial system exists for substantial reasons. This Note advocates a restructuring of the judicial system to reflect the policy goals underlying bankruptcy law, rather than continuing with the current structure, under which bankruptcy judges pursue their own agendas without regard to their proper role in the overall judicial scheme.

Part I of this Note provides background by summarizing the rules of stare decisis. Part II refutes the contention that the present court structure allows bankruptcy judges not to follow domestic district court precedent. Part II asserts that, in pursuit of legitimate ends, bankruptcy judges have employed illegitimate means. Finally, Part II contends that bankruptcy judges are better equipped to make bankruptcy decisions than district judges. Part III concludes that the bankruptcy system should be restructured to allow bankruptcy judges to make decisions without being constrained by district court precedent or appeals. Such reform could achieve the substantive goals desired by bankruptcy judges without undermining the current structure of the judicial system.

I. STARE DECISIS RULES AND POLICIES

The traditional stare decisis doctrine in American jurisprudence has two principal aspects.⁶ First is the obedience

5. See *infra* Part II.D.

6. Judge Richard Posner of the United States Seventh Circuit Court of Appeals in *Colby v. J.C. Penney Co.* distinguishes "persuasion" from "authority" and stresses the importance of this distinction for stare decisis purposes. See *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1122-24 (7th Cir. 1987); cf. 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-22 (stating that the two aspects of stare decisis are "the principle that a court will consider itself bound by its own prior decisions unless there are convincing

principle⁷: courts are bound to follow strictly the decisions of a court to which the court owes obedience.⁸ Second is the conservatism principle: courts must give some deference to decisions from their own court or a court on their own hierarchical level.⁹

A. The Obedience Principle

The first aspect of stare decisis is the obedience principle, which states that courts must strictly follow previous decisions of judges to whom they owe obedience.¹⁰ A court owes obedience to any other clearly superior court. For example, district courts are obliged to follow decisions of the court of appeals from their own circuit,¹¹ and courts of appeals and district courts must follow previous Supreme Court decisions.¹²

reasons for overruling them, and the principle that a decision will be followed by all courts owing obedience to the court that rendered it"). The concepts of "persuasion" and "authority" are referred to in this Note by the terms "obedience principle" and "conservatism principle," respectively. See *infra* Parts I.A & I.B for a discussion of each principle in turn.

7. See *id.* ¶ 0.402(1), at I-10 n.14 (using the language "obedience principle").

8. 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-10 to -12. Under this scheme, lower courts are free to distinguish higher court precedent, but are prohibited from overruling applicable precedents directly. Further, dicta from higher court decisions are not binding upon lower courts, although such dicta are considered to be highly persuasive. *Id.* ¶ 0.402(2), at I-10 to -12. See generally *id.* ¶ 0.402(2), at I-27 to -43 (stating that binding precedent only derives from matters properly before the court that have been explicitly heard and decided).

9. *Id.* ¶ 0.402(1), at I-8 to -10.

10. *Id.* ¶ 0.402(1), at I-4.

11. See, e.g., *In re Chicago, R.I. & P.R.R.*, 794 F.2d 1182, 1185 (7th Cir. 1986) (stating that a district court must follow court of appeals precedents "no matter how misguided the judges may think them"); *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981) (stating that district courts must follow court of appeals precedent "no matter how egregiously in error they may feel their own circuit to be"), *cert. denied*, 459 U.S. 828 (1982); *Distribuidora Dimsa v. Linea Aerea del Cobre*, 768 F. Supp. 74, 77 (S.D.N.Y. 1991) (stating that "[a] district court has no authority to reject a doctrine developed by a higher court unless subsequent events make it 'almost certain that the higher court would repudiate the doctrine if given a chance to do so'" (quoting *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986))); *Shelton v. Hawaii Carpenters' Pension, Health & Welfare Apprenticeship, Vacation & Holiday and Annuity Trust Funds*, 691 F. Supp. 251, 255 (D. Haw. 1988); *Taffi v. United States (In re Taffi)*, 144 B.R. 105, 108 (Bankr. C.D. Cal. 1992); see also 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-10 to -12 (describing the hierarchical order to which the obedience principal applies).

12. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (stating that lower federal courts must follow Supreme Court decisions "no matter how misguided" those decisions are);

Difficulty arises when the obedience relationship between two courts is not so obvious, such as the relationship between bankruptcy judges and domestic district courts.

The obedience principle serves many purposes. First, the obedience principle prevents judicial anarchy. The federal judiciary resembles a pyramid; higher authority courts have fewer judges than do lower authority courts.¹³ In the United States, there are ninety-four federal judicial districts.¹⁴ Decisions of these courts are appealed to the thirteen courts of appeals.¹⁵ Court of appeals decisions are appealable to the Supreme Court.¹⁶ Without an obedience principle, each of these 108 courts would be free to reach its own preferred result. Judges at all levels would seek to impose their own senses of justice on the judicial system, and chaos would result.¹⁷ The obedience principle precludes such independence, thereby unifying the court system.

