2007

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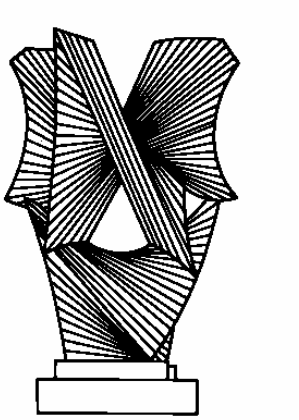
CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 367
(2D SERIES)
PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 187



AN EMPIRICAL INVESTIGATION INTO APPELLATE STRUCTURE AND THE PERCEIVED QUALITY OF APPELLATE REVIEW

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

October 2007

AN EMPIRICAL INVESTIGATION INTO APPELLATE STRUCTURE AND THE PERCEIVED QUALITY OF APPELLATE REVIEW

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Commentators have theorized that several factors may improve the process, and thus perhaps the accuracy, of appellate review: (1) review by a panel of judges, (2) subject-matter expertise in the area of the appeal, (3) other lawfinding ability, (4) adherence to traditional notions of appellate hierarchy, and (5) the judicial independence of appellate judges. The considerable discussion that has expounded upon these theories has occurred in a vacuum of abstract generalization. This Article adds a new dimension by presenting the results of an empirical study of bankruptcy appellate opinions issued over a three-year period. The federal bankruptcy appellate structure provides certain litigants the choice to appeal, in the first instance, to one of two distinct appellate tribunals—district courts and bankruptcy appellate panels (BAPs)—whose structural features relating to the theorized qualities of appellate review differ. As BAPs appear to have more of the features identified as improving the quality of appellate review, the study tests the theory through various hypotheses that focus on the perception held by other federal courts within the bankruptcy appellate structure of the quality of appellate review provided by these distinct appellate tribunals. The data show that, as measured by (1) the subsequent disposition rendered by courts of appeals and (2) the citation practices of other federal courts to the appellate opinions issued by BAPs and district courts, BAPs have been perceived to provide a better quality of appellate review. Having unearthed some evidence that supports the theoretical notions underlying the quality of appellate review, this Article concludes that commentators and policymakers ought to be encouraged to explore further, in a more detailed manner, the question of how appellate structure can be designed to produce better results.

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For helpful suggestions, we are grateful to Adeno Addis, Douglas Baird, the Honorable Prudence Carter Beatty, Michael Collins, Jason Czarnezki, Onnig Dombalagian, David Epstein, Myriam Gilles, Michael Herz, Michelle Lacey, Clarisa Long, Glynn Lunney, Lawrence Ponoroff, Eric Posner, Margo Schlanger, Catherine Sharkey, Nancy Staudt, and Kathryn Zeiler. This Article also benefited greatly from the commentary of participants at the 2007 Annual Meeting of the Law and Society Association; 11th Annual Conference of the International Society for New Institutional Economics (especially that of John Drobak who served as a commentator on the paper); the 2007 Stanford/Yale Junior Faculty Forum (especially that of Pamela Karlan and Judith Resnik who served as commentators on the paper); the 2007 Reenvisioning Law Colloquium at the University of Houston Law Center; the 2006 Annual Meeting of the Midwestern Law and Economics Association; and a faculty workshop at Seattle University School of Law. Jacob Eisenstein provided excellent research assistance.

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INTRODUCTION

What is the ideal structure for appellate review? Without providing a definitive answer to the question, commentators have suggested several factors that may improve the process, and thus perhaps the accuracy, of appellate review. First, it is said that panels of judges are preferable to review by a single judge. Second, expertise in the relevant area of law is a benefit. Third, other indicia of lawfinding ability—such as the ability of lawyers and judges to focus on legal issues without the distraction of factual conflicts and the amenability of judges' schedules to contemplation and reflection—contribute to the quality of appellate review. A fourth factor is whether the court adheres to traditional notions of appellate hierarchy, for example following earlier precedents of that court. Finally, it is said that the independence of the appellate judges—that is, the extent to which job features such as life tenure and a guaranteed salary tend to insulate judges from pressures to decide cases or issues one way or another—is of value.

In this Article, we endeavor to evaluate empirically the relative quality of appellate review. To do this, we rely upon data obtained from the appellate review of bankruptcy matters. The current federal bankruptcy appellate structure provides an excellent setting in which to study appellate review since it offers litigants two paths for obtaining appellate review. First, after the bankruptcy judge issues a ruling, litigants may have the district court—in the person of a single district judge—review that ruling. Alternatively, the parties may agree (in circuits that have them) to have the bankruptcy judge's ruling reviewed by a panel of bankruptcy judges—a so-called "bankruptcy appellate panel" or "BAP." Further appeal in both cases—whether from the district court or the bankruptcy appellate panel—lies with the proper federal circuit court of appeals.

We collected data on affirmance rates in and citation rates to appellate bankruptcy opinions. Analyses of the data generally—and analyses of the citation data in particular—support the notion that BAP decisions in our study are perceived to be of greater quality than are district court decisions. First, we find some support for the proposition that courts of appeals are more likely to uphold upon review the conclusions of BAPs than district courts. Second, BAP decisions are, with statistical significance, cited more frequently than are district court decisions by bankruptcy courts, BAPs, federal courts of appeals, and courts in other circuits. Only district courts are not more likely to cite BAP decisions than decisions rendered by district courts.

Our findings will be of interest both to theoreticians and policymakers. If courts try to reach "correct" decisions, then our findings generally buttress the various theories about how to structure appellate tribunals so as to maximize the quality of appellate review. This, in turn, should guide policymakers in designing appellate tribunals and appellate structures in general. In particular, multimember tribunals that adhere to traditional notions of appellate hierarchy and that have subject-matter expertise in the area of the appeal appear to be desirable. And even if judges do not strive to resolve issues and cases "correctly," our findings still seem to support the notion that judges perceive that appellate tribunals that have certain attributes will reach correct

conclusions. In this sense, our findings show the persuasive strength of the theoreticians' story, or at least judges' perceptions of the strength of that story.

The Article proceeds in the following manner. Part I provides an overview of the theoretical literature discussing the quality of appellate review. Part II discusses the means by which we undertook to evaluate the quality of appellate review: Part II.A presents the legal setting of appeals of core bankruptcy proceedings, and Part II.B sets out the hypotheses we sought to test. Part III explains how we tested the hypotheses. Part III.A details the data we compiled and the essential features of those data. The next two Parts present the findings of our statistical analyses, with Part III.B explicating the bivariate descriptive statistics and Part III.C presenting the results of regression tests we conducted.

I. EVALUATING THE QUALITY OF APPELLATE REVIEW

Assembling an exhaustive list of the ideal elements of appellate review would present no small task. However, the academic literature does suggest several attributes that will tend to contribute to better appellate review.

First, commentators laud the use of panels of judges, rather than single judges, to hear appeals. There are two justifications. First, to the extent that there is an objectively "correct" answer to a question of law posed on appeal, and to the extent that there is a greater than 50% chance that each appellate judge will reach that "correct" answer, the Condorcet Jury Theorem instructs that a panel of judges will more likely reach the "correct" answer than will a single appellate judge.[1] Second, even to the extent that one might question the validity of the assumptions underlying the applicability of the Condorcet Jury Theorem in the context of appellate review,[2] there is an argument that the collegial nature of multimember appellate panels contributes to reflective decisionmaking and thus to the quality of appellate review.[3]

A second factor that contributes positively to appellate review is expertise of the appellate decisionmaking in the subject matter of the appeal.[4] Thus, for example, Congress created the United States Court of Appeals for the Federal Circuit with an eye

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[1] *See* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 1022-23 (2004) (describing Condorcet Jury Theorem).

[2] *See* Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 112-13 & nn.130-31 (2003) (questioning the applicability of the Condorcet Jury Theorem in the context of appellate judicial decisionmaking).

[3] *See, e.g.*, Harry T. Edwards, *The Effects of Collegiality on Judicial Decisionmaking*, 151 U. PA. L. REV. 1639 (2003); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 100-02 (1986). *But see* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (finding empirical evidence that judges on an appellate panel of the same political party are more likely to vote ideologically); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (finding some evidence of ideological voting on federal courts of appeals).

[4] *See* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997) ("Specialization offers two major advantages: expertise and uniformity."). For an argument that it might benefit the legal system to have some judges with expertise in areas other than law, see Adrian Vermeule, *Should We Have Lay Justices?* (Harvard Law School Public Law & Legal Theory Research Paper Series, Working Paper No. 134), *available at* http://ssrn.com/abstract=943369.

to creating an appellate body with the expertise to deal effectively with the complex area of patent law.[5]

Third, courts and commentators identify general "lawfinding ability"—as distinct from expertise in particular areas of law—as a virtue for appellate review.[6] While the Supreme Court has characterized the presence of multijudge panels as "[p]erhaps most important" in assessing lawfinding ability,[7] it has also indicated other factors tend to enhance lawfinding ability in the appellate setting. Specifically, lawfinding ability is greater when (i) the judges have schedules that allow time for reflection;[8] (ii) the judges resolve legal issues once the factual record is fully developed;[9] and (iii) the attorneys may focus on the legal issues in question without the distraction of trial advocacy.[10]

A fourth factor that tends to be associated with the quality of appellate review is the extent to which an appellate court conforms to traditional appellate hierarchy.[11] Courts in the United States are organized according to a standard hierarchy: Trial courts decide cases in the first instance, with a first appeal as of right to an intermediate appellate court and a second appeal to a high court at the discretion of that court.[12] Within that hierarchy are rules of precedent that, while not absolute, create barriers against courts overruling holdings of earlier cases. As a general matter, under so-called horizontal stare decisis, high courts and intermediate appellate courts will follow their own earlier precedents.[13] Further, vertical stare decisis binds inferior courts generally to follow governing precedents issued by superior courts within the hierarchy.[14]

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[5] *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); R. Polk Wagner & Lee Petheridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1114-17 (2004).

[6] *See* Nash, *Resuscitating Deference*, *supra* note 1, at 1022.

[7] Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991).

[8] *Id.* at 231 (noting, with a negative connotation from the perspective of lawfinding ability, that district judges "preside alone over fast-paced trials").

[9] *Id.* at 232.

[10] *Id.* at 231-32.

[11] *See, e.g.*, Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 68 (2006) ("The essence of the American system of precedent as experienced in practice resides in the great authority and hierarchical arrangement of the courts."); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2047 (2004) (suggesting that appellate review and appellate hierarchy are integrally related by noting that "the various characteristics and functions of appellate review . . . suggest that some gradation of judicial authority is central to the nature of appellate review," and that "[a]n appellate system of review is one defined by hierarchy"); John A. Ferejohn & Larry D. Kramer, 77 N.Y.U. L. REV. 962, 998 (2002) ("[T]he development of an appellate hierarchy with collegial courts at the higher levels and stringent rules of vertical stare decisis operates structurally to ensure that no individual judge can, by his or her actions alone, inflict too much damage on the judiciary by making aberrant or overly ambitious decisions."). *But cf.* Pauline T. Kim, *Lower Court Discretion*, N.Y.U. L. REV. (forthcoming) (arguing that the common principal-agent model for analyzing lower court efforts to fulfill appellate court mandates ignores the allocation of discretion to lower courts), *available at* http://ssrn.com/abstract=936769.

[12] *See, e.g.*, Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1607-08 (1995) (elucidating the traditional appellate hierarchy).

[13] Absent en banc review, courts of appeals as bound by prior decisions issued by the court (independent of panel composition). *E.g.*, United States v. Myers, 200 F.3d 715, 720 (10th Cir. 2000).

It is true that court systems need not have the features of appellate hierarchy and stare decisis to function, and indeed to function well.[15] Indeed, commentators debate whether Congress might statutorily alter or abrogate the traditional rules of stare decisis, as well as the normative questions of whether it should.[16] Nonetheless, whether it is constitutionally mandated or normatively desirable, the assumption underlying the dominant U.S. judicial structure is that horizontal and vertical stare decisis provide precedential power to decisions by appellate courts. Assuming that judges seek to arrive at correct outcomes,[17] these standard rules of precedent presumably increase the quality

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In general, horizontal stare decisis does not extend beyond the court that issued an opinion to sibling courts of the same hierarchical level. While intermediate appellate courts will follow decisions issued by earlier panels of the same court—notwithstanding that the composition of the judges on the panels may vary—intermediate appellate courts generally are under no precedential obligation to follow decisions issued by sibling intermediate appellate courts of similar hierarchical rank. Thus, for example, a Ninth Circuit panel may find First Circuit precedent to be persuasive and choose to follow it, but stare decisis does not demand that the Ninth Circuit so act; rather, stare decisis leaves the Ninth Circuit free to disagree with and to disregard the First Circuit precedent. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824-25 (1994). Also the rule of horizontal precedent does not extend to trial courts, as discussed below. *See id.* at 825 ("[A] district court judge may ignore the decisions of 'foreign' courts of appeals as well as other district court judges, even within the same district." (footnote omitted)); Kornhauser, *supra* note 12, at 1609; Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003). *But see* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1095 (1994) (noting a "long tradition" of district judges deviating from prior precedent in the same district only in extraordinary circumstances); *infra* note 68 and accompanying text.

[14] *See, e.g.*, Kornhauser, *supra* note 12, at 1609; Susan B. Haire, Stefanie Lindquist, & Donald R. Songer, *Appellate Court Structure in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 145 (2003) ("Appellate oversight in the lower tires of the federal judicial hierarchy . . . provides a process through which circuit judges are expected to promote legal rules that will guide decision making in subsequent cases"); Chemerinsky, *supra* note 4, at 111 ("[C]ourts generally issue written decisions that, when published, have precedential effect on future rulings involving different parties.").

