Decision-Makers: In Defense of Courts

by

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For more than a decade, the institutional characteristics of bankruptcy courts have been litigated, studied, and debated. What jurisdiction can be vested in Article I judges who do not have the life tenure and the protection against salary reduction that are accorded to Article III judges? Should bankruptcy judges be Article I or Article III judges? Are bankruptcy courts really courts at all? May bankruptcy judges exercise contempt power? What is the relationship between bankruptcy courts and federal district courts? Are decisions by a bankruptcy appellate panel binding on either?

On a practical level, these questions are extremely important in determining where cases are litigated and often their outcome. The Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.¹ invalidated the jurisdictional provisions of the Bankruptcy Reform Act of 1978² and, to understate the obvious, engendered enormous confusion in the bankruptcy courts. The Bankruptcy Amendments and Federal Judgeship Act of 1984³ was enacted in response to Marathon and created a complex body of both substantive and procedural law. Litigants and judges regularly must struggle with the distinction between core⁴ and noncore⁵ matters and with the appropriate relationship between the bankruptcy courts and the federal district courts. The likely growth in the use of bankruptcy appellate panels⁶ raises a whole new set of difficult, but crucial questions that will often be "outcome determinative" in specific cases.

Underlying all of these practical effects are profound institutional and jurisprudential questions. The basic issue is what characteristics of decision-makers matter under what circumstances. In determining the jurisdiction and authority of decision-makers, what are the relevant factors and which should be decisive?

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⁵See id. § 157(c).
⁶See id. § 158(b)(1).
That is the focus of this Article. Analysis is divided into three parts. Part I attempts to identify the characteristics of decision-makers that might be relevant in allocating jurisdiction and in determining the authority of courts and other decision-makers. Part II discusses when these characteristics should matter. For example, when should it be relevant whether a judge has life tenure? When does the ability of a decision-maker to enforce an order matter? Finally, Part III applies this discussion to three specific issues that relate to the bankruptcy courts. First, what is the appropriate constitutional status of the bankruptcy courts? Are they courts at all? Does Article III require limits in their jurisdiction? Second, what is the relationship of bankruptcy appellate panels to bankruptcy courts and to federal district courts? Third, what is the appropriate role for alternative decision-making in this structure?

The emphasis of this Article is on the question of how Congress and the Supreme Court should face fundamental institutional questions in defining the jurisdiction and authority of decision-makers, not on where particular parties may prefer to litigate their claims when given the choice.

I. WHAT ARE THE CHARACTERISTICS OF DECISION-MAKERS?

In order to evaluate the characteristics of decision-makers that are relevant, the first step is to identify the features that distinguish those who resolve disputes and interpret and apply the law. Among a myriad of potentially differentiating factors, five seem (in no particular order) to be particularly important: (i) public or private status; (ii) method of selection; (iii) accountability; (iv) specialization; and (v) reviewability.

A. ARE THE DECISION-MAKERS PUBLIC OR PRIVATE?

The first characteristic is whether the decision-maker is a part of the government. In recent years, there has been an enormous growth in the use of alternative dispute resolution, such as mediation and arbitration.8 Increasingly, contracts in a wide array of fields call for disputes to be handled through private arbitration and not litigation in the publicly operated courts. The Supreme Court has ruled that the Federal Arbitration Act9 makes enforceable arbitration clauses in contracts “evidencing a transaction involving commerce,” even if there is state law voiding arbitration requirements.10 Additionally, statutes

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8In a provocative recent article, Professor Laura Bartell suggests that bankruptcy courts are not really courts at all and that it is therefore unconstitutional for them to exercise the contempt power. Laura B. Bartell, Contempt of the Bankruptcy Court—A New Look, 1996 U. Ill. L. Rev. 1. Part IIIA of this Article, infra, expressly disagrees with Professor Bartell’s conclusions.


increasingly require alternative dispute resolution, and not court litigation, to resolve particular matters.\(^{11}\)

The bright-line distinction between public courts and private alternative dispute resolution is sometimes blurred. For example, court-annexed arbitration makes a private arbitration coordinator a part of the judicial system.\(^{12}\) Yet, overall, there is a basic difference between submitting decisions to a court comprised of government officials and financed by the taxpayers and having matters resolved through private decision-makers.

Three features are especially important in distinguishing courts from alternative dispute resolution. First, courts generally have the ability to enforce their orders and judgments; private decision-makers do not. For example, if a court order is disobeyed, contempt can be used to secure compliance.\(^{13}\) A court can enforce its money judgments by using the law enforcement machinery of the state, seizing and selling property if necessary. Private decision-makers, of course, lack such authority. In the absence of voluntary compliance, a party seeking enforcement of privately rendered decisions must invoke the jurisdiction and power of the courts.

Second, courts generally issue written decisions that, when published, have precedential effect on future rulings involving different parties. In other words, courts have a law-giving function. Whether it is in the development of common law, in the interpretation of statutes, or in enforcing the Constitution, courts frequently issue opinions that have the force of law. In contrast, private decision-makers rarely issue rulings with any effect beyond the parties to the particular dispute, and in no way do such rulings bind future decision-makers.

Finally, court proceedings are generally more formal than alternative dispute resolution. This is commonly said to be one of the primary advantages used to justify the shift towards alternatives to courts. This difference is not, however, clear-cut. Although rules of procedure that are designed to apply to a range of disputes in court systems may be more formal and less flexible than rules tailored to individual proceedings on an ad hoc basis, courts can change and simplify their rules. Conversely, particular alternative dispute resolution proceedings may be governed by rules much more formal and burdensome than anything that would exist in courts. Nor should it be assumed that simpler is necessarily better. Procedural rules may facilitate more thorough consideration and fairer proceedings.