By controlling chaos, the obedience principle permits litigants to predict the outcome of a case more accurately.¹⁸ Both litigants and persons wishing to avoid litigation need to be able to rely upon precedent in order to know what their legal rights and duties are.¹⁹ When the obedience principle is applied strictly, a litigant can be certain that the lower courts will follow the precedents set by courts of higher authority. Thus, individuals can make decisions without having to speculate at the possible legal consequences of their actions.

In re Shattuc Cable Corp., 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992); *Taffi*, 144 B.R. at 108 (stating that "circuit courts of appeal, district courts and bankruptcy courts, are absolutely bound by decisions of the [Supreme] Court on issues of law"); see also 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-10 & n.14 (stating that without the obedience principle, our court system would be mired in endless appeals).

13. *First of Am. Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 241 (Bankr. E.D. Mich. 1991).

14. See 28 U.S.C. §§ 81-131 (1988 & Supp. 1992).

15. See *id.* §§ 41, 1291.

16. See *id.* § 1254.

17. *Muskin Inc. v. Industrial Steel Co., Inc. (In re Muskin)*, 151 B.R. 252, 254 (Bankr. N.D. Cal. 1993) (stating that "every judge's ego must be tempered with the knowledge that he or she was not appointed to impress his or her own ideas of what is right on the world, but rather to make the legal system work efficiently and justly"); cf. *Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980) (stating that "the trial judge . . . is not, despite his best intentions, a law unto himself").

18. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970); *Muskin*, 151 B.R. at 255.

19. P.J. Downey, *Certainty and Stare Decisis*, 1986 N.Z. L.J. 137, 139 (quoting *Howley v. Lawrence Publishing Co., Ltd.*, No. 77/84 (C.A. May 1, 1986)); see also *Moragne*, 398 U.S. at 403; cf. 1B MOORE ET AL., *supra* note 1, ¶ 0.402(3.-1), at I-46 to -47 (noting that "courts must give appropriate consideration to the justifiable reliance on precedent").

Another advantage of the obedience principle is that it reduces the volume of appeals to higher courts.²⁰ Economic necessity assures that most parties appeal adverse decisions only when there is a significant probability of success on appeal. If a lower court decides an issue in accord with a higher court precedent, the litigants are less likely to appeal the decision because they know that the higher court is predisposed towards the lower court's position, making reversal unlikely.²¹ If the lower court ignores the higher court ruling, however, the losing litigant has an incentive to appeal because the higher court has shown a predisposition against the lower court result, making reversal likely.²² Thus, in order to prevent an unnecessary and costly appeal, the lower court should, according to the principle, follow the higher court precedent.²³

A final policy justification for the obedience principle is that it provides equal treatment for parties in factually similar circumstances.²⁴ American jurisprudence is founded upon the concept of "equal justice under the law."²⁵ To the extent that rules bind more courts, more courts will enter consistent judgments. Thus, more litigants will be treated equally. By binding all the courts in a geographic region to the decisions of the highest court of that region, the obedience principle increases the equality of the treatment litigants receive from courts.

B. The Conservatism Principle

The second facet of the stare decisis doctrine is the conservatism principle, which states that courts must strive to

20. See *Moragne*, 398 U.S. at 403-04; *In re Shattuc Cable Corp.*, 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992); 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-10 n.14.

21. See *Downey*, *supra* note 19, at 139 (recognizing that the volume of appeals will increase when a court frequently reviews its earlier decisions).

22. *Id.*

23. See *Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980) (stating that the trial court's refusal to follow a higher court precedent cost the "litigants and the judicial system considerable time and money which should not have been expended").

24. See *Flowers v. United States*, 764 F.2d 759, 761 (11th Cir. 1985); see also 1B MOORE ET AL., *supra* note 1, ¶ 0.402(3.-1), at I-44 (stating that "society has a strong interest in stability, predictability, and equal treatment").

25. This phrase appears across the top of the United States Supreme Court building.

follow decisions that the court itself rendered in the past.²⁶ For example, the United States Supreme Court makes a strong attempt to follow its past decisions, although it remains free to reconsider them under extreme circumstances.²⁷ Similarly, even though district courts are not bound strictly by domestic district court precedent,²⁸ district judges show great deference to previous opinions of other judges within their district.²⁹

Perplexingly, courts of appeals apply the obedience principle, not the conservatism principle, within a circuit. A decision by a three-judge panel of a court of appeals is binding law for future panels of the same circuit; to reverse a previous panel's decision, the court of appeals must sit en banc.³⁰ Presumably, a court of appeals sitting en banc is free to review previous en banc decisions but would be conservative in doing so.

The conservatism principle serves the same purposes served by the obedience principle, but with less certainty. The hesitancy to abandon precedent furthers the purposes of the obedience principle to the extent that it encourages uniformity

26. 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-8 to -10.

27. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 564 (1991) (stating that the Supreme Court "will not depart from the doctrine of *stare decisis* without some compelling justification"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (stating that the Supreme Court does "not lightly overrule recent precedent"); see also 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-8 (stating that the Supreme Court retains the ability "to change its mind").