[15] For example, civil law systems do not rely upon as stringent a hierarchy, or upon rules of precedent as stringent. *See, e.g.*, Thomas Lundmark, *Book Review*, 46 AM. J. COMP. L. 211, 214-15 (1998) ("One of the classic differences between civil-law and common-law jurisdictions is that the former do not recognize judicial precedent as an independent source of law.") (reviewing INTERPRETIVE PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997); Caminker, *supra* note 13, at 826; Kornhauser, *supra* note 12, at 1608. For an exposition, and critique, of the necessity and desirability of stare decisis, see Caminker, *supra* note 13.

[16] *Compare, e.g.*, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (arguing in favor of the constitutional status of stare decisis); Caminker, *supra* note 13, at 828-34 (arguing that the constitutional case for the binding nature of Supreme Court precedent on lower federal courts is "quite powerful"), *with* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000) (arguing to the contrary); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000) (same); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMM. 191 (2001) (same); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001) (same). *See also* Barrett, *supra* note 13 (arguing that some applications of stare decisis may implicate due process concerns).

[17] *See* Kornhauser, *supra* note 12, at 1606 (taking as a baseline assumption in developing economic theory of stare decisis that "the 'judicial team' seeks to answer the expected number of 'correct' answers subject to its resource constraint"); *cf.* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746-47 (1982) (discussing how judges belong to an "interpretive community" that subscribes to the rule of law).

of appellate review. It stands to reason that a court that knows that its opinion will be binding upon that court, and possibly also on lower courts, in the future will consider more carefully its reasoning before issuing judgments and opinions that announce new rules of law.[18] Relatedly, the focus on cases that raise novel legal questions should allow appellate courts to conserve judicial resources, apply them in cases in which they are truly needed, and thus to reach correct answers more frequently.[19]

A fifth factor that many commentators identify as an ingredient of judicial quality is judicial independence.[20] Judges who enjoy greater independence, it is said, are less likely to be swayed by irrelevant, nonjudicial concerns. The American Founding Fathers subscribed to this view,[21] and accordingly vested Article III judges with presumptive life tenure and the guarantee of nonreduction in salary.[22]

Even if goals other than arriving at the correct outcome motivate judges, *see, e.g.*, Erin O'Hara, *Social Constraint or Implicit Collusion? Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993) (arguing that judges' self-interest—including judges' interest in expanding their influence—explains the development of horizontal stare decisis); *infra* notes 97-99 and accompanying text, the fact remains that, to the extent that the U.S. judicial system substantially relies on the traditional hierarchical form and rules, the extent to which a court comports with that norm will increase the *perception* that it is reaching correct decisions.

[18] *See* Kornhauser, *supra* note 12, at 1623 ("In a completely decentralized system each judge would have to attend to the caseload of every other judge in order to identify appropriate cases for review; in a hierarchical system, only the appellate judges need have a systemic perspective on caseload."); *cf. id.* at 1620 (noting that, absent horizontal precedent, "each judge is more likely to give *each case* intensive consideration" (emphasis added)); *id.* at 1624 (arguing in favor of "strict vertical precedent because the hierarchical structure creates a division of labor between levels of the hierarchy"); *id.* at 1625-27 (arguing in favor of horizontal precedent at the appellate, but not the trial, level).

[19] *See* Kornhauser, *supra* note 12, at 1622-24; Caminker, *supra* note 13, at 839-43. Of course, a cost in such a system is that the first court may resolve the legal question incorrectly, and then bind future courts to that rule. *See* O'Hara, *supra* note 17, at 737 n.3 (identifying the "primary social cost of *stare decisis*" as "the entrenchment of bad decisions"); *see also* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989) (discussing reliance by a court on earlier decisions by that court, even if wrongly decided, as an optimization problem and as varying depending upon institutional structure).

There are other social benefits that rules of stare decisis provide—certainty, predictability, fairness, and consistency. *See* Caminker, *supra* note 13, at 843-56 (discussing the desire to avoid "delayed justice," the greater decisionmaking proficiency of superior courts, and uniform interpretation and application of law as consequentialist justifications for stare decisis); Kornhauser, *supra* note 12, at 74-78 (discussing the fairness, competence, and certainty as justifications for stare decisis). These benefits, however, are not the result of the courts necessarily reaching correct conclusions. Indeed, these benefits would inhere if courts uniformly reached bad decisions. *See* Kornhauser & Sager, *supra* note 3, at 105 (contrasting consistency, soundness, and coherence).

[20] *See, e.g.*, Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States*, 35 J. LEG. STUD. 399, 422-24 (2006) (finding a strong correlation between judicial independence and court quality); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2171 (2006). *But see* Daniel M. Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development* 1 (USC Law Legal Studies Research Paper Series, Paper No. C06-1, 2006) ("There is some evidence that judicial independence is associated with economic growth, but the evidence is mixed and causation is unclear."), *available at* http://ssrn.com/abstract=877490.

[21] *See* THE FEDERALIST Nos. 78, 79, 81 (Alexander Hamilton), Nos. 47, 48, 51 (James Madison).

[22] U.S. CONST., art. III, § 1.

II. INVESTIGATING APPELLATE STRUCTURE AND THE PERCEIVED QUALITY OF APPELLATE REVIEW

At its essence, an appeal involves a claim that a trial court committed some form of error—for example, failure to follow proper procedure or improper application of the law. Accordingly, we might say that one of the primary functions of an appellate court, if not the core function, is to ascertain whether the alleged error truly occurred. As we have already discussed, theorists have posited various attributes that improve the quality of appellate review. While plausible that some of these factors may contribute more than others to improving the quality of appellate review, it seems reasonable to conclude that, on balance, as between two different appellate tribunals, the one that has more of the features of quality appellate review will better perform the appellate function.

The two-tiered system of bankruptcy appeals strikes us as an excellent field for an empirical investigation of how alternative appellate structures may affect the quality of appellate review. The current appellate structure provides for appeals of bankruptcy court decisions in "core" bankruptcy proceedings to be heard, in the alternative, by two different appellate tribunals—federal district courts and federal bankruptcy appellate panels (commonly referred to as "BAPs"). Of particular interest for purposes of this Article, based on the criteria we identified above in Part I, we identify the BAP as the stronger of the two appellate courts—that is, better equipped to carry out the core appellate function of identifying alleged error. We investigate this hypothesis through the study of appeals in core bankruptcy proceedings. We seek to unearth evidence that will inform scholarly inquiry into the hallmarks of the quality of appellate review and that will illuminate areas warranting further exploration.

This part sets the backdrop for our empirical study. First, we describe the bankruptcy judicial structure with primary emphasis on the manner in which appeals progress through it. We then discuss our approach for empirically investigating the theoretical proposition that BAPs are the stronger of the two appellate courts in performing appellate function at the first tier of review and develop a series of hypotheses to test the theory.

A. *The Bankruptcy Appellate Process*

Unlike any other part of the federal judicial system, the bankruptcy appeals process routinely involves two levels of intermediate review. This anomalous state of affairs can be traced to congressional reform efforts from the 1970s that sought to improve the quality of the bankruptcy court while simultaneously maintaining it in a subordinate relationship to the district court.[23]

Under the predecessor to the current Bankruptcy Code, the Bankruptcy Act of 1898,[24] district courts delegated much of their responsibility over bankruptcy cases to "bankruptcy referees," individuals appointed by a panel of district judges for a six-year

[23] *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 123 (1997) (noting that "double appeal system was a concession to the federal judges, a symbol of the subordination of the bankruptcy court to the district court").

[24] *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

term.[25] The limited role and status of the referees at the inception of the Bankruptcy Act expanded over time, which in turn increased the cadre of full-time judicial officers involved in the administration of bankruptcy cases.[26] Eventually, the rules of bankruptcy procedure promulgated by the Supreme Court in 1973 redesignated referees as "bankruptcy judges."[27] This change, however, did not remove the distinction between bankruptcy judges and Article III judges, including, for example, "prohibitions against bankruptcy judges using the elevators, parking lots, and dining rooms reserved for Article III judges."[28] Moreover, some Article III judges continued to refer to bankruptcy judges as "referees" in spite of the statutory change.[29] Sentiments such as these infused their way into the policymaking debates over bankruptcy reform in the 1970s.

Congress established in 1970 the Commission on the Bankruptcy Laws of the United States to analyze the Bankruptcy Act and to suggest recommendations for its reform.[30] While the original resolution creating the Commission proposed that the Chief Justice would appoint two bankruptcy judges as commissioners, strident opposition led, among others, by District Judge Edward Weinfeld, chair of the Judicial Conference's Committee on the Administration of the Bankruptcy System, resulted in passage of the resolution without constraints on whom the Chief Justice could appoint.[31] The Chief Justice did not to appoint any bankruptcy judges to the Commission, instead appointing Judge Weinfeld and District Judge Hubert Will.[32] Judge Weinfeld's efforts had the result of excluding bankruptcy judges from engaging in policymaking discussions on bankruptcy reform within the organizational framework of both the Commission and the Judicial Conference.[33] That the federal judiciary went to great lengths to oppose the inclusion of bankruptcy judges in the reform process highly suggests that Article III judges feared loss of power and prestige in the event Congress increased the power of bankruptcy judges.[34] It is this dynamic that underlies the current bankruptcy judicial structure and the anomaly of double appeals. Only one level of intermediate appellate

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[25] Posner, *supra note* 23, at 61-62.

[26] *See* Geraldine Mund, *Appointed or Anointed: Judges, Congress and the Passage of the Bankruptcy Act of 1978* (pt. 1), 81 AM. BANKR. L.J. 1, 3-6 (2007)

[27] BANKR. R. 901(7) (1973) (repealed 1978).

[28] Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 2 (1985). Hearsay evidence suggests that at least one Article III judge viewed bankruptcy judges as occupying the professional status equivalent to a janitor. *See* Mund, *supra* note 26, at 12 n.34 ("Former Bankruptcy Judge Herb Katz recalls: 'I am told—this is hearsay—but Judge Chambers, who was at the Ninth Circuit, chief judge, was asked by somebody . . . [why] bankruptcy judges were not allowed to come to the Judicial Conference. And he was alleged to have said, "If I invite those people, I have to invite the janitors as well."'" (omission and alteration in original) (quoting Interview with Herbert Katz (July 1, 2004))).

[29] Posner, *supra* note 23, at 61 & n.25; *cf.* Mund, *supra* note 26, at 12 n.34 ("As late as 1978, even though Judge James Browning, then chief judge of the Ninth Circuit, specifically invited five bankruptcy judges to attend the circuit conference, Senior District Judge Lloyd George (formerly a bankruptcy judge) reports that 'they wouldn't call me "judge." They called me mister.'" (quoting Interview with Lloyd George (Dec. 20, 2004))).

[30] Pub. L. No. 91-354, 84 Stat. 468 (1970)

[31] *Mund*, *supra* note 26, at 7.

[32] *Id.* at 8.

[33] *Id.* at 8.

[34] *See Posner*, *supra* note 23, at 8.

review would have been needed had Congress made bankruptcy judges co-equals with district court judges, but that was not to be the case.

With enactment of the Bankruptcy Code in 1978,[35] Congress effectuated a complete overhaul of the federal bankruptcy system that had been in place for 80 years. While there were proposals to vest bankruptcy judges with Article III status,[36] Congress ultimately rejected that notion, at least in part with the support of current and former Article III judges.[37] Congress instead decided to establish the bankruptcy courts as "adjuncts" of the federal district courts. Bankruptcy jurisdiction was statutorily vested in the district courts, yet the statute also directed that all of that jurisdiction was to be exercised by the bankruptcy courts, which were to be staffed by Article I judges.[38]

The Supreme Court rejected the 1978 Act's jurisdictional structure in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[39] The Court in *Marathon* held that the 1978 Act violated Article III by vesting federal judicial power in Article I bankruptcy judges. The *Marathon* decision forced Congress to repair the constitutional infirmity. Lobbying by Article III judges led Congress yet again to reject a solution of affording bankruptcy judges Article III status.[40] Instead, Congress simply modified the 1978 structure. The Bankruptcy Amendments and Federal Judgeship Act of 1984 statutorily established the bankruptcy judges, who are appointed by the courts of appeals,[41] as "unit[s]" of the district courts.[42] Thus, parties technically should file bankruptcy cases in federal district court. However, the Act authorized each district court to "refer" "any or all cases" or "proceedings" to the bankruptcy judges.[43] District courts in turn have implemented "standing orders" that refer in the first instance bankruptcy cases to the bankruptcy courts.[44]

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[35] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101-1532 and in scattered sections of 28 U.S.C.).

[36] *See* Countryman, *supra* note 28, at 7-8.

[37] *See id.* at 8-9; Posner, *supra* note 23, at 77 ("The federal judges opposed the creation of more independent bankruptcy courts, because (1) they would lose their appointment power over bankruptcy judges, and thus one of their main patronage opportunities, and (2) their status would be diluted through the vast increase in the number of federal judicial positions.").

Interestingly, as Congress considered various proposals for reorganizing the court structure of the bankruptcy system in its reform efforts from the 1970s that led to enactment of the Bankruptcy Code, bankruptcy judges did not seek Article III status. Instead, they lobbied Congress for appointment by the judicial council, rather than the president, for two reasons: First, they believed their merit would be properly recognized in a nonpolitical judicial appointment process; and, second, they feared that sitting judges would lack the political connections necessary for presidential appointment. *See* Mund, *supra* note 26, at 20-21, 24-25, 29. For a political economic analysis of the 1978 Act's treatment of bankruptcy judges, see Posner, *supra* note 23, at 74-94.

[38] *See* 28 U.S.C. § 1471(b) (Supp. IV 1976).

[39] 458 U.S. 50 (1982).

[40] *See* Countryman, *supra* note 28, at 31.

[41] 28 U.S.C. § 152(a)(1).

[42] 28 U.S.C. § 151; *see also* 28 U.S.C. § 152(a)(1) ("Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.").

[43] 28 U.S.C. § 157(a).

[44] 9 AM. JUR. 2d (Bankruptcy) § 731; Bussel, *supra* note 13, at 1066 & n.12.

