

COURTS CREATING COURTS: PROBLEMS OF JUDICIAL INSTITUTIONAL SELF-DESIGN

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With prospects for reform of the federal judiciary growing, a critical—but overlooked—issue is the extent to which judicial branch actors can and ought to be recipients of congressional grants of power to reshape the federal court system. Existing law recognizes limited discretion for judicial institutional self-design; judicial reform may introduce more substantial examples. Yet the underpinnings of the practice remain unexamined, both doctrinally and normatively. This Article fills that gap.

Doctrinally, congressional delegation of power on Article III actors to create courts (and layers of judicial review) raises serious constitutional questions. First, the Constitution authorizes only Congress to create lower Article III courts and legislative courts. Second, the nondelegation doctrine may raise a separate hurdle, to the extent that Congress conveys on the judiciary discretion that is not limited by an intelligible principle. Third, vesting judicial self-institutional control in Article III actors may conflict with Supreme Court precedent limiting the types of authority that Congress can delegate to the judiciary.

Subconstitutionally, the statutory power and status of judicially created tribunals are muddled: It is unclear under current law whether such tribunals have the powers to issue writs of mandamus, to issue local court rules, and to allow litigants to proceed in forma pauperis. These issues can and should be clarified by amending the relevant statutes.

Beyond the doctrinal, there are several normative issues with empowering courts to create tribunals. Courts are ill-suited to make well-informed judgments about the desirability of a new tribunal. Moreover, the decision whether to create a new tribunal might involve displacing some of the jurisdiction of existing judges. It seems instead that administrative actors within the judiciary are better suited to such tasks than are courts.

INTRODUCTION

Prospects for reform of the federal judiciary are high, with President Joe Biden having announced the formation of a White House Commission to study reform of the Supreme Court and the federal courts writ large.¹ A confluence of factors have contributed to the demand for judicial reform. Concern over

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1. Press Release, The White House, President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/>.

the ideological tilt of the federal courts—perhaps especially after President Donald Trump’s appointment of large numbers of federal judges²—has driven the issue to the forefront. Beyond this, the passing years have witnessed steady growth in the caseload of the federal courts.³

Commentators have joined the chorus of judicial reform. In a recent article, Professors Peter Menell and Ryan Vacca propounded an agenda for judicial reform.⁴ Two aspects of their analysis focus on restructuring the judiciary: introducing a new layer of judicial review—presumably an appellate tribunal charged with resolving splits among the federal courts of appeals⁵—and the integration of more subject-matter-specific tribunals.⁶

Earlier efforts directed at structural judicial reform efforts have traditionally included proposals falling under at least one of these two headings. As a 1990 Federal Courts Study Committee commissioned by Congress and assembled by the Chief Justice⁷ commented, “the central path of radical structural reform focuses on appeals, and it is forked,” with “[o]ne fork lead[ing] to specialized courts” and “the other to additional tiers of intermediate appellate review.”⁸

Proposals such as these assume that, whatever structural reforms are desirable, they should and will be implemented universally and uniformly across the federal jurisdiction. But this need not be the case. Rather, reforms can be tailored to more localized judicial need. And, to the extent that the judiciary itself might be best positioned to assess localized need, one might think that a reform proposal should include the delegation of power on the judiciary to design itself.

At least one major proposal for judicial reform—that of the Commission on Structural Alternatives for the Federal Courts of Appeals created by Congress in 1997⁹—included the notion of “tailoring” in its plan. In 1998, the

2. See Rebecca R. Ruiz & Robert Gebeloff, *As Trump Leaves the White House, His Imprint on the Judiciary Deepens*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/us/politics/trump-judges-appeals-courts.html>.

3. *Judiciary Makes the Case for New Judgeships*, U.S. CTS. (June 30, 2020) <https://www.uscourts.gov/news/2020/06/30/judiciary-makes-case-new-judgeships> (describing the Federal Judicial Conference’s request that Congress create new federal judgeships and that the last bill comprehensively addressing federal judgeships was in 1990).

4. See Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 880–85 (2020).

5. See *id.* at 881–82. This proposal falls within the authors’ broader discussion of expanding the federal judicial system’s capacity, other aspects of which are (i) amending the federal courts’ jurisdiction, (ii) increasing the number of federal judgeships, and (iii) adjusting procedures to address capacity constraints. See *id.* at 880–83.

6. See *id.* at 883–84. Beyond the structure of the federal judiciary, the authors suggest the possibilities of resolving statutory interpretive dissonance, reconsidering life tenure, and ensuring budgetary and technological reforms. See *id.* at 885.

7. Federal Courts Study Act of 1988, Pub. L. No. 100-702, §§ 102–103, 102 Stat. 4642, 4644.

8. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 10 (1990).

9. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 305(a)(1)(B), (a)(6), 111 Stat. 2440, 2491–92.

Commission—chaired by retired Supreme Court Justice Byron White—issued a final report¹⁰ recommending (among other things) the possible introduction of “district court appellate panels” or “DCAPs.”¹¹ The DCAP proposal—introduced as a congressional bill but never enacted¹²—envisions a discretionary grant to circuit judicial councils to create DCAPs and select the subject matter content of their dockets; indeed, the Commission’s final report described the DCAP proposal as “authoriz[ing] the courts to *experiment* with shifting a portion of the reviewing task to the trial court level.”¹³ Specifically, the Commission recommended a new statutory provision that would “authorize, but not require, judicial councils to create district court appellate panels within the circuit and provide by rule for the assignment of certain categories of cases to those panels.”¹⁴ In a circuit where the judicial council created a DCAP, it would hear appeals in all cases emanating from district courts in that circuit falling within the ambit of subject matters assigned to the DCAP.¹⁵ Parties who lost before the DCAP could pursue a discretionary appeal only to the court of appeals (and thence to the Supreme Court).¹⁶

In fact, existing law already incorporates judicial institutional self-design to an extent. Consider first that Congress has empowered courts of appeals with authorized complements in excess of fifteen active circuit judges to constitute themselves into administrative units.¹⁷ Second, Congress has enabled the Judicial Conference (an administrative actor within the Article III judiciary) to set the number of magistrate judges who serve within existing Article III district courts.¹⁸

A third example of discretionary power vested in Article III actors goes farther than the other two, and indeed may have served as the inspiration for

10. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: FINAL REPORT (1998), <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf> [hereinafter COMMISSION FINAL REPORT]. Prior to the establishment of the Commission, some commentators had extolled the virtues of DCAPs (although with little, if any, emphasis on the notion that individual circuits might establish DCAPs as they saw fit). See Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 58–62; Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 825–26 (1989) (reviewing PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)); Daniel J. Meador, *Enlarging Federal Appellate Capacity Through District Level Review*, 35 HARV. J. ON LEGIS. 233, 235–36 (1998); JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 131–32 (1995); FED. JUD. CTR, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 133–39 (1993).

11. COMMISSION FINAL REPORT, *supra* note 10, at 64–66.

12. See Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275, 276 & n.2 (1999).

13. COMMISSION FINAL REPORT, *supra* note 10, at 64 (emphasis added).

14. *Id.*

15. *Id.*

16. *Id.*

17. See *infra* Part I.B.1.

18. See *infra* Part I.B.2.

DCAPs;¹⁹ this is the power to create “bankruptcy appellate panels,” commonly known as “BAPs,” in each judicial circuit.²⁰ In circuits where BAPs have not been created, appeals from final determinations issued by bankruptcy judges in so-called core proceedings, that is, proceedings in a bankruptcy case that go to the very essence of bankruptcy law,²¹ lie to the district court (and thence to the court of appeals).²² In contrast, in circuits where they exist, BAPs are empowered to hear appeals, with the consent of the parties, from final determinations issued by bankruptcy judges in core proceedings.²³ BAPs thus offer an alternative appellate path—as opposed to the district court—for appeals of bankruptcy court determinations in core proceedings.²⁴

The power to create BAPs is entrusted to the discretion of each circuit’s judicial council²⁵ (a quasi-administrative body consisting of circuit and district judges from each circuit),²⁶ while the power to allow cases to flow to the BAP (or not) is committed to each district court in a circuit that has created a BAP.²⁷ BAPs, then, offer an example of a layer of review where discretion is vested in different actors to decide upon the number of judges and number of cases that flow to the layer of review. And both of these are basic “on–off switches”: The circuit judicial council either creates the BAP or not, and (assuming the judicial

19. See COMMISSION FINAL REPORT, *supra* note 10, at 64 n.120 (noting that circuits with BAPs had “taken different approaches to the membership of these panels and the procedures they use” and that “[s]imilar variation, at least during the developmental stages, could provide useful information about how best to organize district court appellate panels”).

20. See *infra* Part I.B.3.

21. For elucidation of “core proceedings,” see 28 U.S.C. § 157(b)(2); *infra* note 111 and accompanying text.

22. 28 U.S.C. § 158(a).

23. *Id.* § 158(b)–(c). District courts, and BAPs, also can hear appeals from a bankruptcy judge’s determination in non-core proceedings, where the parties consented to the bankruptcy judge entering a final determination with respect thereto. See *id.* § 157(c).

24. See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1756–59 (2008).

25. According to the governing statute, the judicial council must establish a BAP unless it finds that either “(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.” 28 U.S.C. § 158(b)(1). “A judicial council may reconsider, at any time, the finding described in paragraph (1).” *Id.* § 158(b)(2)(A).

As originally enacted in 1984, § 158 merely authorized the circuit councils to create, without establishing a presumption in favor of the creation of, BAPs. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 341 (creating 28 U.S.C. § 158(b)(1) and directing that it should read: “The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit . . .”). Legislation in 1994 amended the statute to its current form. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109.

26. The Judicial Code establishes for each circuit a judicial council “consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit, as such number is determined by majority vote of all such judges of the circuit in regular active service.” 28 U.S.C. § 332(a)(1).

27. See *id.* § 158(b)(6) (“Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.”).

council has created a BAP) each district court in the circuit decides to authorize the BAP to hear appeals originating in that district or not.

Given these examples of institutional self-design, one might think that the legality of allowing the judiciary to engage in structural self-design is clear.²⁸ But in fact the questions of whether actors within the judicial branch of government—that is, the branch created under the authority of Article III of the Constitution²⁹—can, and normatively should, be recipients of congressional grants of discretion that empower them to reshape the federal court system remain largely unexplored. Even under current law, questions about the powers of court-created courts have arisen and remain unresolved.³⁰ Judicial reform may well push the envelope even further. Sustained analysis and resolution of these questions thus are critical both to buttressing existing examples of institutional self-design and to enabling reformers to develop proposals that will both pass legal muster and optimize function.

In this Article, I take on doctrinal and normative questions arising out of congressional grants of discretion on Article III actors to potentially reshape the federal court system.³¹ The project is doctrinal in that it addresses potential legal obstacles arising out of such grants. The project is normative in that it asks questions—assuming that such grants of discretion are at least sometimes legal—about when Congress should grant such discretion and about *which Article III actors*—in particular, administrative actors in the judiciary as opposed to courts—are better positioned to be recipients of such discretion.

On the doctrinal side, my focus is very much on means, not ends. I accept for present purposes the power of Congress to delegate what would constitute Article III adjudicatory power—were it in the hands of an Article III actor—

28. Judges, lawyers, and legal academics have critiqued the DCAP proposal on various grounds, but not on the ground that it might involve an improper delegation of congressional power to create courts. *See* Memorandum from Seven C.J.s on the Tentative Draft Report to the Members of the Comm'n on Structural Alts. for the Fed. Cts. of Appeals (Nov. 10, 1998), library.unt.edu/gpo/csafca/report/comments/Becker.htm; Comments of the Ass'n of the Bar of the City of New York on the Tentative Draft Report of the Comm'n on Structural Alts. for the Fed. Cts. of Appeals (Oct. 26, 1998), library.unt.edu/gpo/csafca/report/comments/NYBar.htm; JOHN P. DRISCOLL, JR., A.B.A. STANDING COMM. ON FED. JUD. IMPROVEMENTS, REPORT 110A (1999), https://www.americanbar.org/content/dam/aba/directories/policy/1999_am_110a.authcheckdam.pdf; Thomas E. Baker, *Two Cheers for the Commission on Structural Alternatives for the Federal Courts of Appeals*, 1999 FED. CTS. L. REV. 1; Tobias, *supra* note 12, at 309–10; WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 159 (2013).

29. *See* U.S. CONST. art. III.

30. *See infra* Part III.

31. My focus here is on the federal government, the Article III judiciary, and the federal court system. That said, some of the arguments (especially the normative arguments) I raise here may well translate to the broader set of forums in which federal adjudication takes place, *see* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 G.A.L. REV. 909, 911 (1990) (“‘Federal adjudication’ also occurs in federal agencies, where . . . administrative law judges conduct hearings, make factual findings, and apply law to fact to render decisions.”), and to state judicial systems.

well outside the Article III rubric.³² Indeed, I assume that Congress could, without problem, get to largely the same results as do the delegations I examine below if Congress simply enacted delegated-adjudicatory power directly. My focus is squarely on the power of Congress not to delegate adjudicatory power but rather to *delegate the power to delegate* adjudicatory power on Article III actors. In other words, my focus is on the power of Congress to create in Article III actors the discretion to engage in institutional self-design.

I argue first that the decision by Congress to delegate power on Article III actors to create courts (and possibly also layers of review) raises serious constitutional questions. For one thing, structural federalism looms as a substantial obstacle. The Constitution authorizes Congress, and Congress alone, to create lower Article III courts.³³

The nondelegation doctrine may raise a separate constitutional hurdle. This constitutional doctrine is usually thought to restrict the power of Congress to delegate legislative power on an executive branch actor absent some “intelligible principle” to guide the executive’s discretion.³⁴ Recent scholarship, however, argues that the doctrine extends as well to legislative delegations to the judicial branch.³⁵ It seems that Congress has supplied a quite adequate intelligible principle to guide judicial councils in deciding whether or not to create BAPs³⁶ (although it remains unclear the extent to which the councils have in practice abided by that principle).³⁷ However, one can question whether judicial councils have the capacity, or the desire, to comply with the guiding principle. Moreover, to the extent that district courts play a role in BAP creation by deciding whether or not to allow appeals to flow to the BAP, the statute provides no basis at all to constrain the district courts’ discretion.³⁸

A final constitutional issue is whether vesting judicial self-institutional control in Article III actors runs afoul of Supreme Court precedent limiting the types of authority that Congress can delegate to the judiciary. The Supreme Court has recognized a general constitutional bar against imposing “executive

32. See, e.g., Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 486 (1989) (arguing in favor of Congress’s authority to require arbitration of disputes arising under federal statutes).

33. Article III provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. Using the apparently interchangeable term “tribunal,” Article I further echoes Article III. See U.S. CONST. art. I, § 8 (affording Congress the power “[t]o constitute Tribunals inferior to the supreme Court”); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (“The power given Congress in Art. I, § 8, cl. 9, ‘To constitute Tribunals inferior to the Supreme Court,’ plainly relates to the ‘inferior Courts’ provided for in Art. III, § 1; it has never been relied on for establishment of any other tribunals.”).