28. See, e.g., *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 n.7 (3d Cir. 1991) (citing numerous authorities for the proposition that there is no such thing as the law of the district); *In re Shattuc Cable Corp.*, 138 B.R. 557, 566 (Bankr. N.D. Ill. 1992); see also 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-20 (asserting that "one [district] judge may not feel bound by [the decisions of] another judge sitting in the same district"). *But see Hutchinson v. Cox*, 784 F. Supp. 1339, 1342 (S.D. Ohio 1992) (stating that domestic district court precedent is binding, but then suggesting in the alternative that, even if the precedent was not binding, it was correct).

29. *FDIC v. Cherry, BeKaert & Holland*, 129 F.R.D. 188, 193 n.5 (M.D. Fla. 1989); see also *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (stating that a court should give "considerable weight" to its own previous decisions, although not specifically referring to district courts).

30. See *Nichols v. McCormick*, 929 F.2d 507, 510 n.5 (9th Cir. 1991) In *Nichols*, the defendant challenged the constitutionality of the statute under which he was convicted. A previous panel had ruled the statute to be constitutional as applied to a defendant in substantially the same factual situation. The panel dismissed the complaint because the court had no power to review the previous panel's decision. *Id.* For further articulation of this rule, see *United States v. Kiser*, 948 F.2d 418 (8th Cir. 1991); *United States v. Kikumura*, 947 F.2d 72 (3d Cir. 1991); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985); *Placid Oil Co. v. F.E.R.C.*, 666 F.2d 976 (5th Cir. 1982). *But cf. North Carolina Utils. Comm'n v. F.C.C.*, 552 F.2d 1036, 1044 & n.8, 1045 (4th Cir. 1977) (declining to follow an appellate decision which had not been reviewed en banc because all but one judge from that decision had recused).

of result.³¹ Whenever a court decides to abandon a prior precedent, however, the purposes of the obedience principle are undercut—the litigants' predictive powers are reduced and the current litigants receive treatment different from that received by the prior litigants.

II. THE CURRENT DISTRICT COURT—BANKRUPTCY COURT RELATIONSHIP

Under the Bankruptcy Code of 1978³² (the Code) as amended,³³ most decision-making authority rests in the bankruptcy court.³⁴ Appeals from bankruptcy courts go first to the domestic district court,³⁵ or to a Bankruptcy Appellate Panel (BAP),³⁶ then to the court of appeals,³⁷ then to the Supreme Court.³⁸ Bankruptcy

31. See *supra* Part I.A.

32. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C. (1988 & Supp. 1992)).

33. The Code is amended often. Significant relevant changes to the Code were made by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified at 28 U.S.C. § 151 (1988)).

34. Under the 1984 amendments to the Code, original jurisdiction over bankruptcy matters rests in the district court. 28 U.S.C. § 1334(a) (1988 & Supp. 1991). The district court then has the power to refer cases to the bankruptcy court, 28 U.S.C. § 157(a) (1988), which they usually do. Cf. 1 COLLIER ON BANKRUPTCY ¶ 3.01(2)(a) (Lawrence P. King et al., eds., 15th ed. 1979 & Supp. Nov. 1992) [hereinafter COLLIER] (stating that all district courts have a rule which automatically, though revocably, refers bankruptcy matters to the bankruptcy courts). After referral, the bankruptcy judge has decision-making authority only for the actual bankruptcy case and for "core" proceedings. 28 U.S.C. § 157(b)(1) (1988). Most proceedings relevant to the bankruptcy case are "core." JUDICIAL CONFERENCE OF THE U.S., REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 358 (1990) [hereinafter JUDICIAL CONFERENCE REPORT] (stating that more than 95% of matters before bankruptcy courts are core) reprinted in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990); see also 28 U.S.C. § 157(b)(2) (1988) (defining which proceedings are core); COLLIER, *supra*, ¶ 3.01(2)(b)(iii), at 3-49 (discussing in detail which types of proceedings are core). It has been argued that there are only two types of non-core proceedings: suits by debtors which arose prepetition and suits between third parties. *Id.* Thus, bankruptcy courts exercise power over almost all bankruptcy matters.

35. 28 U.S.C. § 158(a) (1988).

36. The judicial council of a circuit may vote to establish a BAP for their circuit, and, if they do so, district judges may refer appellate cases to the BAP. *Id.* § 158(b)(1) & (3) (1988). The Ninth Circuit is the only circuit which has a BAP presently. 1 COLLIER, *supra* note 34, ¶ 3.03(1)(c)(ii), at 3-169.

37. Both district court and BAP decisions are appealed to the circuit court. See 28 U.S.C. § 158(d) (1988).

38. *Id.* § 1254.

courts decided early cases on the unchallenged assumption that domestic district court decisions bound bankruptcy courts.³⁹ In the mid-1980s, however, bankruptcy courts began to assert their independence from district courts. For example, a bankruptcy judge in 1986 asserted, albeit correctly, that he was not bound by dicta from domestic district court decisions, especially when other decisions within the district were contrary.⁴⁰ The last case on record to assert explicitly that domestic district court decisions bind bankruptcy courts was announced in 1988; again, the binding nature of precedent was assumed, not argued.⁴¹ Subsequent cases have argued in detail that bankruptcy courts are not bound by domestic district court decisions.⁴² No published opinion has advocated in detail the application of stare decisis rules to the bankruptcy court-district court context.

