

Bound by the BAP: The Stare Decisis Effects of BAP Decisions

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I. INTRODUCTION

Final orders, judgments and decrees of a bankruptcy court may not be appealed directly to the circuit court of appeals but must first go through an intermediate appellate stage. Until recently, the Ninth Circuit was alone in using bankruptcy appellate panels (BAPs) to provide an intermediate level of review between the bankruptcy trial court and the circuit court of appeals. In all other circuits (except briefly in the First Circuit) the route to circuit court review lay through the district court. Now, however, BAPs have expanded into the First, Second, Sixth, Eighth and Tenth Circuits.¹ Controversy attends the BAPs. Specifically, the expansion will likely inflame a long-standing quarrel over the precedential value of BAP decisions. This paper addresses that issue and proposes a solution which addresses the concerns of all sides.

BAPs are strange courts. They shake up the normal hierarchical structure dear to many attorneys' hearts. At first glance, they look like circuit courts of appeals: they hear appeals, sit in panels of three, review findings of fact for clear error only, and focus on a de novo review of the law. But look again and they take on aspects of a district court: they serve the same intermediate appeal function in the bankruptcy appeals process as district courts and are themselves subject to review by the circuit court. On yet a third examination they appear clearly subordinate to the district courts: not only do the district judges decide whether to allow BAPs in their districts at all, but BAPs are composed of Article I bankruptcy judges who are by statute mere "units" of the district courts

1. Per a LEXIS search, in 1997 the First Circuit BAP issued 19 opinions, the Second and Tenth Circuit BAPS each issued 13 opinions, and the Sixth and Eighth Circuit BAPs each issued 32 opinions. Note that not all decisions reported on LEXIS are considered published.

and who, for better or worse, are typically seen as “inferior” to Article III judges in the judicial hierarchy.

This multifariousness of status and function has contributed to multiple views of how BAP opinions should be received by other courts. Courts are sharply divided over the extent to which principles of stare decisis should apply to BAP decisions. Most say that BAP decisions are binding precedent on all bankruptcy courts within a circuit.² However, some say that BAP decisions do not bind any bankruptcy court.³ Still others attempt a compromise and say that BAP decisions bind some but not all bankruptcy courts.⁴

Bankruptcy judges are not the only ones who disagree on this issue. The ink of commentators also spills in all directions.⁵ Add to this confusion the questions of what effect BAP opinions should have on district courts and circuit courts, and one can easily understand why the

2. *E.g.*, *Muskin v. Industrial Steel (In Re Muskin)*, 151 B.R. 252 (Bankr. N.D. Cal. 1993) (Jaroslovsky, J.); *In re Thunderbird Inn*, 151 B.R. 224 (Bankr. D. Ariz. 1993) (Nielsen, J.); *Coyne v. Westinghouse Credit Corp. (In re Globe Illumination)*, 149 B.R. 614 (Bankr. C.D. Cal. 1993) (Bufford, J.); *In re General Associate Investors Ltd.*, 150 B.R. 756 (Bankr. D. Ariz.) (Mooreman, J.); *Philadelphia Life Ins. v. Proudfoot (In re Proudfoot)*, 144 B.R. 876 (B.A.P. 9th Cir 1992) (Jones, Russell, Ashland, JJ. writing per curiam); *In re Windmill Farms*, 70 B.R. 618 (B.A.P. 9th Cir. 1987) (Mooreman, Ashland, Elliot, JJ.), *rev'd on other grounds* 841 F.2d 1467 (9th Cir. 1988).

3. *E.g.*, *In re Standard Brands Paint*, 154 B.R. 563 (Bankr. C.D. Cal. 1993) (March, J.); *In re Rheuban*, 128 B.R. 551 (Bankr. C.D. Cal. 1991) (Zurzado, J.).

4. *E.g.*, *Oregon Higher Educ. Assistance Found. v. Selden (In re Selden)*, 121 B.R. 59, 62 (D. Ore. 1990) (BAP decisions bind only those bankruptcy courts sitting in the district out of which the appeal arose); *see also In re Junes*, 76 B.R. 795 (Bankr. D. Or. 1987) (Hess, J.), *aff'd on other grounds*, 99 B.R. 978 (B.A.P. 9th Cir. 1989) (Mooreman, Ashland, Jones, JJ.).

5. Kathleen P. March & Rigoberto V. Obregon, *Are BAP Decisions Binding on Any Court?*, 18 CAL. BANKR. J. 189 (1990) (neither BAP nor district court decisions should bind any court); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 AM. BANKR. L.J. 525, 529-32 (1995) (same); *cf.* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063 (1994) (both BAP and district court decisions should bind bankruptcy courts); *cf.* Jeffrey J. Brookner, Note, *Bankruptcy Courts and Stare Decisis: The Need for Restructuring*, 27 U. MICH. J. L. REFORM 313 (1993) (BAP decisions should bind bankruptcy courts but district court decisions should not); *see also* David A. Levin, Note, *Precedent and the Assertion of Bankruptcy Court Autonomy: Efficient or Arrogant?*, 12 BANKR. DEV. J. 185 (1995); *cf.* Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. STATE L.J. 181 (1989) (empirical study concludes that as matter of fact BAP opinions are accorded great respect by attorneys and judges).

National Bankruptcy Review Commission (NBRC) has proposed to eliminate this court of many guises.⁶

When one studies the matter it becomes easy to understand the profusion of plausible positions: the question of a BAP decision's precedential effect involves the interplay of both the judicial doctrine of stare decisis and the constitutional doctrine of separation of powers. Separately, these doctrines lead in opposite directions. The principles of stare decisis support treating BAP decisions as binding precedent akin to circuit court opinions, but the principles of separation of powers cut against such treatment. Unless these doctrines can be blended, the question will continue to confound. Although one way around the problem is to abandon the BAPs as the NBRC proposes, I shall argue that the BAPs serve a valuable purpose and should be retained. Building upon insights contained in Judge Bufford's imaginative opinion in *In re Globe Illumination*,⁷ I suggest that the BAPs can be integrated into the traditional hierarchical appellate structure so as to reconcile the competing concerns underlying these two doctrines without requiring one to yield to the other.

Part I will explain how the current structure of the bankruptcy appellate system should be understood in terms of the history behind the Bankruptcy Reform Act of 1978 and the constitutional concerns articulated by the Supreme Court in the *Marathon Pipe Line* case.⁸ Part II will examine the doctrine of stare decisis and will explore the policies and principles which support the doctrine, as well as those which undercut it. Part III will first demonstrate that, solely because of the principles behind stare decisis, BAP decisions should bind both bankruptcy and district courts within a circuit. Part III will then show why this result is not violative of the concerns about constitutional separation of powers which underlay *Marathon* and subsequent decisions. Finally, Part IV will argue against the abandonment of the BAPs currently proposed by the NBRC. Instead, I suggest an appellate structure which will, whether Congress gives bankruptcy judges Article III status or not, eliminate the existing intermediate level of review, and at the same time preserve the valuable and unique contributions BAPs can make to the development of a uniform national bankruptcy law.

6. *Bankruptcy: The Next Twenty Years*, National Bankruptcy Review Commission Final Report, October 20, 1997, Ch. 3.1.3 at 752-67 (hereinafter NBRC Final Report).

7. 149 B.R. 614 (Bankr. C.D. Cal. 1993).

8. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) [hereinafter *Marathon*].

II. CURRENT STRUCTURE AND UNDERLYING CONSTITUTIONAL CONCERNS

Currently, 28 U.S.C. § 151 establishes bankruptcy courts as “a unit of the district court to be known as the bankruptcy court for that district.” This statute does not, however, confer jurisdiction. Bankruptcy jurisdiction is vested in the district courts by 28 U.S.C. § 1334. The district courts are in turn permitted by 28 U.S.C. § 157(a) to refer all bankruptcy matters to the bankruptcy courts. It is in this indirect way that bankruptcy courts acquire their jurisdiction. Over matters within their jurisdiction, bankruptcy courts have the power to adjudicate and to order parties to act on the matters adjudicated.⁹ Final orders, judgments and decrees of the bankruptcy courts may not be appealed directly to the circuit court of appeals but must first be appealed either to a district court or, in certain circumstances, to a BAP.¹⁰

Those circumstances are set forth in 28 U.S.C. § 158. Two conditions must be satisfied before an appeal which would otherwise go to the district court may be taken to a BAP. First, the BAP must be created. Section 158(b)(1) provides that “the judicial council of a circuit shall establish” BAPs and appoint bankruptcy judges to them, unless the council determines that there are not enough resources or that BAPs would cause too much delay. Second, the district judges must approve. Section 158(b)(6) provides that appeals may not be heard by BAPs in any given district unless a majority of judges in that district vote to authorize such appeals. Once these two conditions are met, section 158(c) provides that appeals must go to a BAP unless any party to an appeal, within 30 days of the notice of appeal, elects to have the appeal heard by the district court. If this “opt out” election is made, then the appeal will be heard by the district court. Finally, section 158(d) provides that appeals from either the BAPs or the district courts made be heard by the circuit courts of appeals.

9. 28 U.S.C. § 157(b) (bankruptcy courts “may enter appropriate orders and judgments”). *See also* 11 U.S.C. § 105 (bankruptcy courts may “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”).

10. 11 U.S.C. § 158. A tangle of cases address the issue of what constitutes an appealable final order, judgment or decree. Unraveling them, however, is beyond the ambit of this paper.

What role BAPs and their opinions should play in the bankruptcy judicial structure cannot be fully explored without some understanding of how they came to be and how they were restructured in response to the Supreme Court's decision in *Marathon*.¹¹ This section will explain (A) how the BAPs were first created, (B) how the constitutional concerns articulated in *Marathon* affected the BAPs, and (C) how the Congressional response to the *Marathon* decision critically changed the BAP structure.

A. *Birth of the BAPs*

The Bankruptcy Reform Act of 1978 ("BRA"),¹² was not the first exercise of Congress' powers under Article I § 8 of the Constitution "to establish . . . uniform Laws of the subject of Bankruptcies through the United States." However, the BRA accomplished so many reforms of such significance that, rather than merely amend the statutory scheme created by the 1898 Bankruptcy Act, Congress replaced it entirely with a new statutory scheme known as the Bankruptcy Code.¹³ Two of the concerns which lay behind the enactment of the BRA are particularly relevant to the creation of the BAPs. The House floor manager of the BRA and its most tireless advocate, Representative Don Edwards (D-Cal.), described them this way:

[T]he years of study that lead to the passage of the 1978 bankruptcy law made clear that the two major failings of the prior bankruptcy referee system were the lack of simplicity in determining jurisdiction of the bankruptcy court and the low status and lack of power of the bankruptcy judges which resulted in disrespect for their position and inability to attract the best caliber judges.¹⁴

I shall explain each concern in turn. First, one of the most serious inadequacies of the old Bankruptcy Act was that it did not give either the district courts or, through them, the referees, the authority they needed to handle all the issues affecting the bankruptcy. The problem was that the court's jurisdiction was in rem, that is, based on notions of jurisdiction over property. Thus, the district court's bankruptcy jurisdiction extended only to controversies involving property in the actual or constructive possession of the court—so called "summary jurisdiction." The district court could exercise jurisdiction over other, "plenary" matters, such as disputes involving property in the possession

11. See *supra* note 8.

12. P.L. 95-958, 92 Stat. 2549 (1978).

13. See generally, 1978 U.S.C.C.A.N. 5787-6573; COLLIER ON BANKRUPTCY (15th ed.) App. 2 (Legislative History).

14. 130 CONG. REC. H7490 (daily ed. June 29, 1984).

of third persons, only if all parties consented. Endless litigation of the distinction between “summary” and “plenary” had generated much heat but little light. As a result, significant amounts of judicial and litigant resources were being spent on purely jurisdictional questions.¹⁵

To cure this weakness, the Bankruptcy Reform Act attempted to replace the idea of a bifurcated in rem jurisdiction with an unitary all-encompassing jurisdiction. “Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. . . . The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle *everything* that arises in a bankruptcy case.”¹⁶ There was little controversy over this reform and the statute as enacted was very similar to all of the proposed versions in both the House and Senate. To match this extraordinary expansion of bankruptcy court jurisdiction, the BRA explicitly granted bankruptcy courts all “the powers of a court of equity, law and admiralty.”¹⁷

The second subject of concern, the status of the bankruptcy judges, caused far more difficulty. Under the old 1898 Bankruptcy Act, district courts were denominated as bankruptcy courts as well as courts of general Federal jurisdiction, and had initial jurisdiction over bankruptcy cases. They were permitted to refer these cases to bankruptcy “referees.” As appointees of the judges of the district court, like magistrates, bankruptcy referees were subordinate judicial officers of the bankruptcy court. Bankruptcy reformers objected to this structure because under it “the bankruptcy court [] is not truly and completely a court. It is not independent. It must operate under the supervision of an unconcerned district court.”¹⁸ The reformers suggested that if bankruptcy referees were given the power and prestige of true judges, then bankruptcy cases would be better managed and the bankruptcy bench would attract better qualified people.¹⁹ Accordingly, many argued that bankruptcy judges should be appointed as Article III judges which would protect their independence by giving them life tenure with no possibility of reduction

15. See *Report of the Commission of the Bankruptcy Laws of the United States*, H.R. Doc. No. 95-137 at 89-92 (1973).

16. *Report of the Committee on the Judiciary*, H.R. REP. No. 95-595, at 445 (1977) (emphasis added) [hereinafter H.R. REP. 95-595].