\(^{11}\)See, e.g., Cal. Civ. Code § 4607 (West 1997) (making mediation mandatory whenever custody or visitation of a minor child is in dispute).


\(^{13}\)Whether bankruptcy courts can do this on their own or whether they must make a recommendation to the district court is immaterial for this point; what matters is that the federal judiciary has contempt power while private decision-makers do not.
B. The Method of Selecting the Decision-Makers

A crucial distinction among courts in the United States is in how the judges are initially selected. For example, Article III judges—those accorded life tenure and protection against decreased salary—are nominated by the President and confirmed by the Senate.\footnote{U.S. Const. art. III, § 1 and art. II, § 2, cl. 2.} Even here, though, the procedures that determine who becomes a judge vary enormously across the country and over time. It has long been traditional for Presidents to allow Senators of their party to recommend federal district court judges. Some Presidents defer more, and some less, to these choices. There is great variance in how Senators determine who to recommend; many use merit selection panels to suggest names and have formalized procedures, but others have quite informal processes. Article I judges such as bankruptcy judges and magistrate judges are generally chosen through a merit selection process by Article III judges.\footnote{See 28 U.S.C. § 152 (1994) (appointment of bankruptcy judges); id. § 631 (appointment and tenure of magistrate judges).}

There is even wider variance among the states in how judges are selected. Some states have partisan elections of all judges; some have partisan election of trial judges, but appointment with later electoral review of appellate judges; some have nonpartisan elections of judges; some have merit selection systems; some have systems much like that used for federal judges.

The method of selection may explain perceived differences in the quality of the decision-makers that are often implicit in decisions about jurisdiction and authority. Yet, the notion of “quality” in this context seems too elusive to admit of precise definition.\footnote{An earlier article by this author suggested three different models that might be used to evaluate judicial candidates: one focuses solely on professional qualifications; a second includes “judging skills;” and a third includes ideology. See Erwin Chemerinsky, Ideology, Judicial Selection and Judicial Ethics, 2 Geo. J. Legal Ethics 643, 644-45 (1989). For each of these approaches there would still be a need to operationalize the definitions of “quality.”} Moreover, even if “quality” could be defined, it would be difficult to assess which system produces the best judges.

For example, I am very skeptical of the traditional assumption that the process for selecting Article III judges necessarily produces the most “qualified” bench. All too often, individuals are recommended by Senators or nominated by Presidents for political reasons having little to do with judicial ability. Indeed, a merit selection system such as that generally used in selecting bankruptcy judges or magistrate judges would seem better designed to ensure quality.

C. How Are Decision-Makers Held Accountable?

Another basic difference among judges is the way in which they are accountable for their performance. For example, Article III federal judges have
life tenure and only can be removed by impeachment in the United States House of Representatives and conviction in the United States Senate.\(^{17}\) In contrast, Article I judges sit for fixed terms and can be removed through procedures that are much less cumbersome than impeachment or they may simply not be reappointed to successive terms.\(^{18}\) In the vast majority of states, there is electoral accountability for judges. In some courts, judges must run for reelection in partisan, contested elections. In other states, such as California, appellate judges run in retention elections where voters decide whether the individual should remain on the bench. Judges sometimes lose such elections. For example, in 1986, three members of the California Supreme Court—Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso—were denied retention by the voters.

The method of accountability is thought to have a crucial impact on the key matter of the independence of judges. Judicial independence is generally understood to be the ability of judges to decide cases according to their view of the law and not based on external pressures from other branches of government or the public. Archibald Cox wrote:

> To my mind the ideal of judicial independence implies ... [t]hat lawsuits shall be decided by judges free from any outside pressure, personal, economic, or political, including any fear of reprisal; [t]hat the courts' decision shall be final in all cases except as changed by general, prospective legislation, and final upon constitutional questions, except as changed by constitutional amendment; and [t]hat there shall be no tampering with the organization or jurisdiction of the courts for purposes of their controlling their decisions upon constitutional questions.\(^{19}\)

The conventional wisdom is that Article III judges have the greatest independence because of the assurance of life tenure and the protection against decreased salary.\(^{20}\) To be more specific, this is thought to create independence both from the other branches of government and from public pressure.\(^{21}\) Ar-

\(^{17}\) U.S. Const. art. III.


\(^{21}\) There recently has been discussion of whether public attacks on judges, especially sharp criticisms and even calls for resignation and impeachment, are a threat to judicial independence. See, e.g., Louis H. Pollak, Criticizing Judges, 79 JUDICATURE 298 (1996).
ticle I judges are deemed less independent because of the greater possibility of removal and, more subtly, because of the concern that their decisions might be influenced by the desire for reappointment. Elected judges, especially those with relatively short terms who face contested elections, are obviously deemed least independent.

Yet, here, too, the story is more complicated than the conventional wisdom acknowledges. Judges on Article III courts may be influenced by a desire to move to another, higher court. Judges with the least institutional protection may be fiercely independent because of how they define their judicial role. Most importantly, the belief that judicial independence matters in decision-making is an assumption, not a proven fact. It would seem almost impossible to determine the extent to which judicial independence matters in changing the outcome of cases. This, of course, is not to say that judicial independence is irrelevant. Quite the contrary is true. For example, it is highly doubtful that elected judges in Southern states would have found segregation unconstitutional in the 1950s and enforced those decrees. Similarly, it is hard to imagine many elected state judges invalidating school prayers or holding the death penalty unconstitutional. Rather, the point is simply that the relationship between degrees of judicial independence and the outcomes of specific cases is generally highly uncertain. It is a matter of intuition based on experience, and not proven fact.