34. See *infra* note 160 and accompanying text.

35. See *infra* note 162 and accompanying text.

36. See *infra* note 163 and accompanying text.

37. See *infra* note 184.

38. See *infra* note 164 and accompanying text.

or administrative duties of a nonjudicial nature” on Article III judges.³⁹ At the same time, the Court has permitted Congress to delegate to the judiciary “nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”⁴⁰ In particular, the Court has approved the delegation of extrajudicial activities that bear a “close relation to the central mission of the Judicial Branch” and that are “consonant with the integrity of the [Judicial] Branch and are not more appropriate for another Branch.”⁴¹ Allocating discretion to Article III actors to reshape the federal judicial hierarchy may well go beyond the allowable powers that can constitutionally be vested in the judiciary.

Turning to subconstitutional issues, to the extent that Article III actors create tribunals, there are numerous legal issues that go to the power and status of those tribunals. For example, do such tribunals have the power to issue writs of mandamus,⁴² the power to issue local court rules,⁴³ and the power to allow litigants to proceed *in forma pauperis*?⁴⁴ Do they operate under the auspices of the Administrative Office of the U.S. Courts (AO),⁴⁵ and can they avail themselves of the resources of the Federal Judicial Center (FJC)?⁴⁶ These issues

39. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (first citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); and then citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)); see *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (describing this bar as a “general principle”).

40. *Mistretta*, 488 U.S. at 388; see also *Morrison v. Olson*, 487 U.S. 654, 681 (1988) (approving of the delegation on the judiciary of powers that “do not impermissibly trespass upon the authority of the Executive Branch”).

41. *Mistretta*, 488 U.S. at 390.

42. See 28 U.S.C. § 1651(a) (authorizing that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”); *infra* Part III.A.

43. See 28 U.S.C. § 2071 (empowering that “[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business”); *infra* Part III.B.

44. See 28 U.S.C. § 1915(a)(1) (“[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.”); *infra* Part III.C.

45. See 28 U.S.C. § 601 (“The Administrative Office of the United States Courts shall be maintained at the seat of government.”). See generally *id.* §§ 601–13.

The Administrative Office is the agency within the judicial branch that provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts. Judicial Conference committees, with court input, advise the Administrative Office as it develops the annual judiciary budget for approval by Congress and the President. The Administrative Office is responsible for carrying out Judicial Conference policies. A primary responsibility of the Administrative Office is to provide staff support and counsel to the Judicial Conference and its committees.

Judicial Administration, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration> (last visited Apr. 15, 2018).

46. See 28 U.S.C. § 620(a) (“There is established within the judicial branch of the Government a Federal Judicial Center, whose purpose it shall be to further the development and adoption of improved judicial administration in the courts of the United States.”). See generally *id.* §§ 620–29.

are not constitutional in nature. They turn, rather, on the statutes Congress has drafted for general application to courts without considering the possibility of judicially-created tribunals.⁴⁷ These issues can be clarified by Congress amending the relevant statutes. But they highlight the broad issue of *unexpected application* (or lack of application) of existing statutory provisions to judicially-created tribunals.

Beyond any doctrinal issues, I identify several normative issues with empowering *courts* to create tribunals.⁴⁸ Courts are ill-suited to make well-informed judgment calls about the desirability, value, and cost of a new tribunal. To be sure, judges on the ground may have a very good sense of the court's caseload (and maybe also, for a superior court, of the caseload of other courts within the superior court's jurisdiction). But they are not well-equipped and lack sufficient incentives to assemble some of the factual predicates and to balance the relevant factors necessary to reach a reasoned conclusion. Moreover, the decision to create, or not to create, a new tribunal might involve displacing some of the jurisdiction of existing judges (whether that be the judges making the decision themselves or the judges working with or under those judges). As such, one might expect judges to give substantial weight to their own preferences or the preferences of their colleagues. At the least, it seems that administrative actors within the judiciary (such as the AO) would be better suited to such tasks than courts themselves.

Though the doctrinal (both constitutional and subconstitutional) and normative arguments confront technical issues, they are of substantial practical moment. Whether Congress has properly delegated power on the judiciary to create (and bypass and eliminate) courts raises important "rule of law"

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States. The many specific statutory duties of the Center and its Board fall into a few broad categories:

- conducting and promoting research on federal judicial procedures and court operations;
- conducting and promoting orientation and continuing education and training for federal judges, court employees, and others;
- conducting and fostering the study and preservation of federal judicial history; and
- providing information and advice to further improvement in the administration of justice in the courts of foreign countries and inform federal judicial personnel of developments in foreign court systems that could affect their work.

Federal Judicial Center, CONNELLY LIBR., <https://library.lasalle.edu/c.php?g=131030&p=856662> (June 30, 2021, 11:23 AM).

47. See *infra* note 72 and accompanying text.

48. I do *not* mean to assess the normative desirability of the tribunals themselves. Indeed, I am an unabashed fan of the BAPs; prior research I conducted with Professor Rafael Pardo demonstrates that the BAPs provide, and are perceived to provide, quality review of bankruptcy appeals. See Nash & Pardo, *supra* note 24, at 1784–1806. My concern, rather, focuses on whether courts (and judicial actors more generally) are appropriate institutions to make decisions about tribunal creation. I suspect that (if anything), given the option, judicial actors may decide to create tribunals with suboptimal frequency.

concerns. So, too, do the gaps in the judicial statutory regime that, for example, leave unclear whether judicially created courts have certain basic powers.

Indeed, the import of these issues is likely only to grow in the future, with momentum that may be building to reform the federal judiciary.⁴⁹ Moreover, judicial systems—including the federal judiciary—continue to experiment with new types of judicial bodies.⁵⁰ Consider, for example, the increasingly important Judicial Panel on Multidistrict Litigation (JPML).⁵¹ While the grant that creates the JPML may not go so far as to vest discretion in a judicial actor to create a new court or layer of review,⁵² commentators still observe that it has generated a “procedural no man’s land.”⁵³ Consider as well the trend toward creating specialized courts—including, for example, commercial courts⁵⁴ and drug treatment courts.⁵⁵ It seems that this trend will only increase with growing societal complexity as well as other incentives to experiment with and morph the structure of the judicial systems.⁵⁶

The normative questions—whether the judiciary is well-positioned to make overarching decisions regarding the judicial architecture and which judicial actors are better positioned in this regard than others—are important as well. First, the inquiries offer lessons on judicial institutional design for policymakers. Second, to the extent that (as I argue) the current structure is normatively suboptimal, it may be that Article III actors are seeking to reduce their own workload by creating additional judicial layers staffed by non-Article III

49. See *supra* notes 1–3 and accompanying text.

50. For an example of a recent innovation in the patent litigation system, see *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (discussing and upholding “inter partes review,” under which a third-party’s claim that a patent is invalid is determined within the United States Patent and Trademark Office with appeal lying to the United States Court of Appeals for the Federal Circuit).

51. See generally *Overview of Panel*, U.S. JUD. PANEL ON MULTIDIST. LITIG., <https://www.jpml.uscourts.gov/overview-panel-0> (last visited Jan. 31, 2019). The JPML renders decisions on the consolidation of cases across federal judicial districts for pretrial purposes. Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 765 (2012).

52. See 28 U.S.C. § 1407(b).

53. Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) (“[B]ecause . . . claims [before the JPML] are not certified as class actions, they proceed in a procedural no man’s land—somewhere in between individual litigation and class action litigation, but without the protections of either.”).

54. See *infra* note 167.

55. See, e.g., Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717 (2008).

56. Drug treatment courts have arisen as part of various state judiciaries but with the support of the federal Bureau of Justice Assistance. See *Adult Drug Court Grant Program*, BUREAU OF JUST. ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=58 (last visited Jan. 31, 2019) (“The Adult Drug Court Grant Program provides financial and technical assistance to states, state courts, local courts, units of local government, and federally recognized Indian tribal governments to implement or enhance the operations of drug courts. These courts effectively integrate evidence-based substance abuse treatment, mandatory drug testing, incentives and sanctions, and transitional services in judicially supervised court settings that have jurisdiction over offenders to reduce recidivism and substance abuse.”); Hora & Stalcup, *supra* note 55, at 808 (noting non-financial Bureau support).

personnel⁵⁷ or aggrandizing their own power and status by creating suboptimally few such additional layers.⁵⁸ And, in particular, if the latter is true, then that in turn raises judicial efficiency and access-to-justice concerns. For example, as I discuss below, most circuit councils blithely declined to create BAPs.⁵⁹ Yet BAPs generally accelerate the appeals process,⁶⁰ presumably also thereby reducing the costs of pursuing bankruptcy appeals. In the end, then, vesting institutional design decisions in judicial actors who are poorly situated to implement them may have an adverse effect on litigants' access to the justice system.

The Article proceeds as follows. Part I surveys the landscape of the problem. Subpart A specifies the scope of the project. Subpart B then examines settings where Article III actors have the discretion to set the number of judges populating a layer of review—or cases that a layer of review hears—and thus perhaps the discretion to create (or eliminate or bypass) a layer of review.

Part II sets out constitutional issues associated with having an Article III actor create (or eliminate or bypass) a layer of review, and especially a standalone court. Part III does the same with respect to unexpected subconstitutional legal consequences. Part IV turns to the normative questions raised by vesting in Article III actors discretion to create (or eliminate) layers or review.

I. SURVEYING THE LANDSCAPE

In this Part, I survey the landscape of the issue I wish to explore. That first requires a description of precisely what that problem is (and what it is not); Subpart A undertakes that task. Subpart B then examines specific instances of the problem.

A. *Scope of the Project*

While parts of my analytic framework might have application in other settings (such as, for example, the delegation by a state legislature on the state's judiciary to reshape the state's court system), my analysis focuses on delegations

57. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); cf. Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 25 (2015) (arguing that federal courts actively seek to rid their dockets of matters they would prefer not to adjudicate).

58. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 743–44 (1979) (Powell, J., dissenting) (describing the danger that federal courts left to determine the scope of their own subject-matter jurisdiction might choose to aggrandize their own power); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 77, 79–80 (1997) (describing lobbying by Article III judges against affording bankruptcy judges Article III status).

59. See *infra* note 184 and accompanying text.

60. See Ed Flynn, *The Statistical Appeal of BAPs*, AM. BANKR. INST. J., June 2017, at 38, 58–59.

by Congress⁶¹ on the federal judiciary that empower the judiciary to reshape the federal court system. Even that limitation, however, leaves a potentially capacious analytic canvas. I pause, therefore, to clarify the scope of my arguments. In particular, to the extent that I will look at delegations that empower the federal judiciary to reshape the federal court system, I explicate my understanding of “the federal judiciary” and “the federal court system.”

I am interested in Congress delegating authority on Article III actors. Accordingly, my focus is on “the Article III judiciary.” At the core of the Article III judiciary are the various Article III tribunals and the judges who populate them: the United States Supreme Court and its Chief Justice and Associate Justices, the various federal courts of appeals and their circuit judges, the various federal district courts and their district judges,⁶² and the Court of International Trade and its judges.⁶³ Also falling within the Article III judiciary are a few Article III tribunals that are staffed by Article III judges whose primary appointments are to other Article III tribunals (their appointments to the other Article III tribunals having been effected by the Chief Justice).⁶⁴ In addition, because a delegation to reshape the federal court system can (as we shall see)—and perhaps should—fall upon administrative actors within the Article III judiciary, I include within my understanding of the Article III judiciary the Judicial Councils, the Judicial Conference, the AO, and the FJC.⁶⁵

I consider as falling outside the Article III judiciary—and therefore do not include within my analysis delegations that fall upon—courts that are created other than under Article III, such as the Tax Court⁶⁶ and the Court of Appeals

61. Thus, for example, even if it otherwise would fall within my analytic focus, the delegation on the judges of the Superior Court of the District of Columbia to appoint magistrate judges, *see* D.C. CODE § 11-1732(a) (2001), lies beyond this Article’s scope. While the judges of the D.C. Superior Court are appointed by the President with the advice and consent of the Senate (for fifteen-year terms, and with the aid of a merit nomination commission), *see* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 431(c), 433(a), 434, 87 Stat. 774, 793, 795–98 (1973); D.C. CODE §§ 11-1501(a), -1502 (2001), the delegation is granted not by Congress but by the District of Columbia City Council (which itself derives power from the Self-Government Act).

62. *Cf.* Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1034 (1994) (“Magistrate and bankruptcy judges are neither fish nor fowl, neither Article I nor Article III judges. They are non-Article III judges in the Article III judiciary.”).

63. *See infra* note 213.

64. These include the Foreign Intelligence Surveillance Court, *see* 50 U.S.C. § 1803(a)(1); the Foreign Intelligence Surveillance Court of Review, *see id.* § 1803(b); the JPML, *see* 28 U.S.C. § 1407(d); and the division of the United States Court of Appeals for the District of Columbia Circuit for the purpose of appointing special counsels, *see id.* § 49(d).

65. *See supra* notes 45–46.

66. The precise status of the Tax Court is the subject of some question, in light of a recent change in the law. The Supreme Court in *Freytag v. Commissioner* described the Tax Court as (since 1969) “an Article I legislative court.” 501 U.S. 868, 888 (1991). Then, in *Kuratski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), the United States Court of Appeals for the District of Columbia Circuit rejected the argument advanced by a taxpayer that, insofar as (based on the Court’s holding in *Freytag*) the Tax Court is part of the Article III judiciary, it was a violation of the constitutional separation-of-powers for Congress to empower the President to remove Tax Court judges (under 26 U.S.C. § 7443(f)). The court of appeals held that the Supreme Court’s

for the Armed Forces.⁶⁷ This is consistent with my focus on delegations by Congress to Article III actors.⁶⁸ Thus, for example, the power Congress delegates on the judge advocate general for each branch of the military service (each of whom is within the executive branch)⁶⁹ to set up a court of criminal appeals.⁷⁰ I also do not include non-Article III judges—such as bankruptcy judges and magistrate judges—who function within Article III courts⁷¹ (though I do include them within the federal court system, as I discuss presently).

The federal court system is where I will look for the Article III judiciary, through power delegated by Congress, to have the power to affect the judicial hierarchy. For present purposes, the federal court system is in some ways narrower, and others broader, than the Article III judiciary. Insofar as my focus will be on the judicial hierarchy, I do not include administrative and quasi-administrative entities within the federal court system. Thus, the AO, the FJC, and the circuit judicial councils are part of the Article III judiciary but not the federal court system. On the other hand, I do include non-Article III judges appointed by Article III judges, and the tribunals on which they sit, within the federal court system. Thus, for present purposes, magistrate judges, bankruptcy judges, bankruptcy courts, and BAPs lie within the federal court system but not the Article III judiciary.⁷²

holding in *Freytag* that the Tax Court was a “court of law” for Appointments Clause purposes did not mean that the Tax Court was part of the Article III judiciary. *See id.* at 940–42. Indeed, the court held that the Tax Court was part of the Executive Branch. *See id.* at 940.

Evidently in response to *Kuretski*, Congress—as part of a bill to extend certain tax breaks, *see* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242—enacted a new provision that purports to make clear that “[t]he Tax Court is not an agency of, and shall be independent of, the executive branch of the Government,” 26 U.S.C. § 7441. While the effect of this provision remains murky, it nevertheless remains clear that the provision has not made the Tax Court a part of the Article III judiciary. *See* Daniel Hemel, *Tinkering with the Tax Court*, UNIV. OF CHI. L. SCH. FACULTY BLOG (Dec. 18, 2015), <http://uchicagolaw.typepad.com/faculty/2015/12/tinkering-with-the-tax-court.html>.