In determining the scope of the bankruptcy judge's authority to resolve a dispute within a bankruptcy case,[45] it is necessary under to categorize the proceeding as "core" or non-core. Absent the consent of all parties, bankruptcy judges may only issue recommendations for the resolution of non-core proceedings, with de novo district court review upon objection by either party.[46] Appellate review thereafter lies to the appropriate federal court of appeals, and thence to the Supreme Court, in line with the typical federal appellate hierarchy.[47]

Core proceedings, on the other hand, are those that, in effect, lie at the heart of a bankruptcy case,[48] and that bankruptcy judges are empowered to resolve definitively, in the first instance, with appellate review to follow.[49] Here, however, there may be more than one possible appellate path.

The statute authorizes the judicial council of each circuit to establish a "bankruptcy appellate panel"—commonly known as a "BAP"—comprised of bankruptcy judges from that circuit.[50] BAPs are now constituted—and have been constituted since

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[45] 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 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. *See* FED. R. BANKR. P. 7001. Such proceedings begin and go forward much as would 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 some modifications). *See, e.g., id*. 7003 (Fed. R. Civ. P. 3); *id.* 7004(a) (portions of Fed. R. Civ. P. 4); *id.* 7005 (Fed. R. Civ. P. 5); *id.* 7012(b) (Fed. R. Civ. P. 12(b)-(h)); *id.* 7013 (Fed. R. Civ. P. 13); *id.* 7014 (Fed. R. Civ. P. 14); *id.* 7056 (Federal Rule of Civil Procedure 56). 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 *See* FED. R. BANKR. P. 9014; *see also* Khachikyan v. Hahn (*In re* Khachikyan), 335 B.R. 121, 125 (B.A.P. 9th Cir. 2005) ("In a contested matter, there is no summons and complaint, pleading rules are relaxed, counterclaims and third-party practice do not apply, and much pre-trial procedure is either foreshortened or dispensed with in the interest of time.").

[46] The Judicial Code describes a non-core proceeding as "a proceeding that is not a core proceeding but is otherwise related to a case under title 11." 28 U.S.C. § 157(c)(1).

[47] Caminker, *supra* note 13, at 824-25 (discussing the standard federal appellate court hierarchy).

[48] Section 157(b)(1) speaks of "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). In turn, section 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).

[49] 28 U.S.C. § 157(b)(1). Unless, that is, the district court withdraws the reference to the bankruptcy court. *See id.* § 157(d). In that case, the district court hears the matter in the first instance, with appeals in the ordinary course lying to the court of appeals and then the Supreme Court. *See* Bussel, *supra* note 13, at 1067, 1100.

[50] 28 U.S.C. § 158(b)(1). The statute also authorizes the creation of intercircuit BAPs, *see id.* § 158(b)(4), but none has yet been created.

Much as the bankruptcy court is unit of the district court, the bankruptcy appellate panels may be seen as "a unit of the federal courts of appeals." Admin. Office of the U.S. Courts, The Federal Judiciary—United States Courts of Appeals, http://www.uscourts.gov/courtsofappeals/bap.html (last visited Feb. 20, 2007); *see also* 28 U.S.C. § 158(b)(1) (requiring BAPs to be established, and BAP judges to be appointed, by the circuit judicial council); B.A.P. 8th Cir. R. 8016A(a)(1) ("The Clerk of the United States Court of Appeals for the Eighth Circuit shall serve as the Clerk of the United States Bankruptcy Appellate Panel for the Eighth Circuit."). *Compare* Coyne v. Westinghouse Credit Corp. (*In re* Globe Illumination Co.), 149 B.R. 614, 620-21 (Bankr. C.D. Cal. 1993) (describing BAP as unit of the court of appeals), *with* The

1996—in the First, Sixth, Eighth, Ninth, and Tenth Circuits.[51] For a circuit BAP to be empowered to hear appeals from bankruptcy courts in a given district, a majority of district judges in the district must vote to authorize it.[52] Unless a party elects otherwise, appeals of bankruptcy judges' rulings in core proceedings will lie to the BAP (in those circuits that have created them and in districts that have authorized it).[53] Appeals from BAP rulings lie to the court of appeals.[54] Parties may seek, as usual, discretionary review by the Supreme Court of rulings by the court of appeals.

If either the appellant or the appellee so elects—or if the circuit has not created a BAP or, even if it has, if the district court in question has not voted to authorize BAP appeals—then the district court—in the person of a single district judge—initially hears appeals of bankruptcy court rulings in core proceedings.[55] The judgment of the district court may then be appealed to the appropriate federal court of appeals,[56] with discretionary Supreme Court review the remaining appellate step. In short, then, certain parties in some circuits have an option between two possible appellate paths.[57] We illustrate this in Figure 1.[58]

Honorable Kathleen P. March & Rigoberto V. Obregon, *Are BAP Decisions Binding on Any Court?*, 18 CAL. BANKR. J. 189, 197 (1990) (describing BAP as unit of district court).

[51] The 1994 amendments to the Bankruptcy Code were designed to encourage circuit courts to create BAPs by directing that each circuit "shall establish" a BAP unless the circuit judicial council finds that existing judicial resources are insufficient to establish one or that its establishment would result in undue delay or increased cost to parties in cases under the Bankruptcy Code. 28 U.S.C. § 158(b)(1). The six regional circuits that voted against establishing BAPs "concluded that the appellate process was functioning well as already constituted and that BAPs would create undue delay or increase the cost of appeals." The Honorable Henry J. Boroff, *The Precedential Effect of Bankruptcy Appellate Panel Decisions*, 103 COM. L.J. 212, 214 n.10 (1998) (citing Elizabeth Abbott, *Bankruptcy Review Panel Makes Debut*, NAT'L L.J., Mar. 3, 1997, at B1).

On the history of BAPs, see Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1648-60 (1997); *infra* note 75.

[52] 28 U.S.C. § 158(b)(6). In the mid-1990s, when a Second Circuit BAP was in existence, "only three districts participate[d]—and these together typically receive less than a third of all bankruptcy petitions filed in the Second Circuit." Camp, *supra* note 51, at 1660. These facts, presumably, played a large role in the ultimate decision to disband the Second Circuit BAP.

[53] 28 U.S.C. § 158(c).

[54] 28 U.S.C. § 158(d).

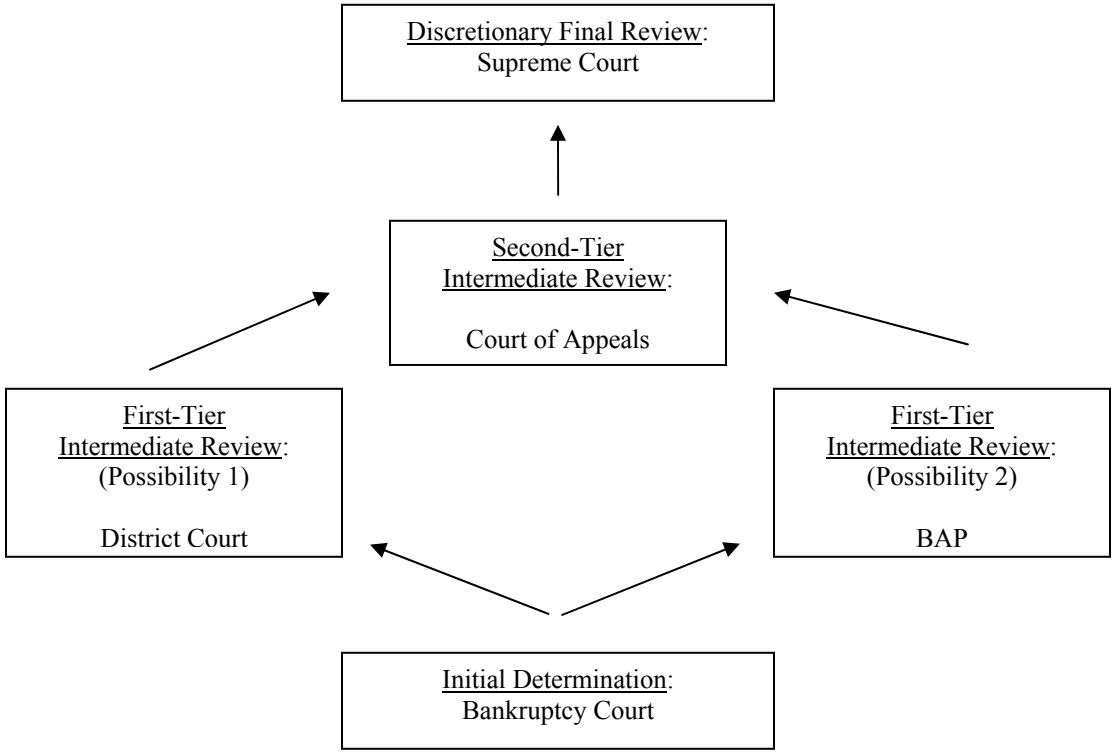
[55] 28 U.S.C. § 158(a). *See* Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 108 (2005) ("Appeals from bankruptcy courts to the district court . . . have steadily declined over sixteen years from 4300 in 1988 to 2800 in 2004, attributable, in part, to the establishment of bankruptcy appellate panels in four of the circuits.").

[56] 28 U.S.C. § 158(d).

[57] *See generally* Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 490-500 (elucidating the differences between the standard federal judicial hierarchy and the bankruptcy appellate system); Camp, *supra* note 51, at 1644 ("BAPs . . . shake up the normal hierarchical structure dear to many attorneys' hearts.").

[58] We should note that a third possible appellate path not yet discussed—that of direct appeal from the bankruptcy court to the court of appeals—exists for a limited set of circumstances. By virtue of amendment to the Judicial Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, appeal may proceed directly to the court of appeals pursuant to a certification procedure if one of the following circumstances exists: (1) the appeal involves a question of law unresolved by the court of appeals for the circuit or by the Supreme Court; (2) the appeal involves a matter of public importance; (3) the appeal involves a question of law requiring resolution of conflicting decisions, or (4)

FIGURE 1
FEDERAL BANKRUPTCY APPELLATE STRUCTURE FOR CORE PROCEEDINGS



It seems, a priori, that BAPs have more of the features of quality appellate review in greater amounts than do the federal district courts. First, bankruptcy appellate panels are collegial bodies, who decide cases in three-judge panels. Indeed, bankruptcy judges who serve on BAPs themselves believe that decision by a panel of judges is beneficial.[59] By contrast, bankruptcy appeals to district courts are heard by a single district judge.

Second, the bankruptcy judges who comprise bankruptcy appellate panels are (by virtue of their appointment as bankruptcy judges) presumably experts in bankruptcy law.[60] Thus, they are well suited to resolve legal issues that might arise in core

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the appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A).

[59] Mabey, *supra* note 55, at 123 ("Several [surveyed bankruptcy judges] acknowledged that they find the collaborative effort and consensus-building required for service on the BAP challenging and very different from what they are used to as single, independent bankruptcy judges but, at the same time, beneficial, because it makes them more patient and more effective in writing decisions.").

[60] *See, e.g.*, Mabey, *supra* note 55, at 107 ("Most of the bankruptcy judges were bankruptcy practitioners in their prior careers."); *see also id.* at 123 (noting that, of a random survey of bankruptcy judges in 2005, "[a]bout 83% . . . were bankruptcy practitioners before taking the bankruptcy bench" and that, "[o]f the 17% . . . who were not bankruptcy practitioners, almost all came from a business law background, as commercial litigators or corporate transactional lawyers," and further noting that the

bankruptcy proceedings.[61] District judges, by contrast, are not generally versed in bankruptcy law.[62]

The third factor—"other" lawfinding ability[63]—appears to favor neither district judges nor bankruptcy appellate panels. Attorneys filing appellate briefs may focus on the legal issues without the distractions of trial advocacy, presumably whether the briefs will be filed with the district court or appellate panel. Similarly, both district judges and bankruptcy appellate panels hear legal issues once a factual record has been established. Last, while district judges and bankruptcy judges both preside over trials, neither the district judge hearing a bankruptcy appeal, nor bankruptcy judges sitting on a bankruptcy appellate panel, are presiding over trials at that time.[64]

Fourth, bankruptcy appellate panels conform to traditional notions of appellate review: Their rulings are generally seen to be binding on future bankruptcy appellate panels drawn from the same circuit.[65] Further, at least one BAP has held that its decisions

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surveyed bankruptcy judges felt that their prior experience was very helpful on the bench); *cf. id.* at 113-16 (discussing the trend among bankruptcy judges to hire more permanent, as opposed to term, law clerks, and noting that those bankruptcy judges who preferred permanent clerks often hired clerks with legal experience, and in particular practice experience in bankruptcy law).

[61] *See* Chemerinsky, *supra* note 4, at 128 ("[T]he BAP is desirable because it allows specialist bankruptcy judges to replace nonspecialist federal judges.").

[62] One might argue that even district judges with no experience in bankruptcy experience before ascending to the bench gain some experience by virtue of hearing a steady stream of bankruptcy cases. A study by the Federal Judicial Center of the bankruptcy appellate structure, however, reached the opposite conclusion, observing that "[t]he number of first-level reviewers greatly exceeds the number of bankruptcy judges producing the judgments reviewed, and appellate caseloads are spread thinly among district judges, giving few judges much opportunity to develop bankruptcy expertise." Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627 (2002).

[63] We employ the modifier "other" because, as noted above, the Court suggested that the use of multijudge panels is "[p]erhaps most important" in assessing lawfinding ability. *See supra* note 7 and accompanying text.

[64] It is this factor that, presumably, vests district judges with lawfinding ability when they sit by designation on court of appeals panels. *See* Nash, *Resuscitating Deference*, *supra* note 1, at 1031 (explaining that the better term is lawfinding "ability" and not lawfinding "expertise").