D. THE EXTENT TO WHICH DECISION-MAKERS SPECIALIZE

Courts differ enormously in the degree to which judges are generalists or specialists. Article III federal courts have broad general jurisdiction, whereas state courts are often more divided along specialty lines. For example, whereas federal district courts hear both civil and criminal cases, in many states, trial courts are split into civil and criminal divisions. In some states, such as Texas, even the highest court is divided into a criminal and a civil bench. Additionally, there are usually many other specialized courts in the state systems, such as family courts, juvenile courts, probate courts, and the like. Furthermore, often decision-makers in the alternative dispute resolution context are specialists in a particular field. For example, the nature of arbitration is that it is possible to select arbitrators who are experts in the particular substantive field in issue. At the opposite extreme, although it is uncommon in the American legal system, there also could be “lay decision-makers,” nonlawyers who serve in the role of judge.

There are, of course, many specialized federal courts. The Tax Court, an Article I court, and the Federal Circuit, an Article III court, each have clear

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specialties. The bankruptcy courts are specialized, but also have broad general jurisdiction to hear other civil claims. There also are many administrative agencies that essentially are Article I courts and that have specialized jurisdiction.

Specialization offers two major advantages: expertise and uniformity. Especially in highly complex areas, a specialized court allows recruitment of judges who have specific background in the field and permits individuals on the bench to develop expertise. Additionally, specialization might produce uniformity by having fewer courts and fewer judges dealing with particular issues. The obverse is that a court with general jurisdiction seemingly could select judges from a broader pool of candidates and allows decision-makers to benefit from the insights gained in cases involving diverse topics.

Again, difficult questions arise in evaluating when specialization is desirable. A judgment must be made about the complexity of the cases and the likelihood that nonexperts could sufficiently master that area of the law to render informed decisions on a timely basis. This, in turn, involves both a view as to the likelihood that such knowledge can be obtained and an issue of whether it is efficient to have nonspecialists do so. There almost certainly will never be a way of measuring whether expert judges render “better” decisions than non-expert ones, especially because “better” would be so difficult to define.

E. HOW RULINGS OF DECISION-MAKERS ARE REVIEWED

The nature of appellate review is important in assessing the performance of decision-makers. There is a continuum from essentially unreviewable decisions to those that are subject to de novo review. Often, in the alternative dispute resolution context, virtually no appellate review is available. At least in federal court, jury findings of fact in civil cases are not reviewable on appeal because of the dictates of the Seventh Amendment. Not only does appellate review vary by court, but for each court the nature of such review may vary depending on the issue. For example, federal courts of appeals review issues of law de novo, but other matters are often reviewed on a “clearly erroneous” or an “abuse of discretion” standard.

Theory and practice may be very different in matters of reviewability. Federal district courts, for example, have broad authority to review the decisions of magistrate judges and bankruptcy judges. Yet, at least in some types of matters, review is likely to be highly deferential to the decisions of the Article I court.

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25See id. § 1334.
27U.S. Const., amend. VII.
29Id.
Reviewability may matter greatly in making decisions about the jurisdiction and authority of particular courts. For example, the perception of reviewability may be dispositive in making jurisdictional decisions. The assignment of broad jurisdiction to the bankruptcy courts after Marathon is, in part, a result of their being defined as adjuncts of the federal district courts.

F. Conclusion as to Characteristics

These are certainly not the only relevant factors in assessing decision-makers. The historical record of the particular decision-makers may be crucial in deciding their jurisdiction. The demographic composition of the courts may matter. The resources available to the decision-maker, the size of the docket and the resources available also may be important in allocating decision-making responsibility. Yet, these five factors seem most important in assessing decision-makers and defining their jurisdiction.

II. WHAT FACTORS MATTER UNDER WHAT CIRCUMSTANCES?

Deciding the jurisdiction of a particular decision-maker likely has constitutional, statutory, and prudential dimensions. Constitutional issues arise in many ways in deciding jurisdiction. For example, Article III limits the subject matter jurisdiction of the federal courts and thus the matters that can be assigned to them.\footnote{U.S. CONST. art. III, § 2.} Also, the Supreme Court has held that the Constitution restricts the matters that can be assigned to Article I courts, as the Marathon case reflects.\footnote{For a review of the law concerning the permissible jurisdiction of Article I courts, see Erwin Chemerinsky, Federal Jurisdiction 207-45 (2d ed. 1994).} Additionally, the Constitution is relevant in determining the allocation of judicial matters between federal and state courts.\footnote{For example, abstention doctrines are often based on considerations of federalism. See, e.g., Younger v. Harris, 401 U.S. 37, 44-45 (1971).} The Constitution also allocates some matters to juries and restricts the appellate review of some decisions.\footnote{For example, a verdict of not guilty in a criminal case is not reviewable under the Double Jeopardy Clause of the Fifth Amendment. See U.S. CONST. amend. V. Also, the Seventh Amendment generally precludes appellate review of a jury’s fact-finding.}

Statutes determine many issues of jurisdiction. For example, Congress generally defines the subject matter jurisdiction of the Article III federal courts. Congress both creates and defines the authority of Article I courts. State legislatures make similar decisions in deciding what state courts will exist and what matters they will hear. As mentioned above,\footnote{See supra notes 8-11 and accompanying text.} the legislature can require that alternative dispute resolution be used for some types of matters.

Finally, courts often have a say in defining their own jurisdiction. For instance, the important justiciability doctrines—such as standing, ripeness,
mootness, and the political question doctrine—are all judicially created. Abstention doctrines are another example of self-imposed limits on judicial authority. In the alternative dispute resolution context, it is often the parties, by their contract or consent, that determine the scope of decision-making authority.