67. *See* 10 U.S.C. § 941; *Ortiz v. United States*, 138 S. Ct. 2165, 2176 (2018).

68. *Cf.* Resnik, *supra* note 31, at 911–12 (describing “[f]ederal adjudication” as including litigation before administrative law judges in federal agencies but also speaking of the docket of federal administrative law judges as distinct from that of the Article III judiciary).

69. *See, e.g.*, 10 U.S.C. § 7037(a) (“The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General . . . from officers of the Judge Advocate General’s Corps, who are recommended by the Secretary of the Army.”); *id.* § 7037(b) (“The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State, and who have had at least eight years of experience in legal duties as commissioned officers.”).

70. *See id.* § 866(a) (“Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State . . .”).

71. *See infra* notes 95–96 and accompanying text (magistrate judges); *infra* note 110 and accompanying text (bankruptcy judges).

72. *See* Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 614 (2002) (“Congress has also created other kinds of judgeships within the Article III branch—bankruptcy and magistrate judges . . .”).

With this in mind, what does it mean for an actor within the Article III judiciary (pursuant to a congressional delegation) to “*reshape*” part of the federal court system hierarchy? I consider the paradigmatic reshaping of a judicial hierarchy to occur when a court is removed from—or never introduced into—its position within the judicial hierarchy. I consider the introduction (or elimination or bypass) of a court to be fundamental in light of the language in Article III that vests the power to create “inferior courts” solely in Congress.⁷³

At the same time, I also consider more generally whether an Article III judicial actor has the power to introduce (or eliminate or bypass) *any layer of review*. Thus, I consider a delegation that empowers an Article III judicial actor to introduce a second layer of review within a single court⁷⁴ or to eliminate or bypass one of two (or more) layers of review within a single court that Congress has created. I include within my purview the introduction (and elimination and bypass) of layers of review (even within a single court) for two reasons. First, while the Constitution speaks of congressional power to create “inferior courts,” it nowhere defines that term (or the term used as a substitute for “courts” in Article I, “tribunals”).⁷⁵ In the absence of clarification, it is possible that every layer of review constitutes a court for constitutional purposes, notwithstanding Congress’s statutory appellations.⁷⁶ Second, and moreover, even if a court is exactly what Congress defines to be a court (such that Article III’s requirement that Congress create inferior courts is satisfied), there are (as I discuss below) other constitutional obstacles to Congress vesting authority in the judicial branch to change the shape of the judicial hierarchy, even if the number of reviewing courts remains constant.⁷⁷

A grant of power to reshape the federal judiciary will typically take the form of either (i) the power to appoint judges—or not to appoint any judges—to a would-be layer of review or court, or (ii) the power to siphon cases—or not to allow cases to proceed—to a would-be layer of review or court.⁷⁸ The power to staff—or not to staff—a layer of review within a court (or a court itself) clearly determines the existence of that layer of review (or court). So, too, is the power

73. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

74. There seems to be little question that Congress can authorize multiple layers of review within the same court. *See, e.g.*, 28 U.S.C. § 46(c) (authorizing “rehearing before the court [of appeals] in banc” after a three-judge panel has issued an initial decision).

75. U.S. CONST. art. I, § 8 (vesting in Congress the power “[t]o constitute Tribunals inferior to the supreme Court”).

76. *Cf.* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 949–52 (“The district courts themselves sit as appellate courts to review some of the work of magistrate and bankruptcy judges . . .” (emphasis added)).

77. *See* Menell & Vacca, *supra* note 4, at 875–79.

78. *See id.* at 801–04.

to allow cases to flow to a layer of review (or court)—or to deprive that layer (or court) of cases—existential.⁷⁹

A final requirement is that for a grant of authority to reshape the judiciary, it must operate on an all-or-nothing, as opposed to a case-by-case, basis.⁸⁰ For example, the Supreme Court’s exercise of the discretion Congress has granted to it to determine whether to add a case to its docket does not create a new level of review.⁸¹

Standing in contrast is the power Congress has conferred upon the AO to decide upon the number of authorized magistrate judge positions in each district.⁸² Here, by setting the number of magistrate judges in a district above zero, the AO is drawing an absolute distinction—like an on–off switch—between districts in which judges *can* refer non-dispositive pretrial matters to magistrate judges and districts in which judges *never can do so*. In this sense, the AO’s power can reshape the federal judiciary. I explore this example, and others, in the next Subpart.

B. *Examples of Judicial Actors Exercising Delegated Powers to Shape the Federal Judiciary*

1. *The Power of Larger Courts of Appeals to Self-Divide into Administrative Units*

Congress has bestowed upon large-sized courts of appeals the discretionary power to divide themselves into administrative units. Concern over the manageability of courts of appeals with large contingents of circuit judges prompted Congress in 1978 to authorize any court of appeals with more than fifteen active circuit judges to “constitute itself into administrative units.”⁸³ Any court implementing such authority is free to channel en banc review within the

79. *Cf.* *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850) (reasoning that Congress’s overarching constitutional power to create lower federal courts must include the lesser power to vest those courts with less than the full jurisdiction authorized by Article III).

80. *See* Menell & Vacca, *supra* note 4, 869–73.

81. *See* 28 U.S.C. §§ 1254(1) (review of decisions by federal courts of appeals), 1257 (review of state high court decisions). A more exacting standard might categorize as additional layers of review, for example, the decision by a district court in a civil case to refer issues to a jury (thus constraining subsequent review, *see* U.S. CONST. amend. VII) or the decision by an appellate court to apply a less-rigorous standard of review.

82. *See* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 6–7 (2014).

83. In full, section 6 of Public Law 95-486 provides:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. The provision remains uncodified. As of today, the Fifth, Sixth, and Ninth Circuits meet the size requirement and can invoke the provision. *See* Menell & Vacca, *supra* note 4, at 840.

administrative unit out of which the case arises.⁸⁴ Prior to its division in 1981,⁸⁵ the old Fifth Circuit (then consisting of Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and the Panama Canal Zone) exercised this option, dividing into two administrative units.⁸⁶ “Unit A” consisted of Louisiana, Mississippi, Texas, and the Canal Zone (which would in 1981 become the new, smaller Fifth Circuit), and “Unit B” consisted of Alabama, Florida, and Georgia (which would in 1981 become the brand new Eleventh Circuit); judges were assigned to the unit that included the state with their home chambers.⁸⁷ Appellate panels were drawn from judges on the unit, and en banc courts consisted only of judges from the unit that included the state where the case originated.⁸⁸ This effectively divided the old Fifth Circuit into two subcircuits. While this division did not introduce a new layer of review, each Unit offered a distinct appellate path for litigants.

The Ninth Circuit today exercises a limited version of this discretion. Although the Ninth Circuit’s use of its discretionary power does not create alternative appellate paths, it does enable the creation of a new, third layer of appellate review. The Ninth Circuit has exercised its discretion to channel en banc cases before the Chief Judge and a random sample of ten other circuit judges.⁸⁹ In other words, even though the Ninth Circuit today has twenty-nine authorized judgeships,⁹⁰ en banc courts consist of different eleven-judge panels.

84. See Act of Oct. 20, 1978 § 6, 92 Stat. at 1633; 28 U.S.C. § 46(c) (“A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 . . .”).

85. See generally DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (2d ed. 1988).

86. In the late 1970s, Congress decided to try to address the Fifth Circuit’s ever-growing docket by authorizing a large number of new judgeships. In 1978, the court itself established a committee of judges to examine the desirability of dividing the court. See *id.* at 222–24. On August 13, 1979, this committee recommended that the court be aligned into two administrative units: one consisting of Louisiana, Mississippi, and Texas and the other consisting of Alabama, Florida, and Georgia. *Id.* at 227. On May 5, 1980, the Circuit Judicial Council decided to petition Congress for a division of the court. *Id.* at 236–37. The Council also decided that, pending permanent congressional action, the Fifth Circuit should be divided into “two administrative units: Unit A, composed of Louisiana, Mississippi, and Texas, and Unit B, composed of Alabama, Florida, and Georgia.” Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687, 703 (1981); see BARROW & WALKER, *supra* note 85, at 242 (“The unit system was adopted only as a precursor to the split. It was not intended to be used as a permanent solution to the circuit’s problems, although that might have been tried if Congress had turned down the court’s petition to divide.”). And on July 1, 1980, the Fifth Circuit was split into two divisions. *Id.* On October 15, 1980, President Carter signed the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, which divided the Fifth Circuit into a new, smaller Fifth Circuit and a new Eleventh Circuit. The division took effect on October 1, 1981. See Baker, *supra* note 86, at 705–06.

87. Baker, *supra* note 86, 703.

88. See Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725, 728 n.17 (1982) (quoting interim local rule).

89. See 9TH CIR. R. 35-3 (“The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.”).

90. See 28 U.S.C. § 44(a).

Unlike the old Fifth Circuit's division, this division leaves the Ninth Circuit intact; three-judge and en banc panels are drawn from the entire complement of circuit judges.⁹¹ However, the Ninth Circuit division also has a provision that allows for an appeal within the court of appeals subsequent to en banc review: the Ninth Circuit's local rule that channels en banc review to a subset of the court's judges allows for review by the full court complement thereafter.⁹² Although this additional review has apparently never been used,⁹³ still the Ninth Circuit's administrative division clearly contemplates the addition of a new (third) layer of review.

2. *The Judicial Conference's Power to Set the Number of Magistrate Judges in Each Federal Judicial District*

Congress has conferred upon the Article III judiciary the power to set the number of magistrate judges to be appointed in each judicial district.⁹⁴ Magistrate judges are non-Article III judges who serve as “adjuncts” to district judges⁹⁵ in a district.⁹⁶ Magistrate judges are appointed by the district judges of the district in which they serve.⁹⁷ They serve for renewable eight-year terms⁹⁸ and may be removed from office only for cause.⁹⁹ Congress has delegated to the Article III judiciary—acting through the Judicial Conference of the United States—the power to determine the number of magistrate judges in each judicial district.¹⁰⁰

91. Baker, *supra* note 86, at 702 n.118.

92. See 9TH CIR. R. 35-3 (“In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.”).

93. See Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2024 (2014) (“There is no indication that th[e] provision” authorizing full court review of an en banc decision “has ever been invoked.”).

94. Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1507–08 (1995).

95. See Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 596 (1985) (describing Congress as having adopted a “dependency model (deputy commissioner as supervised by and reliant upon an Article III judge) when it authorized increased powers for magistrates”).

96. See 28 U.S.C. § 631(a) (“The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine under this chapter.”); Pro & Hnatowski, *supra* note 94, at 1510 (“A magistrate judge is a judicial officer of the district court.”); Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 802 (2003) (describing the federal district courts as including “two layers of non–life-tenured judges (magistrate judges and bankruptcy judges) joining life-tenured district court judges”).

97. See 28 U.S.C. § 631(a) (“The judges of each United States district court . . . shall appoint United States magistrate judges . . .”).

98. See *id.* § 631(e). Part-time magistrate judges serve four-year terms. See *id.*

99. See *id.* § 631(i) (“Removal of a magistrate judge during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability . . .”).

100. See *id.* § 631(a) (directing that magistrate judges are to be appointed “in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine”). The number

The presence of magistrate judges as part of a district court creates an additional layer of review, or an alternative path of review, in that district.¹⁰¹ To see this, consider two ways that district judges can make use of magistrate judges.¹⁰²

Consider first that a district judge is statutorily authorized to “designate a magistrate judge”¹⁰³ to hear certain pretrial non-dispositive motions, subject to review by the district judge for whether the magistrate judge’s decision is “clearly erroneous or contrary to law.”¹⁰⁴ Here, the referral to the magistrate judge adds another layer of review. The magistrate judge issues a binding rule that is subject to review for compliance with law in the district court and then the court of appeals. Had the district court not referred the matter, the district judge herself would have resolved the question, subject to review (although review might generally be unavailable under the final-judgment rule)¹⁰⁵ in the court of appeals.

Consider next that a magistrate judge is also empowered to act in the full stead of a district judge where both (i) the parties in an action so consent and (ii) the magistrate judge has been “specially designated to exercise such

of bankruptcy judges in each judicial district is set by statute. *See id.* § 152(a)(2). However, the Judicial Conference of the United States—which consists of Article III judges, *see id.* § 331—is directed to consider, over time, the need for new bankruptcy judges and the possibility that existing positions have become obsolete. *See id.* § 152(b)(2) (“The Judicial Conference shall, from time to time, submit recommendations to the Congress regarding the number of bankruptcy judges needed and the districts in which such judges are needed.”); *id.* § 152(b)(3) (“Not later than December 31, 1994, and not later than the end of each 2-year period thereafter, the Judicial Conference of the United States shall conduct a comprehensive review of all judicial districts to assess the continuing need for the bankruptcy judges authorized by this section, and shall report to the Congress its findings and any recommendations for the elimination of any authorized position which can be eliminated when a vacancy exists by reason of resignation, retirement, removal, or death.”).

101. The actual exercise of (or failure to exercise) such discretion in any given case does not reshape the federal judiciary. *See supra* text accompanying note 81. By contrast, the decision to authorize—or not to authorize—magistrate judge positions in a given district is the on–off switch that reshapes the federal judiciary.

102. Not all referrals that the presence of magistrate judges in a district allows create a new layer, or substitute a layer, of review. A district judge is authorized to “designate a magistrate judge” to hear other motions and “applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.” 28 U.S.C. § 636(b)(1)(B). In such a case, the magistrate judge prepares “proposed findings of fact and recommendations for . . . disposition,” which is reviewed by the district judge “de novo.” *Id.* § 636(b)(1)(B)–(C). Appeals from the judgment of the district judge in either of these situations may proceed to the court of appeals in the ordinary course. *See id.* § 636(c)(3). The power to make references under this category of cases does not reshape the judicial hierarchy. In such cases, magistrate judges issue only reports and recommendations that are subject to de novo review by the district judges. *Id.* § 636(b)(1).

103. District judges often affirmatively refer matters to magistrate judges on a case-by-case basis (or sometimes multiple times within a single case). At other times, a district court’s standing order or local rule presumptively refers matters to magistrate judges, with each presiding district judge free to revoke that automatic referral as he or she sees fit. *See* Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *The Shadow Judiciary*, 39 REV. LITIG. 303, 306 (2020).

104. 28 U.S.C. § 636(b)(1)(A).

105. For discussion of the final-judgment rule and how it functions effectively to keep certain matters from meaningful appellate review, see 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3905 (2d ed. 2020).

jurisdiction by the district court or courts he serves.”¹⁰⁶ In such a case, appeal of the magistrate judge’s judgment lies directly to the court of appeals.¹⁰⁷ While the availability of such references do not add a layer of review (since there are precisely the same number of layers as there are where a district judge hears a case without reference to a magistrate judge), they do entail the substitution of a *different layer of review*: the magistrate judge is substituted for the district judge.