17. 28 U.S.C. § 1481.

18. H.R. REP. 95-595, *supra* note 16, at 4.

19. *Id.*

in salary. Making the new bankruptcy courts Article III courts was especially important, the reformers argued, because of the extensive jurisdiction and broad powers being newly granted them. Others responded, however, that the status of bankruptcy judges could be raised sufficiently without having to go that far and that bankruptcy judges should be given a limited tenure and be subject to the Federal Salary Act.²⁰

The House was the first to produce a bill. H.R. 8200, proposed on February 1, 1978, would have created a new bankruptcy court, separate and distinct from the district courts, pursuant to Congress' powers under Article III. This action would have transformed the previously inferior referees into Article III bankruptcy judges.²¹

The Senate's bill, S. 2266, did not grant bankruptcy judges Article III status. The Senate's approach to the problem of inferior status was to make bankruptcy courts "of record," independent from (though still "adjunct" to) district courts and to provide that bankruptcy judges be appointed by the circuit judicial council for twelve-year terms, rather than by the district judges for six-year terms as the Bankruptcy Act had provided. The Senate sponsor of the bill, Senator DeConcini, asserted that these measures, added to the broad grant of powers to the bankruptcy court over matters within its jurisdiction, would be enough to make the bankruptcy judges "functionally independent of the Federal district courts,"²² and would "[elevate them] to a status far above that of the present referee."²³ When it received H.R. 8200, the Senate amended it by substituting its bill for the House bill in full and approved H.R. 8200, as amended, on September 7, 1978.

In response to the Senate's proposal, the House retreated from the idea of making bankruptcy courts Article III courts, but rather than accept the Senate's bill, it proposed a compromise. Bankruptcy courts would be established as adjuncts to the circuit courts. Bankruptcy judges would have fixed 14-year tenures, and they would be appointed by the President with the advice and consent of the Senate. Original bankrupt-

20. 2 U.S.C. § 351-60. The Judicial Conference of the United States was among those strenuously opposed to giving Article III status to bankruptcy judges. Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 947-48 (1979).

21. See H.R. REP. 95-595, *supra* note 16, at 15-31, 432-35. Another contributing cause to the low status of bankruptcy referees addressed by the bill was the conflation of judicial and administrative duties in the referees under the old 1898 Act. The bill proposed to separate the two functions by creating the office of the U.S. Trustee to administer bankruptcy cases, but leaving the judicial functions to bankruptcy judges.

22. 124 CONG. REC. S14,719 (daily ed. Sept. 7, 1978).

23. 124 CONG. REC. S17,404 (daily ed. Oct. 6, 1978).

cy jurisdiction was to be vested in the circuit courts, but under the proposed statute bankruptcy courts would be empowered to exercise all of the judicial functions flowing from that grant of jurisdiction.²⁴

It was at this point in the legislative process that the BAPs first appeared. In keeping with the idea that the bankruptcy courts should be “adjuncts” to the circuit courts, the House bill provided that:

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

The House’s proposed compromise was passed (as yet another wholesale amendment of H.R. 8200) and the bill was returned to the Senate on October 1, 1978. However, “[a]t that point, the Chief Justice of the United States personally intervened in an attempt to thwart passage of the bankruptcy legislation.”²⁵ He opposed the compromise idea of making bankruptcy courts adjuncts of the circuit courts.²⁶ Following his intervention the Senate rejected the proposed compromise and reinstated its initial proposal of making the bankruptcy courts adjuncts of the district courts. However, the Senate left the BAP provision untouched and left the bankruptcy judges to be appointed by the President, instead of the circuit. On October 6, 1978, the Senate returned the bill to the House with a “take it or leave it” ultimatum. Time was now a critical factor. The end of the ninety-fifth session of Congress loomed and if the bill was not enacted by then, it would have to start over in committee when the ninety-sixth Congress convened. In the face of this pressure, the bill’s managers in the House accepted the Senate’s ultimatum and the Senate’s version was approved by the House on October 6, 1978.²⁷

Thus, as finally enacted the BRA created a new bankruptcy court whose judges (1) were appointed by the President but removable by a majority vote of the judicial council for the circuit, and (2) did not have

24. See generally 1 COLLIER ON BANKRUPTCY § 1.03 at 1-50 to -59.

25. Klee, *supra* note 20, at 954.

26. *Id.*

27. *Id.* The statutes created by the bill are codified at 28 U.S.C. § 151-58.

life tenure and were not protected from reductions in salary. These judges were then given the broadest possible jurisdiction over all matters relating to bankruptcy cases through a “legislative sleight-of-hand.”²⁸ The BRA also created the BAPs,²⁹ and endowed them with appellate jurisdiction.³⁰ Individual bankruptcy courts at the trial level were clearly intended to be adjuncts to the district courts. But BAPs could legitimately be viewed as adjuncts to the circuit courts of appeals because they had been created as part of the House proposal to make all bankruptcy courts adjuncts of the circuit courts and their status had not been altered in the legislative end-game. Indeed, that was the view adopted by the only Circuit Court to consider the question.³¹ Nothing in the floor debates or committee reports sheds light on this peculiarity; nothing in those sources explains either why the BAPs were included in the penultimate House proposal or why they were retained in the final Senate version. However, an explanation can be inferred from the 1973 report of the Commission on Bankruptcy Laws of the United States, which Congress had formed in 1970 to study the bankruptcy system and propose reforms. The Commission expressed a strong concern that, on the one hand:

[t]he review of a referee’s order by a single district judge, who is primarily a trial court judge, is anomalous. In most state court systems, as well as elsewhere in the federal judiciary, a judge’s rulings can ordinarily be reviewed only by a court consisting of three or more judges.³²

On the other hand, “[p]roposals to the Commission that review of bankruptcy court rulings be routed to the courts of appeals without going through the district courts were considered and rejected. The remoteness of the courts of appeals for large numbers of potential appellants would be a substantial deterrent to appeals.”³³ The creation of BAPs resolved

28. *Marathon Pipeline v. Northern Pipeline*, 12 B.R. 946, 948, n.4 (D. Minn. 1981) (Lord, J.), *aff’d Marathon*, *supra* note 8. The language conferring jurisdiction was found in 28 U.S.C. § 1471. The description of the legislature’s action appears in *Marathon Pipeline*. The scheme worked this way: Section 1471(a) vested in the *district* courts “original [i.e. trial] and exclusive jurisdiction over all cases under title 11.” Section 1471(b) vested in the *district* courts “original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.” Congress then turned around in § 1471(c) and required that the bankruptcy courts “*shall* exercise all of the jurisdiction conferred . . . on the district courts.” See 1 COLLIER ON BANKRUPTCY § 3.01 (15th ed.) (emphasis added).

29. 28 U.S.C. § 160.

30. 28 U.S.C. § 1482.

31. *Briney v. Burley (In re Burley)*, 738 F.2d 981, 986 (9th Cir. 1984).

32. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 96 (1973).

33. *Id.* at 97.

these competing concerns by providing a three-judge appellate panel for review of a single judge's actions in a more accessible forum to litigants than the federal court of appeals.

B. The Constitutional Concern and Marathon

On March 8, 1979, the Northern Pipeline Construction Company (Northern) sued the Marathon Pipe Line Company (Marathon) in federal district court in Kentucky, alleging breach of contract and invoking the diversity jurisdiction of the federal court. In January 1980, while the Kentucky case was pending, Northern filed a Chapter 11 bankruptcy petition in Minnesota. In March 1980, in the context of the Minnesota filing, Northern initiated an adversary proceeding against Marathon, raising the same breach of contract claim it had sued on in Kentucky. Because the breach of contract claim was governed by Kentucky law, Marathon argued from the beginning that the bankruptcy court lacked jurisdiction. A federal court's adjudication of a state law claim would be an exercise of the judicial power of the United States. That power could be exercised only by tenured judges appointed under Article III of the Constitution.

The constitutional concern raised by *Marathon* is typically termed the "separation of powers" doctrine. In brief, those who wrote the Constitution thought that governmental powers could be best divided into three "inherently distinct" types: legislative, executive and judicial.³⁴ What the Framers sought to avoid was "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective."³⁵ Such an accumulation would "justly be pronounced the very definition of tyranny."³⁶ The Constitution, therefore, created three departments or Branches, one for each of the three powers. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."³⁷

34. *Marathon*, *supra* note 8, at 57.

35. *Id.* (quoting from THE FEDERALIST NO. 47).

36. *Id.*

37. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

To make the Judicial Department an effective check upon the other branches, the Framers required in Article III that judges be given (1) life tenure (subject only to impeachment) and (2) irreducible salaries. Any tribunal Congress created to exercise the functions assigned to the Judicial Department which did not have those two characteristics would be too vulnerable to pressure from the Legislative Department to be truly independent and would thus constitute an accumulation of the judicial power in the Legislature—the very definition of tyranny.³⁸

The BRA violated the Constitution, Marathon argued, because Congress had created a tribunal (the bankruptcy court) with extensive power to perform judicial functions, but had not given the judges of that tribunal the two protections of Article III that would have made them truly members of an independent branch of government. Instead, Congress had used its powers under Article I to create nothing more than an extension of itself, the Legislative Department.

The Government offered two arguments for the statute's constitutionality. First, it claimed that Congress had the power to establish non-Article III courts to hear bankruptcy matters because Article I gave Congress the exclusive power to write bankruptcy laws. Second, and in the alternative, it asserted that bankruptcy matters were in fact decided by Article III courts because bankruptcy court decisions were reviewable by the district courts and circuit courts.

The Supreme Court agreed with Marathon and rejected both of the Government's arguments. It struck down 28 U.S.C. § 1471 as an usurpation by the Legislative Department of those powers which could only be exercised by the Judicial Department under Article III.³⁹ The Court's decision was the product of a four-justice plurality (Brennan, Marshall, Stevens, and Blackmun) and a two-justice concurrence (Rehnquist and O'Connor). In rejecting of the Government's first argument, the plurality recognized that there were circumstances under which Congress could create Article I courts, but decided that none of those circumstances applied to adjudication of matters under the bankruptcy laws. Therefore, 28 U.S.C. § 1741 was, on its face, unconstitutional.

Writing for himself and Justice O'Connor, Justice Rehnquist also rejected the Government's first argument but refused to go as far as the plurality in his reasoning. He thought the issue was much narrower than whether the *entire* scope of jurisdiction granted in 28 U.S.C. § 1471 violated Article III of the Constitution. The case involved only the

38. *Marathon*, *supra* note 8, at 57.

39. *Id.* at 76-87.

attempted exercise by the bankruptcy court of its jurisdiction over a state law claim that would otherwise be heard by an Article III federal district court under its diversity jurisdiction. “To whatever extent *different* powers granted [the bankruptcy courts] might be sustained . . . I am satisfied that the adjudication of Northern’s lawsuit cannot be so sustained.”⁴⁰ Rehnquist refused to be drawn into the debate between the plurality and the dissent over just how far Congress could go in vesting non-Article III courts with jurisdiction to adjudicate cases and controversies. However, he thought that the jurisdiction to adjudicate state law claims was so mixed in with the rest of the jurisdiction granted by 28 U.S.C. § 1741 as to be nonseverable, and that therefore the entire provision must fall.

The second Government argument was also rejected by both the plurality and the concurrence. The mere ability to appeal to an Article III tribunal would not satisfy the constitutional scheme, the plurality wrote, because:

[o]ur precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime, “would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to the facts becomes in effect finality in law.” 285 U.S. at 57.⁴¹

Justices Rehnquist and O’Connor agreed that “the extent of review by Art. III 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*. . . .”⁴²

Neither the *Marathon* plurality, concurrence nor dissent discussed the BAPs, except to note their existence in passing. As the Ninth Circuit later noted, “*Marathon* did not discuss what role a non-Article III officer could play in the appellate process or, more specifically, whether the role

40. *Id.* at 89 (Rehnquist, J., concurring) (emphasis added).

41. *Marathon*, *supra* note 8, at 86 n.39 (quoting from *Crowell v. Benson*, 285 U.S. 22 (1932)).

42. *Marathon*, *supra* note 8, at 91.

of the BAP is consistent with Article III.”⁴³ Specifically, although the Court had clearly struck down 28 U.S.C. § 1471, which gave bankruptcy courts trial jurisdiction, it was unclear whether the Court’s holding or logic extended to 28 U.S.C. § 1482, the statute granting jurisdiction to the BAPs. The courts of the First and Ninth Circuits, the only two circuits which had established BAPs under the BRA, agreed that the Supreme Court had not considered the BAP statute, but came to opposite conclusions on their own analysis as to whether that statute was constitutional.

The First Circuit BAP was the first court to consider the continued viability of the BAPs after *Marathon*. In *Massachusetts v. Dartmouth House Nursing Home*,⁴⁴ the court noted that *Marathon* “did not declare section 1482 unconstitutional,”⁴⁵ but independently concluded that its own existence was unconstitutional. This BAP noted that its jurisdiction was to hear all appeals from the bankruptcy courts and the jurisdiction of those courts was flawed. The court then reasoned: “It is obvious that if Congress cannot constitutionally establish non-Article III courts to exercise jurisdiction over the wide range of issues encompassed by section 1471 at the trial level, then it cannot establish non-Article III courts to hear the same issues at the appellate level.”⁴⁶ The First Circuit itself did not reach the constitutional question, finding instead that the emergency rule governing bankruptcy procedure in the circuit had effectively repealed authorization for the BAPs.⁴⁷

The unconstitutionality of the BAPs was, however, far from “obvious” to the Ninth Circuit. It concluded that “the continued functioning of the BAP is consistent with Article III and the *Marathon* decision.”⁴⁸ The Ninth Circuit thought the *Dartmouth House* reasoning had

omitted an important step. *Marathon* stated that non-Article III officers may constitutionally perform judicial functions so long as an Article III judge retains the essential attributes of the judicial power. The role of the BAP in the

43. *Briney v. Burley* (*In re Burley*), 738 F.2d 981, 985 (9th Cir. 1984).