The bankruptcy judges' argument, translated into the terms used by this Note, is that bankruptcy judges should treat domestic district court precedent under the conservative

39. See, e.g., *In re Moisson*, 51 B.R. 227, 229 (Bankr. E.D. Mich. 1985) (stating that domestic district court precedent binds the bankruptcy court and therefore imposes an equitable lien in order to validate a reassignment of a liquor license without a financing statement filing); *Joanis v. Wayzata Bank & Trust Co. (In re Inv. Sales Diversified, Inc.)*, 49 B.R. 837, 846 (Bankr. D. Minn. 1985) (stating that the best rule would be to allow avoidance of a creditor's prior vendor's interests in a contract for deed with a strong-arm clause, but holding otherwise as required by domestic district court precedent); *Eaton Land & Cattle Co. II v. Rocky Mountain Inv.*, 28 B.R. 890, 892 (Bankr. D. Colo. 1983) (stating that domestic district court precedent compelled a holding that an automatic stay tolls the redemption period of a Colorado statute despite the existence of contrary, and more recent, domestic bankruptcy court precedent); *In re V-M Corp.*, 23 B.R. 952, 954-55 (Bankr. W.D. Mich. 1982) (stating that the bankruptcy court is bound by the decision of the relevant district court to disallow an omitted claim as long as the creditor had actual knowledge of the bankruptcy proceedings); *WGR Assoc. v. Heritage Bank, N.A. (In re Bill Ridgway, Inc.)*, 4 B.R. 351, 353 (Bankr. D.N.J. 1980) (stating that even unpublished domestic district court decisions are binding); *Fessenden Hall, Inc. v. Mission Marine Assoc., Inc. (In re Mission Marine Assoc., Inc.)*, 3 B.R. 548, 550 (Bankr. D.N.J. 1980) (stating that the bankruptcy court must follow domestic district court precedent that U.C.C. § 2-702 reclamation rights do not constitute a valid statutory lien under the since repealed version of 11 U.S.C. § 107(c)(1)(A)); cf. *York v. Shepherd (In re Shepherd)*, 56 B.R. 218, 221 (Bankr. W.D. Va. 1985) (stating that domestic district court decisions are binding, especially if they are cited with approval throughout the country).

40. *In re Windsor Communications Group, Inc.*, 67 B.R. 692, 698-99 (Bankr. E.D. Pa. 1986).

41. See *Carr v. Michigan Real Estate Ins. Trust (In re Michigan Real Estate Ins. Trust)*, 87 B.R. 477, 463 (E.D. Mich. 1988).

42. See, e.g., *In re Shattuc Cable Corp.*, 138 B.R. 557, 566-67 (Bankr. N.D. Ill. 1992); *First of Am. Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 241-43 (Bankr. E.D. Mich. 1991).

principle, not under the obedience principle. Bankruptcy judges use two main arguments to support their proposition that domestic district court decisions do not bind bankruptcy courts. First, because bankruptcy courts are a "unit of the district court"⁴³ under the Code, bankruptcy judges claim that they are not subject to the obedience principle, which applies only to inferior courts.⁴⁴ Second, bankruptcy judges argue that application of the obedience principle to the conflict between bankruptcy courts and district courts would not further the policies behind the principle.⁴⁵ This Part attacks both of these contentions and asserts that the present bankruptcy court structure dictates that district court precedent strictly binds all bankruptcy courts within the district. This part then concludes, however, by arguing that forcing district judges to follow domestic district court precedent is illogical because bankruptcy judges make better bankruptcy decisions.

A. Bankruptcy Courts Are Structurally Inferior Courts

Bankruptcy judges' first argument in support of their freedom not to follow domestic district court precedent is that the bankruptcy courts are units of the district court and thus are not inferior to district courts.⁴⁶ In 1984, Congress established each bankruptcy court as a "unit of the district court."⁴⁷ Bankruptcy judges argue that bankruptcy courts therefore are not inferior courts, but rather are part of the same court.⁴⁸

43. The phrase "unit of the district court" was first used in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336 (codified at 28 U.S.C. § 151 (1988)).

44. This argument relies upon a misunderstanding of stare decisis. See, e.g., *Shattuc*, 138 B.R. at 565 (erroneously citing 1B MOORE ET AL., *supra* note 1, for the proposition that the obedience principle applies only to inferior courts). Actually, the obedience principle applies not to inferior courts per se but to any court which owes "obedience" to another court, a purely conclusory standard. See *infra* Part II.A and note 51 and accompanying text.

45. See *Gaylor*, 123 B.R. at 241-43.

46. See *Shattuc*, 138 B.R. at 566.

47. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336 (codified at 28 U.S.C. § 151 (1988)).