3. *The Power of Article III Actors to Create BAPs*

The delegations of discretion that give rise to BAPs constitute an example unto themselves. This is so for three reasons. First, the setting of BAPs is more complex in that, unlike the other examples I survey, this one involves *two distinct* grants of discretion to *two separate actors*—the circuit judicial council and the district courts within the circuit. One of the two discretionary grants (the one to the judicial council) involves the power to set the *number of judges* on the BAP (including to zero by not creating a BAP in the first place), and the other (the one to the district courts) involves the power to set the *number of cases* (in particular to zero, since each district court is free to reject the involvement of BAPs in appeals originating in that district).¹⁰⁸ Second, the discretionary grant on the district court to allow (or disallow) appeals to flow to a BAP works in tandem with the discretionary grant on the circuit council to create a BAP to increase the potency of the former grant. Third, while the introduction of a BAP surely at the least is the creation of an alternate layer of review, it can be argued that it is in fact the creation of a wholly new court.¹⁰⁹

BAPs are primarily concerned with reviewing the determinations of bankruptcy judges¹¹⁰ in “core proceedings”¹¹¹ in bankruptcy cases.¹¹² Upon

106. 28 U.S.C. § 636(e)(1).

107. *See id.* § 636(e)(3).

108. *See id.* § 158(b)(4), (6).

109. *See infra* text accompanying notes 129–152.

110. Like magistrate judges, bankruptcy judges are non-Article III judges who serve within federal judicial districts. (Unlike magistrate judges, however, the Supreme Court has emphatically concluded that bankruptcy judges are not “adjuncts” to a district’s district judges. *See Stern v. Marshall*, 564 U.S. 462, 500–01 (2011).) Bankruptcy judges are appointed by the regional court of appeals in which the district lies. 28 U.S.C. § 152(a)(1). Bankruptcy judges are appointed for renewable fourteen-year terms, 28 U.S.C. § 152(a)(1), and may be removed from office otherwise only for cause, *id.* § 152(e).

The bankruptcy judges in a judicial district constitute a “bankruptcy court,” which itself is statutorily defined as a “unit of the district court.” *See* 28 U.S.C. § 151.

111. Core proceedings are those that “lie at the heart of a bankruptcy case.” Nash & Pardo, *supra* note 24, at 1756. Section 157(b)(1) of the Judicial Code speaks of “core proceedings arising under title 11, or arising in a case under title 11.” *Id.* § 157(b)(1). In turn, § 157(b)(2) lists examples of core proceedings, which include matters concerning (1) administration of the estate, (2) the allowance of claims, (3) objections to discharge, and (4) plan confirmation. *Id.* § 157(b)(2). In contrast, a non-core proceeding is “a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.” *Id.* § 157(c)(1).

112. Disputes in bankruptcy cases generally assume one of two forms: (1) an adversary proceeding, or (2) a contested matter. Adversary proceedings include, for example, a proceeding to recover money or

referral by the district court,¹¹³ bankruptcy judges are empowered to resolve these proceedings definitively, in the first instance,¹¹⁴ with district courts empowered to provide appellate review of bankruptcy court determinations of core proceedings.¹¹⁵ However, in some districts, the parties have the option instead to route their appeal to the BAP rather than the district court.¹¹⁶ In particular, appeal to a BAP is available only where (i) the court of appeals for the relevant circuit has in fact created a BAP and (ii) the district judges of the district in which an appeal emerges have by majority vote opted to allow appeals from bankruptcy judges to flow to the BAP.¹¹⁷

The congressional delegation-of-authority requirement to the circuit judicial council to decide whether to create a BAP is an example of discretion

property; a proceeding to determine the validity, priority, or extent of a lien; a proceeding to object to or revoke a discharge; and a proceeding to determine the dischargeability of a debt. FED. R. BANKR. P. 7001. Such proceedings are initiated and advance much as any other federal lawsuit, insofar as Part VII of the *Federal Rules of Bankruptcy Procedure*, which governs such proceedings, virtually incorporates the *Federal Rules of Civil Procedure* (occasionally with modification). See Nash & Pardo, *supra* note 24, at 1756 n.45. Disputes between parties that are not adversary proceedings are called “contested matters,” and they proceed according to less complex procedures than adversary proceedings—including request for relief by motion rather than the filing of a complaint. FED. R. BANKR. P. 9014. Core proceedings are a subset of adversary proceedings. FED. R. BANKR. P. 7008 cmt. (“Proceedings before a bankruptcy judge are either core or non-core.”).

113. By statute, district courts are free to, and generally do, refer to the district’s bankruptcy judges “any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11.” 28 U.S.C. § 157(a). The statute authorizes each district court to promulgate standing orders referring matters to the bankruptcy court in the district, *see id.*, while empowering district judges to withdraw the reference as they see fit, *see id.* § 157(d).

In practice, the district courts have taken up the Judicial Code’s invitation to put in place standing orders referring all bankruptcy cases to the bankruptcy court. *See id.*; Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 338 (2013). Moreover, a recent empirical analysis of motions before the district court to exercise discretion to withdraw an order of reference to the bankruptcy court shows that, while the percentage of motions granted is not small (although with many motions being unopposed), the total number of such motions made is quite small. *See* Laura B. Bartell, *Motions to Withdraw the Reference - An Empirical Study*, 89 AM. BANKR. L.J. 397, 412, 422, 424 (2015). (Sometimes the district court is under an obligation to withdraw an order of reference to the bankruptcy court. *See* 28 U.S.C. § 157(d). Since there is then no discretion in the district court, such settings lie beyond the scope of the present project.)

114. *See* 28 U.S.C. § 157(b)(1).

115. *See id.* §§ 157(b)(1), 158(a). Appeals from the district courts lie, as usual, to the courts of appeals, *see id.* §§ 1291, 1292, and thence to the Supreme Court, *see id.* § 1254(1).

There is a special provision for immediate direct appeal of a bankruptcy court’s determination of a core proceeding (or a non-core proceeding where the consent of the parties has been obtained) where the court certifies that the determination turns on an issue of law for which there is conflicting, or no controlling, precedent. *See id.* § 158(d)(2).

116. Once a BAP for a circuit is established, the judicial council selects sitting bankruptcy judges to serve on the BAP. *Id.* § 158(b)(1) (noting that the BAP is to be “composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council”). These judges serve as appellate judges on the BAP even while they continue to serve as ordinary bankruptcy judges. Nash & Pardo, *supra* note 113, at 339. The circuit’s judicial council sets the term for bankruptcy judges’ BAP service. *Id.* at 339. The terms are renewable. 28 U.S.C. § 158(b)(3).

117. *See* 28 U.S.C. § 158(b)(6) (“Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.”).

to set the number of judges on a court—here, potentially at zero.¹¹⁸ The statute puts in place a presumption in favor of a judicial council creating a BAP, purporting to cabin the judicial council’s discretion to opt against BAP creation unless it finds that particular conditions are met.¹¹⁹ Further, just as the judicial councils can create BAPs, so too are they free to disband them. Indeed, over the course of the years, a few circuits have discontinued their BAPs.¹²⁰ In short, when Congress creates a court, it takes congressional action to eliminate that court; in contrast, BAPs are “temporary” tribunals that exist at the pleasure of the circuit judicial councils that choose to create them and continue their existence.¹²¹

Consider next the grant of discretion that inheres in a district court once the judicial council for the circuit in which the district court lies has opted to create a BAP: The district court has discretion to allow, or not allow, appeals from the district’s bankruptcy court to flow to the BAP.¹²² In effect, the district court is empowered, by congressional delegation, to reduce the number of cases reaching the BAP from the district to zero. Moreover, the discretion conveyed by Congress is not tied, under the statute, to any limiting principle.¹²³ Clearly, then, in a district lying within a circuit that has created a BAP, the district court has the discretionary power to eliminate an alternate layer of review and thus to channel appeals back to the district court.

The district court’s power to allow (or not to allow) appeals to proceed with the parties’ consent to the BAP bears a resemblance to, but at the same time is dissimilar from, the district court’s power to refer (or not) matters—again with the parties’ consent—to magistrate judges.¹²⁴ On the one hand, the district court can use both these discretionary powers to create, with the parties’

118. Other than implicitly putting in place a minimum number of BAP judges by directing that the BAP hear cases in panels of three judges and that no BAP judge may sit on a panel hearing an appeal originating in the district where he serves as a bankruptcy judge, *id.* § 158(b)(5), the statute says nothing about the number of BAP judges, presumably leaving that determination to the discretion of the circuit judicial council. Of course, the discretion to establish the BAP in the first place is the greater power, and hence is my focus in the text.

119. The statutory structure conveys the notion that judicial council discretion not to create a BAP is exceedingly circumscribed. *See supra* note 25. The reality, however, is quite different. Most circuit judicial councils that have opted against BAP creation have done so either by issuing perfunctory orders that merely recite the terms of the statute or by flouting the statutory requirement and issuing no order at all. *See infra* note 184.

120. *See infra* note 128 and accompanying text.

121. *See Ozenne v. Chase Manhattan Bank (In re Ozenne)*, 818 F.3d 514, 516 (9th Cir. 2016) (holding that the BAP had no authority to issue a writ of mandamus under 28 U.S.C. § 1651(a) because it was not, as the statute requires, “established by Act of Congress”), *vacated on other grounds*, 828 F.3d 1012 (9th Cir. 2016). The en banc court ultimately decided the case on grounds other than the status of the BAP. *See Ozenne v. Chase Manhattan Bank (In re Ozenne)*, 841 F.3d 810, 815–16 (9th Cir. 2016) (en banc) (holding that mandamus was unavailable where petitioner tried to use it as a substitute for filing a timely appeal).

122. 28 U.S.C. § 158(b)(6).

123. *See id.* § 158 (lacking any additional standards that would otherwise limit a district court’s discretion under § 158(b)(6)).

124. *See supra* notes 106–107 and accompanying text.

consent, an alternate layer of review—if not, in the case of a BAP, a fully-fledged court. On the other hand, the district court’s discretion to refer (or not) matters to magistrate judges (and, indeed, the district court’s discretion to refer (or not) matters to bankruptcy judges) is implemented on a case-by-case basis.¹²⁵ In contrast, the district court’s discretion to refer (or not) appeals to the BAP is implemented *for all* appeals; it is, in other words, much more of an on–off switch.

Technically, each district court has the power only to restrict appeals from that district from flowing to the BAP. But the district courts’ power works in tandem with the circuit council’s power to decide whether to create a BAP in such a way as to empower district courts—in some cases, a *few* district courts in a circuit—to have effective veto power over the existence of a BAP.¹²⁶ Consider that, if no district court votes to allow appeals to flow to the BAP, then the BAP would technically exist but hear no cases—a circumstance that might lead one to question whether the BAP had really been “created.”¹²⁷ Practically speaking, moreover, the failure of *some* district courts to buy into the BAP can undermine the BAP’s existence: Indeed, the Second Circuit eliminated a BAP in the wake of half its districts—including the two districts that were its most populous and that generated the greatest volume of bankruptcy cases—having opted out of the BAP.¹²⁸ Put another way, the district courts’ on–off switch powers can combine to induce the circuit council to exercise *its* on–off switch power over the BAP.

How exactly does the creation of a BAP affect the federal judicial structure? It is clear that at the least it introduces an alternate litigation path: where the parties do not withdraw their consent, the BAP substitutes for the district court as the first-tier appellate review in the federal bankruptcy litigation process.¹²⁹

125. See *supra* notes 101–107 and accompanying text.

126. Compare 28 U.S.C. § 158(b)(1) (empowering a circuit’s judicial council to establish BAPs), *with id.* § 158(b)(6) (requiring majority vote by particular districts’ bankruptcy judges for BAP to hear cases in that district).

127. Cf. Warren E. Burger, *The Time Is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86, 88–89 (discussing a proposal to establish for a five-year trial period an “intercircuit tribunal” comprised of court of appeals judges that would address circuit splits, and noting that, “if during that time we see that the experiment is not effective, it could be terminated immediately simply by the Supreme Court’s decision not to send any additional cases to the panel”).

One might justifiably respond to this by pointing out that no rational circuit judicial council would vote to create a BAP if no district court within the circuit was likely to vote to allow cases to flow to the BAP. However, it is possible that district courts that initially voted to make use of the BAP could later change their minds and revoke that authorization.

128. See Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1660 & n.64 (1997) (“[O]nly three districts participate—and these together typically receive less than a third of all bankruptcy petitions filed in the Second Circuit.”); Nash & Pardo, *supra* note 24, at 1757 n.53 (noting that the degree to which districts, and especially populous districts, declined to opt into the BAP “presumably . . . played a large role in the ultimate decision to disband the Second Circuit BAP”).

129. See *Woodman v. Concept Constr., LLC (In re Woodman)*, 698 F.3d 1263, 1266 (10th Cir. 2012) (“Bankruptcy appellate panels were designed to provide an alternative, not a supplement, to an appeal to the district court.”).

The question arises, however, whether more than simply introducing an alternate litigation path, the creation of a BAP introduces an entirely new *court*.

The answer to that question is elusive. It has been argued that the BAP is a “unit” of another court—either the court of appeals sitting above it, or the district court sitting in the hierarchy beside it.¹³⁰ But, as we shall see, the authority in favor of both these positions is slender. Indeed, it can also be argued that the BAP is a standalone entity that is a unit of no other court, and if that is true, then it would seem that the BAP must be a court unto itself.¹³¹

The language Congress used to authorize the creation of BAPs is sparse. That said, there is language present, and absent, in the language of the BAP statute that one might marshal to make the argument that the BAP is, or alternatively is not, a standalone court.¹³² To start, consider first that a strong case can be made that BAPs are standalone entities; they are not units of existing courts and thus presumably are courts themselves. While the Judicial Code specifically notes that the bankruptcy judges “shall constitute a unit of the district court,”¹³³ nowhere does that Code so much as suggest that a BAP shall constitute a unit of any existing court. Instead, the Judicial Code speaks simply of the circuit’s judicial council “establish[ing] a bankruptcy appellate panel service.”¹³⁴

At the same time, the statute also lends itself to the argument that the BAP is *not* a standalone court. First, the BAP statute speaks of the BAP as a “panel service.”¹³⁵ This language can be read to suggest that the bankruptcy judges populating BAP panels are “serv[ing]” some other judges, presumably on an Article III court (though one could also read the word “service” to refer to bankruptcy judges “serv[ing]” on panels).¹³⁶

Second, while Congress has generally referred to courts it has created as “court[s] of record,”¹³⁷ it did not do this with respect to the BAP. Perhaps this omission was a deliberate one that reflects a congressional understanding that BAPs would be parts of existing courts. Indeed, the Bankruptcy Code of 1978

130. See *Coyne v. Westinghouse Credit Corp. (In re Globe Illumination Co.)*, 149 B.R. 614, 620 (Bankr. C.D. Cal. 1993) (holding that BAPs are units of circuit courts, not district courts).

131. See *infra* notes 133–136 and accompanying text.

132. See *infra* notes 133–136 and accompanying text.

133. 28 U.S.C. § 151; see *supra* note 110.

134. 28 U.S.C. § 158(b)(1).

135. *Id.* § 158(b)(1)–(2), (5)–(6) (referencing “panel service” in four separate subsections).