In evaluating how decision-making authority should be allocated, I would identify five criteria to guide such choices: (i) the potential for public reaction to the decisions; (ii) the potential for pressure from other branches of government; (iii) the need for judicial interpretation and precedents; (iv) the degree of benefit derived by having specialized decision-makers; and (v) whether allocation of power between federal and state governments is implicated.

In any given situation, these criteria may point in opposite directions. And, there will be debates about how the criteria should be applied. Nonetheless, I believe that these criteria are at least useful in beginning the discussion about what characteristics of decision-makers matter and under what circumstances. This is no attempt to rank order these criteria, although in particular cases their comparative importance could be crucial in making jurisdictional decisions.

A. POTENTIAL FOR PUBLIC REACTION TO THE DECISIONS

The likelihood that the decision-makers will perceive that their rulings will be scrutinized by the public and be used in evaluating performance on the bench is the first consideration. Although it is axiomatic that judges ideally should decide cases based entirely on their view of the law and the facts without any attention to public pressure or later evaluation, it is a mistake to assume that all courts and all decisions will receive equal public scrutiny. Decisions with regard to patents, for example, will rarely arouse public ire. On the other hand, certain types of decisions are much more likely to attract public attention. Historically, for example, constitutional rulings and decisions in criminal cases have precipitated great controversy.

The more the decisions are likely to engender public attention and controversy, the more important it is to allocate decision-making authority to decision-makers who are largely insulated from political pressure. Recognizing that there is a vast literature debating whether state court judges, who generally are electorally accountable, are as likely to enforce constitutional norms as the Article III bench, I favor broad jurisdiction for Article III judges to hear constitutional matters. Although the superiority of the relatively more-insulated

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judges for deciding controversial matters can never be proven, it is the assumption upon which Article III rests and one that seems in accord with over 200 years of experience.37

On the other hand, insulation matters little for deciding cases that are unlikely to come to public attention or to provoke public controversy. The general jurisdiction of elected state courts is thus defensible because the vast majority of matters that come before them will never attract media attention or be relevant in the evaluation of judges.

Bankruptcy courts occasionally decide matters that attract great public attention. The Orange County, California, bankruptcy and the various bankruptcies arising out of mass torts illustrate the potential for public interest.38 Yet, such public attention to bankruptcy court matters is uncommon. Even in such instances, bankruptcy court rulings are far less likely to be controversial than are constitutional decisions. Hence, the desire for judicial independence need not be a major factor in defining the jurisdiction of the bankruptcy courts, and there is no reason to limit what bankruptcy courts can hear because of the concern over public pressure.

B. POTENTIAL FOR PRESSURE FROM OTHER BRANCHES OF GOVERNMENT

The independence of Article III courts is important when the issues are of the type that will generate scrutiny and pressure from other branches of government. Constitutional questions regarding the separation of powers are of this type, as are other issues relating to the system of checks and balances. Judges with life tenure and salary protection are more likely to be able to perform this checking function than are those who are answerable to the legislative and executive branches.

Restrictions on the jurisdiction of Article I courts thus seem most appropriate and necessary when such matters are involved. This is the position that Justice White espoused in his dissent in Marathon: “The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them, or conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.”39

37Some have tried to measure “parity” between federal and state courts. See Michael E. Solimine & James L. Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings L.J. 213 (1983). I believe, however, that the effect is seriously methodologically flawed and that such flaws would haunt any similar studies. See generally Chemerinsky, supra note 36 (discussing in detail the debate over whether state courts are equal to federal courts in their ability and willingness to protect federal constitutional rights).


Although Justice White’s position was rejected by the Marathon plurality, the Supreme Court subsequently adopted this approach. In *Thomas v. Union Carbide Agricultural Products Co.*, the Court upheld the constitutionality of an arbitration system designed to resolve valuation disputes among participants in a pesticide registration program. In *Thomas*, federal law required that manufacturers submit research data regarding the health, safety, and environmental effects of all pesticides. The law permitted the data submitted by one company to be used by another that sought to register the same or a similar product, but a company using another’s data had to pay for the costs of the data generation. The Environmental Protection Agency (EPA) was entrusted with determining the appropriate amount of compensation owed and resolving disputes. To relieve the EPA of this burden, Congress shifted the task of valuation for compensation purposes to a system of negotiations and binding arbitrations. Judicial review was limited to instances of fraud, misrepresentation, or other conduct.

The issue in *Thomas* was whether Congress could assign this private law dispute to a non-Article III court. The Court upheld the arbitration system as constitutional and Justice O’Connor, writing for the majority, declared:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly “private” right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.\(^{41}\)

In other words, the Court adopted a functional approach, considering the desirability of a non-Article III tribunal and the degree of encroachment on the federal judiciary. In this way, the Court’s approach in *Thomas* was similar to the balancing test urged by Justice White in *Marathon*.\(^{42}\)

This shift to a balancing approach was made even clearer in *Commodity Futures Trading Commission v. Schor*. In *Schor*, the Supreme Court separately considered two aspects of the jurisdiction allocated to the Commodities Futures Trading Commission. First, the Commission possesses statutory authority to provide reparations to individuals who are injured by fraudulent or illegally manipulative conduct by brokers. Second, the Commission also has promul-
gated regulations which enabled it to adjudicate all counterclaims arising out of the same allegedly impermissible transactions. As to the former, the Court found that the Commission’s jurisdiction to order reparations to injured consumers was of “unquestioned constitutional validity.” Because the Commission could not enforce its own orders, which instead required federal court action, the Court concluded that the Commission served as a permissible adjunct to the federal court.\footnote{Id. at 856.}