44. *In re Dartmouth House Nursing Home* 30 B.R. 56. (B.A.P. 1st Cir. 1983), *aff’d on other grounds* 726 F.2d 26 (1st Cir. 1984).

45. *Id.* at 58.

46. *Id.* at 62.

47. *In re Dartmouth House Nursing Home*, 726 F.2d at 28-30. *Marathon* was decided on June 28, 1982. However, out of concern for the massive disruption that it would cause the bankruptcy system, the Supreme Court did not apply its decision retroactively. Instead, the Court stayed its mandate—eventually until December 24, 1982—to give time for responsive measures to be taken before bankruptcy courts lost their jurisdiction. By that time, each circuit had promulgated emergency rules to govern bankruptcy procedure until such time as Congress enacted new legislation.

48. *Briney v. Burley* (*In re Burley*), 738 F.2d 981, 987 (9th Cir. 1984).

appellate process is constitutional because the court of appeals retains those essential attributes.⁴⁹

The Ninth Circuit noted that the fatal flaw in the bankruptcy court jurisdictional scheme appeared to be that too much power and jurisdiction had been granted to the bankruptcy "adjuncts," and too little supervisory authority had been left in the district courts. That problem did not exist with the BAPs because unlike the district court, in its relationship to the trial level bankruptcy court, the court of appeals, in its relationship with the BAP, retained all of the essential attributes of the judicial power. First, the power to make the final determination of all questions remained with the court of appeals, because it reviewed BAP decisions *de novo*. This was far different from the highly deferential standard of review of the district court over bankruptcy courts' findings of fact, the aspect of the district court/bankruptcy court relationship that so disturbed the Supreme Court. Second, the choice of whether or not to establish or disband the BAP rested with the circuit council.⁵⁰ Again, this evidenced a far greater degree of control over the BAP by the circuit courts than the district courts exercised over the individual bankruptcy court. Thus, the Ninth Circuit concluded "that the BAP is constitutional . . . as an adjunct to the court of appeals."⁵¹

The Ninth Circuit decided *In re Burley* on July 3, 1984. One week later, on July 10, 1984, the question of the constitutionality of the BAPs as created by the BRA was mooted by the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA). This was Congress' long-delayed response to *Marathon*.

C. *The Congressional Response to Marathon*

In the BAFJA, Congress made several important changes to the Bankruptcy Code. The most significant was jurisdictional. The BRA had attempted to unify the bifurcated "summary" and "plenary" bankruptcy jurisdictions into one all-encompassing jurisdictional grant, which was then passed on automatically to the bankruptcy courts. In

49. *Id.* at 985.

50. The court might have added here that because the BAPs were created by the circuit, and bankruptcy judges were removable by the circuit, the power to appoint and remove had been taken from the Legislative Branch and lodged in the Judicial Branch.

51. *In re Burley*, 738 F.2d at 986.

contrast, the BAFJA resurrected the concept of two classes of jurisdiction and left it to the district courts' discretion whether and what types of matters to refer to the bankruptcy courts, which were now "units" instead of "adjuncts."⁵²

The BAFJA did not return to the *in rem* distinction that the old 1898 Bankruptcy Act had made between property in and property out of the court's possession; instead it introduced a distinction between "core" and "non-core" proceedings. As the BRA had done, the BAFJA initially lodged in the district courts all "original and exclusive jurisdiction over bankruptcy cases" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11."⁵³ However, the BAFJA differed from the BRA in that bankruptcy courts could now "hear and determine" only those "proceedings arising under title 11, or arising in a case under title 11" that were labeled "core proceedings."⁵⁴ The bankruptcy court could exercise its full range of powers over core proceedings, including the making of final findings of fact, reviewable only for clear error. Proceedings that were merely "related to a case under title 11" but not "arising under" or "arising in" a case under title 11, were "non-core proceedings."⁵⁵ With respect to those types of proceedings, a bankruptcy court had power to "hear" but not to "determine." Final judgment came from the district court, to whom the bankruptcy court had to submit proposed findings of fact for *de novo* review (unless the parties consented to give the bankruptcy court the power to make the final decision).

These provisions, along with the provisions allowing (and sometimes requiring) the district court to withdraw the reference to the bankruptcy court and allowing (and sometimes requiring) federal court abstention from state law claims, were the chief correctives to the constitutional concerns articulated in *Marathon*. It is evident that these correctives addressed more the specific complaint of the concurrence than the broad condemnation in the plurality opinion.⁵⁶ Whether these changes have cured the constitutional defect in the BRA has never been tested in the Supreme Court. Although lower courts have upheld the revised statute

52. 28 U.S.C. § 157(a).

53. 28 U.S.C. § 1334.

54. 28 U.S.C. § 157(b).

55. 28 U.S.C. § 157(c).

56. See 130 CONG. REC. No. S8890 (1984) (remarks of Sen. Dole). Note that in *Marathon*, the diversity of the parties gave the court federal subject matter jurisdiction. An intriguing problem is whether Congress can, consistent with the limits on federal jurisdiction in Article III, grant *any* federal forum subject matter jurisdiction over purely state law issues merely because they are "related to" a bankruptcy case. See 28 U.S.C. § 157(c); 130 CONG. REC. Nos. S 8893-8894 (1984) (remarks of Sen. Hatch).

against constitutional challenges,⁵⁷ commentators are markedly split over the matter.⁵⁸

During the BAFJA legislative process, the Ninth Circuit recommended to the Senate that the BAPs be retained.⁵⁹ As finally enacted, the BAFJA did preserve BAPs, but made two critical changes, both designed to make the BAPs a subsidiary and voluntary alternative to the district courts for those wishing to appeal. It appears that Congress was operating on the theory that parties could waive their right to have their dispute heard by an Article III court.⁶⁰

The first change that the BAFJA made was in how BAPs were to be established. Although BAP judges were still appointed by the judicial council of the circuit (indeed, the BAFJA made the circuit courts responsible for appointing bankruptcy judges in general, whereas the BRA had lodged that power in the President), the circuit court could no longer simply impose BAPs on the districts, as it was able to under the BRA. Instead, under the new 28 U.S.C. § 158, a BAP could operate in a given district only if a majority of the district judges in that district voted for it.

The second change was that the BAFJA required that the litigants consent before a BAP could hear an appeal. At first, the Ninth Circuit's order establishing the post-1984 BAPs provided that appeals would go to the district courts unless both parties agreed to have the appeal heard by a BAP (an "opt in" rule). It was difficult, however, to obtain affirmative consent from all parties to an appeal in a timely fashion. As a result, only three appeals had been submitted to a BAP in the first six months of the order's operation, while 352 appeals had gone directly to

57. See, e.g., *In re Michigan Real Estate Ins. Trust*, 87 B.R. 447 (E.D. Mich. 1988) (vesting of jurisdiction in "units" of district court held constitutional); *In re Global Int'l Airways*, 81 B.R. 541 (W.D. Mo. 1987) (vesting of jurisdiction in bankruptcy courts to hear core matters held constitutional); *Matter of Associated Grocers of Nebraska Cooperative*, 62 B.R. 439 (D. Neb. 1986) (Article III not violated by grant of power to bankruptcy courts to avoid preferences under revised statutory scheme enacted by Congress after *Marathon*).

58. See NBRC Final Report, *supra* note 6, at 732-37.

59. Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. STATE L.J. 181, 191 n.56 (1989).

60. See Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 685 (1985) (explaining the absence of legislative history and suggesting that Congress added the consent requirement out of "an overabundance of caution").

the district courts.⁶¹ To deal with this problem, the Ninth Circuit changed to an “opt out” rule: appeals were routed automatically to the BAPs unless one party raised a timely objection. Since that change was made, BAPs have heard about sixty percent of appeals taken from bankruptcy courts.⁶²

The 1994 bankruptcy amendments have expanded the BAPs’ role. As enacted by the Bankruptcy Reform Act of 1994,⁶³ each circuit is now required to form a BAP unless the circuit concludes that there are not enough resources or that BAPs would cause too much delay. Nonetheless, it remains the rule that a BAP may operate only in a district that has approved it. In the Second Circuit, for example, where BAPs have been established, only three districts participate—and these together typically receive less than a third of all bankruptcy petitions filed in the Second Circuit.⁶⁴ The new amendments also codify the Ninth Circuit’s “opt out” rule: appeals go to the BAPs automatically in jurisdictions where BAPs operate, unless a party timely objects.⁶⁵

Thus have BAPs come to dwell in a jurisprudential twilight zone: they are mandated by law, and created by the circuit court of appeals, but they exist only at the sufferance of each district court, hear appeals only by consent of the parties, and are composed of judges who, when sitting as trial judges, are mere “units” of the district court. The consequent debate over what precedential value their opinions should be accorded is not surprising. What is surprising is the degree to which almost all the participants in that debate have assumed, without examination, that the doctrine of stare decisis is (1) a clear and applicable doctrine that is (2) desirable not only generally but specifically in bankruptcy law. The next section will examine each of these assumptions and explore the various justifications that support or undercut the doctrine generally. Part III will then look to see which of these justifications support application of the doctrine to BAP decisions. Through this commonsense analysis one can come to a principled conclusion about the extent to which BAP decisions should bind other courts.

61. See Bermant & Sloan, *supra* note 59, at 192.

62. See, e.g., 1994 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Table S-14.

63. P.L. 103-394 (October 22, 1994).

64. The participating districts are Connecticut, Vermont and the Northern District of New York. See 1994 ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Table F.

65. 28 U.S.C. § 158(c).

III. THE IDEAS BEHIND STARE DECISIS

A. *Structure of the Doctrine*

The term “stare decisis” is short for the maxim “stare decisis et non quieta movere” which may be translated “let stand what is decided and do not disturb what is settled.”⁶⁶ The key idea behind this judicially created, flexible doctrine is that a judge should follow the legal rules used to decide a prior case that was like the pending case, even when the judge believes the prior decision erroneous.⁶⁷ Before delving into the justifications for this idea, a brief description of the doctrine’s structure may be helpful.

1. *Strict and Lenient Stare Decisis*

The doctrine of stare decisis is nothing if not flexible. It can bind with ball and chain or with rubber bands. How strictly the doctrine is applied varies across both space and time. While the key concept behind stare decisis is found in almost all legal systems, the doctrine itself is given uniform force neither between judicial systems nor even within a single judicial system over time. For example, beginning in the seventeenth century the British House of Lords, the court of last resort in Great Britain considered itself strictly bound by its own previous decisions.⁶⁸ Then in 1966 that body decided it could, after all, modify or even overrule itself.⁶⁹ At the other extreme, most civil law countries would deny that they apply stare decisis at all. That is, they claim not to be bound by any prior single decision.⁷⁰ But they do follow the

66. BLACK’S LAW DICTIONARY 1406 (6th ed. 1990).

67. This was nicely put in Paul W. Werner, Comment *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 B.Y.U.L. REV. 633, 640 (1994). “When a court lays down a rule of law attaching a specific legal consequence to a detailed set of facts, the court must adhere to the legal principle it has announced by applying it in all subsequent cases that come before it presenting a similar factual premise.”

68. Bussel, *supra* note 5, at 1081 n.75.

69. *Id.* Even now, the second highest court in Great Britain, the Queens Bench, which sits in panels much like American courts of appeal, adheres strictly to its prior decisions, even to the point that a panel decision will bind the court sitting *en banc*.

70. “A central premise in civil law systems is that judicial decisions are not a source of law. It would violate the rules against judicial lawmaking if decisions of

same idea; they simply call it something like “looking for the trend in the law.” As a matter of practice the courts in such countries do consider, respect, and give weight to other decisions.⁷¹ Though never as strict as British courts, nor as loose as the Continental ones, our own Supreme Court has vacillated over time in its adherence to the doctrine. In the past twenty years the Court appears to have [at least] discussed the doctrine more than at any other time in its history.⁷²

2. *Horizontal and Vertical Stare Decisis*

Stare decisis is usually described in hierarchical terms: it is the application by a “lower” court of the decisions of a “higher” court, where “higher” is defined as the possession of any power to review a “lower” court’s decision. The obvious example is the application of a Supreme Court decision by the lower federal courts.⁷³ This is known as “vertical stare decisis.” However, the doctrine also has application between coordinate panels of a single court, or between the same court’s previous decisions and the current case. For example, the United States Courts of Appeals typically sit in panels of three judges. A panel decision is binding on all subsequent panel decisions within the same circuit. Likewise, the Supreme Court’s prior decisions have a stare decisis effect on its later cases. This application of the doctrine is termed “horizontal stare decisis.”⁷⁴

While some judges understand both meanings of stare decisis,⁷⁵ others confuse the general doctrine with its specific application to “superior” and “inferior” courts.⁷⁶ Courts and commentators concerned with BAPs have typically devoted their analytical energies solely to the question whether or not a prior decision has come from a “superior” court. They have assumed that if a court is “superior” then obedience

courts were to be binding on subsequent courts. Hence, no court is bound by the decision of any other court in a civil law jurisdiction.” Evan Caminker, *Why Must Inferior Court Obey Superior Court Precedents?*, 46 STANFORD L. REV. 817, 826 (1994).