48. E.g., *Shattuc*, 138 B.R. at 566; *In re Rheuban*, 128 B.R. 551, 555 (Bankr. C.D. Cal. 1991). Bankruptcy judges concede that their courts are inferior to courts of appeals, and thus that they are bound to follow appellate court precedent from within their own circuit. See *Shattuc*, 138 B.R. at 565; see also *Taras v. Commonwealth Mortgage Corp. (In re Taras)*, 136 B.R. 941, 948 (Bankr. E.D. Pa. 1992) (stating that

Thus, district court decisions emanate from the same court, not from a higher court. Because district court decisions do not bind judges of the district court,⁴⁹ and because bankruptcy judges are judges of the district court, district court decisions do not bind bankruptcy judges either.⁵⁰

This argument is not compelling. The Code admittedly establishes each bankruptcy court as "a unit of" the district court. A unit of a larger whole, however, can owe obedience to the larger whole.⁵¹ The sales department of General Motors is

bankruptcy courts must follow the law of the circuit "to the extent that it is not plainly inconsistent" with Supreme Court precedent); *In re Conroy*, 110 B.R. 492, 498 (Bankr. D. Mont. 1990) (holding that the bankruptcy court is bound by its circuit court precedent); *Norfolk & W.R.R. v. Bergman (In re Bergman)*, 103 B.R. 660, 668 (Bankr. E.D. Pa. 1989) (holding that the applicable circuit court's precedent is binding despite another court of appeals' conflicting decision on a similar issue). *But see In re Thompson*, 59 B.R. 690, 694-95 (Bankr. W.D. Tex. 1986) (refusing to apply domestic circuit court precedent because the precedent was clearly erroneous, because other courts of appeals had reached a contrary result, and because the statute had been amended).

49. See *supra* notes 28-29 and accompanying text.

50. *Shattuc*, 138 B.R. at 565-66; *In re Rheuban*, 128 B.R. 551, 554-55 (Bankr. C.D. Cal. 1991); see also *Coyne v. Westinghouse Credit Corp. (In re Globe Illumination Corp.)*, 149 B.R. 614, 619 (Bankr. C.D. Cal. 1993) (stating that the court was following domestic district court precedent because it was correct, not because it was binding, but holding that bankruptcy courts are bound by BAP decisions). Bankruptcy judges concede that they owe deference to district court decisions (i.e. that they should apply the conservatism principle to domestic district court precedent). See *Shattuc*, 138 B.R. at 567 (stating that bankruptcy courts should "give deference to and seek to follow" domestic district court decisions); *In re Davis*, 134 B.R. 34, 37 n.6 (Bankr. W.D. Okla. 1991) (noting that domestic district court decisions, while not binding, deserve deference); *Kroh Bros. Dev. Co. v. National Fidelity Life Ins. Co. (In re Kroh Bros. Dev. Co.)*, 115 B.R. 1011, 1015 n.2 (Bankr. W.D. Mo. 1990) (implying that bankruptcy courts should yield to domestic district court precedent even where a court of appeals decision from another circuit is contrary); *Rude v. Whitehorn (In re Whitehorn)*, 99 B.R. 734, 736 (Bankr. N.D. Tex. 1989) (stating that "generally bankruptcy judges should follow the decisions of their district courts"). This deference is no greater, however, than that owed to domestic bankruptcy court precedent. See *In re Windsor Communications Group, Inc.*, 67 B.R. 692, 698-99 (Bankr. E.D. Pa. 1986) (following a decision of a fellow bankruptcy judge despite the existence of contrary domestic district court precedent, which admittedly was owed some deference); cf. *Glinka v. Bank of Vt. (In re Kelton Motors, Inc.)*, 130 B.R. 170, 176 (Bankr. D. Vt. 1991) (stating that a bankruptcy judge should follow precedents of another bankruptcy judge within the district "unless a compelling reason or public policy consideration demands").

51. Furthermore, it begs the question to suggest that a court does not owe obedience to another merely because it is not structurally inferior. Moore states that a court must follow a precedent of a court to which it owes obedience. 1B MOORE ET AL., *supra* note 1, ¶ 0.402(1), at I-4 (commenting that "a decision on an issue of law . . . is binding . . . on such other courts as owe obedience to its decisions"). It skirts the issue altogether to state that bankruptcy courts owe no obedience because they are not inferior courts; the "unit of" analysis leaves us to determine whether courts can owe deference to another court even if they are not structurally inferior. The

“a unit of” the corporation,⁵² but the sales manager still owes obedience to the board of directors. It is at least conceivable that bankruptcy courts owe obedience to district court precedent.⁵³ Whether bankruptcy courts in fact do owe such obedience depends on whether such obedience would further the policies underlying stare decisis.

B. The Policy Bases of Stare Decisis

Bankruptcy judges' second argument in support of their freedom not to follow domestic district court precedent is that the policies underlying the obedience principle are inapplicable to the bankruptcy court context. Bankruptcy judges therefore claim that they should be obliged to apply only the conservatism principle.⁵⁴ This argument fails because the policy bases of stare decisis do apply to the bankruptcy context, albeit less so than in other contexts.

First, bankruptcy judges argue that the application of the obedience principle to the bankruptcy court context does not increase predictability. Because there are roughly two district judges for every bankruptcy judge,⁵⁵ a bankruptcy judge or litigant has to research more reports, not fewer, to find controlling precedent at the district level. “The goal of predictability is not well-served when one lower court judge must look to the decisions of . . . as many as twenty different higher courts.”⁵⁶

answer to that question in New York is yes. The intermediate appellate courts in New York are not separate courts but “appellate division[s]” of the trial courts. See N.Y. JUD. LAW § 71 (McKinney 1983). Nonetheless, appellate division precedent binds state trial courts. See, e.g., *Ross Bicycles, Inc. v. Citibank, N.A.*, 539 N.Y.S.2d 906, 907 (App. Div. 1989); *Messina v. County of Nassau*, 557 N.Y.S.2d 837, 841 (Sup. Ct. 1990). Just as New York trial courts owe obedience to the Appellate Division, bankruptcy judges can owe deference to federal district courts.