136. *Id.*

137. For examples of statutes establishing courts—under both Article I and Article III—as “court[s] of record,” see *id.* § 43(a) (courts of appeals); *id.* § 132(a) (district courts); *id.* § 171(a) (United States Court of Federal Claims); *id.* § 251(a) (United States Court of International Trade); 10 U.S.C. § 941 (United States Court of Appeals for the Armed Forces); 26 U.S.C. § 7441 (United States Tax Court); 38 U.S.C. § 7251 (United States Court of Appeals for Veterans Claims).

originally established the bankruptcy courts as “court[s] of record,”¹³⁸ removing that description after the Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* found that system constitutionally infirm;¹³⁹ this change prompted Congress instead to ensconce the bankruptcy courts as “units” of the district courts.¹⁴⁰ This said, Congress also failed to use the term “court of record” in the statutes creating the Foreign Intelligence Surveillance Court, the Foreign Intelligence Surveillance Court of Review, or the JPML,¹⁴¹ yet it seems clear that these are all standalone entities.¹⁴²

If one concludes that indeed the Judicial Code creates BAPs as units of existing courts (or at least is consistent with that construction), one then must confront the question of the identity of the Article III courts of which the BAPs are units. The two logical candidates for courts of which the BAP might be a unit are the court of appeals and the district court. The problem is that neither of these, in the end, makes complete logical sense as a “home” for a BAP—at least as the statute is currently constructed.¹⁴³

The case that the BAP is a unit of the court of appeals¹⁴⁴ is weak. No statutory provision authorizes a court of appeals to confer—or even suggests

138. As originally enacted in 1978, § 151 established, “in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.” 28 U.S.C. § 151(a) (1976 ed., Supp. IV).

139. See 458 U.S. 50 (1982) (Brennan, J., plurality opinion).

140. See, e.g., Eric G. Behrens, Stern v. Marshall: *The Supreme Court’s Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts*, 85 AM. BANKR. L.J. 387, 406–07 (2011).

141. See 50 U.S.C. § 1803(a)(1), (b) (Foreign Intelligence Surveillance Court and Court of Review); 28 U.S.C. § 1407(d) (JPML).

142. I note that these judicial tribunals, and the BAP, all share in common that they are staffed by judges who have an initial appointment to a different tribunal. See 28 U.S.C. § 158(b)(5) (“[A] member of such service may not hear an appeal originating in the district for which such member is appointed or designated”); 50 U.S.C. § 1803(a)(1) (“The Chief Justice . . . shall publicly designate [eleven] district court judges from at least seven of the United States judicial circuits . . . who shall constitute a court”); *id.* § 1803(b) (“The Chief Justice shall publicly designate three judges . . . from the United States district courts or courts of appeals who together shall comprise a court of review”).

I further note that Congress also has not used the words “court of record” with respect to the United States Supreme Court. This might be chalked up to an understanding that the Constitution, not Congress, creates the Supreme Court. See U.S. CONST. art. III, § 1.

143. Were the circuit—as an agglomeration of the court of appeals and the district courts within the circuit—itsself a court, one might take the position that the BAP is a unit of the circuit in which it operates. After all, the judicial council of the circuit decides whether to create the BAP (along with the district courts in the circuit), and the BAP provides services that reduce the workload of the circuit (in particular, the district courts within the circuit). However, a conception of the circuit as a court is quite at odds with both statutory language and existing practice. No statute refers to a circuit as a court. See 28 U.S.C. § 43 (establishing separate “circuits” and “courts” in the context of statutory court creation). And I am aware of no court that includes within its ambit multiple Article III courts. Further, even if a BAP is somehow a unit of the circuit (viewed as a court), the possibility of intercircuit BAPs would remain a challenge. See *infra* note 145 and accompanying text.

144. A California bankruptcy court in 1993 stated that “a bankruptcy appellate panel is a unit of the circuit court.” *Coyne v. Westinghouse Credit Corp. (In re Globe Illumination Co.)*, 149 B.R. 614, 620 (Bankr. C.D. Cal. 1993). The court relied upon the Ninth Circuit’s 1984 decision in *In re Burley*, 738 F.2d 981 (9th Cir. 1984), reaffirming the vitality of BAPs in the wake of *Marathon*, and that court’s analogy between the relationship between district courts and magistrate judges (who then toiled under the simpler moniker

that a court of appeals may confer—jurisdiction on a BAP.¹⁴⁵ To the contrary, the existence or non-existence of a BAP has no predictable effect on the workload of the court of appeals; the existence of a BAP simply determines how first-level appeals from bankruptcy judges will be allocated. The court of appeals hears all second-level appeals regardless of the existence of a BAP. An additional argument also weighs against understanding the BAP as a unit of the court of appeals: the Judicial Code provides for the possibility of multiple circuits joining together to give to a unitary intercircuit BAP.¹⁴⁶ While the provision has never been invoked, its mere existence is clearly incompatible with the notion that a BAP is a unit of the court of appeals that creates it.¹⁴⁷

In contrast to the court of appeals, a reasonable case can be made in favor of conceiving of the BAP as a unit of the district court. That the BAP should constitute a unit of the district court makes some practical sense. Much as the statutory scheme confers on district courts the power to confer jurisdiction on bankruptcy judges to consider in the first instance certain matters that otherwise would fall on the district court docket (thus reducing the size of the district judges' dockets), so too are district courts statutorily authorized to confer jurisdiction on the BAP to consider certain matters that otherwise would fall on the district court docket (thus reducing the size of the district judges' dockets).¹⁴⁸

Still, several factors make it rather difficult to see the BAP as a unit of the district court. First, the statutory provision that authorizes the creation of

“magistrates”) and the relationship between courts of appeals and BAPs. *In re Globe Illumination Co.*, 149 B.R. at 620 (“The Ninth Circuit in *Burley* found that the relationship between the BAP and the court of appeals is functionally equivalent to the relationship between a magistrate judge and a district judge. It follows that both a BAP judge and a circuit judge are judges of the circuit court, just as both a magistrate judge and a district judge are judges of the district court.” (footnote and citation omitted)). In fact, although it did describe the BAP “as an adjunct to the court of appeals,” *Burley*, 738 F.2d at 986, the court in *Burley* did not characterize the BAP as a unit of the court of appeals. *See id.* This semantic difference is, in my view, substantial. *See id.* at 986–87 (noting that one way in which “[t]he analogy to the magistrate-district court relationship is . . . not a perfect one” was the substantial effect the creation of BAPs, as opposed to the appointment of magistrate judges, has on the judicial hierarchy). A unit of a court—both under its common usage and as that term is used in statutes passed by Congress—is a part of the court; in contrast, an adjunct to a court helps, but need not be an actual part of, the court. *Id.* at 986 (citing *United States v. Raddatz*, 447 U.S. 667 (1980)).

More importantly, while the *Burley* court did analogize between magistrate judges and BAPs, the court’s point was not to suggest that a BAP is a part of the court of appeals (nor indeed did the court describe magistrate judges as part of the district court). The court’s point, rather, was to highlight the parallels between the district court’s *supervision* of magistrate judges and the court of appeals’ *supervision* of the BAP: Since the Supreme Court had upheld the constitutionality of the use by district courts of magistrate judges despite their Article I status, *see, e.g., Raddatz*, 447 U.S. 667, the analogy was designed to defend the constitutionality of BAPs. *Burley*, 738 F.2d at 986–87. In short, the Ninth Circuit in *Burley* did not have occasion to pass on the question of whether the BAP is a unit of the court of appeals.

145. *See* 28 U.S.C. § 158(b) (governing BAPs).

146. *See id.* § 158(b)(4).

147. *See id.*; *In re Globe Illumination Co.*, 149 B.R. at 620.

148. *See* Kathleen P. March & Rigoberto V. Obregon, *Are BAP Decisions Binding on Any Court?*, 18 CAL. BANKR. J. 189, 193 & n.43 (1990) (arguing that the BAP is “a unit of the district court” in part because “only the district court has authority to refer proceedings to the BAP for review”).

BAPs—which is also the only statutory provision that even mentions BAPs—is captioned “Appeals” and discusses generally appeal of bankruptcy court final and interlocutory orders.¹⁴⁹ Second, the court of appeals is directed to appoint BAP judges from among “bankruptcy judges of the districts in the circuit.”¹⁵⁰ Indeed, a BAP hearing an appeal from an order of a bankruptcy judge on a district is expressly precluded from including *any bankruptcy judge from that district*.¹⁵¹ It thus is hard to conceive of the BAP as a unit of any district court. Third, some courts have held, and some commentators have argued, that BAP decisions are binding precedent on all bankruptcy courts (and perhaps even district courts) within the circuit.¹⁵² That position, if it is accurate, is hard to reconcile with the notion of the BAP sitting as a unit of the district court whence the appeal arises.

I do not resolve here the debate over whether the BAPs are units of existing courts. One can argue, however, that Congress has vested discretionary power in Article III actors to create actual courts. Moreover, whether BAPs are standalone courts or not, the on–off switch-like powers surrounding BAP creation are a step beyond the other discretionary powers we have seen.¹⁵³

Table 1 summarizes the examples we have seen in this Section. For each grant of authority, the table identifies (i) the recipient of discretionary authority, (ii) whether that recipient is a court or an administrative actor, and (iii) whether the grant affects the shape of the federal judiciary by introducing (or eliminating) a new, or alternate, court or layer of review.

TABLE 1: Summarizing discretionary grants by Congress on Article III actors to reshape the federal judiciary by varying the number of judges.

149. See 28 U.S.C. § 158.

150. *Id.* § 158(b)(1).

151. *Id.* § 158(b)(5). This point severely undercuts the argument made in an article—co-authored by a then-sitting bankruptcy judge—that the BAP is a unit of the district court in part because “[b]ankruptcy judges serving on the BAP are officers of the district court who hear and determine appeals on behalf of the district court.” March & Obregon, *supra* note 148.

152. For conflicting authority on the point, see Nash & Pardo, *supra* note 24, at 1761 nn.69–70; see also JONATHAN P. FRIEDLAND ET AL., 2 BANKRUPTCY LITIGATION ¶ 9:44 (2020).

153. Were the DCAP proposal enacted, see *supra* text accompanying notes 10–16, then it would seem that the discretionary power vested in circuit councils to create DCAPs, and then to funnel certain categories to them, would similarly be a step beyond other existing discretionary powers. See FED. JUD. CTR., *supra* note 10, at 138 (“Conceptually, models of district-level review add another tier to the federal court system . . .”).

Grant	Recipient of discretion	Is the recipient of discretion a court or an administrative actor?	How does the grant affect the shape of the federal judiciary?
Power to divide large court of appeals into administrative units	Court of appeals	Court	<ul style="list-style-type: none"> • Fifth Circuit's 1980 division: alternate appellate path • Ninth Circuit's current division: additional layer of review
Power to set the number of magistrate judges in each judicial district	Judicial Conference of the U.S.	Administrative	Additional layer of review; alternate layer of review
Power to create a BAP	Circuit council	Administrative ¹⁵⁴	Alternate appellate path (or a new court)
Power to authorize referral of appeals to the BAP	District courts	Court	Alternate appellate path (or a new court)

II. CONSTITUTIONAL OBSTACLES TO CONGRESSIONAL GRANTS OF DISCRETION TO ENGAGE IN JUDICIAL INSTITUTIONAL SELF-DESIGN

In this Part, I discuss three legal problems raised by the creation of new tribunals by federal courts. These problems all pertain to structural federalism. First, I explain that the relevant constitutional text commits court creation to Congress. The remaining two issues assume that, the text of the Constitution notwithstanding, Congress has some leeway to delegate the power of court creation. One involves a limitation on Congress as delegator: The nondelegation doctrine. The other issue involves a limitation on the judiciary as delegate: The Supreme Court has outlined constitutional limits on legislative delegations to judicial actors, and the delegation of court creation may run afoul of those limits.

154. I argue below that the circuit councils are better described as quasi-administrative since they lack any meaningful administrative support staff. *See infra* notes 237–238 and accompanying text.

*A. Judicial Institutional Self-Design and Constitutional Text Committing Court
Creation to Congress*

Article III of the Constitution quite clearly vests discretion to create lower federal courts in the legislative branch,¹⁵⁵ while Article I similarly vests in the Congress the power to create “inferior tribunals.”¹⁵⁶ From a formalist viewpoint,¹⁵⁷ these express delegations eliminate, it would seem, judicial discretion to create (at least) any new Article III courts.¹⁵⁸

Just how broadly this restriction limits the freedom of Congress to confer discretion on Article III actors to reshape the federal judicial hierarchy depends upon how broadly one reads the terms “courts” and “tribunals” in the

155. Specifically, Article III states: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

156. *See id.* art. I, § 8 (affording Congress the power “[t]o constitute Tribunals inferior to the supreme Court”).

157. *See, e.g.*, Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–59 (1990) (discussing constitutional formalism and describing how, under a formalist approach, “[t]he separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending”).

158. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1337 (2016) (Roberts, C.J., dissenting) (“[T]he Judiciary lacks authority to . . . establish new tribunals.”); *cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 495–508 (2010) (discussing how, insofar as the Constitution vests executive power in the President, it was unconstitutional for Congress to vest for-cause removal authority of an officer in neither the President nor a direct presidential appointee). So, too, does it seem that the courts lack general power to decline jurisdiction properly granted. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382–83 (1821) (declining to find an exception to the Supreme Court’s constitutional appellate jurisdiction where the “general grant of jurisdiction” included “no exception” for “those cases in which a State may be a party”); Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) (“In the absence of some recognized public policy or defined principle guiding the exercise of the [statutory diversity] jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.”). *See generally* THE FEDERALIST NO. 47 (James Madison) (“The 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, may justly be pronounced the very definition of tyranny.”); *id.* NO. 51 (James Madison) (speaking generally of the need for checks and balances among the branches of the federal government).

Somewhat analogous is the Court’s treatment of the federal courts’ power to read implied private rights of action into federal statutes. After the Court for some years had taken a permissive view, *see* Cort v. Ash, 422 U.S. 66, 74–85 (1975), Justice Powell raised constitutional issues with the practice in an influential dissent, *see* Cannon v. Univ. of Chi., 441 U.S. 677, 730 (1979) (Powell, J., dissenting). Indeed, the dissent was influential enough eventually to persuade a majority of the Court to follow it. *See, e.g.*, Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979). Justice Powell explained that, “[b]y creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve,” *Cannon*, 441 U.S. at 746 (Powell, J., dissenting), and such action “conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction,” *id.* at 747.

Of course, even under Justice Powell’s approach, a court yet may read an implied private right of action into a statute, just under more limited circumstances than had previously been the case. *See, e.g.*, *Transamerica*, 444 U.S. at 18–19. To the extent that the constitutional problems with vesting court creation in the judiciary are larger, I acknowledge the analogy between implied private rights of action and court creation is far from perfect. Indeed, this makes perfect sense, since reading an implied private right of action into a statute merely augments an existing court’s jurisdiction.

constitutional provisions. A broad reading suggests that even allowing Article III actors to create layers of review is prohibited, congressional efforts to house the “layer of review” within a single preexisting “court” notwithstanding.

Given the absence of any constitutional elucidation of the terms “courts” or “tribunals,” however, it seems that the better reading from a functionalist perspective¹⁵⁹ is to defer to congressional definitions of “courts” in the structure of the judicial hierarchy. Under this understanding, judicial creation of actual standalone courts, but not additional layers of review within courts, would be prohibited—hence my efforts in delineating the examples I survey in Part I to identify those examples that may involve new standalone courts (as compared to merely new layers of review).