71. Brookner, *supra* note 5, at 313 n.2; Bussel, *supra* note 5, at 1081 n.76.

72. A LEXIS search for all Supreme Court cases in which the term “stare decisis” appears found 335 of them: In the past 20 years, there have been about 10-14 per term. In the 10 years prior to that, the numbers drop off sharply, to 2-4 per term, and then, in the period back to 1800, the term is mentioned only every few years.

73. Taylor Mattis, *Stare Decisis Among and Within Florida’s District Courts of Appeal*, 18 FLA. STATE U. L. REV. 143, 143-44 (1990).

74. *Id.*

75. See, e.g., *Life Ins. Co. of Va. v. Barakat (In re Barakat)*, 173 B.R. 672, 676 (Bankr. C.D. Cal. 1994) (Mund, J.).

76. For an excellent exploration of the range of justifications for vertical stare decisis, see Caminker, *supra* note 70.

is owed and that if a court is not “superior” then its decisions must not be binding.⁷⁷ Such a slavish devotion to hierarchy without a fair examination of the underlying reasons why hierarchy matters obscures rather than illuminates. As Professor Evan Caminker aptly warns: “[W]e must take care not to confuse the familiar with the necessary: The common law system’s axiom that lower courts must obey superior court precedent needs justification.”⁷⁸ The next two sections will briefly review the rationales which support stare decisis, both as a general proposition and as principle for the operation of a hierarchical system, as well as those rationales which undermine it.

B. Reasons for Stare Decisis

There are a number of ways in which the justifications for stare decisis might be presented. No single justification explains the application of the doctrine in all circumstances or for all courts.⁷⁹ I present the justifications in roughly the order of the frequency with which I have seen them articulated in cases and commentaries, with just a brief description of each.

1. Stability

One common justification for stare decisis is that it promotes stability in the law. Justice Brandeis’ epigram is one often-quoted expression of this idea: “stare decisis is usually the wise policy, because in most

77. See, e.g., *Catalona v. Holdenried (In re Holdenried)*, 178 B.R. 782, 786 (Bankr. E.D. Mo. 1995) (bankruptcy court bound by prior district court decision because “[t]his Court must follow the decisions of a higher court having direct appellate review”); *In re Shattuc Cable Corp.*, 138 B.R. 557 (Bankr. N.D. Ill. 1992) (stare decisis described only as “lower courts are bound to follow the decisions of superior courts” and therefore bankruptcy court not bound by prior district court decision because district court was not superior to bankruptcy court which was a “unit” of the district court); March & Obregon, *supra* note 5 (BAP and district court decisions should not bind any court because neither BAPs nor district courts are functionally superior). But see Bussel, *supra* note 5 (exploring range of justifications for making both BAP and district court decisions binding on bankruptcy courts).

78. Caminker, *supra* note 70, at 826.

79. *Id.* at 817; Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 73-78 (1989).

matters it is more important that the applicable rule of law be settled than that it be settled right.”⁸⁰

At the same time, it is recognized that stability is only a means to an end, not an end in itself. Stability is desirable to the extent that it can “furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise.”⁸¹ Thus, *stare decisis* tends to be of greater importance in areas of law in which people might rely upon a given legal rule to govern their conduct. For example, it is a widely accepted assumption in tort law that the level of care people take in performing a given activity will vary with the governing liability rules, so that if the rules change, so will their behavior.⁸² Likewise, it is widely believed that parties rely upon known legal rules in entering into contractual relationships.⁸³ The reliance aspect of the stability rationale can, however, easily be overstated. “The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains.”⁸⁴ Certainly, the value of stability as a justification for *stare decisis* is less important in areas of law where the legal rule does not necessarily influence people’s behavior, or where the legal rule may not be the only or even the primary influence on behavior.⁸⁵

Nor is the value of stability uniform across time; stability loses its attractiveness as it becomes stagnation. If law is to be an enforcer of

80. *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). See also *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986) (*stare decisis* ensures that “the law will not merely change erratically”). See also Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102-07 (1989) (attributing societal economic benefits of decreased error costs and decreased transaction costs to increased stability provided by *stare decisis*).

81. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970).

82. This idea is discussed in the context of automobile/pedestrian accidents in Chapter 6 of A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 37-51 (1983), and is also discussed in Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 68-69, 82-86 (1989).

83. E.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved”). Contract law and tort law are not the only area where *stare decisis* is thought to be of special importance. See *Marshall v. Baltimore & Ohio Ry.*, 57 U.S. 314, 325 (1850) (“There are no cases, where an adherence to the maxim of ‘*stare decisis*’ is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of the courts”).

84. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 122 (1924).

85. E.g., *Moragne*, *supra* note 81, at 403-04 (allowing cause of action for negligence would not violate stability rationale behind *stare decisis* because it would simply “effectuate well-established rules of primary behavior”).

social values, it must also be a reflection of them. Thus, the concept of stability must include a notion of orderly change over time; too rigid an adherence to stare decisis may actually undermine social stability.⁸⁶ Imagine the consequences if the Court in *Brown v. Bd. of Education* had adhered to the doctrine of separate but equal laid down in *Plessey v. Ferguson*.

The stability rationale is invoked most often to justify vertical stare decisis. However, both theory and practice suggest it is also relevant to the justification of horizontal stare decisis between multi-judge panels. The theoretical relevance arises from the difficulties encountered by groups of people who, by voting or by some other means, must translate the preferences expressed by their individual members into a preference expressed by the whole group. Social scientists who study collective decision-making—the study of social choice—assert that it is impossible to devise a rational method for translating individual preferences into group preferences.⁸⁷ One phenomenon of collective decision-making, which social choice scholars have studied for well over 200 years, is that there may never be any result which can withstand shifting coalitions of voting blocks, even assuming (with a great leap of faith) that everyone involved in the decision process acts in a completely principled way.⁸⁸ Unprincipled behavior simply exacerbates the difficulty of maintaining majority agreement for a given outcome.⁸⁹ This problem, called cycling by social choice theorists, is as inevitable in a three-judge panel as it is in a hundred-member senate.⁹⁰ A rule of stare decisis is at least a partial solution to the problem of cycling, because application of the

86. Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 82-90 (1989) (exploring the justification for stare decisis where changes in society's substantive values change the socially optimal legal outcomes).

87. See generally Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L. REV. 1219 (1994) (reviewing social choice literature); KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d Ed. 1963).

88. Stearns, *supra* note 87.

89. *Id.*

90. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1329-50 (1995) (demonstrating how cycling phenomenon occurs within multi-judge panels); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (demonstrating how it is impossible for the Supreme Court to be consistent over time).

rule slows the rate at which decisions can change over time and thus promotes stability.⁹¹

The practical relevance of the stability rationale to horizontal stare decisis is demonstrated by the experience of the Michigan intermediate court of appeals, which found that where multi-judge panels fail to apply horizontal stare decisis, the law becomes less stable.⁹²

2. Uniformity

Closely related to stability is the idea that stare decisis promotes uniformity in the law. The debate over this justification often depends on which aphorism one prefers: “treat like cases alike” or “two wrongs don’t make a right.” To those concerned that each case be justified on its merits rather than by reference to an established rule, this justification for stare decisis is unpersuasive. Even for those who prefer uniform rules, however, there are problems with this justification. The idea of the first aphorism is that like cases should yield like results; equality before the law means equal treatment by the law. This principle sounds well as it trips off the tongue, but its practical application is like nailing Jell-O to the wall. What constitutes the relevant facts that make one case like another is frequently open to debate.⁹³ Treating people fairly sometimes requires applying different rules, or recognizing that a given rule cannot be uniformly applied without injustice. For example, assume that a local ordinance prohibits people from sleeping in tents within the city limits. The application of that rule to upper -middle-class teenagers frolicking in the park is something quite different from the “uniform” application of the rule to a homeless family camped under the freeway.⁹⁴ Likewise, uniformity, like stability, can degenerate into stagnation. While few doubt that the law strives to be “fair” it is not

91. Stearns, *supra* note 90, at 1329-50.

92. See Taylor Mattis, *Stare Decisis Within Michigan’s Court of Appeals: Precedential Effect of Its Decisions on the Court Itself and on Michigan Trial Courts*, 37 WAYNE L. REV. 265, 285 (1991) (listing areas of confusion and conflict).

93. One such debate occurs in the area of poverty law where scholars argue over what facts should be presented to an adjudicator and how they should be presented. For an especially lucid review and critique of the debate, see Kathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995).

94. Deciding what predicate facts are relevant to the invocation of stare decisis can also be seen as another facet of the hoary debate over rules versus standards. See, e.g., Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 104 (1981) (advocating that judges follow the “meta-rule” established in prior cases rather than “some narrowly defined construction of the precise legal rule”).

always clear that uniform application of a given legal rule is the way to achieve fairness.⁹⁵

3. *Judicial Economy and Efficiency*

Courts frequently intone the mantra that “[t]his court must follow the decisions of a higher court having direct appellate review,”⁹⁶ and that “lower courts are bound to follow the decisions of superior courts.”⁹⁷

It could be that these are normative statements about the value of hierarchy—assertions that the judges of a “superior” court must be obeyed because of where they sit in the hierarchy. The strong version of this normative claim might be that the judges of “superior” courts must be obeyed because they are appointed by virtue of being better judges than those appointed to the “inferior” court. A simple look at who is on the bench suffices to refute this claim; few would assert that Judges Richard Posner or John Minor Wisdom are in any sense inferior to, say, Justice Clarence Thomas. The weaker version of the normative claim would suggest that there is some tendency for more competent jurists to be appointed to the more prestigious positions. However, the question then becomes what value is served by pretending that all superior court judges are inherently smarter and wiser than inferior court judges. That is an even more difficult normative claim to advance than the strong version, for it advocates institutionalizing hypocrisy. If only some are better, why defer to all? And if not deferring to all, then upon what basis does someone (who?) decide exactly which are the better judges?

It is not necessary, however, to defend the mantra as a normative claim. It may instead be supported by two consequentialist claims: that

95. The debate over the proper role of the state in accommodating religious beliefs and actions stemming from those beliefs is another excellent example of claims that a rule, supposedly “neutral” because applied to all persons, is actually discriminatory because people attempting to exercise their religious beliefs “are different in a way that cannot be changed but can only be accommodated.” Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1140 (1990) (analogizing theory of accommodation for free exercise of religion to handicap discrimination where “the paradigmatic instance . . . is treating people who are fundamentally different as if they were the same”).

96. *Catalona v. Holdenried* (*In re Holdenried*), 178 B.R. 782, 786 (Bankr. E.D. Mo. 1995).

97. *In re Shattuc Cable Corp.*, 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992).

the “path-of-review” justifies stare decisis, and that appellate courts are just better at getting the law right than are trial courts. I consider each of these claims in turn.

The first claim is that by establishing a path of review, the principle of stare decisis promotes judicial economy and leads to more efficient decision-making. The lower court’s adherence to a rule laid down by the appellate court saves the litigants the time and expense of appealing against a foregone conclusion. The lower court’s obedience also conserves judicial resources: the resources of the appellate judiciary,⁹⁸ and its own. The ability to rely upon precedent frees the trial court from re-inventing the wheel or becoming expert in all areas of the law that come before it.

The path-of-review rationale justifies vertical stare decisis more than horizontal stare decisis. It also almost proves too much. That is, it assumes, as the footnoted quote from *Moore’s* demonstrates, that chaos would ensue without vertical stare decisis. But the very reasons for the rule in the first place would appear to operate to restrain trial judges as much as the rule itself—few people wish to reinvent the wheel or to learn every area of law in order to make an informed decision. Often, regardless of whether there is a formal rule or not, prior decisions of reviewing courts will be followed because that is the easiest action to take. Moreover, there is another, very practical, reason for lower court judges to obey higher court decisions. “Judges follow the decisions of higher courts because they know that the higher courts will reverse if they don’t and the value of the trial court’s decisions (and hence his or her effectiveness as a judge) will be diminished if he or she is always reversed.”⁹⁹

The second consequentialist claim for strong vertical stare decisis is that the appellate courts are inherently better decision-makers and are more likely than a trial court to find or establish the correct legal rule. This has little to do with the individual abilities of the appellate judge and everything to do with the structure of the appellate court. This idea is something more than “three heads are better than one.” Since appellate panels are solely in the business of hearing appeals, they are institutionally more competent to decide them. The legal issues will have been defined below. The parties will brief the issues more

98. 1B *Moore’s Federal Practice* (2d Ed. 1990) ¶ 0.402[1] at 10 n.14 (“unless the inferior courts make a good faith effort to follow the decisions of the courts with jurisdiction to review their judgments, appeals would be endless”). For an exposition of the economic justifications for stare decisis, see Macey, *supra* note 80; Kornhauser, *supra* note 86.