52. One could argue that a corporation's sales department is indistinguishable from the corporation as a whole. Likewise, Judge Arthur J. Spector has claimed that “the bankruptcy courts are . . . indistinguishable from the district courts.” See *First of Am. Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 243 (Bankr. E.D. Mich. 1991). Bankruptcy courts, however, are indeed distinguishable from district courts. See *infra* Part II.B.

53. At least one commentator has concluded that bankruptcy courts are structurally inferior to district courts. See Charles J. Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 494 (1988) (stating that bankruptcy courts are “clearly subordinate to and supervised by” the district courts).

54. *Gaylor*, 123 B.R. at 241–43.

55. See *id.* at 242.

56. *Id.*

This argument fails because it addresses the number of judges potentially hearing bankruptcy matters, not the number of actual cases. There cannot be more bankruptcy cases decided in district courts than in bankruptcy courts and district courts combined. Accordingly, a rule making district court decisions binding, as opposed to making both district court and bankruptcy court decisions important but not compelling, would reduce the amount of precedent that a litigant would have to consult in deciding how to address an issue.⁵⁷ Declaring district court precedent binding upon bankruptcy courts in fact would narrow the number of cases to which a litigant must resort.

Furthermore, predictability always will increase where some binding precedent exists, even if that precedent is harder to locate. A litigant aware of a domestic district court precedent would know that all bankruptcy courts were bound to follow it, and thus the litigant could rely on that precedent. Once a district court addressed an issue of bankruptcy law, therefore, the law of the district would become more predictable.⁵⁸

57. An unscientific sampling of cases conducted by the author confirms that this approach would cut the amount of applicable precedent roughly in half. Using WESTLAW, the author searched the bankruptcy database for all cases in the bankruptcy courts (FBKR-BC) and district courts (FBKR-DC), isolating cases from certain judicial districts during the first quarter of 1993.

TABLE 1

Jurisdiction	Bankruptcy Court Cases	District Court Cases
S.D.N.Y.	25	32
E.D.N.Y.	10	7
W.D.N.Y.	6	4
N.D.N.Y.	3	3
D. Colo.	9	10
N.D. Ga.	5	2
M.D. Ga.	3	1
S.D. Ga.	0	1
D. Me.	6	4
W.D. Wis.	1	1
E.D. Wis.	0	3
TOTAL	68	68

58. Of course, the law of the district would not become settled. Making district court precedent binding upon bankruptcy courts would not bind the district court to affirm the ruling on appeal. Any inconsistency of precedent, however, would arise

Prohibiting bankruptcy judges from ignoring domestic district court precedent would further the predictability goal of the obedience principle.

Second, bankruptcy judges argue that the application of the obedience principle to the bankruptcy court context would not reduce the volume of appeals.⁵⁹ The obedience principle usually reduces the volume of appeals because the failure of a lower court judge to follow a higher court's decisions will, or at least should, result in automatic reversal.⁶⁰ A rule forcing the lower court to follow the higher court precedent renders the perfunctory appeal unnecessary. In contrast, bankruptcy judges argue, a bankruptcy court's departure from domestic district court precedent will not necessarily be reversed, because a decision of a domestic district court is not settled, as it does not bind other district judges.⁶¹

Even when a domestic district court precedent requires a certain result in the bankruptcy court, the decision of the bankruptcy court may be reversed on appeal; a bankruptcy case could be appealed to a district judge who disagrees with, and who will choose to depart from, the precedent set by the author of the domestic district precedent.⁶² Though a strictly applied stare decisis doctrine would increase the predictability of the bankruptcy court result, the continued possibility of reversal on appeal would give the litigants some incentive to appeal more often.⁶³ Bankruptcy judges argue, therefore, that the obedience principle does not work to reduce the volume of appeals in the bankruptcy context.

The argument that the obedience principle would not reduce appeals in the bankruptcy context, however, is overstated. Though the litigant knows that the district judge to whom the case is appealed has the power to reconsider the previous district judge's opinion, the litigant also knows that that judge

only at the district court level. See *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991).

59. See *In re Shattuc Cable Corp.*, 138 B.R. 557, 566 (Bankr. N.D. Ill. 1992); *Gaylor*, 123 B.R. at 241-42.

60. See *supra* note 22.

61. See *supra* note 27 and accompanying text.

62. In the United States District Court for the Southern District of Texas, for example, cases are randomly assigned by the computer. Telephone interview with Joan Davenport, Clerk of Courts, Bankruptcy Appeal Clerk, United States District Court, Southern District of Texas (Mar. 15, 1994). Subsequent cases involving the same debtor are sent to the judge who heard the first matter involving that debtor. *Id.*

63. See *Shattuc*, 138 B.R. at 566; *Gaylor*, 123 B.R. at 242.

will employ a conservative outlook in reviewing his sister judge's decision.⁶⁴ Because reversal is unlikely, the incentive to appeal still is somewhat lower than it would be if the obedience principle was not applied. Thus, binding bankruptcy courts to follow district court precedent would reduce the volume of appeals.