The more difficult question was whether the Commission could hear state law counterclaims. In Marathon, both the plurality and the concurrence had found objectionable the bankruptcy courts’ ability to hear state law matters.\footnote{Id.} In Schor, however, the Court approved the Commission’s authority to rule on the state law counterclaims. In reaching this decision, the Schor Court expressly endorsed the use of a balancing test to appraise the constitutionality of legislative courts.\footnote{See 458 U.S. at 84–88; id. at 90 (Rehnquist, J., concurring in the judgment).} The Court identified the benefits of an administrative alternative to federal court litigation in terms of efficiency and expertise. At the same time, the Court said that these interests had to be balanced against “the purposes underlying the requirements of Article III.”\footnote{478 U.S. at 851 (“Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.”).} The Court considered two goals of Article III: insuring fairness to litigants by providing an independent judiciary and maintaining the “structural” role of the judiciary in the scheme of separation of powers. As to fairness, the Court said that the defendant had consented to the administrative proceedings as an alternative to federal court litigation and hence could not claim that the Commission adjudication was inherently unfair.\footnote{Id. at 847.}

As to the separation of powers, the Court declared: “In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules.”\footnote{Id. at 840–50.} Justice O’Connor, writing for the majority, said that the relevant inquiry is “the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart

\footnote{Id. at 851.}
from the requirements of Article III.\textsuperscript{51} The Court upheld the Article I court because it concluded that "the magnitude of any intrusion on the Judicial Branch can only be termed de minimis."\textsuperscript{52}

The point is that, to evaluate when an Article I court is permissible, the Supreme Court now uses the exact functional approach that Justice White advocated in his dissent in Marathon. This means that if Marathon were decided today, there is every reason to believe that it would be decided differently. The approach endorsed in Schor indicates a strong likelihood that Justice White's opinion might attract a majority of the current Court.

Put differently, the bankruptcy courts should be allowed to exist as Article I courts, with all of the jurisdiction vested by the 1978 Act. Article I bankruptcy courts are permissible because they are not intended for, nor are they likely to have the effect of, undermining impartial adjudication or increasing congressional control over decision-making. From a functional perspective—the one now used by the Supreme Court—Marathon was wrongly decided.

C. Need for Judicial Interpretation and Precedents

A crucial difference between courts and alternative dispute resolution is the function of the former in publishing decisions that interpret the law and guide future conduct. As described by Professor Owen Fiss, "[a]djudication uses public resources, and employs [public officials] whose job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."\textsuperscript{53}

For example, alternative dispute resolution is ill-suited to deal with constitutional issues. The open-textured language of the Constitution requires interpretation. Court pronouncements interpret the meaning of the Constitution, guide governmental and private actions, set the law for lower courts to follow, and provide a basis for the development of the law through the common law method. All of this would be lost if constitutional matters were handled via alternative dispute resolution. As an example, imagine that the issues in New York Times Co. v. Sullivan,\textsuperscript{54} concerning the First Amendment protection for defamation of public officials, had been decided in arbitration. The case, after all, was a civil dispute between private parties. Yet, the Supreme Court's decision changed defamation liability across the entire country and set constitutional principles that have been developed and applied for more than three decades.

\textsuperscript{51}Id.
\textsuperscript{52}Id. at 856.
\textsuperscript{53}Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1085 (1984).
\textsuperscript{54}376 U.S. 254 (1964).
At the other extreme, it is possible to imagine cases where published precedents are unlikely to occur or, if they exist, probably will matter little. For instance, there are inevitably a large number of disputes between attorneys and clients over fees. Such cases are fact-intensive and generally involve settled law; what is needed is an efficient and fair dispute resolution system. Alternative dispute resolution such as arbitration seems ideal in such circumstances.

Bankruptcy law matters seem to fit in between these two poles. The bankruptcy statutes are filled with ambiguities that require court interpretation. The large body of published bankruptcy opinions are evidence as to the importance of judicial resolution of these matters. Yet, within the domain of bankruptcy courts, there probably exist particular types of disputes where the law-giving function of the court is less important and alternative dispute resolution would be potentially more efficient.

I do not mean to imply that this is the only relevant factor in evaluating the usefulness of alternative dispute resolution. For example, it is also important to assess the probability of a need for judicial enforcement. Alternative dispute resolution is less useful and appropriate when the court's coercive powers will be needed. Also, alternative dispute resolution often produces compromises in results; thus, it is least suited when strict enforcement of the law is desired. Judge Harry Edwards observed: "A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the decisions made by our lawmakers and may, as a result, ignore public values reflected in rules of law." Ultimately, in deciding the role for private decision-making, the inquiry must be contextual as to whether the values of courts outweigh the gains of alternative dispute resolution in particular areas.

D. NEED FOR SPECIALIZED DECISION-MAKERS

Constitutional law is not regarded as specialized. Quite to the contrary, every judge, at every level, has the authority to decide constitutional questions. In sharp contrast, patent law is considered a highly-specialized field, with federal courts having exclusive jurisdiction and centralised decision-making even within the federal courts.

Specialization is plainly appropriate for a technical, complex body of law. Specialized courts offer many advantages. They allow recruitment of individuals with expertise in the field and thereby ideally produce a higher quality bench that can process cases efficiently. Ideally, more uniformity will emerge with such specialization. When there are specialized courts, deference should

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be given to their expert decision-making.

The anomaly in the current structure of the bankruptcy courts is that a specialized judiciary has been created, but these benefits to some extent are diluted by making the bankruptcy courts adjuncts of the general Article III federal district courts. This, of course, was done in response to Marathon. But, as argued above, and as I have contended elsewhere, Marathon was wrongly decided because it failed to use a functional analysis in appraising the permissibility of an Article I court.