99. *In re Muskin*, 151 B.R. 252, 254 (Bankr. N.D. Cal. 1993) (Jaroslovsky, J.).

carefully than at trial, where the demands of fact-finding may absorb their resources. The appellate panel will likewise not be distracted by the trial from concentrating on the law and will have more time and resources to consider the law than does the trial judge. Finally, communication between the judges will lead to a better result since each judge can test the soundness of his or her reasoning against the others.¹⁰⁰

Of course, once an issue has received the benefit of a variety of judicial opinions, this justification weakens. That is, a trial court may be able to overcome some of the disadvantages of lack of time, lack of proper briefing, and lack of colleagues if there are a variety of easily discovered decisions on point. And, indeed, one often sees in trial court opinions careful research and thoughtful analysis of points of law on which there is a great deal of controversy.¹⁰¹

4. *Judicial Legitimacy*

A fourth justification for stare decisis is that it promotes two fundamental principles of American democracy and so protects the legitimacy of the judiciary. One such fundamental principle is that no

100. Indeed, purely as a function of probability, a group of judges is more likely to reach the "right" result in a given case than is an individual judge, assuming that each judge on the panel is more likely than not to individually find the correct rule. I emphasize that this only works when each panel judge is also more than 50% likely to reach the right result sitting solo. So, where x = probability of a "right" result ($x > 50\%$), and y = probability of a "wrong" result ($y = 100\% - x$), then for a three-judge panel the probability of a "right" result is given by the formula $x^3 + 3x^2y$; for a court with nine members, deciding by majority vote, the formula would be $x^9 + 9x^8y + 36x^7y^2 + 84x^6y^3 + 126x^5y^4$. Thus, if each judge on a three-judge panel has an 80% probability of reaching the "right" result sitting alone, then voting together they have an 89.6% probability of reaching the correct disposition. This calculation also assumes each judge remains independent of the others. A strong-willed judge would affect the outcome either way depending on that judge's brilliance or stupidity.

101. Further, as Evan Caminker points out, this justification may also weaken in situations calling for the exercise of equitable discretion. Caminker, *supra* note 70, at 849 n.128. He argues that just as the trial court is best suited to judicial fact-finding, so it is institutionally best suited to make equitable decisions and to create equitable exceptions. His suggestion is, however, only one side of the debate over the adage "hard cases make bad law." It may be that trial courts are too close to a case to appreciate how an equitable ruling in the case before them could lead to inequitable decisions over time. But it also may be that more remote courts simply lack the discipline, imagination or flexibility to prevent equitable exceptions from becoming lawless exercises of arbitrary will.

person, and hence no judge, is above the law. To view judicial decisions as products of uncontrolled willfulness on the part of a judge would rob those decisions of whatever moral power they have to command obedience. Courts have little power to coerce obedience directly and so must rely upon the acceptance of their decisions as reasoned products of disinterested minds. A dramatic example was the State of Georgia's defiance of *Worcester v. Georgia*,¹⁰² where the Supreme Court held that under treaties made by the United States with the Native American tribes, certain lands in Georgia desired by white settlers belonged to the Cherokees. The decision did nothing to help the Cherokees; they were forcibly removed anyway. President Andrew Jackson refused to help, reputedly sneering "John Marshall has made his decision, now let him enforce it."¹⁰³ The quote is apocryphal, although Jackson was in complete sympathy with the Georgians. But Jackson also recognized that federal power was too weak to support the Supreme Court's mandate. Without that support, the mandate was worthless:

"The decision of the supreme court has fell [stillborn], and they find that it cannot coerce Georgia to yield to its mandate, and I believe Ridge¹⁰⁴ has expressed despair, and that it is better for them to treat and move. In this he is right, for if orders were issued tomorrow one regiment of militia could not be got to march to save them from destruction and this the opposition know, and if a collision was to take place between them and the Georgians, the arm of the government is not sufficiently strong to preserve them from destruction."¹⁰⁵

102. 31 U.S. (6 Peters) 515 (1832).

103. GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA 1828-1848*, 49 (1959).

104. Major John Ridge was a leader of the Cherokee party that held out against the Georgians. He did indeed "treat" on December 29, 1835, and moved his party west. IV *CORRESPONDENCE OF ANDREW JACKSON*, John Spencer Bassett (ed.) 430 n.2 (editor's note) (1929).

105. *Id.* at 430. In the 1820s, encouraged by a series of treaties with the United States, the Cherokees had established themselves as a farming community in Georgia. The treaties guaranteed their sovereignty. When gold was discovered on their land, however, the Georgia legislature and Governor Lumpkin quickly enacted statutes which renounced the treaties, appropriated the lands, and extended state jurisdiction over all Indian lands. One Corn Tassels, a Cherokee, committed murder on Indian land. He was arrested, tried, and convicted under Georgia law and sentenced to hang. He and the Cherokee tribe appealed to the Supreme Court to declare his sentence void because under the treaties he should have been tried and punished under tribal law. The Supreme Court issued a writ for Governor Lumpkin to show cause why Corn Tassel should not be released. Lumpkin ignored the writ and had Tassel hanged, which mooted that appeal. See *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Peters) 1 (1831). One year later, a Congregationalist minister, Samuel Worcester, was sentenced to four years at hard labor for failing to obtain a state permit to live on Indian lands. Again, he and the Cherokee tribe appealed to the Supreme Court to reverse. This time, the Court was able to hear the case and issued an opinion (written by Marshall) and an order nullifying the sentence and declaring the above-described statutes unconstitutional. *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832). Again, the Supreme Court's order was ignored,

In general, however, litigants obey court decisions. In large part they do so because such decisions are seen as the product of reasoned application of legal rules and not mere politics or personality. Thus, "stare decisis" is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of "the judiciary as a source of impersonal and reasoned judgments."¹⁰⁶ Maintaining the perception that judges reach decisions on the basis of legitimate legal principles, that judges are not above the law is, I suggest, a key reason favoring stare decisis.

Another fundamental tenet of American democracy which stare decisis supports is the concept of majority rule. The democratic ideal is that the legislature makes the laws, the executive carries them out, and the judiciary enforces them (unless it finds them unconstitutional). However, the reality is that the legislature cannot foresee all contingencies and may deliberately avoid providing even for those it can foresee because it is unable to make hard political choices. Consequently, statutes are frequently ambiguous. Sometimes the ambiguities are resolved by the formulation of administrative rules, but at least as often they are resolved by judicial decisions. "[T]he courts, the most electorally non-accountable body of government, routinely choose between a variety of possible constructions of a legislative act, any one of which the legislature could have legitimately chosen."¹⁰⁷ By following a strict rule of stare decisis with respect to statutory interpretation, the courts can send a clear signal to Congress that it cannot completely abdicate its legislative function:

Worcester was not released, and the Cherokees were driven out of their lands. See Rebecca BROOKS GRUVER, *AN AMERICAN HISTORY* 370-72 (1972); VAN DEUSEN, *supra* note 103; ADRIENNE SIEGEL, *THE MARSHALL COURT 1801-1835* at 175-87 (1987).

106. *Payne v. Tennessee*, 501 U.S. 808, 852 (Marshall, J., dissenting) (quoting *Moragne v. States Marine Lines*, *supra* note 81). See also, *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-87 (1986) (White, J., dissenting) (without stare decisis, "deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results"); *Vasquez v. Hillary*, 474 U.S. at 265 (1986) (stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

107. Lawrence C. Marshall, "*Let Congress Do It*": *The Case for An Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177, 206 (1989) (advocating strict application of stare decisis to decisions construing federal statutes).

We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.¹⁰⁸

Thus, by unwavering interpretation of a statute, a court can advance an important democratic value. By declining, in effect, to usurp the majoritarian norm, it can put the onus on the electorate to direct the legislature to correct any “erroneous” interpretation. For example, a debate in Congress between two legal rules may lead to statutory language which is worded so ambiguously that it could be interpreted to support either rule. Congress will be unlikely to succeed in overriding whichever rule the judiciary “interprets” the statute to express (because otherwise Congress could have chosen the other rule in the first place). The electorate, however, assuming it had the requisite knowledge and concern about the issue, could instruct or elect representatives to “correct” the law if the electorate knew that *stare decisis* would prevent the judiciary from altering its interpretation. Contrariwise, the absence of legislative correction does not serve the same majoritarian norms; collective silence should not be construed as collective consent to a particular interpretation.¹⁰⁹

In sum, a rule of *stare decisis* is not itself a democratic rule. It does nothing to change the autocratic nature of a judicial decision. But it does promote the majoritarian value of democracy indirectly by enabling the judiciary to resist the temptation repeatedly to “legislate” on the same subject by interpreting and re-interpreting a particular statute.

The force of this rationale for *stare decisis* varies with the circumstances, as do other rationales. For example, in jurisdictions where the judiciary is elected, the rationale may lose considerable force to the argument that the judiciary is as answerable to the electorate as the legislature, and the judge who advances an unpopular interpretation of a statute risks losing the next election.¹¹⁰ Likewise, the less one believes that law and politics can or should be separated, the less sensible this rationale becomes. The idea that *stare decisis* prevents the

108. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

109. See Marshall, *supra* note 107, at 193-96 (arguing that democratic legislative process is undermined by judicial reliance on Congressional silence or inaction); see also William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

110. However, the idea of a judiciary responsive to the electorate, while popular a century ago, has fallen out of favor in the past 50 years. See David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 10 (1992).

usurpation of political powers which properly belong in the legislature becomes problematic: since the political predilections of judges already pervade their decisions, to follow a prior interpretation of a statute is merely to give force to the political will of another judge at an earlier time. It is, in effect, to vote the party line—and it does not withdraw the judiciary from the realm of the political.

5. A Constitution or Statute Requires

Finally, *stare decisis* may be required by either a constitution or statute. For example, when the United States Constitution speaks in terms of a “supreme” court and “inferior” courts, it arguably requires that all federal courts obey Supreme Court precedent. Article I empowers Congress to “constitute Tribunals inferior to the supreme Court” and Article III provides that “[t]he 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.” Some scholars read these clauses as establishing “inferior” courts which are subservient to the “supreme” court.¹¹¹ Others, however, read the term “inferior” as referring to a lesser degree of jurisdictional authority than the term “supreme.”¹¹²

Even if the Constitution were read as requiring “inferior” federal courts to follow Supreme Court precedent, however, the justification would extend only from the lower federal courts to the Supreme Court and would not speak either to the relationship between lower federal

111. Caminker, *supra* note 70, at 828-38.

112. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating The Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 254-59 (1985) (arguing that the Supreme Court is “supreme” because, among other reasons, it is the court of last resort, the only court from which no appeal lies); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1180 n.139 (1992) (suggesting that the terms “inferior” and “supreme” could refer to the differing geographical jurisdictions assigned to each tier of courts). My own historical study of why the “Supreme” Court of New York is not and has never been the court of last resort leads me to conclude that the terms “supreme” and “inferior,” without more, are as likely to refer to a concept of geographical jurisdiction as a concept of obedience. See Bryan T. Camp, *Politics and Power in the Court for the Correction of Errors*, (1988) (unpublished M.A. thesis, University of Virginia) (on file with author) (discussing how the Supreme Court of New York was “supreme” not in the sense that it had the final word on what rule of law would prevail, because it most assuredly did not, but because its word, until such time as it was reversed by the Court for the Correction of Errors, was binding on all lower courts throughout the state).

courts themselves (i.e. between trial and appellate courts) or to the relationship between state courts and the Supreme Court.

Likewise, while the Constitution could be said to require state courts to follow federal decisions on federal law under the Supremacy Clause, it is also arguable that the Judiciary Act of 1789 § 34 (the Federal Rules of Decision Act) requires federal courts to apply *stare decisis* to issues of state law decided by state courts. The Rules of Decision Act provides that “[t]he laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the court of the United States in cases where they apply.”¹¹³

It was certainly argued in early Supreme Court cases that the Supreme Court (and other federal courts) must abide by state court precedent on state law issues.¹¹⁴ As is well known, this argument was squashed on two grounds in *Swift v. Tyson*.¹¹⁵ First, state court decisions were not “laws” within the meaning of the Judiciary Act because court decisions did not “make” laws but were only evidence of what the law was. Second, if state and local court decisions on matters of “general law” were binding, that would lead to chaos in the federal system.¹¹⁶ *Swift* was itself overruled by *Erie v. Tompkins*,¹¹⁷ with the interesting comment: “[I]f only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.”¹¹⁸

Thus, it is not too much to say that the Rules of Decisions Act, as interpreted since 1938, commands the federal courts to obey the state courts of last resort as to issues of state law. In effect, it establishes a limited *stare decisis* rule for federal courts.

C. *Reasons Against Stare Decisis*

Although the above justifications support a rule of *stare decisis* under some circumstances, it does not follow that a rule of *stare decisis* is desirable in all situations. As described above, each justification applies

113. Federal Rules of Decision Act (originally codified at 28 U.S.C. § 725 (1940)) (codified as amended, at 28 U.S.C. § 1652 (1997)).

114. *See, e.g.*, *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842) (counsel arguing that New Jersey Supreme Court precedent interpreting land grant patent should have preclusive effect under doctrine of *stare decisis*).

115. 41 U.S. (16 Pet.) 1, *overruled by* *Erie v. Tompkins*, 304 U.S. 64 (1938).

116. *Martin*, 41 U.S. 367, at 1.

117. *Erie*, 304 U.S. 64 (1938).

118. *Id.* at 77-78. For a discussion of the relationship of *stare decisis* to statutory construction, *see supra* text accompanying note 107.

more strongly in some circumstances than in others. In addition, there are several reasons why stare decisis may sometimes run counter to other worthy legal doctrines and policies.