One might argue that lawfinding ability is enhanced to the extent that the judge (whether district or bankruptcy) enjoys relief from her other responsibilities while hearing appeals. This seems not to be the case, however, at least for bankruptcy judges:

> When asked how BAP service affects their service as a bankruptcy judge, several of the [surveyed bankruptcy judges] indicated that it required adjustments to their bankruptcy court trial and hearing schedule and that it substantially added to their workload. Some of the Survey Participants suggested that those bankruptcy judges who serve full-time on the BAP should have the option of employing an additional law clerk. One Survey Participant indicated that service on the BAP was "like having a second job."

Mabey, *supra* note 55, at 122 (footnote omitted); *see also* Honorable Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1330 (1993) ("The fundamental truth which is the basis for this article is that the bankruptcy caseload in many districts in this country is so overwhelming that the bankruptcy judges are sorely pressed in the struggle to cope with it.").

[65] BAPs in three circuits—the Eighth, Ninth, and Tenth—have reached this conclusion. *E.g.*, *In re* Luedtke, 215 B.R. 390, 391 (B.A.P. 8th Cir. 1997) (BAP bound by prior decisions, citing circuit court cases saying that circuit court panels bind subsequent circuit court panels); Ball v. Payco-Gen. Am. Credits, Inc. (In re Ball), 185 B.R. 595, 597 (B.A.P. 9th Cir. 1995) ("We will not overrule our prior rulings unless a Ninth Circuit Court of Appeals decision, Supreme Court decision or subsequent legislation has undermined

are binding on all bankruptcy courts within that circuit,[66] even if the bankruptcy courts themselves do not share this view.[67] In contrast, one district judge is generally seen to be under no obligation to follow the ruling of another district judge—even one in the same district—whether on matters of bankruptcy or otherwise.[68] And bankruptcy courts have

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those rulings."); Salomon N. Am. v. Knupfer (In re Wind N' Wave), 328 B.R. 176, 181 (B.A.P. 9th Cir. 2005) (reaffirming that the BAP will not overrule its prior rulings unless an intervening circuit court or Supreme Court decision, or subsequent legislation, undermines those rulings); Concannon v. Imperial Cap. Bank (In re Concannon), 338 B.R. 90, 95 (B.A.P. 9th Cir. 2006) (same); In re Blagg, 223 B.R. 795, 804 (B.A.P. 10th Cir. 1998) ("Our decision is dictated by the principle that we are bound by prior panel decisions. A panel cannot overrule the judgment of another panel of the court."), *appeal dismissed*, 198 F.3d 257 (10th Cir. 1999); Smolen v. Hatley (In re Hatley), 227 B.R. 757, 761 (B.A.P. 10th Cir. 1998) (same), *aff'd*, 194 F.3d 1320 (10th Cir. 1999).

[66] Philadelphia Life Ins. Co. v. Proudfoot (In re Proudfoot), 144 B.R. 876, 879 (B.A.P. 9th Cir. 1992) ("BAP decisions originating in any district in the Ninth Circuit are binding precedent on all bankruptcy courts within the Ninth Circuit in the absence of any contrary authority from the district court for the district in which the bankruptcy court sits."); In re Windmill Farms, Inc., 70 B.R. 618, 622 (B.A.P. 9th Cir. 1987) ("One of the reasons for establishing the BAP was to provide a uniform and consistent body of bankruptcy law throughout the entire Circuit. In order to achieve this desired uniformity, the decisions of the Bankruptcy Appellate Panel must be binding on all of the bankruptcy courts from which review may be sought, i.e. each district in the Ninth Circuit."), *rev'd on other grounds*, 841 F.2d 1467 (9th Cir. 1988).

[67] *Compare, e.g.*, Ore. Higher Educ. Assistance Found. v. Selden (In re Selden), 121 B.R. 59, 62 (D. Ore. 1990) (BAP decisions bind only those bankruptcy courts sitting in the district out of which the appeal arose), *with* Daly v. Deptula (In re Carrozzella & Richardson), 255 B.R. 267 (Bankr. D. Conn. 2000) (rejecting argument that substantial motivation of Congress in creating BAPs was to generate a uniform body of bankruptcy law within the circuits; concluding that there is no principled reason why decisions of a BAP should have more precedential authority than those of district courts; odd and unseemly, if not unconstitutional, for a BAP—comprised of three Article I judges—to be generating for bankruptcy judges, and perhaps also for district judges, the law of the circuit until the circuit court had spoken); *In re* Virden, 279 B.R. 401, 409 n.12 (Bankr. D. Mass. 2002) (same), *and* Life Ins. Co. of Va. v. Barakat (In re Barakat), 173 B.R. 672, 676-80 (Bankr. C.D. Cal. 1994), *aff'd on other grounds*, 99 F.3d 1520 (9th Cir. 1996) (concluding that BAPs bind bankruptcy courts on matters arising in core proceedings even though district courts do not). For further discussion regarding the precedential effect of BAP decisions, see *Salomon N. Am.*, 328 B.R. at 181 n.2 (noting the Ninth Circuit BAP's prior holding that its decisions bind our bankruptcy courts within the circuit, but also recognizing that some bankruptcy courts have rejected that holding); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1989) ("BAP decisions cannot bind the district courts themselves. As article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction."); *id.* at 472 (O'Scannlain, J., concurring) ("writ[ing] separately to propose that the Judicial Council of this Circuit consider adoption of an order requiring that Bankruptcy Appellate Panel . . . decisions shall bind all of the bankruptcy courts of the circuit, subject to the restrictions imposed by article III so well discussed in the [court's] opinion"); Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1225 n.3 (9th Cir. 2002) (describing "binding nature of Bankruptcy Appellate Panel decisions" as "an open question," and "join[ing] Judge O'Scannlain's call for the [Ninth Circuit] Judicial Council to consider an order clarifying whether the bankruptcy courts must follow the BAP"); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525, 529 (1995) ("Even stronger arguments can be made against any *stare decisis* effect at all for the opinion of a bankruptcy appellate panel."); Chemerinsky, *supra* note 4, at 129-30 ("I would argue that district courts should be bound by BAP decisions. The view that an Article I court can never bind an Article III court is an overstatement."); Trujillo, *supra* note 57, at 494 n.23 (arguing that BAPs function as district courts, and accordingly cannot issue binding opinions).

[68] *See* Baisier & Epstein, *supra* note 67, at 529 (noting that "[n]one of the district judges is bound by a bankruptcy appeals decision of a district judge from one of the other 93 district courts" and that "district judges in multi-judge districts are not even bound by the bankruptcy appeals decisions of other judges from that same district"). *But see* Bussel, *supra* note 13, at 1095-96 ("Even where review lies in a district court

held that they are not bound at least by the holding of a single district judge on a multijudge district court.[69] As such, BAPs comport more with the standard model of appellate hierarchy than do district courts sitting on appeal.[70]

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composed of more than one judge, rather than a BAP, uncertain and disuniform development of bankruptcy law is mitigated by a long tradition within district courts of deviating from a co-ordinate judge's prior decision only in "extraordinary circumstances." Given this bias, relatively few district judges—in comparison to the specialist bankruptcy courts—have enough interest and confidence in their views of bankruptcy law to be willing to create conflicts within the district. In any event, the problem of intra-district conflict could be eliminated if the federal district courts would adopt "law-of-the-district" rules for bankruptcy appeals analogous to the "law-of-the-circuit" rules currently in effect, in most regions, at the Court of Appeals level. All district courts might be bound by a published precedent within the district in subsequent bankruptcy appeals." (footnotes omitted)); *see also id.* at 1096 n.116 ("I am aware of only a handful of cases where district judges in the same district adopt differing views of the same question of bankruptcy law and in those cases one or both of the decisions is unpublished.").

[69] *See, e.g.*, *In re* Romano, 350 B.R. 276, 281 (Bankr. E.D. La. 2005) ("[A] single decision of a district court in this multi-judge district is not binding upon this court."); *id.* at 277-81 (summarizing authority both ways); Paul Steven Singerman & Paul A. Avron, *Of Precedents and Bankruptcy Court Independence*, 22 AM. BANKR. INST. J. 1 (2003) (noting conflict, gathering authorities, and finding that a majority of bankruptcy courts have held that they are not bound by the decision of a single district court judge in a multi-judge district); Trujillo, *supra* note 57, at 494 (arguing that bankruptcy decision by one bankruptcy judge cannot bind other bankruptcy judges in the same district, and that bankruptcy decision by one district judge cannot bind other district judges or any bankruptcy judges in the same district). *But see* Chemerinsky, *supra* note 4, at 129 ("While a district court exercising original jurisdiction cannot bind other district courts, its decisions should be binding on bankruptcy courts when the district court is serving as an appeals court.").

[70] Our point here is simply that BAPs seem to fit more cleanly into the standard hierarchical appellate model than do district courts sitting on appeal, not that that is necessarily mandated under the current statutory scheme or normatively desirable. The latter two points are debatable.

With respect to the current statutory scheme, there are statements in the legislative history indicating that Congress created the BAPs to help foster greater uniformity in bankruptcy law. *See, e.g.*, 140 CONG. REC. S14,463 (daily ed. Oct. 6, 1994) (statement of Sen. Heflin) ("It should be recognized that the creation of a bankruptcy appellate panel service can help to establish a dependable body of case law."). *But see Daly*, 255 B.R. at 273 ("Any suggestion that Congress' authorization of the creation of BAP Services was motivated substantially by its desire to create a uniform body of bankruptcy law within the circuits is not supported by the BAP Service's history, which instead suggests that BAPs were conceived primarily as a tool for relieving district court judges of an ofttimes undesirable and burdensome aspect of their workload."). At the same time, one can point to the certification procedure in section 158(d)(2)—under which courts of appeals may decide interlocutory appeals when, among other circumstances, the question raised is one "as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States," 28 U.S.C. § 158(d)(2)(A)(i)—as evidence that Congress chose other, explicit means of increasing bankruptcy law uniformity. *See* H.R. REP. NO. 109-31, at 148 (2005) ("[D]ecisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value. To address these problems, [the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005] amends section 158(d) of title 28 to establish a procedure to facilitate appeals of certain decisions, judgments, orders and decrees of the bankruptcy courts to the circuit courts of appeals by means of a two-step certification process."), *reprinted in* 2005 U.S.C.C.A.N. 88, 206.

Commentators are divided over whether BAP decisions bind bankruptcy courts. *Compare, e.g.*, Bussel, *supra* note 13, at 1098 (arguing that bankruptcy courts should consider both BAP and district court decisions as binding precedent); Chemerinsky, *supra* note 4, at 128 ("From [a] functional perspective, I think that BAP decisions clearly should be binding on bankruptcy courts."); Camp, *supra* note 51, at 1676-84 (arguing that BAPs should bind both bankruptcy and district courts) *with* Trujillo, *supra* note 57, at 492 ("[O]nly opinions of the U.S. courts of appeals and the U.S. Supreme Court bind bankruptcy courts by reason of formal hierarchy."); *cf.* Caminker, *supra* note 13, at 870-72 (arguing that theoretical considerations argue in favor of bankruptcy courts being bound by district court decisions). Moreover,

strict application of vertical stare decisis is difficult, insofar as it is not certain until after the bankruptcy court has issued judgment into which appellate path the case will proceed. *Cf.* Camp, *supra* note 51, at 1682 ("Since bankruptcy judges do not know at the time they make a decision whether it will be a BAP or a district court that will hear any appeal, and since no district court has so far considered itself bound by a BAP, it is no surprise that many bankruptcy judges feel free to disregard BAP decisions."). (Compare this to the United States Tax Court, which considers itself bound by its own precedent, except insofar as it has also held that it is bound "to follow a Court of Appeals decision which is squarely in point where appeal from [the] decision lies to that Court of Appeals." *Golsen v. Comm'r*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). Because the court of appeals to which a taxpayer will appeal is determined by his state of residence, *see* 26 U.S.C. § 7482(a), (b), it is always clear at the time of decision which circuit's precedent is binding.)

As to the normative question, there are those who argue that an increase in application of stare decisis would be normatively desirable. *See, e.g.*, The Honorable Henry J. Boroff, *The Precedential Effect of Bankruptcy Appellate Panel Decisions*, 103 COM. L.J. 212, 221 (1998) (arguing that the current dual track appellate system makes it difficult to generate binding precedent, and that the system be changed to allow for development of binding precedent); Bussel, *supra* note 13, at 1095 n.114 ("[L]ogically . . . district courts . . . as well as bankruptcy courts might be bound by prior BAP decisions."). However, there also are strong arguments that a structure other than the standard appellate hierarchy might be desirable. First, one of the bases on which the pyramidal appellate hierarchy functions is the notion that issues "percolate" up from the lower courts to the higher courts. It is the desire for percolation that, commentators argue, restricts (and properly so) application of horizontal stare decisis to the same court and not to sibling courts of equal hierarchical stature. *See* Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 834 (1990) ("The rejection of intercircuit stare decisis is premised upon—and given the obvious costs in deferring uniformity, is explainable only in terms of—the benefits of dialogue among the circuits."); *see also* Maxwell Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1352 (1995) (arguing, based upon social choice theory, that the Supreme Court "would desire intra- but not inter-circuit stare decisis," since such a regime "avoids the irrationality that would result from cyclical preferences *within* particular circuits, while, at the same time, reducing the likelihood that legal doctrine that results from path manipulation in a *given* circuit will be replicated *across* the circuits."). *But cf.* O'Hara, *supra* note 17, at 772 (arguing that the absence of stare decisis across circuits is justified on the ground that "an agreement to follow another circuit's precedents will not save the judges in a particular circuit much time"). In the case of appeals of core bankruptcy matters, there are, anomalously, two levels of intermediate appeals. Perhaps, then, in order for issues properly to percolate up to the courts of appeals, there ought to be no horizontal stare decisis at the first intermediate level—i.e., at the level of the BAPs and district courts.