B. *The Delegation of the Power of Judicial Institutional Self-Design and the Nondelegation Doctrine*

The nondelegation doctrine ordinarily applies to restrict congressional freedom to delegate authority on agencies. The doctrine renders an agency delegation invalid unless Congress lays out an “intelligible principle” to which the agency is required to conform.¹⁶⁰ Professor Alexander Volokh has argued (perhaps in a nod to a more functional application of the doctrine) that the nondelegation doctrine incorporates the “inherent-powers corollary,” that is, the notion that the nondelegation doctrine’s requirement of an “intelligible principle” does not apply “when the delegation concerns an area close to the delegate’s inherent powers.”¹⁶¹

Although the matter is not free from doubt, recent scholarship has asserted that the doctrine is not restricted in application to agencies and indeed applies to courts and judges.¹⁶² Assuming the doctrine applies in the judicial context, do the delegations to reshape the federal judiciary that we discussed in Part I pass muster? The answer is that most, but not all, do.

159. See, e.g., Lawson, *supra* note 157, at 860 (contrasting functionalism with formalism by explaining that “the question of blending [of the power of the branches of the government] is treated as one of degree rather than, as with formalism, one of kind”).

160. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001). See generally Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 413–21 (2008).

161. Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1397 (2017); see *id.* at 1397–1407.

162. See Andrew S. Oldham, *Sherman’s March (in)to the Sea*, 74 TENN. L. REV. 319, 371–75 (2007); Lemos, *supra* note 160, at 421–60; Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 266–70 (2011); Volokh, *supra* note 161, at 1395; *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–50 (1825) (upholding the delegation, apparently applying the nondelegation doctrine to a congressional grant of discretion to the judicial branch). To be sure, Congress in effect has the “final word” on delegations to the judiciary through its control of the federal judiciary’s fisc. See Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 998–1019, 1033–35. *But cf. id.* at 1035–49 (suggesting limits on that power). But that does not resolve the nondelegation issue; indeed, Congress also retains fiscal control over agencies, yet that fact does not resolve any nondelegation issues in that setting.

First, consider that only one of the delegations surveyed in Part I is tied to an intelligible principle that purports to limit the exercise of discretion. Congress did temper the delegation to the judicial councils to create BAPs with an intelligible limiting principle: A judicial council is to create a BAP unless it finds either that there are insufficient judicial resources to do so, or that to do so would impose unreasonable delays and costs on litigants.¹⁶³ Thus, the delegation to the circuit judicial councils to create BAPs satisfies the nondelegation doctrine.

But the other delegations we discussed in Part I are not tied to any intelligible principle. For example, consider the flipside of BAP creation—the provision that allows district courts to opt out of sending appeals to the BAP even where the court of appeals has created a BAP. In contrast to the delegation to the courts of appeals, the delegation of discretion to the district courts has no limits whatsoever.¹⁶⁴ In the language of the nondelegation doctrine, there is no intelligible principle to guide the district courts' discretion. So, too, do the delegations on large courts of appeals to divide into administrative units, and on the Judicial Conference to set the number of magistrate judges in each district; both lack any intelligible principle guiding the exercise of discretion.¹⁶⁵

Does Professor Volokh's inherent-powers corollary rescue any of these delegations? The answer here is that it saves only one. Under the inherent-powers corollary calculus, the question becomes whether the powers Congress has conferred upon the Article III judiciary—described above in Part I—lie in an area closely related to powers that already inhere in the judiciary.¹⁶⁶ Consider first the power of the judiciary to create administratively new units of existing courts (as exemplified by the power granted to large courts of appeals to divide into administrative units). Here, there is a long tradition of judicial administrative creation of new units.¹⁶⁷

163. See *supra* note 25 and accompanying text. In practice, many judicial councils have not actually fulfilled this mandate. See *infra* note 184 and accompanying text. This does not impact the validity of the delegation, though as I discuss below, it might draw into question the normative desirability of circuit councils as vessels for such discretion. See *infra* note 238 and accompanying text.

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

165. See *supra* notes 83 (discussing the en banc function to divide into administrative units), 100 and accompanying text (setting the number of magistrate judges).

166. See *supra* Part I.B (discussing the powers Congress conferred upon the Article III judiciary); Volokh, *supra* note 161, at 1395–96 (“Federal courts have a lot of inherent powers . . . from their inherent power to make procedural rules for themselves to their inherent power to make federal common law in particular circumstances.”).

167. See, e.g., Charles T. McCormick, *Modernizing the Texas Judicial System*, 21 TEX. L. REV. 673, 685 n.48 (1943) (quoting, with approval, a draft article for the Minnesota Constitution that would establish a Judicial Council with the power, *inter alia*, to divide courts into subdivisions and departments); ROBERT L. HAIG, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 1:5 (5th ed. 2020) (“In January 1993, the [New York state] court system implemented . . . an experiment in which four Justices of the Supreme Court were assigned to hear commercial cases exclusively, and to preside throughout the life of each case. Their courtrooms were called Commercial Parts and the Justices were assigned to hear cases involving contracts, corporations, insurance, the Uniform Commercial Code, business torts, bank transactions, complex real

In contrast, Professor Volokh's inherent-powers corollary provides little solace for the other two discretionary powers conferred by Congress on the Article III judiciary to reshape the federal judiciary. Consider first the power of the Judicial Conference to determine the number of magistrate judge positions in each federal district.¹⁶⁸ There is no tradition of court power in this area. Review of historical American practice confirms that, while case-by-case discretionary power to refer cases is of longstanding pedigree,¹⁶⁹ it took statutory action to establish the permanent positions and powers.¹⁷⁰

Second, consider each district court's power to allow, or preclude, the referral of appeals in bankruptcy cases to flow (with the permission of the parties) to the BAP.¹⁷¹ Here, while historical review again confirms the longstanding history of such referral powers on a case-by-case basis,¹⁷² history is not replete with examples of such referrals applied across categories of cases. The federal court abstention doctrines leave the door open to absolute applications of discretion that function along the lines of an on-off switch, but only under limited circumstances. While most abstention doctrines emphasize the federal courts' discretion to decline jurisdiction on a case-by-case basis,¹⁷³ a

estate transactions, and other commercial law issues.”); *id.* (“With the momentum generated by these developments, Chief Judge Kaye created the Commercial Courts Task Force in March 1995, co-chaired by then-Chief Administrative Judge E. Leo Milonas and Robert L. Haig, to develop a blueprint for the creation of a statewide Commercial Division of the New York State Supreme Court. In the ensuing months, Chief Administrative Judge Lippman worked with Chief Judge Kaye and the Task Force members to put their recommendations into action.” (footnote omitted)); *cf.* *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 327–35 (1941) (upholding the power of federal courts of appeals to convene en banc even without explicit statutory authorization); John R. Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 JUDICATURE 40, 40 (1989) (“The power of district courts to convene *en banc* is a matter of judicial interpretation only.”); 28 U.S.C. § 46(b) (authorizing the Federal Circuit to “determine by rule the number of judges, not less than three, who constitute a panel”).

168. See *supra* Part I.B.2.

169. See Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1321–32 (1975) (describing the American history of references to special masters); see also Crowell v. Benson, 285 U.S. 22, 51 (1932) (noting the “historic practice” in certain cases “to call [upon] the assistance” of “masters, and commissioners or assessors”).

170. See Donald M. Zolin et al., *Report on Magistrates by the Committee on the Federal Courts of the New York County Lawyers’ Association*, 136 F.R.D. 193, 198–200 (1991) (discussing the statutory history of the magistrate judge system and the federal commissioner system that preceded it); Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 5–16 (1970) (reviewing statutory provisions empowering federal commissioners); Richard W. Peterson, *The Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62, 66–71 (1970) (discussing the statutory regime governing federal commissioners); Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 345–47 (1979) (discussing further the statutory regime governing federal commissioners); Peterson, *supra*, at 74–98 (describing original Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 604, 631–39 and in scattered sections of 18 U.S.C.)); McCabe, *supra*, at 347–50; Richard S. Goldsmith, *The Role and Jurisdiction of the U.S. Commissioner in the Federal Judicial Structure*, 1 LINCOLN L. REV. 89, 119 (1966) (describing how Congress originally authorized U.S. Commissioners in 1793).

171. See 28 U.S.C. § 158(b)(6).

172. See *supra* note 169 and accompanying text.

173. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 549–52 (1985) (reviewing abstention doctrines).

couple of abstention doctrines speak in more mandatory terms. *Burford* abstention by its terms *requires* abstention in favor of complex state administrative schemes.¹⁷⁴ And *Younger* abstention generally precludes federal courts from exercising jurisdiction to enjoin pending state court criminal prosecutions.¹⁷⁵ Still, these forms of abstention are the exception rather than the norm, and they apply in very particular, and limited, circumstances.¹⁷⁶ There is, in other words, only a very limited tradition of any such inherent power in the courts.

In total, only one of the discretionary grants surveyed in Part I—the grant of power to circuit councils to create BAPs—is limited in scope by an intelligible principle and thus does not run facially afoul of the nondelegation doctrine (assuming that principle applies to the grants to the judicial actors). The inherent-powers corollary (to the extent it is a valid part of the nondelegation doctrine) rescues one of the discretionary grants surveyed in Part I from invalidation under the nondelegation doctrine.¹⁷⁷ However, it provides no solace for the discretionary power to set the number of magistrate judges, and little solace for the discretionary power of district courts to allow bankruptcy appeals to flow to the BAP. Table 2 summarizes the results.

TABLE 2: Viability of various discretionary powers under the nondelegation doctrine.

174. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 332–34 (1943).

175. See *Younger v. Harris*, 401 U.S. 37, 43–45 (1971).

176. See *Burford*, 319 U.S. at 332–34; *Younger*, 401 U.S. at 43–45.

177. See *supra* note 166 and accompanying text.

Discretionary Power	Is the grant of discretionary power accompanied by an intelligible principle?	Is the discretionary power closely related to powers that already inhere in the judiciary?	Is the discretionary grant arguably problematic under the nondelegation doctrine? ¹⁷⁸
Power of large courts of appeals to divide into administrative units	No	Yes	No
Power of the Judicial Council to set the number of magistrate judges in each district	No	No	Yes
Power of the circuit councils to create BAPs	Yes	-- ¹⁷⁹	No
Power of the district courts to allow bankruptcy appeals to flow to the BAP	No	Arguably not	Yes

Our consideration of the nondelegation doctrine is not yet complete. Assuming that (i) the nondelegation doctrine applies to delegations to the judiciary and (ii) the nondelegation doctrine would be satisfied by the applicable confining principle were the delegation made to an agency, an argument still can be made that courts (at least those with a functional approach) would examine the delegation here, to the judiciary, more closely, because of the judiciary's comparative administrative disadvantage. Professors Rafael Pardo and Kathryn Watts have argued that delegations to courts deserve greater scrutiny than do delegations to agencies.¹⁸⁰ They explain that “functionalist considerations”—including “agencies’ relative expertise, accountability, flexibility, accessibility, and their ability to achieve uniformity”—“make agencies well suited to receive and exercise delegations of policymaking power.”¹⁸¹ In contrast, “the same functional considerations may not support Congress’s decision to delegate policymaking to courts.”¹⁸²

The discretionary power of circuit judicial councils to create BAPs provides an example of courts’ shortcomings in complying with the standards of a

178. This assumes that the nondelegation doctrine applies to congressional delegations to judicial actors. *See supra* note 162 and accompanying text.

179. This inquiry is unnecessary to the extent that, as the first column concludes, the discretionary grant to circuit councils to create BAPs is accompanied by an intelligible principle.

180. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 423 (2012).

181. *Id.*

182. *Id.*

congressional delegation. The statute establishes a presumption in favor of BAP creation, cabining the judicial council's discretion to opt against BAP creation unless it finds that particular conditions are met.¹⁸³ This structure conveys the notion that judicial council discretion not to create a BAP is exceedingly circumscribed. The reality, however, is quite different. Most circuit judicial councils that have opted against BAP creation have done so either by issuing perfunctory orders that merely recite the terms of the statute, or by flouting the statutory requirement and issuing no order at all.¹⁸⁴

183. 28 U.S.C. § 158(b)(1).

184. *See, e.g.*, Letter from Linda Ferren, Secretary of the District of Columbia Circuit Judicial Council, to Francis Szczebak, Chief of the Bankruptcy Division of the Administrative Office of the U.S. Courts (Dec. 16, 1994) (on file with D.C. Circuit Executive's Office) ("[T]he Judicial Council of the D.C. Circuit considered the establishment of bankruptcy appellate panels. . . . The Council found that there are insufficient judicial resources in the Circuit to permit the establishment of such panels."); Order in the Matter of the Termination of Bankruptcy Appellate Panel Service of the Second Judicial Circuit (June 30, 2000) (on file with the Court of Appeals for the Second Circuit) (stating only that "the Judicial Council of the Second Circuit has determined there are insufficient judicial resources available in the Second Circuit justifying the continuation of the Bankruptcy Appellate Panel Service"); Resolution of the Judicial Council of the Third Circuit (Jan. 30, 1996) (on file with Court of Appeals for the Third Circuit) (declining to establish a BAP on the ground that "a majority of the judges of each of the district courts within the Third Circuit have voted . . . not to authorize . . . appeals from the district to be heard and determined by a panel of a bankruptcy appellate panel service"); Resolution of the Judicial Council of the Fourth Circuit (Sept. 25, 1995) (on file with the Court of Appeals for the Fourth Circuit) ("[T]he Judicial Council of the Fourth Circuit does not believe there is a demonstrated need for the use of Bankruptcy Appellate Panels in this circuit. After canvassing the views of all districts in the circuit by means of inquiry to the chief judges in each of the judicial districts, and deliberations at [two of] its . . . meetings, the Judicial Council finds that (1) there are insufficient judicial resources (bankruptcy judges) to establish a Bankruptcy Appellate Panel within the Fourth Circuit, and (2) the establishment of a Bankruptcy Appellate Panel would result in undue delay and increased costs both to the Judicial Branch and parties in bankruptcy litigation."); Resolution of the Judicial Council of the Seventh Circuit (Oct. 17, 1995) (on file with the Court of Appeals for the Seventh Circuit) ("[T]he Judicial Council of the Seventh Circuit cannot create bankruptcy appellate panels in this Circuit at this time. The Judicial Council has found that all but one of the districts in this Circuit oppose the creation of bankruptcy appellate panels. The remaining district, the Northern District of Illinois, has yet to vote on the issue. Moreover, no funds are presently available. Consequently, the Judicial Council has voted unanimously to defer further study of bankruptcy appellate panels unless and until the Northern District of Illinois votes favorably and funds are made available by Congress.")

The Eleventh Circuit, and especially the Fifth Circuit, seem to have put more effort into the task. The Eleventh Circuit reached beyond the Article III judges represented by the Judicial Council, to the bankruptcy judges and bankruptcy bar, in making its determination. *See* Resolution of the Judicial Council of the Eleventh Judicial Circuit (Dec. 29, 1995) (on file with the Court of Appeals for the Eleventh Circuit) ("[T]he Judicial Council of the Eleventh Judicial Circuit resolves not to create a [BAP] because there are insufficient judicial resources available in the circuit to operate such a court at this time. In fact, until . . . 1993 . . . the circuit's bankruptcy courts were woefully understaffed."). Four districts within the Eleventh Circuit were "yet laboring under a sizeable backlog of cases" and as such were "in no position at [that] time to contribute judgepower to a BAP," while "[t]he other bankruptcy courts of the circuit . . . ha[d] but five authorized judgeships among them; hence, they would [have] be[en] hard pressed to staff a BAP." *See id.* ("The questions of whether to create a BAP in the Eleventh Circuit and, if so, whether a district court should 'opt out,' have been considered in each district of the circuit by the judges of the district court, the judges of the bankruptcy court, the district court's Lawyers Advisory Committee, and the bankruptcy bar. Their collective thoughts in the matter have been communicated to and debated by the members of the Judicial Council. Of the 19 members of the Council, 18 vote not to establish a BAP at this time.")