1. The Law Will Be Better Developed

One problem with a strict rule of stare decisis is that it requires obedience to the “first out” decision. There is no a priori reason to believe that the first decision to come out of an appellate court is any better than the second or third decision. In fact, if anything, the intuition is that the later decisions will be more valuable and so should be accorded more respect.¹¹⁹

The United States generally does not follow a “first out” rule. Instead, there are two important ways in which the legal systems operating within the United States eschew stare decisis in favor of legal diversity and non-uniformity, a situation that some (especially civil law students learning common law) find distressingly confusing.

First, the United States is unique among the world’s legal systems in the degree to which it is a federal system. It contains over fifty non-federal jurisdictions applying their own local laws, which must be respected by the national courts. One cannot expect the laws of over fifty jurisdictions to be uniform, and they are not. Far from considering it a liability, however, our jurisprudence celebrates this diversity of laws and legal regimes.

Second, the federal courts are structured so that a “first out” decision does not necessarily control subsequent decisions. That is, the Supreme Court has great discretion in deciding what cases it will take under consideration. Rule 10 of the Supreme Court Rules makes it clear that a petition for a writ of certiorari “will be granted only when there are special and important reasons therefore.” In describing those reasons, the Court Rule speaks in terms of conflict. It favors for consideration issues over which there are conflicts between and among the courts of appeals or state courts of last resort, and cases in which any court’s decision of a federal question “conflicts with applicable decisions of this

119. See Julia R. Hathaway, Note, *Conflict Resolution Among Panels of the Michigan Court of Appeals Under Administrative Order 1994-4*, 41 WAYNE L. REV. 1409 (1995) (arguing against “first out” rule promulgated by Michigan Supreme Court requiring intermediate courts of appeals to obey the first panel decision on a subject until the rule thereby established is overturned by the Supreme Court).

Court.” The idea behind this principle is that conflict is good. The Court recognizes that the “first out” opinion on any given issue by a circuit does not preclude another circuit from deciding differently. Conflicting circuit opinions allow legal issues to “percolate,” and it may be that a legal problem will work itself out through this process. Far from being harmful, a short-term diversity of legal rules may actually help the long-term resolution of a legal problem. In this way, a legal regime freed from strict stare decisis may actually develop better law if orderly change is provided for by other mechanisms.

2. *Judicial Economy and Legitimacy*

To be effective, stare decisis requires that the judge applying the doctrine be able to distinguish between dicta and holdings. This is often quite hard to do.¹²⁰ Adherence to stare decisis thus consumes judicial resources as courts try to parse past decisions to discover what is binding and what is not. Worse, it consumes judicial resources as judges twist precedent to justify the desired results.¹²¹ Either way, stare decisis wastes time and effort, and undermines judicial legitimacy if the doctrine is observed only in the breach.

IV. THE CONFLICT BETWEEN STARE DECISIS AND CONSTITUTIONAL CONCERNS

A. *Bankruptcy and District Courts Should Be Bound by BAP Decisions*

Considering only the ideas behind stare decisis, and putting aside for the moment the constitutional concerns involved, I submit that both bankruptcy and district courts should be bound by BAP decisions to the same extent they are bound by circuit court decisions.¹²² Specifically,

120. Compare Werner, *supra* note 67, at 642-47 (arguing that the reasoning of the court is not part of the court’s decision for purposes of stare decisis), with Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000-09 (1994) (after collecting case law demonstrating significant confusion, arguing that the reasoning of the court is integral to the court’s decision for purposes of stare decisis).

121. TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711, 2742 (1993) (O’Connor, J., dissenting) (judges “know how to mouth the correct legal rules with ironic solemnity while avoiding those rules’ logical consequences.”) (quotation marks and citations omitted); see generally Caminker, *supra* note 70, at 819-20, (reviewing literature documenting state and lower federal courts’ attempts to evade Supreme Court precedent).

122. These considerations also lead to the conclusion that horizontal stare decisis should apply as between BAP panels as it does between panels of the circuit courts of appeal. That has long been the rule in the 9th Circuit BAP. See, e.g., Ball v. Payco-

the stability, uniformity, and legitimacy justifications support assigning BAP decisions the same weight as circuit court opinions. Those courts and commentators who have pointed out how the judicial economy and efficiency justification does not support a stare decisis rule under the current structure are correct in part, but since most of them consider only the path-of-review justification, they err in stopping their analysis at that point and concluding that stare decisis has no application. Likewise, while considerations of federalism as reflected in the Rules of Decision Act or the Constitution do not compel stare decisis, nonetheless to the extent that the Constitution's provision of uniform rules for bankruptcy reflects the American experience under the Articles of Confederation, the Constitution reflects a conclusion that bankruptcy law is not an area where diversity of the law is valued. Finally, it is unlikely that applying stare decisis will produce hypocrisy in the bankruptcy arena any more than in other areas of law where the doctrine is well accepted. The following sub-sections expand on each of these points in turn.

1. Stability

Stability—the consistent application of rules over time—is as important in bankruptcy as in any other area of law. Many of bankruptcy's legal rules directly affect both pre- and post-petition behavior. For example, creditors need to know whether they may retain funds before seeking permission to set-off.¹²³ Likewise, creditors and debtors often need to know how to write agreements so that the consequences of bankruptcy on the agreements are known and predictable.¹²⁴ Most importantly, bankruptcy trustees need to know the range of actions they are permitted or required to take to augment the estate, run the business, and satisfy the debtor's creditors.

While instability in bankruptcy law may result from a variety of factors and not simply from bankruptcy judges' refusal to give stare decisis effect to district court or BAP decisions, the fact that there are

General American Credits (*In re Ball*), 185 B.R. 595 (B.A.P. 9th Cir. 1995) (BAPs will adhere to prior BAP opinions unless and until overruled by the Court of Appeals).

123. See *Citizens Bank of Md. v. Strumpf*, 116 S.Ct. 286 (1995).

124. See, e.g., *In re General Assoc. Investors Ltd. Partnership*, 150 B.R. 756 (Bankr. D. Ariz. 1993) (questioning whether, in financing hotel, bank's deed of trust, assignment of lease and rents, and financing statement for debtor's resort included as security revenue derived from rental of rooms or facilities).

316 bankruptcy judgeships makes it considerably more difficult to develop legal rules that have staying power. By the same token, the situation becomes even less stable when more than 316 judges are reviewed by over 649 district judges sitting in ninety-four different district courts, none of whom are bound to follow the decisions of the others. It is not until one arrives at the circuit court level that order is established.

It is not only the number of judges, but also the intermediate layer of review which adds uncertainty over whether anything will be settled. For example, in Fiscal Year 1994 (FY94) 837,797 bankruptcy petitions were filed, 4,892 appeals were taken to the district courts and 1,382 appeals were taken to the circuit courts.¹²⁵ During FY94, the circuit courts disposed of 1,337 cases, 650 on their merits.¹²⁶ Interestingly, the 1,337 dispositions resulted in 931 reported opinions.¹²⁷ Of those 931 opinions, over one third (336) came from the Ninth Circuit.

If one assumes that these numbers are also a fair reflection of the dynamic picture—that is, that for every 840,000 petitions filed, approximately 5,000 will ask for intermediate review and 1,400 will seek circuit court review—then one can appreciate how, if the bankruptcy judges were answerable directly to the circuits or a BAP in each circuit, conflicting decisions over points of bankruptcy law could be harmonized far more quickly within each circuit. For example, when a hotel files for bankruptcy protection, everyone involved wants to know how to treat post-petition room revenues. Secured lenders want those monies treated as “rents” within the meaning of Bankruptcy Code section 552 because then the revenues will be treated as “cash collateral” under Bankruptcy Code section 363(a), and the lenders will be entitled to certain protections before the debtor could use the revenues. Naturally, debtors want the monies treated as something other than rents. Before 1994, the state of the law on this question was “incoherent” in the Ninth Circuit.¹²⁸ Although a BAP had held in early 1991 that the revenues were not rents but money paid on accounts,¹²⁹ its decision did not settle the question because of the uncertain stare decisis effect of its opinion.¹³⁰

125. 1994 ANN. REP. OF THE DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS., Tables B-1, C-2, and F, respectively.

126. *Id.* Table B-1.

127. Per LEXIS search of BKRTCY library, CASES file, searching for “COURT (circuit) and DATE (aft September 30, 1993) and DATE (bef October 1, 1994).” Note that not all cases reported on LEXIS are considered published precedent.

128. *In re Hotel Sierra Vista Ltd.*, 112 F.3d 429, 431 n.2 (9th Cir. 1997).

129. *In re Northview Corp.*, 130 B.R. 543 (B.A.P. 9th Cir. 1991).

130. Compare *In re Thunderbird Inn*, 151 B.R. 224 (Bankr. D. Ariz. 1993) (bound by BAP decision), with *In re General Assoc. Investors Ltd. Partnership*, 150 B.R. at 756;

Until Congress clarified the matter in the Bankruptcy Reform Act of 1994 to include post-petition room revenues as property within the meaning of sections 552 and 363,¹³¹ the fact remained that neither lenders nor borrowers could predict which rule would obtain, regardless of the wording used in the loan security documents (deeds of trust, etc).¹³²

Accordingly, the stability rationale strongly supports applying stare decisis to BAP decisions. As one jurist aptly noted:

A bankruptcy judge who feels free to disregard Appellate Panel decisions deprives every attorney in his or her territory of the ability to predict the outcome of a bankruptcy dispute, at least at the trial court level. It is the attorneys, and not the judges, which make any legal system work by counseling their clients and crafting compromises so that only a small portion of potential disputes ever actually come before the judge for adjudication. Published court decisions, whether favorable or unfavorable to particular position, are the tools a competent lawyer uses in advising his or her clients. The bankruptcy judge who refuses to feel bound by Appellate Panel decisions takes this tool away from the attorneys and thereby harms the system.¹³³

2. Uniformity

The term "uniformity" in bankruptcy is usually taken to mean geographic uniformity, the elimination of differences in the treatment of debtors who live in different places. One goal of the current system is to give the same fresh start to debtors in California as to debtors in West Virginia. The idea is to remedy the problem illustrated by early cases in which the resident of one state was not able to gain a true fresh start

cf. In re Everett Home Town Ltd., 146 B.R. 453 (Bankr. D. Ariz. 1992) (not bound by BAP decision). Although the BAP opinion turned in part on Arizona property law, that state's treatment of room revenues is not significantly different from other states' treatment. See *Northview Corp.*, 130 B.R. at 543.

131. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. 11 U.S.C.S. §§ 363, 552 (Law. Co-op. 1997).

132. Note that this is not a situation which parties can contract around. Here, the rule really does matter because § 552 is one of those bankruptcy provisions which alter contractual arrangements. See, e.g., *In re Thunderbird Inn*, 151 B.R. at 225 (court assuming that the trust deed contained language sufficient to bring room revenues within the meaning of the parties' security agreement but nonetheless finding that, based on *In re Northview Corp.*, 130 B.R. at 543, the lender's interest in post-petition room revenues was cut off by section 552(a), the room revenues were not "cash collateral" within the meaning of Bankruptcy Code section 363(a), and therefore the lender was not entitled to adequate protection from debtor's use of the revenues).

133. *In re Muskin Inc.*, 151 B.R. 252, 255 (Bankr. N.D. Cal. 1993).

because that state's insolvency laws could not affect contracts made or obligations incurred in other states.¹³⁴ Even with the extension of the national bankruptcy laws to debtors of all sorts—businesses and municipalities, as well as individual consumers—the application of a “uniform” rule to diverse regimes of state property law has results that are not uniform. Thus, the lack of uniformity in bankruptcy law, even more than the lack of stability, is due not only to the failure of bankruptcy judges to be bound by the BAPs, but is also caused by the interplay of varying state law regimes with the Bankruptcy Code.¹³⁵

Reducing the number of decision-makers, however, would help reduce the divergence of opinions and help establish uniform treatment of debtors, just as it would increase stability. For example, consider the proper interpretation of Bankruptcy Code section 523(a)(1)(C), which prevents a debtor from receiving a discharge for otherwise dischargeable tax liabilities that the debtor “willfully attempted in any manner to evade or defeat.” The question is under what standard a debtor should be held to have “willfully attempted.” For over ten years courts struggled to find a common standard of proof of willfulness. Some required proof that measured up to the standard used in the criminal statute for felony tax evasion.¹³⁶ Others adopted the more lenient civil standard of willfulness, achieving opposite results on similar facts.¹³⁷

The difference in standards leads to a difference in treatment. It is universally acknowledged that “the purpose of the Bankruptcy Code is to allow the honest debtor a fresh start.”¹³⁸ But the choice of standard can determine who does and does not fall within the category of “honest debtors.” For example, the bankruptcy court in *In re Toti* used the criminal standard of willfulness to find the debtor honest, but was

134. *E.g.*, *Cook v. Moffat*, 46 U.S. 295 (1847) (Maryland consumer debtor unable to escape obligations to New York merchant because the discharge given under Maryland law was ineffective as to the obligation incurred in New York).

135. One obvious example of this is seen in Bankruptcy Code § 522, which allows a debtor to exempt out of the bankruptcy estate property that “is exempt under . . . State or local law.” *Id.* Thus, while all states may allow a debtor a homestead exemption, some states (such as Texas) place no cap on the value such exemption may have, whereas other states (such as Virginia) limit the value of the homestead exemption (as does the available federal exemption provision in Bankruptcy Code § 522(d)).

136. *See* I.R.C. § 7201. *See e.g.*, *In re Gathwright*, 102 B.R. 211 (Bankr. D. Or. 1989) (debtor's conduct in filing late returns and understating income not sufficient to show willful intent to evade payment of taxes; court refused to consider proof of evasion of payment).