C. Judicial Power Should Rest in Article III Courts

A further reason to apply the obedience principle to the district court-bankruptcy court relationship is that district courts, but not bankruptcy courts, are established by Congress under Article III of the United States Constitution.⁶⁵ Although the Constitution, as currently interpreted by the United States Supreme Court, probably does not mandate that bankruptcy courts owe obedience to district court precedent, the principles underlying Article III provide sufficient justification to force bankruptcy judges to follow domestic district court precedent.

The Supreme Court has interpreted Article III to require only that "the essential attributes of the judicial power" remain vested in Article III courts.⁶⁶ The exact scope of this mystical "judicial [p]ower" is unclear.⁶⁷ There appears to be no case law supporting the argument that the Constitution requires that domestic district court precedent binds bankruptcy courts. This Note, therefore, does not pursue that argument.

Rather, this Note argues that the policies underlying Article III justify a rule that bankruptcy courts should consider themselves to be bound by district court precedent. The protections afforded to Article III judges make them better qualified to make important, complex, and controversial decisions. Because honoring these policies protects the rights

64. See *supra* notes 28-29 and accompanying text.

65. U.S. CONST. art. III. Compare 28 U.S.C. §§ 132-135 (1988) (giving Article III protections to district judges) with *id.* §§ 152-153 (establishing bankruptcy courts without Article III protections).

66. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 77 n.29 (1982) (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

67. See, e.g., J. Anthony Downs, Note, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1035 (1985); Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947 (1984).

of individual litigants⁶⁸ and the very structure of the judicial system,⁶⁹ bankruptcy judges should defer to district court precedent even though the Supreme Court does not consider the Constitution to dictate that result.

Article III vests the judicial power of the United States in judges who (1) are appointed by the President upon the advice and consent of the Senate,⁷⁰ (2) are given life tenure during good behavior,⁷¹ and (3) are guaranteed not to receive cuts in pay.⁷² These protections are designed to guarantee that the judiciary is not dependent upon the politically-ruled branches of government, the legislative or executive branches, and is free to reach correct results even when they are politically unpopular.⁷³ When a bankruptcy judge refuses to follow a district court precedent, there is the ever-present threat that this departure is the product of influence from outside pressures upon the bankruptcy judge, who may be seeking to protect his future in the judiciary.⁷⁴ The district court precedent should prevail because that decision was made under the protections of Article III. Bankruptcy courts therefore should be considered lower courts as compared to district courts under the current structure, and domestic district court precedent should bind bankruptcy courts.

D. Bankruptcy Judges Are Superior Decision Makers on Bankruptcy Law Issues

As the above discussion asserts, the current bankruptcy court structure dictates that bankruptcy judges should follow domestic district court precedent. Nonetheless, bankruptcy

68. Downs, *supra* note 67, at 1036.

69. *Id.* at 1036-37.

70. U.S. CONST. art. II, § 2.

71. U.S. CONST. art. III, § 1.

72. *Id.*

73. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 & n.10 (1982); Anne G. Maseth, *Jurisdiction: A New System for the Bankruptcy Courts*, 2 BANKR. DEV. J. 1, 4 (1985). The protections were implemented in response to a major complaint of the American colonists against British rule—that the colonial judges were dependent upon the will of the King of Great Britain. *Federal Magistrates and the Principles of Article III*, *supra* note 67, at 1949.

74. Unlike Article III judges, bankruptcy judges do not have life tenure. Instead, bankruptcy judges serve 14-year terms after appointment by the judges of the circuit court of appeals. 28 U.S.C. § 152 (1988).

judges are better equipped to decide bankruptcy matters than are district judges. Bankruptcy law is highly specialized and intricate.⁷⁵ Most district court judges are relatively unfamiliar with bankruptcy law⁷⁶ and have no time to learn it.⁷⁷ It is counterproductive, therefore, to vest bankruptcy decision-making power in the district court. Thus, this note advocates the removal of the district courts from the bankruptcy system, leaving the complexities of bankruptcy cases to the decision-making power of specialist bankruptcy judges.

Opponents of specialized bankruptcy courts argue that it is best to leave bankruptcy policy to "generalist judges who are not insulated from the rest of the law."⁷⁸ This concern is addressed by leaving the court of appeals, or at least the Supreme Court, in the appellate structure,⁷⁹ which this Note recommends.

III. ALTERNATIVES FOR A NEW STRUCTURE

Much academic attention has been focused in the last two decades on restructuring the bankruptcy court system.⁸⁰ Proposals have included giving Article III status to bankruptcy

75. See JUDICIAL CONFERENCE REPORT, *supra* note 34, at 361 (stating that the Bankruptcy Code rivals the Internal Revenue Code in complexity); Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 B.Y.U. L. REV. 545, 559, 565 (noting the highly complex nature of bankruptcy issues).