The Fifth Circuit promulgated a summary resolution, *see* In re Bankruptcy Appellate Panel in the Fifth Circuit (June 28, 1995) (on file with the Court of Appeals for the Fifth Circuit) ("The Judicial Council of the Fifth Circuit, by majority vote . . . exercised its authority to reject the creation of a Bankruptcy

I address the courts' inherent shortcomings in engaging congressional delegations in Part IV's normative discussion.¹⁸⁵ For now, it suffices to observe that delegations to judicial actors may draw greater scrutiny than would similar delegations to executive branch actors.

C. The Delegation of the Power of Judicial Institutional Self-Design and Limits on Delegations to the Judiciary

The Supreme Court has recognized a general constitutional bar against imposing “executive or administrative duties of a nonjudicial nature . . . on judges holding office under Art. III.”¹⁸⁶ At the same time, the Court has (in a more functional turn) permitted Congress to delegate to the Judiciary “nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”¹⁸⁷ In particular, the Court has approved the delegation of extrajudicial activities that bear a “close relation to the central mission of the Judicial Branch” and that are “consonant with the integrity of the [Judicial] Branch and are not more appropriate for another Branch.”¹⁸⁸

One can mount a substantial argument that the general bar against delegation to the judiciary should apply to judicial institutional self-design. Institutional self-design does not bear a “close relation to the central mission of the Judicial Branch.”¹⁸⁹ Nor is it consonant with the integrity of the judiciary, as evidenced by the lobbying Article III judges have at times undertaken when

Appellate Panel in the Fifth Circuit. . . . The Judicial Council finds: (1) insufficient judicial resources are available to make a Bankruptcy Appellate Panel worthwhile in the Fifth Circuit; and (2) the delay and cost to the parties would be inordinate.”), but also appended a ten-page report backing up its conclusions, *see* REPORT OF THE FIFTH CIRCUIT JUDICIAL COUNCIL REGARDING THE CREATION OF A BANKRUPTCY APPELLATE PANEL (1995) (on file with the Court of Appeals for the Fifth Circuit) (including substantial budgetary data and analysis). *See also* U.S. BANKR. APP. PANEL OF THE TENTH CIR., ANCHORS AWEIGH: THE CREATION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT 15 (2010), <https://static1.squarespace.com/static/54170cd0e4b00eba52a2db00/t/56ccd86ecf80a1db151ead1d/1456265334954/Anchors+Aweigh+Color.pdf> (recapping the history of the Tenth Circuit BAP and noting that the committee devoted to studying the possible creation of a BAP “asked the Circuit Executive’s Office (‘CE’) to compile information concerning staffing costs and budget projections for the proposed BAP,” and that, “[u]sing statistics gleaned from the Ninth Circuit BAP, the CE’s office was able to estimate a ‘cost per case’ figure for BAP appeals”).

185. *See infra* Part IV.

186. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852) and *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)); *see Mistretta v. United States*, 488 U.S. 361, 385 (1989) (describing this as a “general principle”).

187. *Mistretta*, 488 U.S. at 388; *see also Morrison v. Olson*, 487 U.S. 654, 681 (1988) (approving of the delegation on the judiciary of powers that “do not impermissibly trespass upon the authority of the Executive Branch”).

188. *Mistretta*, 488 U.S. at 390.

189. *See Ozenne v. Chase Manhattan Bank (In re Ozenne)*, 818 F.3d 514, 529 (9th Cir. 2016) (Bybee, J., dissenting) (“I fail to appreciate how court-creation has a ‘close relation to the central mission of the Judicial Branch.’”), *vacated on other grounds*, 828 F.3d 1012 (2016).

Congress has considered revising the structure of the federal judiciary.¹⁹⁰ One can only imagine that such machinations (unchecked by the involvement of another branch of government or by media coverage) would be even greater where courts enjoy discretion to create new tribunals. Finally, it seems that court-creation is more appropriate for the political branches, where opportunities for public scrutiny and participation abound.¹⁹¹

An argument can be made that it makes a constitutional difference whether the delegate in the judicial branch receiving the discretionary grant of power is an administrative actor (as opposed to a court or judge).¹⁹² *Mistretta*, however, makes no such distinction apparent.¹⁹³

Beyond this, even if the Constitution is more lenient on delegations to administrative actors, I discuss below reasons to examine the extent to which non-judicial actors within the judicial branch enjoy true administrative expertise and capacity and thus make a normative argument that some non-judicial actors might on this basis be better receptacles of discretionary power to engage in institutional self-design than other non-judicial actors.¹⁹⁴ Perhaps, if there is a constitutionally more lenient approach for delegations to non-judicial actors, it

190. See Posner, *supra* note 58, at 47, 77, 79–80 (describing lobbying by Article III judges against affording bankruptcy judges Article III status); see also Sara Randazzo, *Under New Bill, Federal Appellate Court Based in California Could Be Split Up*, WALL ST. J., (Feb. 2, 2017, 4:58 PM ET), <https://www.wsj.com/articles/under-new-bill-federal-appellate-court-based-in-california-could-be-split-up-1486072683> (stating that the Ninth Circuit was “strongly opposed to a split”); Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 242–80 (2016) (describing how federal judges in the District Court for the Eastern District of Texas have affirmatively sought to attract patent cases to the district).

191. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 743–44 (1979) (Powell, J., dissenting) (explaining that, where federal courts expand their own power by reading implied private rights of action into otherwise silent federal statutes, “the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned”); see *supra* note 158 and accompanying text.

192. Indeed, a Ninth Circuit panel opinion (where an en banc court subsequently adjudicated the case on grounds other than those used by the panel) makes the argument that the constitutionality of BAPs is saved since “Congress did not delegate BAP establishment to the courts—it was delegated to an administrative authority”—the circuit councils. *In re Ozenne*, 818 F.3d at 521; see also *id.* (“The Supreme Court has never held, nor has our court, that Congress cannot authorize the judicial councils in each circuit to establish a temporary panel service to adjudicate specific, public rights, such as bankruptcy claims.”). I note that, even if the delegation to the circuit judicial councils passes muster because the circuit judicial councils qualify as “administrative,” that fact is of little moment if, as I have argued, Congress vested the power to create BAPs not just in those councils, but in the district courts.

193. See *Mistretta*, 488 U.S. at 388 (noting with approval the vesting by Congress of “nonadjudicatory activities . . . either in federal courts or in auxiliary bodies within the Judicial Branch” (emphasis added)); *id.* at 388–89 (“Though not the subject of constitutional challenge, by established practice we have recognized Congress’ power to create the Judicial Conference of the United States, the Rules Advisory Committees that it oversees, and the Administrative Office of the United States Courts whose myriad responsibilities include the administration of the entire probation service. These entities, some of which are comprised of judges, others of judges and nonjudges, still others of nonjudges only, do not exercise judicial power in the constitutional sense of deciding cases and controversies, but they share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary.” (footnote omitted)).

194. See *infra* Part IV.

extends only to non-judicial actors for which it can be demonstrated that administrative expertise and capacity actually inhere.

III. UNINTENDED CONSEQUENCES OF COURT-CREATED TRIBUNALS

In this Part, I survey consequences that may inadvertently result from having courts create tribunals.

A. *Power to Issue Writs of Mandamus*

Does a court created by an Article III actor have the power to issue a writ of mandamus and other fundamental judicial writs? Federal courts draw their power to issue such writs from the All Writs Act, which authorizes “[t]he Supreme Court and all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”¹⁹⁵ Thus, a lower court’s power to issue writs, such as mandamus, turns on whether the court is one “established by Act of Congress.”¹⁹⁶

Whether a court created by an Article III actor is established by Act of Congress remains an open question, but the better answer is that it is not.¹⁹⁷ If so, then under current statutory law, a tribunal created by a court does not have the power to issue writs under the All Writs Act.¹⁹⁸

B. *Power to Issue Local Court Rules*

Does a court created by an Article III actor have the power to issue its own local rules? Section 2071 of the Judicial Code empowers “[t]he Supreme Court and all courts established by Act of Congress [to] from time to time prescribe rules for the conduct of their business.”¹⁹⁹ Thus, if a court created by an Article III actor is not a court established by Act of Congress, then such a court created by an Article III actor lacks the authority to issue local court rules.

195. 28 U.S.C. § 1651(a).

196. *Id.*

197. See *In re Ozanne*, 818 F.3d at 517 (“[A] tribunal created by the independent actions, choices, or judgment of a third party has not been ‘established by Act of Congress,’ even if authorization or support from Congress was a logically necessary part of the tribunal’s creation . . .”). For a further discussion of *In re Ozanne*’s subsequent appellate history, see *supra* note 121.

198. See *In re Ozanne*, 818 F.3d at 521–22. But see *Salter v. U.S. Bankr. Ct., C.D. Cal. (In re Salter)*, 279 B.R. 278, 283 (B.A.P. 9th Cir. 2002) (“Because Congress authorizes the establishment of BAPs and defines their authority, we conclude that a BAP is a court established by act of Congress . . .”).

199. 28 U.S.C. § 2071(a).

The method used to promulgate local rules for BAPs seems to acknowledge implicitly this point: BAP local rules are promulgated not by the BAP, but by the relevant circuit judicial council.²⁰⁰

Importantly, the fact that a court may not have issued its own rules—a point that is nonobvious and counterintuitive—can have practical ramifications. At least one district court has found that a local BAP rule charging the BAP with deciding whether venue lies with the district court or BAP was not controlling on the district court.²⁰¹ The court analogized to the fact (contested by some) that BAP decisions are not binding on district courts.²⁰² But that analogy does not hold, since the local BAP rules are the product of the circuit council, not the BAP.²⁰³

C. Powers Associated with Being a “Court of the United States”

Congress has chosen to confer certain powers on courts that qualify as courts of the United States. For example, “any court of the United States” may authorize litigants to proceed *in forma pauperis*, that is, to absolve indigent litigants of having to pay otherwise necessary court fees.²⁰⁴ So, too, may any court of the United States impose sanctions on an attorney who “multiplies the proceedings . . . unreasonably and vexatiously.”²⁰⁵

Does a court created by an Article III actor qualify as a court of the United States? Section 451 of the Judicial Code defines “court[s] of the United States” to “include[] the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.”²⁰⁶

The statutory definition leaves little wiggle room for a court created by an Article III actor. Consider, by way of explication, the case of the BAP. The BAP

200. See FED. R. BANKR. P. 8026(a)(1) (“A circuit council that has authorized a BAP under 28 U.S.C. § 158(b) may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the BAP.”).

201. See Matter of Specialty Retail Shops Holding Corp., No. 8:19CV405, 2020 WL 42465, at *1–2 (D. Neb. Jan. 3, 2020).

202. See *id.* at *2.

203. See FED. R. BANKR. P. 8026(a)(1).

204. 28 U.S.C. § 1915(a)(1) (“[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.”).

205. *Id.* § 1927 (“Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”).

206. *Id.* § 451. The provision also defines the term “judge of the United States” to “include[] judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.” *Id.*

would qualify as a court of the United States if it is a unit of an Article III court and that Article III court has the power to delegate its powers as a court of the United States to the BAP. But satisfaction of neither of these prongs is self-evident.²⁰⁷ Alternatively, a newly-created court could qualify if the court is both created by Act of Congress and is staffed by judges who are “entitled to hold office during good behavior.”²⁰⁸ Leaving to the side debate over whether the BAP is created by Act of Congress,²⁰⁹ the BAP fails the test because BAP judges are bankruptcy judges who serve for fixed terms.²¹⁰

D. *Entitlement to Support by the AO and the FJC*

The applicable provision of the United States Code extends the support of the AO²¹¹ and FJC²¹² to “courts,” which the relevant statute defines to “include[] the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade.”²¹³ But how exclusive is this definition? The Judicial Conference’s 1995 *Long Range Plan for*

207. For a discussion of whether the BAP is a unit of either the district court or court of appeals, see *supra* the text accompanying notes 143–152.

The question of whether courts of the United States may delegate power to their units is also unclear: Courts are divided over whether bankruptcy courts have the powers enjoyed by courts of the United States by virtue of their status as units of district courts. *Compare, e.g., In re Schaefer Salt Recovery*, 542 F.3d 90, 105 (3d Cir. 2008) (finding that the bankruptcy court can impose sanctions under § 1927), and *McGinnis v. McGinnis (In re McGinnis)*, 155 B.R. 294, 297 (Bankr. D.N.H. 1993) (holding that the bankruptcy court can permit a litigant to proceed *in forma pauperis*), with *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 896 (9th Cir. 1992) (finding that the bankruptcy court cannot permit a litigant to proceed *in forma pauperis*), and *Determan v. Sandoval (In re Sandoval)*, 186 B.R. 490, 495–96 (B.A.P. 9th Cir. 1995) (explaining that the bankruptcy court cannot impose sanctions under § 1927).

208. 28 U.S.C. § 451.

209. See *supra* notes 121, 197 and accompanying text; *Wallin v. Martel (In re Martel)*, 328 F. App’x 584, 586 n.1 (2009) (“Neither could the BAP have granted leave to proceed *in forma pauperis* under 28 U.S.C. § 1915, because that statute affords such authority only to a ‘court of the United States.’ We have previously held that this term, as used in an analogous statute, refers only to Article III courts, and the BAP is not such a court.” (citation omitted)).

210. See 28 U.S.C. § 158(b)(1); see also *Court Insider: What is a Bankruptcy Appellate Panel?*, U.S. CTS. (Nov. 26, 2012), <https://www.uscourts.gov/news/2012/11/26/court-insider-what-bankruptcy-appellate-panel>. A harder question would surround such a court that was staffed by Article III judges. Were the proposal ever to be enacted, a DCAP would be staffed by sitting Article III district and circuit judges. See COMMISSION FINAL REPORT, *supra* note 10, at 64. The outstanding question would remain whether the DCAP was created by Act of Congress.

211. See 28 U.S.C. §§ 601, 604, 612. For a further discussion of the support the AO provides the courts, see *supra* note 45 and accompanying text.

212. See 28 U.S.C. §§ 620(a), 623. For a further discussion of the support the FJC provides the courts, see *supra* note 46 and accompanying text.

213. See 28 U.S.C. § 610 (“As used in this chapter [governing the Judicial Conference] the word ‘courts’ includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade.”).

*the Federal Courts (Long Range Plan)*²¹⁴ notes the exclusion of several Article I courts from the AO's reach.²¹⁵ On the other hand, many Article I courts and judges—including the BAPs—are included within the AO's structure.²¹⁶

The import of unintended consequences is multifaceted. As things stand, many of the results I describe above may be undesirable. Some may adversely and unfairly affect litigants, especially unsuspecting litigants proceeding *pro se*, and some may have a deleterious effect on the legitimacy of a tribunal created by a court.²¹⁷ They can be resolved by simple statutory amendment. Given the success of BAPs²¹⁸—and especially if Congress chooses to authorize more courts to create tribunals—Congress should implement such statutory fixes.²¹⁹ The BAPs, and other tribunals that may one day be created by the judiciary, should be made a clear part of the infrastructure of the judiciary.