I believe that Marathon is an artifact that was a reaction to a unique historical time. In 1980, the Republican Party won the presidency and also control over the Senate. Many bills were introduced into Congress to restrict federal court jurisdiction over matters such as abortion, school prayer, and busing. A great deal of scholarly attention was focused on the constitutionality of such proposals between 1980 and 1982, when Marathon was decided. For example, the prominent Foreword to the November 1981 Harvard Law Review, written by Professor Lawrence Sager and published while the Supreme Court was considering Marathon, focused on the constitutionality of congressional restriction of federal court jurisdiction.

Marathon thus was decided at a time of great concern over the ability of Congress to limit federal court jurisdiction. I think that the Court likely saw the case as an occasion to announce that separation of powers principles limit such congressional authority. The result was a decision that is inconsistent with the Court’s usual functional approach to deciding when Article I courts are permissible.

The point, developed more fully in Part III, infra, is that the specialization and expertise of the bankruptcy courts should not be undermined by review by Article III federal district courts. Bankruptcy appellate panels are a preferable form of review and when there is review by district courts, especially as to issues of bankruptcy law, it should be deferential to the bankruptcy courts. To the extent that Marathon precludes this, it should be overruled.

E. WHETHER ALLOCATION OF FEDERAL-STATE POWER IS IMPLICATED

Omitted from discussion thus far are considerations of federalism. Yet, in defining federal court jurisdiction, federalism is unquestionably a key value. For example, I believe that the most important constitutional command in the

See supra notes 40–52 and accompanying text.


area of federalism is the supremacy of federal law. Decision-making authority should be allocated to best ensure that this value is achieved.61

In the context of the bankruptcy courts, Marathon rested on the premise that it offended Article III to assign Article I courts the authority to hear state law matters. Indeed, Justice O'Connor, writing for the Court in Thomas, said that Marathon established only "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review."

The issue must therefore be why state law matters must be decided in Article III courts, as opposed to Article I courts. The benefits of Article III courts, described above, that flow from life tenure and salary protection, are irrelevant here. If the matter did not go to an Article III court, it would be heard in a state court possessing concurrent jurisdiction. State court judges virtually never have the protections given federal judges in Article III. Therefore, from the perspective of judicial independence, there is no reason to preclude Article I courts in this area. Nor, as explained above, are the cases decided by bankruptcy courts likely to be of the nature that warrants making Article III independence a constitutional requirement.

The question then becomes whether principles of federalism explain the Court's unwillingness to allow Article I courts to decide state law matters. There is no reason to believe that allowing Article I judges to hear such state law claims is more of a threat to state sovereignty than when Article III judges decide them. Nor is there any reason to believe that Article III judges will be more sensitive to federalism concerns than Article I courts. Thus, looking at the values of judicial independence and federalism makes the Marathon decision even more baffling.

F. Conclusion as to Jurisdiction

In conclusion to Part II, these five questions are not the only relevant inquiries in deciding jurisdictional questions. But these five inquiries are crucial in many of the key issues concerning allocating decision-making authority.

III. Application to Bankruptcy Courts

In addition to the factors and criteria described above, three specific issues deserve particularized discussion. What is the constitutional status of bank-

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61 As an aside that is beyond the scope of this Article, I am deeply distressed by the Supreme Court's recent decision concerning the Eleventh Amendment that limits the ability of the federal courts to enforce federal law to secure state compliance. See Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (holding that Congress cannot override the Eleventh Amendment except when acting pursuant to Section five of the Fourteenth Amendment and that suits cannot be brought against state officers to enforce federal laws that have comprehensive enforcement mechanisms).

ruptcy courts? What is the authority of the bankruptcy appellate panel? What is the role for alternative dispute resolution?

A. The Constitutional Status of Bankruptcy Courts

Professor Laura B. Bartell recently argued that bankruptcy judges lack the contempt power and that to invest such power in non-Article III bankruptcy courts would violate the Constitution. Professor Bartell contends that bankruptcy courts are not really courts at all and hence cannot exercise the contempt power: "The initial flaw in the analysis for most courts looking at the contempt power of the bankruptcy court is that they begin with an incorrect premise—that a 'court' (called the 'bankruptcy court') exists whose powers they are attempting to discern, over which a 'judge' (called the 'bankruptcy judge') presides." She reasons that the mere creation of independent bankruptcy courts in the 1978 Act was the key element that the Supreme Court found unconstitutional in Marathon. Professor Bartell concludes:

[Just like "magistrate judges" on whom Congress conferred the title of 'judge' in 1990, bankruptcy judges are administrative functionaries, wearing black robes and bearing an exalted title, but functionaries nevertheless. Despite the fact that many judges repeatedly mislabel bankruptcy courts as "Article I courts," as the Fifth Circuit has mused, "we are unsure even that today's bankruptcy courts are 'courts' in a generic sense not defined strictly by Article III."

I strongly disagree with Professor Bartell's analysis and her conclusion. First, her argument is tautological; it is entirely based on her definition of what is a court and what is a judge. She defines a court and a judge as requiring the independence granted by Article III or at least the independence provided by the 1978 Act. Since current bankruptcy courts lack this feature, she concludes that they cannot be called courts at all. However, Professor Bartell never defends her definition of the terms "court" or "judge." She never clearly specifies what characteristics must be present in order to label an institution a "court" and its officers "judges." More importantly, she never defends her claim that independence is essential for status as a court or judge.