76. See JUDICIAL CONFERENCE REPORT, *supra* note 34, at 362 (recognizing that "even the most diligent district court judges cannot acquire the same expertise in bankruptcy matters" as BAP judges).

77. *Id.*; Carlson, *supra* note 74, at 559; Conrad K. Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 157 (1978).

78. BANKRUPTCY REFORM CIRCA 1993: A PRESENTATION OF THE NATIONAL BANKRUPTCY CONFERENCE'S BANKRUPTCY CODE REVIEW PROJECT 55 (1993) [hereinafter BANKRUPTCY REFORM CIRCA 1993]; Simon H. Rifkind, *Bankruptcy Code-Specialized Court Opposed*, 52 AM. BANKR. L.J. 187, 187-88 (1978). *But see* Carlson, *supra* note 74, at 564-65 (supporting the creation of a separate Article III bankruptcy court as necessary to provide the high level of competence essential to an adjudication of complex bankruptcy issues); Lawrence P. King, *Bankruptcy Code—Specialized Court Supported*, 52 AM. BANKR. L.J. 193, 194 (1978) (stating that bankruptcy judges' expertise is not limited to bankruptcy issues).

79. Carlson, *supra* note 75, at 565; *see also* BANKRUPTCY REFORM CIRCA 1993, *supra* note 78, at 55 (stating that a specialized appellate tribunal would achieve greater uniformity in decisions and increase the efficiency of the appellate process).

80. For a discussion of different possible structures, see Cyr, *supra* note 77, at 146-56. For a proposal that BAP's be established in each circuit, see JUDICIAL CONFERENCE REPORT, *supra* note 34; Carlson, *supra* note 75, at 558-67.

judges or to BAP judges, establishing BAP's in all thirteen circuits, eliminating district courts from the bankruptcy court system altogether, getting rid of bankruptcy specialists altogether, or a combination of some of the above proposals.

This Note proposes that, whether or not in conjunction with another reform, the district courts should be removed from the bankruptcy court structure. Removing district court judges from the bankruptcy structure would cure the illogic of the current system. Non-Article III bankruptcy judges no longer would be forced to struggle to circumvent the precedents established by Article III district judges who are not bankruptcy experts.

A variety of altered structures would remedy the problem discussed in this Note. For example, the district courts simply could be removed from the appeals process, with appeals from the bankruptcy court going directly to the courts of appeals, or to a BAP for the circuit. BAP and court of appeals precedent would be fully binding on bankruptcy courts. If a BAP is used, appeal from the BAP could go to the court of appeals, or directly to the Supreme Court. Alternatively, all bankruptcy appeals could be heard before a national bankruptcy appellate court, much like the Federal Circuit currently hears intellectual property appeals. Or perhaps all bankruptcy matters could be consolidated before a single bankruptcy trial court, similar to the United States Tax Court.

The number of satisfactory bankruptcy systems is limited only by the imagination of the legislators revising the system. What is important is that the structure of the bankruptcy courts should facilitate the rendering of sound bankruptcy decisions. If specialists are to decide bankruptcy issues, then the hierarchy should enable them to do so without ignoring their proper role. In other words, bankruptcy judges should not be bound to follow district court precedent. Within these constraints, the decision on exactly how to structure the system should hinge upon considerations beyond the scope of this Note, such as expense and effectiveness.

The fact that resolution of bankruptcy matters ultimately will be settled by a nonspecialist court is not problematic. Although the Supreme Court, and the courts of appeals, if they remain in the chain of appeal, are not bankruptcy specialists, they differ from the district courts. Appellate courts have time to delve into complex issues in more depth, and they have the

mechanisms to make this possible.⁸¹ Further, the judges on courts of appeals typically are more highly qualified, often having served for many years as district judges or having otherwise distinguished themselves before ascending to the appellate level. Lastly, decisions at the appellate level are made by more than one judge, increasing the amount of thought that goes into an issue and decreasing the likelihood that a major facet of the problem is overlooked or misunderstood.

CONCLUSION

The present bankruptcy court structure is inconsistent with its intended function. The experts, the bankruptcy judges, are at the bottom of the decision-making hierarchy subject to review by the district courts. Recognizing that they are more knowledgeable on bankruptcy issues, bankruptcy judges disregard domestic district court precedent that they disagree with and reach the result that they favor in order to increase the quality of decision making.

At best, the current structure is awkward and illogical; at worst it is a dangerous violation of jurisprudential and Constitutional rules. It is senseless to place the best decision makers at the bottom of the decision-making hierarchy. Even worse, doing so leads such decision makers to ignore the system in order to reach functional results. If bankruptcy judges are to make bankruptcy law, then we should establish a system that allows bankruptcy judges to do so effectively within the confines of the Constitution and the common law.

81. For example, appellate courts regularly call upon outside experts to submit amicus briefs to help them resolve a matter correctly. See *American College of Obstetricians and Gynecologists Pa. Section v. Thornburgh*, 699 F.2d 644, 646-47 (3d Cir. 1983) (Higginbotham, J., dissenting). Also, appellate litigants have more time to focus on an issue, brief their arguments in detail, and present oral arguments. This depth of analysis typically is more difficult in the heat of a trial court proceeding.