137. *See, e.g.*, *In re Berzon*, 145 B.R. 247; 252 (Bankr. N.D. Ill. 1992) (debtor's conduct in filing late returns and understating income sufficient to show a willful attempt to evade payment of taxes); *see also In re Harris*, 49 B.R. 223 (Bankr. W.D. Va. 1985) *modified on reconsideration* 59 B.R. 545 (Bankr. W.D. Va. 1986).

138. *In re Toti*, 24 F.3d 806, 809 (6th Cir. 1994).

reversed by the district and appellate courts, who decided that debtor honesty should be measured by the civil standard.¹³⁹ Beginning with the appellate opinion in *Toti*, courts appear to have reached a consensus that although “Congress did not intend that a failure to pay taxes, without more, should result in the nondischargeability of a debtor’s tax liabilities in bankruptcy,”¹⁴⁰ the government must nonetheless prove only that the debtor’s actions were voluntary, conscious and intentional, (as opposed to accidental), which is the civil standard of willfulness used in such statutes as I.R.C. § 6672 (the Trust Fund Recovery Penalty).¹⁴¹

If BAP decisions were binding on all courts within a circuit, greater uniformity would be achieved more quickly because the number of decision makers would be reduced. Debtors would be less subject to disparate treatment at the trial court level. Like the goal of stability, the goal of uniformity supports giving circuit-wide stare decisis effect to BAP opinions.

3. *Judicial Economy and Efficiency*

The BAP is a three-judge panel which is established primarily to review cases for errors of law. As such, it plays an identical role to the circuit courts and possesses identical virtues of economy and efficiency: it is a specialized tribunal with three brains at work and all parties focused on the legal questions. To this extent, the judicial economy rationale supports making BAP decisions binding on both bankruptcy and district judges, who are institutionally less able to give thoughtful consideration to the legal issues than appellate judges.¹⁴² Moreover, the current side-by-side system is widely viewed as incompetent to

139. *In re Toti*, 141 B.R. 126 (Bankr. E.D. Mich. 1992), *rev’d* U.S. v. *Toti*, 149 B.R. 829 (E.D. Mich. 1993), *aff’d In re Toti*, 24 F.3d 806 (6th Cir. 1994).

140. *In re Haas*, 48 F.3d 1153, 1157 (11th Cir. 1995).

141. See *In re Birkenstock*, 87 F.3d 947 (9th Cir. 1996); *Dalton v. IRS*, 77 F.3d 1297, 1302 (10th Cir. 1996) (following *Toti*); *Matter of Bruner*, 55 F.3d 195, 200 (5th Cir. 1995) (agreeing with *Toti*); see also *In re Sumpter*, 64 F.3d 663, 76 A.F.T.R.2d (P-H) 95-6408 (6th Cir. 1995) (holding that the words “in any manner” are broad enough to encompass attempts, whether or not successful, to thwart the payment of taxes).

142. *In re Muskin*, 151 B.R. 252, 254-55 (Bankr. N.D. Cal. 1993) (“Ego aside, there is no good reason why a bankruptcy judge should want to spend hours struggling with a complicated and thorny issue when three other bankruptcy judges have already done the same thing, reached a conclusion, and published a decision for the benefit of all.”).

provide “the desired certainty of outcome.”¹⁴³ As the examples given above suggest, according circuit-wide binding effect to BAP decisions would not only provide greater certainty and uniformity, but also increase judicial efficiency by speeding the resolution of controversial issues that might otherwise spend far longer “percolating” among the bankruptcy and district courts before being addressed by one or more circuit courts.

Undercutting these efficiency arguments, however, is the fact that the BAPs do not necessarily lie in the path of review from bankruptcy courts. One cannot predict that an appeal will go to a BAP. The fact that there is no horizontal stare decisis between district judges adds even more uncertainty to the outcome of an appeal. Therefore, according stare decisis effect to BAP decisions will not necessarily reduce the numbers of appeals taken, especially to the district courts. This is the main argument that both Bankruptcy courts and commentators have used to justify failures to follow district court and BAP decisions.¹⁴⁴ Since bankruptcy judges do not know at the time they make a decision whether it will be a BAP or a district court that will hear any appeal, and since no district court has so far considered itself bound by a BAP, it is no surprise that many bankruptcy judges feel free to disregard BAP decisions.¹⁴⁵

As I have tried to show, however, the fact that another court will be able to reverse a judge is not the only reason for that judge to give binding effect to that court’s decisions. There are many other reasons—including reasons of efficiency. The lack of a path-of-review justification, which itself is only part of the larger judicial efficiency

143. See *Life Ins. Co. of Va. v. Barakat (In re Barakat)*, 173 B.R. 672, 679 (Bankr. C.D. Cal. 1994) (noting that if district judges can ignore BAP interpretations in the same way that one circuit court of appeals “respectfully disagrees” with another circuit court of appeals, then “litigants never know what the binding interpretation of the law will be” until the court of appeals in that circuit resolves the conflict). See also NBRC Final Report, *supra* note 6, at 765 (under current view that BAP opinions cannot create binding precedent, “BAPs may actually accelerate the divergence of views on various legal questions”).

144. See, e.g., *March & Obregon, supra* note 5; *First of Amer. Bank v. Gaylord (In re Gaylor)*, 123 B.R. 236, 242 (Bankr. E.D. Mich. 1991). One can expect this argument to be made even more forcefully in those circuits, such as the Second Circuit, where BAPs have been adopted by only some of the judicial districts.

145. See *State of Or. Higher Educ. Assistance Found. v. Selden (In re Selden)*, 121 B.R. 59 (D. Or. 1990) (using path-of-review rationale to hold that BAP opinion in case arising from Central District of California was not binding on bankruptcy court in District of Oregon). But see *Life Ins. Co. of Va. v. Barakat (In re Barakat)*, 173 B.R. 672 (Bankr. C.D. Cal. 1994) (holding BAP decision binding circuit-wide despite path-of-review rationale because “there is no reason that both the BAP and the district court appellate decisions must have identical [e]ffect, authority, or jurisdiction”).

rationale for stare decisis, is not sufficient cause to reject the doctrine's application to BAP decisions without examining the extent to which other justifications apply. Moreover, if district courts were bound by BAP decisions, the lack of direct review of district court opinions by BAPs would be of even less importance. I discuss this intriguing possibility in Part IV.

4. *Judicial Legitimacy*

By refusing to accord stare decisis effect to BAP decisions, bankruptcy courts impair their legitimacy "as a source of impersonal and reasoned judgments."¹⁴⁶ One bankruptcy judge chastised his colleagues for doing so:

[I]t is in my opinion wrong, and in some sense shameful, for a bankruptcy judge to feel free to disregard an Appellate Panel decision in the absence of a conflicting ruling by the district court. When a bankruptcy judge disregards an Appellate Panel decision on his or her own, merely because he or she disagrees with it, that bankruptcy judge is letting his or her ego interfere with the system itself.¹⁴⁷

The self-restraint problem can be especially acute in areas of the law, such as bankruptcy, where the process is seen as primarily equitable in scope. Bankruptcy judges are called upon to do equity between competing concerns, constantly balancing the debtor's interest in a fresh start with the creditors' interest in fair treatment.¹⁴⁸ While the problem

146. *Payne v. Tennessee*, 501 U.S. 808, 852 (1991) (Marshall, J., dissenting).

147. *In re Muskin*, 151 B.R. at 254 (Jaroslovsky, J.). Judge Jaroslovsky's enthusiasm for stare decisis was sorely tested in a later case, *Stokes v. Vierra*, 173 B.R. 417, 418 (Bankr. N.D. Cal. 1994), *remanded* 185 B.R. 341 (N.D. Cal. 1995), where the judge reluctantly decided he was bound to follow a BAP opinion (a 2-1 panel split, no less) with which he strongly disagreed. The district court did not express an opinion on the stare decisis question, however, because it did not think the bankruptcy court had read the BAP opinion correctly; it remanded the case for further proceedings in light of its interpretation of the BAP opinion.

148. In fact, at least one circuit has held that it is precisely the equitable nature of the bankruptcy court's jurisdiction which, when a creditor files a claim before the bankruptcy court, destroys that creditor's "right to adjudicate before a jury any issue that bears directly on the allowance of that claim." *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323, 1329 (2d Cir. 1993) ("It is reasonable that a creditor or debtor who submits to the equity jurisdiction of the bankruptcy court thereby waives any right to a jury trial for the resolution of disputes vital to the bankruptcy process . . . and does so not so much on a theory of waiver as on the theory that the legal issue has been converted to an issue of equity.").

in today's world is often thought to be that bankruptcy judges are too pro-debtor, they have not always been so. A prominent jurist of the last century expressed a very different sentiment:

I would go to any length, short of doing violence to the plainly expressed will of the legislature, in so construing a [bankruptcy] statute as not to give the least countenance to that lax morality in relation to the payment of debts which is now beginning to disgrace sovereign States, as well as individuals and private corporations.¹⁴⁹

Precisely because judges are subject to human passions and prejudices, stare decisis provides a mechanism to limit the extent to which each judge imposes his or her own moral vision, whether pro-debtor or pro-creditor, on the bankruptcy world.

B. *Of Round Holes and Square Pegs: The Constitutional Problem*

The Supreme Court thought that the Bankruptcy Reform Act of 1978 violated the separation of powers doctrine. The gist of the plurality's opinion in *Marathon* was that

28 U.S.C. § 1471 . . . has impermissibly removed most, if not all, of the essential attributes of the judicial power from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.¹⁵⁰

I submit that, strictly from an examination of the various justifications for stare decisis, it follows clearly that BAP decisions should be binding on all bankruptcy courts within a circuit. Since both BAPs and bankruptcy courts are composed of the same judges appointed under Article I, there is little constitutional concern about that idea—a round peg fits into a round hole. It is also clear, as I hope I have shown, purely from what would best promote the ideas behind stare decisis, that the BAP decisions should be binding on the district courts. However, round pegs fit square holes only poorly: there might be constitutional concerns about requiring district court Article III judges to obey legal rulings issued by Article I judges. If BAP decisions were binding on district courts, then district courts would be in the uncomfortable position of having to defer to one set of Article I courts (the BAPs) on the law and to another set of Article I courts (the bankruptcy courts) on the facts (as to core matters, at least). At first blush, this would seem to raise the same problems that concerned the *Marathon* court. The

149. *Stone v. Green*, 4 Hill 469 (N.Y. 1842) (Bronson, J.).

150. *Marathon*, *supra* note 8, at 87.

Ninth Circuit certainly thought so in *Bank of Maui v. Estate Analysis*: “On the other hand, it must be conceded that BAP decisions cannot bind the district courts themselves. As article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction.”¹⁵¹

However, a closer look at what concerned the *Marathon* court suggests that BAP decisions may indeed be able to bind district courts, even under the current structure, without offending the constitution. The issue in *Marathon* was whether an Article I trial court could, because its decision was subject to review of the law by an Article III court, be permitted to adjudicate a purely state law claim. Here, in contrast, the issue is whether an Article I appellate court can, without violating the constitutionally protected separation of powers, create binding legal rules to which an Article III court must apply the facts, whether those facts were found by the bankruptcy court or by the district court acting in its capacity as a trial court. A close examination of the relationship between bankruptcy trial courts and BAPs supports the argument that BAPs may constitutionally create legal rules that are binding on at least those district courts in a circuit which have consented to BAP review (a weak assertion of stare decisis effect), and possibly on all district courts in a circuit (the strong assertion of stare decisis effect that would be the more desirable rule). The constitutionality of both assertions of the stare decisis effect rests upon the argument that BAPs depend for their existence upon the Article III courts which create them. Ultimately the situation reduces to Article III courts binding Article III courts.¹⁵²

The weak assertion relies on the requirement of district court consent. Recall that the BAFJA made two critical changes to the BAP structure:

151. 904 F.2d 470, 472 (9th Cir. 1990)

152. *Coyne v. Westinghouse Credit Corp.* (*In re Globe Illumination Co.*), 149 B.R. 614 (Bankr. C.D. Cal. 1993). While I believe that Rigoberto Obregon is correct that Judge Bufford’s conclusion that BAPs are adjuncts of the circuit courts is wrong, see Rigoberto V. Obregon, *In re Globe Illumination Co.: A Provocative But Flawed Theory on the Precedential Value of BAP Authority*, 21 CAL. BANKR. J. 45 (1993), Obregon does not, in my view, give adequate weight to the difference between the institutional function of the BAP as an appellate tribunal and the bankruptcy court as a trial tribunal. That is indeed a distinction with a difference; just because the BAPs are not “true” adjuncts of the circuit courts as they were supposed to be under the compromise legislation offered by the House prior to the enactment of the BRA, it does not follow that the BAPs do not perform the same institutional function—to say what the law is. That is quite different from a trial court’s function—to find the facts and apply the law to them.

first, that the parties must consent to BAP jurisdiction and, second, that the district courts must have voted to allow a BAP to operate. To the extent that the constitutional legitimacy of the BAP under the current structure depends upon district court consent, then it does not have constitutional force for BAP decisions to bind those districts which have accepted BAP review.