Second, Professor Bartell's definition of "court" is contrary to the common use of those words. By her analysis, it is questionable whether any Article I court could ever exist. Yet, the Supreme Court repeatedly has spoken of Article I courts and their judges. In fact, in Freytag v. Commissioner,

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65See Bartell, supra note 7, at 1.
64Id. at 25.
63Id. at 27.
62Id. at 27–28 (quoting Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1514 (5th Cir. 1990)).
Supreme Court held that the Chief Judge of the Tax Court may appoint special judges for specified proceedings. The Supreme Court reasoned that the Tax Court, although an Article I tribunal, is a “court of law” that can be authorized by Congress to appoint special judges who constitute “inferior officers” within the meaning of the Appointments Clause in Article II that permits Congress to vest the appointment of inferior officers in “the President alone, in the Courts of Law, or in the Heads of Departments.”68 If Tax Courts have been specifically declared to be “courts of law,” there is no reason why bankruptcy courts cannot have this status. Put another way, if it looks like and acts like a court and everyone thinks that it is a court, then it should be treated as a court.

Third, although Professor Bartell’s primary argument is that it would be unconstitutional to create bankruptcy “courts,” she also makes a statutory claim. She says that the 1984 law speaks of “bankruptcy judges,” but does not expressly mention “bankruptcy courts.” She writes:

In a section headed “Procedures,” the district courts are authorized to refer such cases and proceedings to the bankruptcy judges (not to the “bankruptcy courts”) for hearing and determination (for “cases under Title 11 and all core proceedings”) or for hearing only (for noncore proceedings “otherwise related to a case under Title 11”).69

Professor Bartell’s assumption in this argument is that a bankruptcy court can only be considered a court if Congress expressly used the word “court” in this section. Why? She does not say. Quite to the contrary, there is every reason to believe that when Congress used the phrase “bankruptcy judges,” it thought that the place they would work would be “bankruptcy courts.” The place was called bankruptcy court before the law. The place where judges usually work is called a court. There is no reason to infer any different intent here.

Finally, as a constitutional argument, Professor Bartell overextends the holding in Marathon. As Justice O’Connor expressed in the language quoted above,70 the ruling in Marathon was that Congress may not give “a non-Article III court” the power to adjudicate and render a final judgment in a state law contract action.71 Justice O’Connor did not say that a non-Article III court could not exist or that it could not hear other matters. Indeed, she spoke expressly of a “non-Article III court.”

All of this responds to Professor Bartell on the assumption that Marathon remains good law and says that bankruptcy courts can and do exist now. Her thesis, of course, collapses if Marathon has lost vitality. Indeed, as suggested

68Id. at 882–83 (quoting U.S. Const. art. II, § 2, cl. 2).
69Bartell, supra note 7, at 27.
70See supra note 62 and accompanying text.
earlier in this Article,\textsuperscript{72} I believe that \textit{Marathon} is inconsistent with the Court’s later functional approach, can be explained as a reflection of unique contemporaneous events, and should be overruled.

Indeed, from a functional perspective, I would suggest that there is no reason for bankruptcy courts to be adjuncts of the district courts. The selection of bankruptcy judges, as indicated in Part I, is at least as likely to produce highly qualified bankruptcy judges as district court judges. The emphasis on merit selection of bankruptcy judges in every circuit has likely produced a bench that, by any measure, is as qualified as the federal district courts. There is no reason to believe that the merit selection processes used in varying degrees by Senators is better at selecting qualified individuals than that used by the circuits in selecting bankruptcy judges.\textsuperscript{73} Moreover, the specialization of bankruptcy courts, as discussed in Part II, makes them superior for deciding bankruptcy law issues. There is no reason to believe that the cases decided by bankruptcy courts require the independence of an Article III court.

B. The Authority of Bankruptcy Appellate Panels

The 1978 Act authorized the creation of the Bankruptcy Appellate Panel (BAP), an alternative system for review of bankruptcy cases by a specialist panel of bankruptcy judges.\textsuperscript{74} Before \textit{Marathon}, the First and Ninth Circuits created BAPs, but only the Ninth Circuit has maintained a BAP after the adoption of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Other circuits did not use this approach. A recent amendment to Title 28 has now encouraged other circuits to adopt BAPs.\textsuperscript{75}

\textsuperscript{72}See supra notes 40-52, 57-60 and accompanying text.

\textsuperscript{73}The argument might be that the greater prestige of the district court attracts the most qualified individuals. This assumes that there are not enough of the “most qualified individuals” to fill both the district court and bankruptcy court positions. There is no reason to believe that this assumption is true or that the selection process is sufficiently precise to find such people.


\textsuperscript{75}As part of the Bankruptcy Reform Act of 1994, Congress amended 28 U.S.C. § 158(b) to make BAPs the presumptively preferred method for reviewing appeals from orders of bankruptcy judges. Those amendments, in part, provide:

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that —

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

As discussed above, the BAP is desirable because it allows specialist bankruptcy judges to replace nonspecialist federal district court judges. Several difficult issues arise, however, concerning the status of decisions by the BAP. For example, are BAP decisions binding on bankruptcy courts? Are district court decisions binding on the bankruptcy courts? Are BAP decisions binding on district courts?

As I have read the cases and law review articles on this topic, I am again struck by how much of the argument proceeds from definition. Contrary to this view, I believe that the answer to the questions concerning the BAP must be derived functionally from the values to be served. The crucial premise for my analysis is that it is desirable for appellate decisions to have binding effect.

Principles of stare decisis serve many valuable ends. First, they enhance efficiency. If appellate precedents are followed, there is no need to litigate the same issue repeatedly in different cases. The question is decided in an appellate court, and lower courts are then responsible for following that decision. Second, binding appellate precedents foster consistency. If each bankruptcy judge is free to decide an issue for himself or herself, varying results are inevitable. The outcome of the legal questions is likely to depend on the identity of the judge. Binding appellate precedents thus foster fairness and equity among litigants. Third, binding appellate precedents foster predictability in the law. Individuals can know the law and base their conduct accordingly. Lawyers can know the law and advise their clients accordingly. Without binding precedent, the law is uncertain and the benefits of predictability are lost.