Second, given that the BAPs and district courts lie at the same hierarchical level, it might not make sense for horizontal stare decisis rules to apply to BAPs but not district courts. Perhaps, once again, horizontal stare decisis should not apply at all. (One might argue, to the contrary, that horizontal stare decisis should apply to both courts. *See* Chemerinsky, *supra* note 4, at 129.)

Third, perhaps bankruptcy law and society would be better served by a system other than the traditional appellate hierarchy, at the lower levels of appeals of core bankruptcy matters. Civil law systems rely far less on precedent than does the common law system dominant in the United States. *See supra* note 15 and accompanying text. Civil law judiciaries decide cases based largely upon the proper interpretation of the governing "code." Insofar as bankruptcy turns upon the content of a code—the "Bankruptcy Code"—bankruptcy seems to provide an ideal setting for application of such judicial review. *Cf.* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 216 (2000) (arguing for "a softer, more nimble, rule of precedent [that] would improve the quality of outcomes in particular bankruptcy cases"). (Interestingly, while Ponoroff facially argues in favor of increased reliance on a civil law jurisprudential approach in the bankruptcy context, his arguments do not seem to accord so well with the principles underlying the structure of judicial review in civil law systems. Ponoroff laments: "The opportunity for two levels of appeal as a matter of right has contributed to the crush of reported decisions, a phenomenon that, in my view, has hampered pragmatic and considered decisionmaking in the bankruptcy courts. That problem is compounded by the disturbing rise in adherence to textual or plain meaning methods of interpretation in bankruptcy cases, particularly in the decisions of the circuit courts of

It is only the final criterion—the question of judicial independence—on which district courts have some advantage over bankruptcy appellate panels. Judicial independence has been considered to be a function of life tenure and the guarantee of nonreduction in salary. Both attributes have been enshrined in the Article III status conferred on district judges, whereas bankruptcy judges who sit on bankruptcy appellate panels do not get the benefit of either attribute by virtue of their Article I status.[71]

On this basis, one might readily conclude that district judges enjoy judicial independence while bankruptcy judges do not. But this would be a facile conclusion that improperly casts the assessment of judicial independence as an all-or-nothing proposition—that is, judicial independence as attainable only through life tenure and the guarantee of nonreducible remuneration. Careful consideration of the matter, however,

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appeal[s].” *Id.* at 181 (footnotes omitted). Ponoroff thus seems more concerned with allowing different interpretations of the Bankruptcy Code to percolate up through the judiciary. He also seems to embrace more of a realist conception of bankruptcy law than a civil law conception, explaining, “A more forward-looking, and less technical and ‘busy,’ code would abate the pressure to decide and review cases on the kind of formal, textualist grounds that typically prove the most difficult to distinguish in subsequent cases.” *Id.* at 216. Indeed, Ponoroff acknowledges that he endorses “a different style of judging, one that eschews a strict adherence to precedent, but not by any means civilian, to the extent that style is perceived as the unimaginative and rote application of positive legal rules to particular fact situations performed by a cadre of mid-level bureaucrats.” *Id.* at 223. “Rather,” he endorses “a style that actually places greater responsibility on the decisionmaker to reason analogically from code principles, as well as from subsidiary sources such as custom, usages, settled jurisprudential doctrine, and equity.” *Id.* at 223-24.)

To the possible objection that the fact that the higher levels of bankruptcy judicial review—courts of appeals and the Supreme Court—rely upon the standard appellate hierarchy, one can point to the coexistence of Louisiana’s civil law system within the United States judicial system as an example of how such a system can function. *See, e.g.*, Shelp v. Nat’l Sur. Co., 333 F.2d 431 (5th Cir. 1964) (in determining Louisiana law under *Erie*, federal courts should apply precedential rules that Louisiana state courts apply); Alvin Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the* Erie Railroad, 48 LA. L. REV. 1369 (1988) (article written by Fifth Circuit Judge endorsing *Shelp*). *But see* John Burnitt McArthur, *Good Intentions Gone Bad: The Special No-Deference* Erie *Rule for Louisiana State Court Decisions*, 66 LA. L. REV. 313 (2006). Indeed, the notion that bankruptcy courts do not consider themselves bound by rulings of single district judges in multijudge districts—and therefore presumably do at some point consider themselves bound once a number of district judges in the same district reach the same conclusion—resembles the “jurisprudence constante” under which precedent develops in Louisiana and other civil law systems. *See, e.g.*, Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century*, 63 LA. L. REV. 1, 6 (2002) (describing jurisprudence constante as a doctrine under which “a case may be used to discern a pattern [of decisions] that may aid in interpretation”); Stearns, *supra*, at 1357 n.143 (discussing jurisprudence constante); *cf.* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 257 (1985) (proposing, “as a special rule of stare decisis, the practice that when the first three circuits to decide an issue have decided it the same way, the remaining circuits defer to that decision”). Any potential difficulties in integrating a civil law precedential model into the larger common law-based federal court system would be mitigated by the fact that the vast majority of bankruptcy cases are not appealed beyond the first level of intermediate appellate review. *See* Bussel, *supra* note 13, at 1091; *cf.* Chemerinsky, *supra* note 4, at 122 (noting that “[b]ankruptcy law matters seem to fit in between . . . two poles” in that “bankruptcy statutes are filled with ambiguities that require court interpretation,” while there also “probably exist particular types of disputes where the law-giving function of the court is less important and alternative dispute resolution would be potentially more efficient”). *But cf.* Bussel, *supra* note 13, at 1097 (“I would have difficulty understanding why Congress would intend BAPs and district courts to serve merely as rest-stops on the road to real appellate review.”).

[71] *See supra* notes 36-38 and accompanying text.

suggests that the difference may be narrower than that generally perceived by courts and commentators.

A more felicitous account reveals that the term of appointment for bankruptcy judges, the standard for their removal from office, the treatment afforded to their compensation, and the manner of their appointment afford bankruptcy judges a moderate amount of judicial independence. First, although bankruptcy judges do not get life tenure, the term of their appointment lasts fourteen years.[72] The appointments, moreover, may be renewed,[73] and indeed in most cases are renewed.[74] While judicial independence may be fostered by life tenure, the renewable, fourteen-year term of bankruptcy judges places them in a position to serve as long as many of their Article III counterparts.[75] Even if the absence of life tenure gives Congress leeway to reduce the term of bankruptcy judges[76]—an option that it has never exercised since it created the bankruptcy courts—still the fourteen-year, renewable term certainly grants a fair amount of judicial independence to bankruptcy judges.[77]

Second, the Judicial Code prescribes that a bankruptcy judge may be removed "only for incompetence, misconduct, neglect of duty, or physical or mental disability,"[78] whereas the Constitution mandates that an Article III will hold his or her office only "during good Behaviour."[79] The broad language of the good-behavior standard for removal arguably encompasses the grounds set forth by the Judicial Code for removal of bankruptcy judges. Moreover, while Article III judges may be removed only by impeachment[80] and bankruptcy judges may be removed by a majority of all of the judges

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[72] *See* 28 U.S.C. § 152(a)(1).

[73] *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 303, 110 Stat. 3847, 3852 (providing that, "[w]en filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States").

[74] *See* Mabey, supra note 55, at 107 (noting that, of the 115 bankruptcy judges who left the bench in the decade prior to 2005, only 10 did so as a result of not being reappointed); *see also* U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, Bankruptcy Judge Reappointment Regulations § 1(e) (June 2001) (providing that "[t]he court of appeals shall decide whether or not to reappoint the incumbent [bankruptcy] judge *before* considering other potentially qualified candidates" (emphasis added)).

To the contrary, one might argue that the fact that bankruptcy judges must seek, and generally receive, reappointment, demonstrates the *absence* of judicial independence.

[75] Article III judges (other than Supreme Court Justices) whose service on the federal bench terminated between 1983 and 2003 served, on average, 24 years. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 618 chart 4 (2005).

[76] While Congress may reduce the duration of the fixed-term appointment for bankruptcy judges at any point it so desires via statute, the constitutionally-guaranteed life tenure granted to Article III judges could only be stripped away via constitutional amendment (an exponentially more difficult proposition).

[77] *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 95 (1973) (proposing various reforms "to enhance the real and apparent judicial independence of bankruptcy judges," including "[e]xtension of the term of the bankruptcy judges from the present six years to the proposed fifteen years."); *cf*. Nash, supra note 20, at 2196 (observing that "one can question the degree to which life tenure in fact secures for judges a larger measure of judicial independence").

[78] 28 U.S.C. § 152(e).

[79] U.S. CONST. art. III, § 1.

[80] No. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (Brennan, J., plurality opinion) ("The 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only

of the judicial council of the circuit within which the bankruptcy judge has been designated to serve,[81] yet the practical reality is that very few bankruptcy judges have been removed from office.[82] If the specter of removal from office does not appear to be greater for bankruptcy judges than Article III judges, it follows that bankruptcy judges need not limit their behavior in such a way that would prevent them from acting as independently as an Article III judge.

Third, although the Supreme Court has identified the "fixed and irreducible" compensation provided to Article III judges by the Compensation Clause as a hallmark of an independent judiciary,[83] the lack of a similar guarantee in the salary of bankruptcy judges should not be overemphasized in assessing their judicial independence. Since Congress enacted the Bankruptcy Code in 1978 and created the current scheme for federal bankruptcy judgeships, the salary of bankruptcy judges has only increased.[84] Moreover, as of 1987, bankruptcy judges have received a salary at an annual rate that equals 92 percent of the salary of a district court judge (as determined by section 135 of the Judicial Code).[85] Thus, for the past two decades, bankruptcy judges have had fixed compensation that nearly equals that of their district court counterparts.

Finally, if one does not ignore the substantive differences in the appointment processes of bankruptcy judges and district judges and the consequences that flow therefrom, it becomes clear that bankruptcy judges may be better situated than district judges to avoid and resist the political influence that would threaten to compromise an independent judiciary. While the judicial appointment process for Article III judges has become increasingly politicized, evidenced most recently by the tendency for close examination of the ideology of nominees,[86] the appointment process for bankruptcy judges has seemingly remained apolitical. The Judicial Code charges the task of appointing a bankruptcy judge to the court of appeals for the circuit in which there exists a vacancy for a bankruptcy judgeship.[87] Thus, the appointment process for bankruptcy judges involves judges selecting judges—a presumably nonpolitical process.[88] This

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to removal by impeachment."). *But see* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE. L.J. 72 (2006) (arguing that federal judges may be removed from office by means other than impeachment).

[81] 28 U.S.C. § 152(e).

[82] *See* Mabey, supra note 55, at 107 (listing reasons for departure from the bench for the 115 bankruptcy judges who did so in the decade prior to 2005, but not mentioning removal as one of those reasons). On the other hand, one might argue that the low rate of removal of bankruptcy judges reflects the *absence* of judicial independence: Bankruptcy judges have behaved in a way so as to avoid removal.

[83] *Northern Pipeline*, 458 U.S. 50 at 59 (Brennan, J., plurality opinion).

[84] *See* Mabey, supra note 55, app. A.

[85] 28 U.S.C. § 153(a). Congress amended the Judicial Code in 1987 to provide for the current salary structure for bankruptcy judges. Pub. L. No. 100-102, § 408 (1987).

[86] *See* Nash, supra note 20, at 2182-92.

[87] *See* 28 U.S.C § 152(a)(1), (3).

[88] The possibility exists, however, that the judicial appointment of judges may substitute judicial patronage for political patronage and thus compromise judicial independence. *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, 673 (2002) ("Article III created judicial independence to avoid judges needing to curry favor in order to retain their jobs and their salaries. But through the power of judicial appointment, judges now have something to give. Salaries, staff support, courtrooms, chambers, committee assignments, and pensions come with magistrate and bankruptcy judge

nonpolitical process has produced a bankruptcy bench mostly populated by specialists with bankruptcy expertise,[89] who themselves could be characterized as nonpolitical.[90]

When one considers the type of jurist produced by the judicial selection process for bankruptcy judges in conjunction with their term of appointment, the standard for their removal from office, and the treatment afforded to their compensation, it would appear that bankruptcy judges have achieved a considerable degree of judicial independence.[91] Accordingly, while the district court seems to enjoy some advantage over BAPs with respect to this final attribute that has been identified as improving the quality of appellate review, the advantage is not likely to be a substantial one. We summarize the differences in the attributes of the BAPs and district courts below in Table 1.

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positions. As life-tenured judges become a source of patronage, applicants and their supporters have more to gain by courting those judges." (footnote omitted)). *But* see Posner, *supra* note 23, at 81-82 ("Appointments by the judicial branch are not as controversial, because judges belong to different parties."). Furthermore, one may argue that, insofar as the circuit judges are a product of a politicized appointment process, they themselves may be politicized and thus infuse politics into the appointment process for bankruptcy judges. The merit-selection process for appointing bankruptcy judges, however, seems to have provided little opportunity for such politicization to take root. A quick look at the manner in which the Ninth Circuit conducts this process (one that seems representative of the process conducted in other circuits) suggests why this has been the case.

Interested candidates must submit applications for the position, *see* JUDICIAL COUNCIL OF THE NINTH CIRCUIT, Regulations Governing the Appointment of U.S. Bankruptcy Judges § 2.02 (Mar. 21, 2001), which the Circuit advertises nationally and which it encourages the federal judicial districts within the circuit to advertise intensely and locally, *see id*. § 2.01. A local merit screening committee, which generally consists of (1) the chief judge of the district in which the bankruptcy judge is to be appointed, (2) the president of the state bar association, (3) the president of one or more local bar associations within the district, (4) the dean of a law school located within the district, (5) the administrative circuit judge of the circuit geographical unit in which the bankruptcy judge is to be appointed, and (6) the chief bankruptcy judge of the district in which the bankruptcy judge is to be appointed, *see id*. § 3.02(a), recommends to the Court-Council Committee on Bankruptcy Appointments, whose membership includes three circuit judges who serve as voting members, *see id*. § 3.04(b), five applicants who ought to be considered for appointment, *see id*. § 3.03(c)(1). The Court-Council Committee circulates a report to the Ninth Circuit Judicial Council recommending a candidate for appointment, and that report will be deemed to be the Judicial Council's recommendation to the Court of Appeals (unless the Council determines that the Court-Council Committee should reconsider its recommendation). *See id*. §§ 3.04(c)(4); 3.05(a). The recommended candidate is appointed upon a majority vote of the members of the Court of Appeals. 11 U.S.C § 152(a)(3).