The reasoning behind the strong assertion of stare decisis effect is that BAPs do not remove the “essence of judicial power” from either the district or circuit courts. As far as district courts are concerned, the “essence of judicial power” is the power to find the facts at trial. The undermining of that power is what the Supreme Court found unconstitutional about the BRA in *Marathon*; and that is what the constitutional debate over the structure of the bankruptcy system has continued to be about. Specifically, the Supreme Court has said that, regardless of an issue’s classification as core or non-core, if the issue presents a controversy which entitles the litigants to resolution by a jury trial, the Bankruptcy Code cannot operate to deprive the litigants of that right.¹⁵³ However, the question that *Marathon* left open and lower courts have not yet resolved, is whether bankruptcy courts are either statutorily empowered or constitutionally able to conduct jury trials.¹⁵⁴ This controversy demonstrates that concerns about the separation of powers are highest at the fact-finding level. The essence of judicial power at that level is the control of the fact-finding process. The BAPs do not remove the fact-finding function from the district courts. Under the current structure, they are never even in the position of reviewing district courts’ findings of fact.

Nor do the BAPs impermissibly interfere with the circuit courts’ function. The essence of judicial power at the appellate level is the power to ascertain the law. As Chief Justice Marshall put it, the function of the reviewing court is “to say what the law is.”¹⁵⁵ The BAPs do not remove this power of interpretation from the circuits. A BAP is a creation of the circuit court; its judges are appointed by the circuit court; and its decision in any given case is fully reviewable by the circuit court, should the parties appeal.

Thus, for BAPs to play the role of a corrector of legal errors should not trigger separation of powers concerns about either district or circuit courts. BAP decisions may, without offending the Constitution, bind

153. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

154. Compare *Ben Cooper, Inc. v. Insurance Co. of Pa.* (*In re Ben Cooper*), 896 F.2d 1394, 1403 (2d Cir. 1990) (yes to both), with *Kaiser Steel Corp. v. Frates*, (*In re Kaiser Steel Corp.*), 911 F.2d 380, 389 (10th Cir. 1990) (no to the first).

155. See *Briney v. Burley* (*In re Burley*), 738 F.2d 981, 986 (9th Cir. 1984).

both bankruptcy and district courts. To implement such a stare decisis regime the circuit court would have to announce and implement the rule, either through administrative action or through case law. Such action would not violate the separation of powers doctrine under the current statutory scheme because, first, there is no practical danger of Congressional or Executive manipulation of the legal rules in any particular case and, second, it would be entirely appropriate in principle for Congress, should it not like the legal rules concerning bankruptcy established by the courts, to change those rules pursuant to its Article I mandate to create uniform bankruptcy rules.¹⁵⁶ In fact, under the current structure, since BAPs do not review any district court decisions, there would be no danger of BAPs reversing district courts on application of law to facts in any specific case.¹⁵⁷

V. AN ALTERNATIVE TO THE CURRENT STRUCTURE

The reasons behind stare decisis support making BAP decisions binding on both bankruptcy and district courts. That BAPs should bind bankruptcy courts causes no constitutional concern. However, the idea of BAPs binding district courts will surely generate concerns that have political, if not constitutional legitimacy. District judges may resist a perceived reduction in their power, just as they have resisted the dilution of their positions by the creation of Article III bankruptcy courts.¹⁵⁸

The obvious theoretical solution is for Congress to scrap the current Rube Goldberg bankruptcy appellate structure, establish bankruptcy

156. As discussed *supra* notes 128-132 and accompanying text, this is precisely what Congress did in the Bankruptcy Reform Act of 1994 as to the hotel room revenue problem. Of course, in that example, the courts did not come up with a uniform or stable rule and Congress stepped in. But the point is that no constitutional difference exists between an Article III court being bound by a BAP-created legal rule that room revenues were "cash collateral" or the same rule written in the statute by Congress.

157. However, since BAPs create legal rules in the context of deciding specific cases and do not "say what the law is" in the same way administrative agencies promulgate interpretative regulations, I doubt that an argument could be constructed that BAP conclusions of law should be binding for exactly the same reasons agencies' regulations are binding.

158. Nor is it entirely clear that bankruptcy judges want Article III status. See *New NCBJ President Officer Views on Consumer Filings, Chapter 12, BAPs*, AM. BANKR. INST. J., Oct. 1996, at 7-8 ("It is my belief that if you took a poll of all 325 bankruptcy judges and asked them about it, it would be about 80/20 saying 'Thank you, no.' [to becoming Article III judges]").

courts as Article III courts and provide for a single appeal as of right to an appellate tribunal. Many commentators agree on that much, though specifics differ. Some have proposed routing all bankruptcy appeals to a single Article III appellate court with national jurisdiction; others suggest routing them through an already existing tribunal like the Federal Circuit.¹⁵⁹ Others argue against a specialized tribunal, fearing that the loss of a generalist supervisory court would result in inferior “law declaration.”¹⁶⁰ The National Bankruptcy Review Commission has thrown its considerable weight behind the idea that all appeals should go directly from bankruptcy courts to the existing Circuit Courts.¹⁶¹ For the following reasons, I offer an idea which resonates with those who favor a specialized review court: make the BAPs true adjuncts of the circuit courts—just as bankruptcy courts are adjuncts of the district courts—and do so regardless of whether Congress decides to give bankruptcy judges Article III status.

Although the legislative history of the BAP provisions is sparse, one of the more intriguing recommendations made in 1973 by the Commission on the Bankruptcy Laws to Congress was to disallow appeals directly from the bankruptcy courts to the circuit courts. This recommendation should be given renewed consideration. Much of bankruptcy work is equitable in nature. As suggested above, the ideas behind *stare decisis* do not apply as well to issues which center on equitable determinations (the application of broad standards) as they do to issues centered on application of legal rules. Quite to the contrary, courts reviewing controversies in equity routinely defer to the courts who are closest to the action. Thus, although the Commission’s concern was that the physical “remoteness” of the courts of appeals would discourage appeals,¹⁶² it is also true that a circuit court’s “remoteness” from the day-to-day concerns of the bankruptcy world may detract from the quality and sensitivity of its review.

The BAPs are a commendable compromise between a reviewing court that is “too remote” and a trial court that is “too close to the action.” On the one hand, the bankruptcy judges who comprise a BAP are well

159. See Nathan B. Feinstein, *The Bankruptcy System: Proposal to Restructure The Bankruptcy Court and Bankruptcy Appellate Processes*, in 1995-1996 ANNUAL SURVEY OF BANKRUPTCY LAW 517 (William J. Norton, Jr., ed., 1995); Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063 (1994).

160. See Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 AM. BANKR. L.J. 525, 537-39 (1995).

161. NBRC Final Report, *supra* note 6, at 752.

162. See *Report of the Commission of the Bankruptcy Laws of the United States*, H.R. Doc. No. 95-137, at 96 (1973).

aware of the actual, practical impact of its legal decisions at the trial and administrative level. On the other hand, a BAP has the institutional advantages of an appeals court: its judges sit as colleagues in a panel of three; they are adequately briefed on the legal issues; and they are free from the distraction of having to manage the bankruptcy case itself. The conclusion of the only study of the BAP work product was that "the Panels are generally well-regarded by Ninth Circuit attorneys with bankruptcy appellate experience. The attorneys respond particularly favorably to procedural and qualitative aspects of the Panels' operations."¹⁶³ If possible, the BAPs should be retained because they are a good idea.

The NBRC proposes to eliminate the BAPs because it associates the BAPs with a two-tiered appellate system and cannot conceive of a role for BAPs in a single-tiered system.¹⁶⁴ That is, the NBRC's chief concern is that an intermediate level of appeal is one bite too many; it causes litigants delay and expense without adding value to the system. Few would dispute that point. As I hope I have shown, however, such a flaw does not inhere in a two-tiered appellate scheme. If BAP opinions are given binding effect throughout the circuit, many of the ill-effects described by the NBRC would be ameliorated. More importantly, it does not necessarily follow that in order to eliminate intermediate appeals one must also eliminate the BAPs. I suggest that the BAPs could be retained while intermediate appellate review was eliminated, so that litigants get only one appeal as of right. All that would require is that Judge Bufford's analysis of BAPs as adjuncts to the circuit courts in *In re Globe Illumination* became reality.¹⁶⁵

The idea is to assume that bankruptcy courts retain Article I status, and that district courts retain their close supervisory powers and their ability to remove any matter from the bankruptcy courts' consideration. Then, in each circuit a Bankruptcy Appellate Service ("BAS") could be created as an adjunct to the circuit courts. Its judges would be appointed by the circuit court from among the active bankruptcy judges. From the BAS, three-member panels of bankruptcy judges (still "BAPs") would be drawn. Appeals from the decisions of the trial court (either a

163. Bermant & Sloan, *supra* note 59, at 217.

164. NBRC Final Report, *supra* note 6, at 764-67 (analyzing BAPs as part of the problems posed by intermediate review).

165. *See supra* note 152.

bankruptcy court deciding a core matter, or a district court that had either withdrawn the reference or reviewed a non-core matter) would go directly to the circuit level. There would be no district court review and no intermediate level of review as of right. At the discretion of the circuit, an appeal could then be referred to a BAP, or not. Circuits could choose the extent to which referrals were to be made; they could create automatic referrals, perhaps for all core matters, while they retained the power in any given case to withdraw the reference at any time. (In this, their procedure would be similar to the handling of referrals by the district courts.) A litigant seeking to reverse any adverse BAP decision could be permitted to petition the circuit court for a writ of certiorari. The circuit would have discretion to accept or deny review. However, where the BAP certified that its decision created a conflict with another circuit, circuit review could be mandatory. In cases where review was denied or its outcome unfavorable, the litigant could then petition the Supreme Court for review as under current practice.

Under this scheme, the BAPs would be adjuncts to the circuit courts, but would retain their Article I status. The terms of bankruptcy judges appointed by the circuits would still be limited and their salaries would have no constitutional protection against diminution.¹⁶⁶ The Article I character of the BAS, however, ought not to raise separation of powers concerns. To begin with, such concerns are far weaker at the appellate level than at the trial level, as seen in the review of post-*Marathon* case law above. As a practical matter, it is difficult to find a separation of powers objection to the arrangement: the BAS would be well insulated from either legislative or administrative pressures. Nor would there be a theoretical breach: the circuit courts would retain ultimate power to say what the law is. Moreover, the history surrounding the adoption of the Constitution also suggests that such an arrangement would not impermissibly blend constitutional powers. As mentioned above, the idea of separation of powers was of great concern to those who wrote the Constitution. James Madison devoted a series of the Federalist essays “to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.”¹⁶⁷ In that series, Madison reviewed to what extent the state constitutions of the time addressed the separation of powers issue. For example, Madison concluded that New York’s state Constitution made

166. One provision of each judge’s employment contract could be that no reduction in salary could take place during the appointment. While this would not suffice to make bankruptcy courts Article III courts, it would reduce concern that this scheme encroaches on the judicial sphere of action.

167. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)

“no declaration on this subject, but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments.”¹⁶⁸ Madison reached this conclusion even though the court of last resort in New York, at that time called the Court for the Trial of Impeachments and Correction of Error (CCE), was composed of the three justices of the Supreme Court, the Chancellor, and the entire thirty-two members of the New York senate. This court existed for the first seventy years of the Republic; it was abolished in 1846. It produced a substantial body of law, some of which is good law even today.¹⁶⁹ One reason why Madison and others would not have been concerned about this arrangement is that the CCE was not set up to try cases. Its function, as its title implies, was merely to correct errors made by courts (such as the New York Supreme Court) in trying cases. Its purpose was to address and settle only those cases “presenting great and novel questions which will occasionally arise under any judicial system, where the ordinary courts after the fullest argument and scrutiny fail to satisfy the public or the parties in interest.”¹⁷⁰ In short, it performed solely an appellate legal error correction function. Its decisions were binding on both the Supreme Court (and all lower courts of law) as well as on the Chancellor and Vice-Chancellors (the courts of equity). The CCE’s function as an appellate court triggered separation of powers concerns only when it became embroiled in a series of constitutional controversies, at which time the difficulty of having the same people who had enacted a statute pass upon its constitutionality became apparent.¹⁷¹ No such concern is raised by making the BAPs adjuncts to the circuit courts. As outlined above, such an action would not remove the essence of the circuit courts’ power to determine the law.

168. *Id.* at 305.

169. For example, *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826) was discussed in at least one first-year property casebook as a leading case on constructive eviction as of 1984. See PAUL GOLDSTEIN, *REAL PROPERTY* (1984).

170. Charles O’Connor, in *REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK*, 697 (William G. Bishop & William H. Attree, eds.) (The Evening Atlas 1846).

171. See generally Camp, *supra* note 112.

VI. CONCLUSION

The reasons behind the stare decisis doctrine strongly support both bankruptcy courts and district courts giving full precedential effect to BAP decisions. Under the current structure, it is clear that circuit courts could take administrative action to require this result for bankruptcy courts. While the power of the circuit courts to implement such a rule for district courts admits of doubt, there is nonetheless a respectable argument for the constitutional soundness of a circuit court rule requiring district courts to obey legal rules established by BAP decisions. To the extent that the system can be reformed, rules permitting two appeals as of right from a trial decision should be abolished and BAPs should be reformed as circuit court adjuncts. If bankruptcy court judges are given Article III status, then no constitutional concern arises from any type of review structure. However, the potential political problems facing such reform are considerable. An alternative is the idea of creating a Bankruptcy Appellate Service and making BAPs adjuncts to the circuit courts. Even as Article I courts, the BAPs could then continue to contribute to the development of bankruptcy law without running afoul of the constitutional command to reserve the essence of judicial power to Article III courts.