From this functional perspective, I think that BAP decisions clearly should be binding on bankruptcy courts. As Bankruptcy Judge Geraldine Mund explained, “Stare decisis maintains a hierarchical dimension which is believed to be crucial to the efficient operation of the judicial system.” Making BAP decisions binding on bankruptcy courts will provide all of the benefits of binding decisions described above.

\[96\text{See supra notes 22–26 and accompanying text.} \]

\[97\text{For an excellent discussion of these issues, see Daniel J. Bussel, Power, Authority, and Precedent in Interpreting the Bankruptcy Code, 41 UCLA L. Rev. 1063 (1994).} \]

\[98\text{See, e.g., In re Windmill Farms, 70 B.R. 618 (B.A.P. 9th Cir. 1987), rev’d on other grounds, 841 F.2d 1467 (9th Cir. 1988); Life Ins. Co. v. Barakat (In re Barakat), 173 B.R. 672 (Bankr. C.D. Cal. 1994) (bankruptcy courts are bound by BAP, but not by district courts); Coyne v. Westinghouse Credit Corp. (In re Globe Illumination Co.), 149 B.R. 614 (Bankr. C.D. Cal. 1993) (bankruptcy courts throughout the circuit are bound by BAP); In re Thunderbird Inn, 151 B.R. 224 (Bankr. D. Ariz. 1993) (same).} \]


\[101\text{Barakat, 173 B.R. at 677.} \]
Bankruptcy Judge Kathleen March and Roberto Obregon take a contrary, and I think incorrect, position and say that "[a]n emerging view, and possibly the better reasoned view, is that BAP case law is not binding on any court."\(^{32}\) They argue that a single federal district court judge is not bound to follow the decisions of other district court judges. A BAP exercises appellate authority similar to that of a district court judge reviewing bankruptcy court decisions. Therefore, by this view, a BAP panel cannot bind other BAP panels. Nor, they reason, because it is exercising power delegated from district courts, can it bind other district courts. Finally, they contend that bankruptcy courts, because they are adjuncts to district courts, are not bound either.

The problem with this argument is that it is based on a definition, rather than a functional analysis. It defines the bankruptcy court in a particular way and says that the conclusion concerning precedent flows from the definition. I believe that conclusions about the binding effect of precedent should be determined based on the gains as opposed to the costs of the alternative arrangements. From this perspective, I can see only benefits to giving BAP decisions binding effects in the bankruptcy courts.

If there is not a BAP, should district court decisions have a binding effect on bankruptcy courts? Again, there is a temptation to answer this question from definition. For example, once more, the argument would be that one district court judge cannot bind another district court judge so that one district court judge cannot bind a bankruptcy court. The problem is that it confuses district courts sitting as original jurisdiction tribunals and district courts serving an appellate function. While a district court exercising original jurisdiction cannot bind other district courts, its decisions should be binding on bankruptcy courts when the district court is serving as an appeals court. Although I believe that the BAP is the best approach to appellate review, if none exists, then the district court has an appellate role. The benefits of binding appeals are such that district court decisions should be given *stare decisis* effect. There is a loss, from a functional perspective, in requiring that specialized courts follow the decisions of nonspecialized judges. But this is an argument for creating a BAP, not a reason to lose all of the benefits of binding appellate review.

Finally, the hardest issue is whether a BAP decision is binding on district courts. Many factors make this a difficult question. The conventional wisdom is that an Article I court cannot bind an Article III court. Moreover, at the very least, the BAP and a district court are at the same level and, again, the rule is that one district court does not bind another.

Nonetheless, I would argue that district courts should be bound by BAP decisions. The view that an Article I court can never bind an Article III court

is an overstatement. Decisions by an Article I court can have res judicata and collateral estoppel effects in Article III courts. Moreover, whether an Article III court should be regarded as superior to an Article I court should be answered contextually. Are there reasons to believe that the protections of Article III make the Article III court superior to the Article I court for particular decisions?

In this context, the Article I BAP seems superior in determining questions of bankruptcy law to the nonexpert federal district court. Nothing in Article III forecloses district courts from following the decisions of BAPs in the area of bankruptcy law. To the extent that Marathon is a problem with this, the BAP could be redefined to be an adjunct of the appeals court. This would offer a hierarchical reason for making BAP precedents binding on district courts. It also would provide a structure of appellate review that is consistent with the way Marathon defined Article III.

C. THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION

Finally, I contend that the trend towards increased use of alternative dispute resolution generally would be undesirable in the area of bankruptcy law. As discussed earlier, courts have unique features. Most importantly, they issue published decisions that interpret the law. These published decisions guide people as to their rights and duties and provide a body of precedents to inform other courts. This is lost with alternative dispute resolution. The Bankruptcy Code is filled with uncertainties and the bankruptcy reports are filled with interpretations and opinions on countless difficult questions. Moreover, the enforcement power of the judiciary is often needed to implement the orders and edicts of the bankruptcy courts. This too is lost with a shift to alternative dispute resolution.

CONCLUSION

 Debates and litigation over jurisdiction are inevitable in a system with multiple venues. Allocating jurisdiction inevitably raises basic questions about the separation of powers and federalism. Ever since Marathon, jurisdictional issues have been a constant plague for the bankruptcy bench and bar.

 Analysis always should be functional. The key question is what characteristics of decision-makers are important and under what circumstances. This Article has begun an exploration of that issue.

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See supra Part I.