[89] *See* Mabey, supra note 55, at 107 ("Most of the bankruptcy judges were bankruptcy practitioners in their prior careers.").

[90] *Cf.* Resnik, *supra note* 88, at 670 (2002) ("Turn first to the advantages of judicial appointment of judges. As a few details of current practices illustrate, the judiciary has selected a high-quality and relatively nonpolitical corps of judges . . . .").

[91] This state of affairs can be traced to congressional efforts in the 1970s to elevate the status of bankruptcy judges. Congress established in 1970 the Commission on the Bankruptcy Laws of the United States to evaluate the then-exisiting bankruptcy system and to suggest recommendations for its reform. Pub. L. No. 91-354, 84 Stat. 468 (1970). In its report, the Commission envisioned that improvements in the appointment, tenure, and compensation of bankruptcy judges would enhance their "real and apparent judicial independence." *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.1, at 95 (1973).

TABLE 1
STRUCTURE OF DISTRICT COURTS AND BANKRUPTCY APPELLATE PANELS

First-Tier Appellate Court	Number of Judges	Bankruptcy Expertise	Other Lawfinding Ability	Traditional Appellate Hierarchy	Judicial Independence
District Court	Single judge	Unlikely	Some	Weak	Strong
Bankruptcy Appellate Panel	Panel of three judges	Yes	Some	Strong	Moderate

B. *Hypotheses*

Insofar as BAPs exhibit more of the features associated with quality appellate review than do federal district courts, the discussion in Part I suggests that BAPs will provide a greater quality of bankruptcy appellate review than their district court counterparts—assuming, of course, that the question of judicial independence does not outweigh other factors. Many challenges stand in the way of investigating this general claim, chief among them the difficulty in empirically testing the "correctness" of the dispositions rendered by the appellate court. Knowledge of this would be crucial for purposes of ascertaining whether the appellate court had appropriately performed its appellate function—that is, identifying error in those instances when it occurred. Making such a determination would necessarily involve content analysis of appellate opinions according to a particular metric of correctness. The difficulty in developing such a metric would be the inherent subjectivity infused into its design. What we may deem to be a "correct" decisions may be "incorrect" according to others. Accordingly, at the initial stage of empirical inquiry, we are not persuaded that detailed content analysis of appellate opinions is warranted.[92]

Absent detailed content analysis of appellate opinions, how might we empirically proceed with our inquiry into the quality of appellate review? Although we cannot empirically test the "correctness" of decisions, we can empirically test the ***perception*** held by other actors within the bankruptcy judicial system of the correctness of those decisions. For those bankruptcy appeals that proceed to the second tier of review, we can consider whether the court of appeals deemed proper the disposition rendered by the first-tier appellate court.

[92] Professor Frank Cross has expressed a similar view in his empirical study of decisions rendered by U.S. Courts of Appeals. *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 46-47 (2007) ("[T]here are typically nonfrivolous legal arguments for each side in circuit court cases, so it is impossible to code certain cases as being legally correct (or incorrect) without the researcher second-guessing and effectively overriding the judge. Such an approach offers an unreliable tool for evaluating judicial decisions because it probably reflects more about the researcher than about the judges being evaluated. Research requires a more objective tool for evaluating the law.").

There are several ways in which the rate at which a higher court upholds a lower court's disposition may shed light upon judicial perceptions of correctness of lower court decisions.[93] First, there is a tautological sense in which what an appellate court says is, by definition, correct (unless, that is, the appellate court decision is itself reversed). Thus, if an appellate court affirms the disposition of a lower court, then the lower court's disposition was correct. Second, assume that the appellate court wishes to resolve the legal issues "correctly" for the parties and for future courts.[94] The law generally calls upon appellate courts to examine legal issues de novo, without deference to the reasoning or conclusion of the court below.[95] Still, if the appellate court ultimately reaches the same conclusion as the court below, then it is accurate to say that, judging from the appellate court's decision, the appellate court perceived the lower court's conclusion to be correct.[96]

Courts of appeals may not always affirm a decision because they believe the earlier decision was "correct," however. Judges need not be so selfless. Indeed, there is a school of thought that views judges, like all people, as self-interested actors.[97] Judges may be interested in keeping their jobs—for bankruptcy judges, this translates to reappointment. Insofar as district judges enjoy Article III status, they have life tenure and are guaranteed not to suffer any salary reductions. Still, even Article III judges may have dreams of higher office.[98] Article III judges—and, for that matter, bankruptcy appellate panels—may also wish to avoid the "ignominy" of reversal by a higher court.[99]

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[93] *But cf.* Polk & Petheridge, *supra* note 5, at 1127-28 (noting the limits of "result-oriented statistical studies"); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A New Window into the Behavior of Judges?* (N.Y.U. Law & Econ. Research Paper Series, Paper No. 06-29, 2006) (using empirical data to argue that judges of one political party are more likely to cite opinions authored by judges of the same party, especially in particular "high stakes" settings), *available at* http://ssrn.com/abstract=913663.

[94] *See supra* note 17.

[95] *See, e.g.*, Concannon v. Imperial Cap. Bank (*In re* Concannon), 338 B.R. 90, 93 (B.A.P. 9th Cir. 2006) ("[W]e review the bankruptcy court's conclusions of law and interpretations of the Bankruptcy Code *de novo*."); Official Unsecured Creditors Comm. v. Ampco-Pittsburgh Corp. (*In re* Valley-Vulcan Mold Co.), 237 B.R. 322, 326 (B.A.P. 6th Cir. 1999) (conclusions of law by bankruptcy court reviewed by BAP de novo); *see generally* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588 (2006).

[96] It is possible that, legal standard to the contrary notwithstanding, appellate courts do not always reexamine legal issues de novo in practice. Perhaps, for example, courts of appeals are inclined to rely upon the expertise of BAPs (sub rosa, of course, since the law dictates otherwise) and thus are inclined to affirm BAP opinions. Or, equally, perhaps, the appellate courts might more often than not affirm district court opinions on the ground that district judges enjoy Article III status and thus are independent. In either case, it would be accurate to view an appellate court affirmance as embracing the lower court opinion as correct.

[97] *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); *supra* note 17.

[98] *See* Nash, *supra* note 20, at 2197. Indeed, Professor Resnik has identified such careerism by bankruptcy judges. *See* Resnik, supra note 88, at 673 (observing that "[a]n increasingly well-trodden path is for a person to shift from magistrate or bankruptcy judge to district court judge"). A recent study of the bankruptcy bench, however, indicated that only 8 of the 115 bankruptcy judges who left the bench in the decade preceding 2005 did so as a result of appointment to an Article III judgeship. Mabey, supra note 55, at 107.

[99] *See, e.g.*, Caminker, *supra* note 13, at 827 & n.40 and the authorities cited therein; *see also* Nash, *supra* note 20, at 2197-98 (discussing the desire of Article III judges to avoid impeachment, public chastisement, and overruling by the legislature).

Even if judges on BAPs and district judges have some of these motivations, however, that ought not to change appellate judges' behavior in terms of upholding the conclusion of lower court decisions, assuming at least that the reappointment or elevation process does not demand political decisionmaking.[100] Put another way, a judge—whether a bankruptcy judge serving on a BAP or a district judge—who wants to be reappointed or elevated has essentially the same incentive to decide cases correctly as do judges who simply want to decide the disputes before them correctly. As such, a court reviewing a first-level intermediate bankruptcy appellate decision—whether a panel of a court of appeals or the Supreme Court—should adopt the conclusion of the lower court if it deems that conclusion to be "correct." So similarly should appellate court judges seek to affirm correct decisions—and reverse incorrect ones—even if their motives are not strictly to reach correct outcomes.

Based upon the foregoing, we offer the following hypothesis.

Hypothesis 1: Courts of appeals more likely will uphold the dispositions rendered by BAPs than those rendered by district courts.

Citation rates provide yet another basis on which to test empirically the ***perceived*** correctness of an appellate opinion.[101] To the extent that citation of one court by another reflects the view of the citing court that the other court was "correct" in some way, the notion of correctness is, in different ways, both narrower and broader than correctness in the context of affirmation on direct appeal: It is narrower in that the citing court well may be citing a case not based upon a broad holding but rather based upon some narrow holding, or even dicta; it is broader in that, unlike a court that affirms a lower court's disposition even though it disagrees with its reasoning, a court that cites to another court's decision positively at some level agrees with some aspect of the court's reasoning.[102] Of course, there may be situations where a court cites another court's

[100] Note, however, that other motivations may explain bankruptcy judges' behavior. *See, e.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) (arguing that bankruptcy judges in different districts compete for large corporate bankruptcy cases through the use of precedent favorable to corporations); Marcus Cole, '*Delaware is not a State': Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1890-93 (2002) (arguing that, in order to conform to dominant state culture favorable to corporations, Delaware bankruptcy judges compete for corporate bankruptcy filings).

[101] *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (arguing that citation practices are not essentially a matter of taste but rather are systematic and susceptible to empirical study); John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977) [hereinafter Merryman, *Toward a Theory of Citations*]; John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954); *cf.* William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271-76 (1998) (noting that "[c]itations are at best a crude and rough proxy for measuring influence," and identifying potential drawbacks and limitations to empirical analyses of judicial citations).

[102] *See* Landes & Posner, *supra* note 101, at 251 & n.3 (excluding from citation study "citations indicating rejection of the cited case as a precedent"). Our study, too, includes only positive citations. *But cf.* Landes *et al.*, *supra* note 101, at 273 (deciding "not [to] distinguish between favorable, critical, or distinguishing citations" insofar as "[c]ritical citations, in particular to opinions outside the citing circuit,

opinion simply because it perceives the other court's opinion to be binding precedent.[103] For this reason, we consider the results of intercircuit citations and citations by courts of appeals to BAPs and district courts—settings where there is no issue of binding precedent such that citation is purely a matter of choice—to be especially informative.[104]

Within this context, one can point to two broad notions as to why courts cite other courts' opinions; both accord with our broad understanding of "correctness."[105] First, a court may cite to another court's decision because it is truly influenced by the other court's reasoning.[106] If this is true, then the citing court in some sense finds the other court's reasoning to be "correct." Alternatively (or perhaps in addition), a court may cite to another court's decision "not so much to explain the basis for [its] decision[] as to justify [that] decision[], however well or ill considered they may have been," thus making the "primary function" of citations that of "legitimation."[107] Even if a court simply cites to another court to legitimate its own conclusions, we would say that the citing court perceives of the other court's reasoning as, in some sense, "correct," and indeed is using the citation to bolster the perception that its own reasoning and conclusions are "correct."

In light of the foregoing, and as detailed below, we proceed to test the ***perceived*** correctness of an appellate opinion by considering (1) the propensity of other federal courts within the bankruptcy judicial structure to cite the opinions issued by first-tier appellate courts, (2) the depth of treatment given to such opinions by federal citing courts (including direct quotation of such opinions),[108] and (3) the immediacy with which such opinions garner a citing reference. Accordingly, we offer the following additional hypotheses.

Hypothesis 2A: Federal courts more likely will positively cite to BAP opinions than to district court opinions.

Hypothesis 2B: Federal courts will positively cite to BAP opinions more frequently than to district court opinions.

Hypothesis 3: Courts of appeals will cite more frequently to BAP opinions than to district court opinions.

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are also a gauge of influence since it is easier to ignore an unimportant decision than to spell out reasons for not following it").

[103] *See* Landes & Posner, *supra* note 101, at 251 (excluding from citation study nonprecedential citations).

[104] *See* Landes & Posner, *supra* note 101, at 272-73; David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 L. & SOC'Y REV. 337, 341 (1997).

[105] *See* Walsh, *supra* note 104, at 339; *see also* Merryman, *Toward a Theory of Citations*, *supra* note 101, at 400 (offering various theories for an increase in the rate at which the California Supreme Court cited to federal courts).

[106] *See* Walsh, *supra* note 104, at 339 ("[C]itations "may" indicate intercourt communication and influence on judicial decisionmaking."); *cf.* McKenna & Wiggins, *supra* note 62, at 651 ("The availability of published opinions is generally thought to be an important aspect of the appellate process because written opinions provide guidance to judges and litigants by explaining the reasons for the appellate decision.").

[107] Walsh, *supra* note 104, at 339.

[108] *Cf. id.* at 342 (distinguishing between "strong" and "weak" citations).

Hypothesis 4: Bankruptcy courts will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 5: BAPs will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 6: District courts will cite more frequently to district court opinions than to BAP opinions.

Hypothesis 7: Federal courts in other circuits will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 8: Positive federal citing references will afford a greater depth of treatment to BAP opinions than to district court opinions.

Hypothesis 9A: Positive federal citing references are more likely to directly quote BAP opinions than district court opinions.

Hypothesis 9B: Positive federal citing references will directly quote BAP opinions more frequently than district court opinions.

Hypothesis 10: The time within which a federal citing reference will be made to opinions issued on appeal by BAPs will more likely be faster than to those issued by district courts.

Notably, in Hypotheses 2B, 3, 4, 5, and 7, we hypothesize that BAP opinions will be cited more often than district court opinions. We suggest this on the ground that several factors weigh in favor of the conclusion that BAPs will resolve issues of bankruptcy law "correctly," while only one factor—the question of judicial independence—weighs in favor of district courts.