IV. NORMATIVE ASSESSMENT OF COURTS CREATING COURTS

In this Part, I assess the normative desirability of having courts create courts. In so doing, I not only try to evaluate the general question, but also try to assemble a set of best practices on the assumption that in some settings the phenomenon is likely to take place regardless of my general assessment. My questions are basic ones: Leaving to the side the constitutional and other legal issues, is it desirable to have judicial actors decide whether to create courts? Moreover, might some judicial actors be better at the task than others?

214. See JUD. CONF. OF THE U.S., *supra* note 10, at 85 n.17

215. A map of “The United States Court System” in the *Long Range Plan* presents tribunals that fall outside the U.S. court system—the U.S. Court of Appeals for the Armed Forces, the U.S. Court of Veterans Appeals, administrative agencies, and state court systems—against a shaded background. *Id.* at 55.

216. In a footnote, the *Long Range Plan* addresses the status of various Article I judges and courts for Judicial Conference purposes. See *id.* at 85 n.17. It justifies the inclusion of bankruptcy judges and magistrate judges within the ambit of the judicial branch's administration on the ground that these judges, though appointed under Article I, serve on Article III courts. See *id.* It finds the Court of Federal Claims to be an “anomalous” case but notes that historical practice supports the statutory conclusion that “the Court of Federal Claims is lodged within the judicial branch for administrative purposes.” *Id.* It then explains: “The other Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch.” *Id.*

217. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (arguing that “issues of process dominate public evaluations of the police, the courts, and social regulatory activities”).

218. See Nash & Pardo, *supra* note 24.

219. Cf. Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1240–47 (2008) (suggesting statutory tweaks to make the Tax Court more like other courts in the federal system); Pardo & Watts, *supra* note 180, at 452–55 (outlining a “minimalist model” for a “federal bankruptcy agency” to supplant court-based policymaking).

Note that the Commission on Structural Reform anticipated at least one of these problems, specifically authorizing the circuit council to issue rules for the DCAP in that circuit. See COMMISSION FINAL REPORT, *supra* note 10, at 98.

I divide the inquiry into two categories of qualities that one would find desirable in a delegate: (i) administrative ability, including relevant expertise and the ability to gather and analyze relevant data, and (ii) democratic decision-making, including accountability, accessibility, and transparency.²²⁰ Considerations under the second category, I argue, mitigate against vesting the power to create courts in the judiciary at all; considerations under the first category suggest that, at the least, such power should be vested in more administrative bodies within the judiciary, as opposed to courts themselves.

Section A discusses concerns of administrative ability. Section B addresses issues of democratic decision-making. Section C deploys the discussions in Sections A and B in analyzing how to identify the best judicial repository for discretion to create new courts (or to eliminate existing ones).

A. *Values Related to Administrative Ability*

1. *Expertise*

One value associated with delegation of administrative decisions to agencies is the notion that agencies are said to possess specialized expertise pertinent to the administrative tasks.²²¹ It is questionable whether courts have the requisite expertise to decide whether it is advisable to create a new tribunal.²²² To be sure, individual judges doubtless have anecdotal evidence as to how some parts of the judicial hierarchy are functioning. There is, however,

220. See, e.g., Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1426–39 (2013) (identifying deliberative justifications for the administrative state, including empowering the public and collaborative governance). These are not the only considerations that inform generally the question of whether, and where, to vest administrative policymaking authority. Scholars argue that administrative lawmaking is valuable in that it produces (i) greater legal uniformity, see, e.g., Pardo & Watts, *supra* note 180, at 434–39; and (ii) prospective clarity in the law, see, e.g., *id.* at 441–43; and in that it (iii) offers great flexibility in response to changed circumstances, see, e.g., *id.* at 443–44. But (i) the goal in vesting discretion to create courts is expressly *not* to achieve uniformity (or at least not necessarily to achieve uniformity), and there is no need to build a coherent body of law; (ii) prospective legal clarity is not an issue when creating a court; and (iii) the discretion to create (and not to create and to eliminate) courts is designed to provide considerable flexibility. *Id.* at 423.

221. See, e.g., Lemos, *supra* note 160, at 445 (“One of the most common defenses of delegation to agencies is that agencies possess technical expertise that Congress lacks.”); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440–41 (1987) (suggesting that the increase in grants of authority to regulatory agencies during the New Deal was motivated in part by a conception of administrative agencies as “technically sophisticated”).

222. Cf. Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 98 (2006) (arguing that district judges gain expertise through their jobs at managing cases, but that this expertise is best exercised through discretionary decision-making on a case-by-case basis); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 177–85 (1977) (describing how the Court’s misapprehensions about juvenile courts led to its decision in *In re Gault*, 387 U.S. 1 (1967)); *id.* at 238–49 (describing how misapprehensions about how criminal litigation typically unfolds informed the Court’s development of the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961)).

a world of difference between practicing within an existing institution on the one hand and turning to the architecture of institutional design on the other.

If the judiciary is at all the proper home for such decisions, it seems that a part of the judiciary that is more administrative in nature—perhaps, in the federal judicial system, the AO—would be a better choice than individual courts or councils composed of a few judges with limited administrative experience or support.²²³

2. *Ability to Gather and Analyze Relevant Data*

Agencies are also seen to have the ability to gather and analyze relevant data to enhance their native expertise.²²⁴ While they have the power to gather information in relation to cases before them, courts in contrast are not well suited to gathering information on a broad scale or to analyzing large amounts of information.²²⁵ Here again, to the extent that the judiciary is to be the home for discretion to create new tribunals, the proper entity to exercise such discretion would be more administrative.

B. *Values Related to Democratic Decision-Making*

1. *Accountability*

Another benefit said to accrue from delegating administrative policymaking to agencies is that agencies are seen to be politically accountable.²²⁶ While agencies are not directly accountable to voters, they are—through their appointive heads—accountable to the President and Congress, and thus indirectly accountable to voters.²²⁷

223. Professor Neil Komesar highlights the challenges facing judges who are called upon to make institutional design decisions about their own courts: “Judges must be particularly careful to avoid the siren-song of single institutionalism.” NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 149 (1994).

224. See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 *DUKE L.J.* 1013, 1055–56 (1998).

225. See, e.g., *id.* at 1064 (noting that agencies enjoy “greater factfinding power” than do courts); HOROWITZ, *supra* note 222, at 274–84 (recognizing “judicial incapacity in gathering and using behavioral data” that derives from both (i) “problems of the admissibility and presentation of evidence,” and (ii) “fundamental differences between legal inquiry and social science inquiry”).

226. See, e.g., Lemos, *supra* note 160, at 448 (“Supporters of the . . . hands-off approach to delegations to agencies also maintain that agencies are democratically accountable, at least derivatively, because of their relationship with the president and Congress.”); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. PA. L. REV.* 1, 34 (2011) (“Political accountability and oversight are two of the most significant checks on agency discretion.”); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 35 (2009) (noting that political control and accountability help legitimize agencies).

227. See, e.g., Pardo & Watts, *supra* note 180, at 432.

At least in the federal system where Article III judges enjoy lifetime appointments, the judiciary is largely unaccountable to the political branches. To the extent accountability fosters better decision-making, the judiciary is the wrong place to lodge discretion.

2. *Accessibility and Transparency*

Yet another benefit of policymaking delegation to agencies is that agencies—at least when they proceed by rulemaking, as opposed to adjudication—“offer the most ‘accessible,’ ‘meaningful,’ and ‘effective’ site for public participation in lawmaking.”²²⁸

The judicial branch offers little opportunity for accessibility, and far from being transparent, is quite opaque. Worse still, one has reason to suspect that special interests within the judiciary might try to capture the process; as I discussed above, judges have in the past tried to influence the content of congressional bills affecting the design of the judicial hierarchy.²²⁹ One thus might expect that vesting discretion to design the hierarchy in the judiciary is likely to exacerbate the problem.

The power district courts have over the existence of BAPs is illustrative of the problem. District judges exercise influence—through their role on the judicial council—on the judicial council’s decision whether to create a BAP in the first place.²³⁰ And, even to the extent one is created, the district judges in each district have the additional power to decline to allow litigants in the district to have access to the BAP, even to the point of undermining and eliminating the BAP.²³¹

C. *Choosing Among Judicial Delegates*

How might the foregoing analysis guide us in choosing a delegate for judicial institutional design? Not surprisingly, values relating to democratic decision-making argue against delegating that authority upon the judiciary altogether.

One should hesitate, however, to stop there. After all, the previous Section implicitly compared as possible delegates Article III actors to administrative agencies. But the reality is that the alternate repository for discretion in judicial system design is not an administrative agency, but rather Congress.²³² And

228. See, e.g., Lemos, *supra* note 160, at 450 (quoting Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781–82 (1999)); Pardo & Watts, *supra* note 180, at 439–40.

229. See *supra* note 190 and accompanying text.

230. See 28 U.S.C. § 158(b)(1).

231. See *id.* § 158(b)(6).

232. See KOMESAR, *supra* note 223 (“Valid institutional comparison calls upon courts to function when they can do a better job than the alternatives. . . . In the relevant comparative institutional world, courts may

Congress has not distinguished itself as an able architect of federal court jurisdiction and system design.²³³

Values related to administrative ability—perhaps especially expertise in the subject—might argue (at least in some cases) in favor of an Article III actor as the delegate.²³⁴ To that extent, these values do argue in favor of some Article III actors as preferable delegates to other Article III actors. Administrative Article III actors are better positioned to analyze and gather relevant data, and perhaps even accumulate relevant expertise, than are judicial actors.²³⁵

Beyond this basic dichotomous preference for administrative actors over judicial actors as delegates, it seems that some Article III actors that might technically fall within the category of administrative actors are less well-positioned than others to exercise discretionary power to engage in judicial institutional self-design. Given the relatively lower abilities and capacities of Article III actors (as compared to actors in the executive branch), one should not expect all non-judicial Article III actors to be adept at administrative matters.²³⁶ Indeed, the AO, followed by the Judicial Conference, as the two administrative bodies that serve and represent the broad judiciary and that enjoy considerable administrative support, are likely the most adept.

By comparison, the circuit judicial councils—consisting of judges from the court of appeals and districts within each circuit, and little dedicated support—are not exemplars of administrative prowess. Neither in theory nor practice are the judicial councils especially “administrative” authorities. Unlike, for example, the AO, the councils are populated by judges, and they do not enjoy large administrative support staffs.²³⁷ Indeed, the administrative shortcomings of

be called upon to consider issues for which they are ill equipped in some absolute sense because they are better equipped to do so in a relative sense.”)

233. See, e.g., Thomas Arthur & Richard Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 966–72 (1991) (discussing unanticipated and bizarre results of plain readings of 28 U.S.C. § 1367, which Congress enacted in 1990 in response to the Court’s decision in *Finley v. United States*, 490 U.S. 545 (1989)).

234. Besides delegating authority to the judiciary, Congress might gain the benefit of the judicial branch’s expertise by having judges, or administrators within the judiciary, testify before Congress. Cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1660–1704 (2000) (describing how Chief Justice William Howard Taft arranged for the Supreme Court Justices to draft a bill greatly expanding the Court’s certiorari jurisdiction, and then arranged for Justices to testify before Congress in support of the bill); Posner, *supra* note 58, at 74 (noting that District Judge Edward Weinfeld testified before Congress on behalf of the Judicial Conference with respect to a bill that would create a Bankruptcy Commission); *id.* at 79–80 (noting testimony before Congress by various federal judges on behalf of the Judicial Conference with respect to the Bankruptcy Reform Act of 1978).

235. See Sunstein, *supra* note 224.

236. See KOMESAR, *supra* note 223, at 149–50.

237. A congressional statute authorizes—but does not require—“[t]he judicial council of each circuit [to] appoint a circuit executive.” 28 U.S.C. § 332(e). If such an appointment is made, then “[t]he circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.” *Id.* § 332(f)(3).

judicial councils show in the failure by many of them to comply with the terms of the discretion afforded them in deciding whether to establish BAPs.²³⁸

In sum, there are arguments against Congress enabling judicial institutional self-design. However, to the extent that non-judicial Article III actors are deemed appropriate repositories for discretionary power to engage in institutional self-design, it is normatively preferable to place that discretion in the hands of more capable administrative actors within Article III—such as the AO or the Judicial Conference—or at least explicitly to enlist the aid of such actors even while vesting ultimate discretionary authority in other actors.²³⁹

CONCLUSION

In this Article, I have identified numerous issues associated with the notion of Congress granting discretion to Article III actors to engage in institutional self-design. I have surveyed several examples where Congress has conveyed upon Article III actors the power to reshape the federal judiciary. I have described serious constitutional issues and subconstitutional, unexpected issues that dog judicial institutional self-design. Finally, I have considered the value of, and preferable structures for, institutional self-design. From a normative perspective, I question the desirability of vesting the judiciary with the power to create courts. To the extent that the decision is nevertheless made to do so,

238. *See supra* note 184 and accompanying text.

239. By way of example, 28 U.S.C. § 633 vests with the Judicial Conference responsibility for determining the number of magistrate judges in each district. In practice, however, a broader group of administrative actors partake in the process:

[T]he Director [of the AO] provides the district courts, circuit councils, Magistrate Judges Committee, and the Judicial Conference with recommendations concerning the number, salaries, and locations of magistrate judge positions. To meet the Director's responsibilities in this regard, the Magistrate Judges Division conducts on-site interviews of judges and other court officials, analyzes caseload statistics, studies utilization of magistrate judge resources, and prepares written survey reports and recommendations for district courts seeking additional magistrate judge positions. The Division also conducts periodic district-wide reviews of all existing magistrate judge positions in each district to determine whether there should be any changes in their number, salaries, or locations. Before March 1991, the Administrative Office, the Magistrate Judges Committee, and the Judicial Conference, reviewed each magistrate judge position prior to the expiration of an incumbent's term of office, in order to determine whether the position should be continued for an additional term of office. After twenty years experience with the magistrate judges system, the Judicial Conference changed this survey methodology in 1991 to require the Director of the Administrative Office to review all magistrate judge positions in each district periodically to determine whether any changes should be made.

Pro & Hnatowski, *supra* note 94, at 1509–10 (footnotes omitted); *see also* Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 570–73 (discussing the implementation of the magistrate system under the original Federal Magistrates Act of 1968).

To be sure, the involvement of other actors here is not required by statute. The need for mandating such consultation is highlighted by the evident failure of the judicial councils to have sought out help in fulfilling their discretionary charge regarding the creation of BAPs. *See supra* note 184 and accompanying text.

administrative judicial actors make a better home for that discretion than do courts themselves.

The issues explored in this Article are on the verge of taking on heightened significance. Recent decades have witnessed an increase in experimentation in the design of judicial systems.²⁴⁰ With judicial reform looming on the horizon,²⁴¹ it would not be surprising to see a proliferation of judicial institutional self-design and the problems that accompany it. It would be prudent to confront the problems that already exist today and to take steps to ameliorate them.

240. *See supra* notes 50, 55–56 and accompanying text.

241. *See supra* notes 1–3 and accompanying text.