It seems to us highly probable, a priori, that bankruptcy judges and BAPs themselves are unlikely to be concerned with the fact that the bankruptcy judges who serve on BAPs, like themselves, do not enjoy Article III status.[109] Accordingly, we have developed Hypotheses 4 and 5. Hypothesis 3 is to similar effect. It seems to us that courts of appeals would be more impressed with the structural factors favoring BAPs than the lack of Article III status—particularly with respect to subject-matter expertise.[110] Note first that, to the extent that the absence of Article III status may suggest a lack of independence vis-à-vis the issues in the case and/or the parties, that problem is greatly ameliorated by the fact that the parties must have consented in order to have the BAP issue a decision in the first place. Second, court of appeals judges presumably do not

[109] *See* McKenna & Wiggins, *supra* note 62, at 628 ("Bankruptcy appellate panel (BAP) judges provide specialized bankruptcy expertise that their bankruptcy colleagues . . . value as a source of authority.").

[110] *See id.* at 678 ("Circuit judges, on average, have less specialized knowledge than bankruptcy judges, particularly those selected to serve on BAPs.").

need the buffer of Article III status to remind them that they lie several notches above bankruptcy judges and BAPs on the judicial food chain.[111]

The same cannot be said for district judges. The fact that district judges consider bankruptcy judges' lack of Article III status to be important is amply demonstrated by the extent to which they lobbied *against* giving bankruptcy judges that status.[112] Further, district judges lie on the same level as BAPs on the bankruptcy appellate hierarchy.[113] In short, it seems that district judges will think of BAPs as coequals in terms of hierarchy at best, and at worst as subordinates. Accordingly, we think it comparatively less likely that district judges, as opposed to other federal judges, would look to opinions authored by BAPs as opposed to district judges. It is on these bases that we preliminarily offer Hypothesis 6.

Given our hypotheses regarding the greater propensity of other federal courts within the bankruptcy judicial structure to cite to BAP opinions (with the exception of Hypothesis 6), we further hypothesize that the underlying motivations prompting such courts to engage in these citation practices will also lead them to discuss BAP opinions in greater detail and to cite to BAP opinions with more immediacy. We thus propose Hypotheses 9 and 10.

We now turn to evidence from the findings of our study and use that evidence to evaluate our hypotheses empirically.

III. EMPIRICAL ANALYSIS OF THE PERCEIVED QUALITY OF APPELLATE REVIEW: EVIDENCE FROM APPELLATE BANKRUPTCY OPINIONS

This Part presents the results of our empirical study of appellate bankruptcy opinions issued both at the first-tier and second-tier levels of appellate review in the bankruptcy judicial system. We test the hypotheses discussed above in Part II.B through the use of quantitative methodology and look for patterns that point to a relationship between the type of appellate court and the manner in which others perceive the quality of review provided by the court. In doing so, we seek to evaluate the theoretical assumptions that have evolved regarding those attributes considered to improve the quality of appellate review. We would like to emphasize, however, that we do not purport to provide either a definitive or exhaustive account. We readily admit that we have chosen to study a narrow set of data from a snapshot in time and that, accordingly, inferences should not be made regarding the representativeness of such data to the general universe of bankruptcy appeals. Aware of these limitations, we nonetheless have strong convictions that a great deal of valuable information can be gleaned from the data and that this information will help guide future discussions. Ultimately, our goal is to begin a shift away from generalization and abstraction and thereby to generate a more

[111] It is also conceivable that courts of appeals in circuits that have BAPs are somewhat favorably inclined to cite to those BAPs, to the extent that they consider the BAPs to be adjuncts of the courts of appeals. *See supra* note 50.

[112] *See supra* 37 and accompanying text.

[113] *See supra* Fig. 1.

concrete understanding of how differences in appellate structure affect the quality of appellate review.

This Part proceeds as follows. Part III.A sets forth the selection criteria used to constitute the sample for our study, discusses the major variables that we studied and incorporated into our statistical models, and details the general characteristics of the sample. Part III.B presents descriptive statistics comparing perceptions of the quality of appellate review provided by BAPs with perceptions of the quality of appellate review provided by district courts. Part III.C presents the central findings from our regression models, and Part III.D interprets our results.

If those attributes identified as improving the quality of appellate review truly did so, we would expect to see a positive relationship between BAP opinions and their perceived quality. Furthermore, we would expect this relationship to be stronger than the relationship, if any, between district court opinions and their perceived quality.

In summary, we find somewhat mixed results. On the one hand, the manner in which courts of appeals dispose of appeals from BAPs and district courts provides some evidence for the claim that BAPs would be perceived to provide a better quality of review than the district courts. On the other hand, data on subsequent citation by federal courts to the opinions rendered on appeal by BAPs and district courts lend considerable support to the claim. Given the possible impact of selection effects on the affirmance data as opposed to the citation data, we consider the strongly robust results we observe in the citation context to be more informative.

A. *Sample Selection and Variables of Interest*

1. Sample Selection

To constitute the sample of appellate bankruptcy opinions for this study, we formulated a search query in Westlaw's FBKR-CS database, which contains reported and unreported case law documents (i.e., decisions and orders) relating to bankruptcy that were issued by various courts—including the Supreme Court, courts of appeals, bankruptcy appellate panels, district courts, and bankruptcy courts.[114] Since we sought to create two separate databases, one for first-tier appellate dispositions by BAPs and district courts (the "first-tier database") and one for second-tier appellate dispositions by courts of appeals (the "second-tier database"), we ran two, separate search queries. The first query consisted of the single term "11 U.S.C.," the standard citation to title 11 of the United States Code (commonly referred to as the "Bankruptcy Code"), coupled with (1) a date restriction that limited query retrieval to decisions and orders issued during the three-year period beginning on October 1, 1997 and ending on September 30, 2000,[115] and (2) a field restriction that limited query retrieval to decisions and orders whose preliminary field contained either the term "district court" or "bankruptcy appellate panel," but not "court of appeals."[116] The second query mirrored the first query with the

[114] Reported case law documents are those released for publication in West Federal Reporters.

[115] Coverage for the FBKR-CS database begins with the year 1789.

[116] The preliminary field for case law documents (i.e., decisions or orders issued by a court) in Westlaw is found at the top of such documents and generally contains the name of the court that issued the

exception that field restriction limited query retrieval to decisions and orders whose preliminary field only contained the term "court of appeals."[117] The first query produced 1,487 documents, while the second query produced 871 documents. These large numbers clearly presented a challenge by virtue of the time it would take to review each document. We sought to reduce the time demand by randomly selecting for review approximately one-quarter of the documents produced by each search query—specifically, 372 documents from the first search query and 218 documents from the second search query.[118] We then began our review of each of these documents according to the following procedures in order to identify those that would be selected for inclusion and analysis in the two databases.

We sought to include in the databases appeals that involved the resolution of dispositions rendered by bankruptcy courts in core proceedings.[119] We included only those documents that disposed of the appeal on the merits. (As most of these documents were opinions rather than orders, for ease of reference we will collectively refer to the documents as opinions for the remainder of the Article.) Opinions that solely involved procedural dispositions (e.g., dismissal for lack of jurisdiction) were excluded. In most instances, each opinion generated one observation. However, some opinions generated multiple observations. For example, some opinions resolved multiple appeals in separate and unrelated bankruptcy cases. In other instances, an opinion would resolve an appeal of separate orders that were entered by the bankruptcy court in distinct proceedings within the same case. Finally, by virtue of the identical date restriction included in both search queries, each opinion was issued during one of three government fiscal years: either 1998, 1999, or 2000.[120]

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document. In its entirety, the first search query read as follows: "11 u.s.c." & pr ("district court" "bankruptcy appellate panel" % "court of appeals") & da (aft 9/30/1997 & bef 10/01/2000).

[117] In its entirety, the first search query read as follows: "11 u.s.c." & pr ("court of appeals") & da (aft 9/30/1997 & bef 10/01/2000).

[118] Each search query produced a numbered result list in which the opinions were listed in reverse chronological order. For the first-tier database, the results were organized by court in reverse chronological order (i.e., district court opinions were listed first in reverse chronological order followed by BAP opinions listed in reverse chronological order). We used a random number generator to select the opinions from each result list that we would analyze. For each result list, we randomly generated a set of unique numbers falling within the range of the total documents retrieved by the search query.

[119] *See supra* notes 48-49 and accompanying text.

[120] We tailored our search in this manner for two reasons. First, we wanted to facilitate comparisons of our data with official government data regarding bankruptcy appeals. Generally, such data track the government's fiscal year, which begins on October 1st and ends on September 30th, rather than the calendar year.

Second, we chose the specific time period for this study in order to capture the BAP experience at its apex in terms of participating circuits. BAPs did not become a fixture of the bankruptcy judicial system until 1996. The enactment of the Bankruptcy Code in 1978 amended the Judicial Code to permit, but not require, the establishment of BAPs on a circuit-by-circuit basis. Only the First and Ninth Circuits chose to do so, establishing their BAPs in 1979 and 1980, respectively. In the wake of the *Marathon* decision, however, the First Circuit concluded that continued operation of a BAP would be inappropriate until Congress remedied the defects in the constitutionally infirm, bankruptcy jurisdictional scheme. *See* Commonwealth v. Dartmouth House Nursing Home, Inc., 726 F.2d 26 (1st Cir. 1984). The Ninth Circuit reached the opposite conclusion in *Briney v. Burley (In re Burley)*, 738 F.2d 981 (9th Cir. 1984), holding that circuit court supervision of the BAP satisfied *Marathon*'s requirement of Article III judicial review. Despite the measures taken by Congress in 1984 through the Bankruptcy Amendments and Federal

Pursuant to these selection procedures, our first-tier database consists of 268 observations drawn from 264 opinions,[121] four of which produced a second observation. Our second-tier database consists of 170 observations drawn from 165 opinions,[122] five of which produced a second observation. Not surprisingly, for both databases, the majority of appeals wended their way through the district courts rather than the BAPs—although more so for appeals in the second-tier database (approximately 81%) than the first-tier database (approximately 60%). The distributions of opinions by circuit in each database roughly approximate one another.[123]

As stated before, we do not seek in our study to make claims about the unobserved population of bankruptcy appeals but rather confine our commentary to the observed sample of data we have amassed. That said, we recognize that the story we seek to tell may not be as compelling if selection bias accounts for the results that we present. Accordingly, we seek to alleviate concerns regarding two major types of potential selection bias stemming from litigant choices that could produce a distorted picture: (1) case-selection bias and (2) forum-selection bias.

It has been theorized that cases adjudicated at the trial level represent a nonrandom group by virtue of litigant choices.[124] For a host of reasons, litigants may choose only a select group of cases for which to pursue a final adjudication by a trial court. If tried cases substantively differ from settled cases, a study that focuses solely only tried cases will misrepresent the larger world of litigation since most cases settle.[125]

An appeal further exacerbates the bias produced by the selection of cases for litigation since (1) not all adjudicated cases are appealed and (2) not all appealed cases are disposed of by court decision. The bankruptcy appellate structure doubly compounds the problem given the two levels of intermediate appellate review.

Judgeship Act to address the *Marathon* decision, the First Circuit Judicial Council chose not to reauthorize its BAP, thus leaving the Ninth Circuit as the only circuit with an operating BAP. This state of affairs changed with the Bankruptcy Reform Act of 1994, which amended the Judicial Code to require the judicial council of each circuit to create a BAP absent a finding by the council that (1) insufficient judicial resources in the circuit would preclude its establishment, or (2) that establishment of a BAP would produce undue delay or increased cost to parties in bankruptcy cases. 28 U.S.C. § 158. Prompted into action by this amendment, in 1996 the First Circuit reauthorized and the Second, Sixth, Eighth, and Tenth Circuits established BAPs. The Second Circuit BAP, however, ceased operations on July 1, 2000.

[121] Thus, our selection criteria reduced the random sample of documents relating to the first-tier database by approximately 18%.

[122] Similar to the first-tier database, see supra note 121, our selection criteria reduced the random sample of documents relating to the second-tier database by approximately 17%.

[123] *See infra* Appendix tbl.1.

[124] *See, e.g.,* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[125] According to a recent empirical study, approximately 2% of federal civil lawsuits in 2002 ended in trial. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 tbl.1 (2004). The bankruptcy analogue of a federal civil law suit is an adversary proceeding. *See supra* note 45. In 2002, approximately 5% of adversary proceedings terminated during or after trial. *See* Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 930 (2005).

If these assumptions are correct, should they be of concern in a study such as ours? We think not for the following reasons. First, cases settled either at the trial or at the appellate level are not a relevant population for purposes of our study. Our study asks whether the circuit court will perceive the BAP to have performed the appellate function better than the district court. Since circuit courts are not autonomous decision-making bodies and can only resolve those appeals brought before them by the litigants, *the only cases that can and should be measured for this purpose are those cases actually appealed to and resolved by the circuit courts*.[126] Second, Professor Frank Cross's comprehensive empirical study of decisionmaking by the courts of appeals has documented that litigant effects are not a major determinant of circuit court decisions, both generally and in particular types of cases (i.e., criminal decisions and labor decisions).[127] We have no reason to believe that circuit court outcomes in bankruptcy decisions would be any different. Finally, case-selection bias should not impact our citation data insofar as a court is generally constrained to written opinions when it chooses those opinions to which it cites.

We also recognize that our data potentially include a forum-selection bias in that attorneys in circuits that have BAPs may be more likely to prefer appeals relating to certain subject matters to be heard by BAPs than by district courts, or vice versa.[128] Thus, it is possible that there are some issues that BAPs never or only rarely hear. (Assuming that bankruptcy cases are at some level homogenous nationwide, that will not be the case for district courts, since there are circuits in which district courts hear substantially all appeals from bankruptcy court rulings.) More generally, it is possible that BAP and district court dockets vary substantially. While we cannot eliminate this possibility, we have looked for evidence of such a bias and have found no such evidence.[129] Thus, while

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[126] Even if the group of appeals resolved by the circuit courts are nonrandom such that our results would not hold if the circuit courts also decided those cases that were not appealed beyond the first level of intermediate review, such theorizing is an exercise in futility. Simply put, we cannot measure the outcome of circuit court decisions that do not exist. In other words, since we look to measure quality of appellate review that the circuit court *perceives*, we ought not to fret about those cases that will never see light of day in the circuit court.

[127] *See* CROSS, *supra* note 92, at 123-47.

[128] Since the Judicial Code mandates that, in circuits with BAPs, bankruptcy appeals will be heard by the BAP *unless* one of the parties to the appeal elects to have the district court hear the appeal, *see* 28 U.S.C. § 158(c)(1), the dynamic of any potential selection bias at work in the BAP perhaps should be understood as the product of those subset of appeals where the forum preferences of the parties to the appeal have aligned. Although there could be instances where all parties prefer to have the appeal heard by the district court, there would also be instances where only one party had such a preference. Thus, a BAP docket is unique in that all of its appeals theoretically involve litigants with a consistent forum preference. We say "theoretically" since it is conceivable that a party with an inconsistent forum preference may have failed to make, in a timely fashion, the election for the district court to hear the appeal.

[129] By virtue of the fact that, for purposes of our statistical analyses, we do not differentiate between district courts from circuits with BAPs (BAP circuits) and those from circuits without BAPs (non-BAP circuits), the concern arises that any potential selection bias at work in BAP circuits could be masked by those observations from non-BAP circuits. Approximately 31% of the observations in the first-tier database and 36% of the observations in the second-tier database consisted of district court opinions from non-BAP circuits. *See infra* Appendix tbl.1. We conducted bivariate statistical analyses to ascertain whether selection bias existed in the BAP circuits by focusing on those circumstances in which one would expect to see such bias have a disproportionate effect—namely, (1) the subject matter of the appeal and (2) affirmance rates by the court of appeals. For neither of these circumstances do we find evidence of selection bias.

recognizing that such a bias may lurk at more refined levels of case-type delineation, we are at least confident that the size of any forum-selection bias is confined, not pernicious, and thus probably has not had a meaningful effect upon our data and analysis.[130]

2. Variables of Interest

Recall that we sought to test our broad inquiry into the perceived quality of appellate review by focusing on (1) how two distinct appellate courts in the bankruptcy judicial system—the BAPs and district courts—perform their error-finding function and (2) how other judicial actors perceive the quality of that performance. As our hypotheses indicate, we concerned ourselves with an array of dependent variables that fall within one of two categories: (1) the disposition rendered on appeal by the court of appeals and (2)

First, we examined whether a statistically significant relationship exists in BAP circuits between the subject matter of the appeal and the first-tier appellate court to hear the appeal. To do so, we classified observations according to whether the subject of the appeal fell into one of the four most frequently occurring subjects of appeal heard by first-tier appellate courts. For the first-tier database, for all observations and for those observations from BAP circuits, the four most frequently occurring subjects were matters relating to discharge, procedure/jurisdiction, avoiding powers, and multiple subjects. For the second-tier database, for all observations and for those observations from BAP circuits, the four most frequently occurring subjects were matters relating to discharge, claims, avoiding powers, and multiple subjects. For the first-tier database, approximately 56% of the appeals heard by district courts in BAP circuits *as well as* all district courts combined involve one of the four most frequently occurring subjects. For the second-tier database, approximately 64% of the appeals heard by district courts in BAP circuits and 59% of the appeals heard by all district courts combined involve one of the four most frequently occurring subjects. Applying a chi-square test with one degree of freedom, we note that no statistically significant relationship exists in BAP circuits between the subject matter of the appeal and the first-tier appellate court to hear the appeal (a p-value of 0.288 for the first tier database and a p-value of 0.876 for the second-tier database).

Second, for all observations in the first-tier database, we further examine whether a statistically significant relationship exists between the subject matter of the appeal and whether there was a subsequent appeal to the circuit court. Again, we classify observations according to whether the subject of the appeal fell into one of the four most frequently occurring subject matter categories. For those observations involving subsequent appeal to the circuit court, approximately 62% involved a top subject matter category. For those observations without circuit court review, approximately 56% involved a top subject matter category. Applying a chi-square test with one degree of freedom, we note that no statistically significant relationship exists ($p = 0.475$) between the subject matter of the appeal and subsequent appeal to the circuit court.

We finally note that, for both databases, courts of appeals affirm district courts in BAP circuits at a similar rate to the affirmance rate for all district courts combined. For the first-tier database, courts of appeals affirm district courts in BAP circuits 62% of the time and affirm all district courts combined approximately 61% of the time; for the second-tier database, courts of appeals affirm district courts in BAP circuits 68% of the time and affirm all district courts combined approximately 70% of the time. Bivariate analysis confirms that no statistically significant difference exists between the rate at which courts of appeals affirm district courts from BAP circuits and district courts from non-BAP circuits. For the first-tier database, a two-sided Fisher test indicates a p-value of 0.526; and for the second-tier database, a two-sided Fisher test indicates a p-value of 0.327.

[130] With respect to citations, if there is a forum-selection bias, then the BAPs are not deciding some categories of cases—and, perhaps, certain issues—that the district courts are. This logically should translate into an increase in citations to district court opinions as compared to BAP opinions, since other courts facing such issues and wishing to include citations will have no opportunity to cite to any BAP opinions. Yet, as we discuss below, our results on the data as they are generally show that BAP citations are favored. In short, if there is a selection bias, then our statistical analyses, if anything, *understate* the extent to which BAP citations are favored.

citations by other federal courts to the appellate opinions issued by BAPs and district courts. We will discuss each category and the variables associated with it in turn.

First, we define the disposition rendered on appeal according to three ordered outcomes: (1) "negative" for those dispositions where the reviewing court reversed, remanded or vacated the disposition rendered below, (2) "hybrid" for those dispositions where the reviewing court affirmed in part the disposition rendered below, and (3) "positive" for those dispositions where the reviewing court fully affirmed the disposition rendered below.[131] Second, in order to document citation data to the opinions in our databases, we relied upon KeyCite, West's citation research service.[132] We documented for each first-tier level opinion all positive citations made to it by any federal court—aside from those citations made in connection with the direct appellate history of the opinion—during the five-year period following the date that the opinion was issued. Pursuant to these criteria, approximately three-quarters (75%) of the first-tier appellate opinions had citing references. We further documented (1) citations by type of court, (2) citations by depth of treatment, (3) citations directly quoting the cited opinion, and (4) the immediacy with which first-tier appellate opinions were cited.[133]

The major explanatory variables (i.e., independent variables) in the databases include (1) whether the BAP or district court heard the initial appeal, (2) whether the appellant was solely the debtor in whose case the appeal arose, (3) whether the appellee was solely the debtor in whose case the appeal arose, (4) whether the appeal arose in the context of a case filed under Chapter 7 of the Bankruptcy Code, (5) whether the bankruptcy case in which the appeal arose was filed by an individual or a business entity, (6) the type of dispute proceeding within which the appeal arose (i.e., an adversary proceeding or contested matter), and (7) the broad subject matter of the appeal.

B. *Bivariate Descriptive Statistics*

Our primary interest lies in the statistical relationship between the identity of the first-tier appellate court and various dependent variables: (1) the disposition rendered upon subsequent appeal by the court of appeals, (2) the number of federal court citations to the opinion issued by the first-tier appellate court, (3) the depth of treatment given to first-tier appellate opinions when cited by other federal courts, (4) direct quotation of the first-tier appellate opinion by positive citing references, and (5) the immediacy with

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[131] For the frequency of the dispositions rendered on appeal in first-tier and second-tier level opinions, see *infra* Appendix tbl.2.

[132] KeyCite organizes citing references for a case by segregating negative citing references from positive citing references. KeyCite further organizes negative and positive citing references according to the depth of treatment given by the citing reference to the cited opinion. Four categories exist for the depth of treatment provided by the citing reference: (1) "examined," indicating that the citing reference contains an extended discussion of the cited opinion usually more than a printed page of text; (2) "discussed," indicating that the citing reference contains a substantial discussion of the cited opinion, usually more than a paragraph but less than a printed page; (3) "cited," indicating that the citing reference contains some discussion of the cited opinion, usually less than a paragraph; and (4) "mentioned," indicating that the citing reference contains a brief reference to the cited opinion, usually in a string citation. Finally, KeyCite identifies citing references that directly quote the cited opinion.

[133] For citation data for those first-tier appellate opinions with positive citing references, see *infra* Appendix tbl.3.

which the first-tier appellate opinion is cited. By searching for a statistically significant relationship between the identity of the first-tier appellate court and each of these dependent variables, we can look for those relationships warranting further inquiry through regression analysis that will confirm the existence of the relationship when controlling for other factors.

Hypothesis 1 posits that courts of appeals more likely will uphold the dispositions rendered on appeal by BAPs than those rendered by district courts. Our data offer limited support for this hypothesis. Although we find that a statistically significant relationship exists between the first-tier appellate court and the subsequent disposition rendered on appeal for the 77 observations in the first-tier database for which there was a subsequent appeal to the court of appeals,[134] we do not find such a relationship for the 170 observations in the second-tier database With respect to the former sample, the court of appeals fully affirmed the disposition rendered by the BAP approximately 81% of the time as opposed to 62% for district court dispositions.[135] If no association had existed between the type of first-tier appellate court to have initially decided the appeal and the disposition rendered on subsequent appeal by the court of appeals, we would have expected to see BAP dispositions fully affirmed by the court of appeals approximately 69% of the time. Our analysis confirms that there is less than a 5% probability that random chance alone would have yielded a difference as large as the one witnessed. For this limited subset of data, then, we might infer that the identity of the first-tier appellate court caused at least *some* of the observed difference in the rate at which the court of appeals upheld the first-tier disposition.

On the other hand, with respect to the 170 observations in the second-tier database, the court of appeals fully affirmed BAP dispositions approximately 82% of the time as opposed to approximately 68% of the time for district court dispositions.[136] We would have expected to see BAP dispositions in the second-tier database fully affirmed approximately 71% of the in the absence of a relationship between the type of first-tier appellate court to have initially decided the appeal and the subsequent disposition by the court of appeals. Our analysis reveals that there is a 9.2% probability that random chance

[134] Of the 77 observations in the first-tier database for which there was a subsequent appeal to the court of appeals, 50 were district court dispositions and 27 were BAP dispositions. As there were a total of 162 district court and 106 BAP dispositions in the first-tier database, *see infra* Appendix tbl.1, approximately 31% of the district court dispositions and 25% of the BAP dispositions involved subsequent appeal. As our first-tier database only includes opinions that disposed of the appeal on the merits, these figures seem to be consistent with empirical evidence that has estimated that up to a third of first-tier appellate dispositions rendered on the merits have been further appealed to the court of appeals. *See* McKenna & Wiggins, *supra* note 62, at 630; *see also* U.S. BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT, STATISTICAL REPORT: JANUARY 1, 2005 – DECEMBER 31, 2005 (2005) (documenting that approximately 30% of bankruptcy appeals in the 8th Circuit in 2005 were taken to the U.S. Court of Appeals).

[135] The 81% affirmance rate for BAP dispositions in the first-tier database approximates the rate at which the U.S. Court of Appeals for the Tenth Circuit affirmed merit-based BAP dispositions—that is, 89%—during the ten-year period beginning on July 1, 1996 and ending on June 30, 2006. *See* U.S. BANKRUPTCY APPELLATE PANEL FOR THE TENTH CIRCUIT, ANNUAL REPORT OF BANKRUPTCY APPEALS IN PARTICIPATING BAP DISTRICTS FOR THE STATISTICAL YEAR JULY 1, 2005 – JUNE 30, 2006 (INCLUDING DISPOSITION STATISTICS FOR APPEALS DISPOSED OF SINCE JULY 1, 1996) 8 (2005).

[136] The 82% affirmance rate for BAP dispositions in the second-tier database approximates the experience in the Tenth Circuit from 1996 to 2006. *See supra* note 135.

alone would have yielded the difference witnessed in the second-tier database between the observed and expected outcomes. Because there exists a greater than 5% probability that this difference is completely random, for purposes of the second-tier database, we cannot formally reject the null hypothesis that no relationship exists between the type of first-tier appellate court and the subsequent disposition by the court of appeals. Nonetheless, this finding should be placed in proper perspective. First, our failure to unearth *evidence* of a statistically significant difference in this particular instance does not mean that the difference does not exist. Moreover, a 9.2% probability is still fairly small—enough so that we ought not to discount completely the support we find in the first-tier database for Hypothesis 1.[137] Finally, it may be the case that we observe this degree of possible random difference due to the small frequency of BAP dispositions in the second-tier database—to wit, approximately 19% of the dispositions.[138]

Hypotheses 2 through 7 generally predict that, with the exception of district courts, other federal courts will positively cite to BAP opinions more than they positively cite to district court opinions. For district courts, we hypothesize that they will cite more often to district court opinions than BAP opinions. Finally, we predict that intercircuit citations to BAP opinions will exceed intercircuit citations to district court opinions. As an initial matter, BAP opinions had a higher propensity to be positively cited by other federal courts than district court opinions. Approximately 91% of the BAP opinions in the first-tier database had been positively cited by federal courts, whereas slightly less than two-thirds (65%) of the district court opinions had received similar treatment. In the absence of a relationship between the type of first-tier appellate opinion and positive citation thereto by other federal courts, we would have expected to see approximately three-quarters (75%) of the BAP opinions positively cited. Our analysis confirms that there is less than a 0.01% probability that random chance alone would have yielded a difference as large as the one witnessed. It would thus appear that the type of first-tier appellate opinion has some influence on a federal court's decision to cite that opinion.

We can further elaborate on this relationship by looking to the number of citing references to the opinions according to the type of federal court making the citing reference. We note that 53% of the observations in the first-tier database that have positive citing references are district court opinions.[139] Assuming a random (or at least) random distribution of issues and factual settings, we would expect citation rates to

[137] For the details of these results, see *infra* Appendix tbl.4.

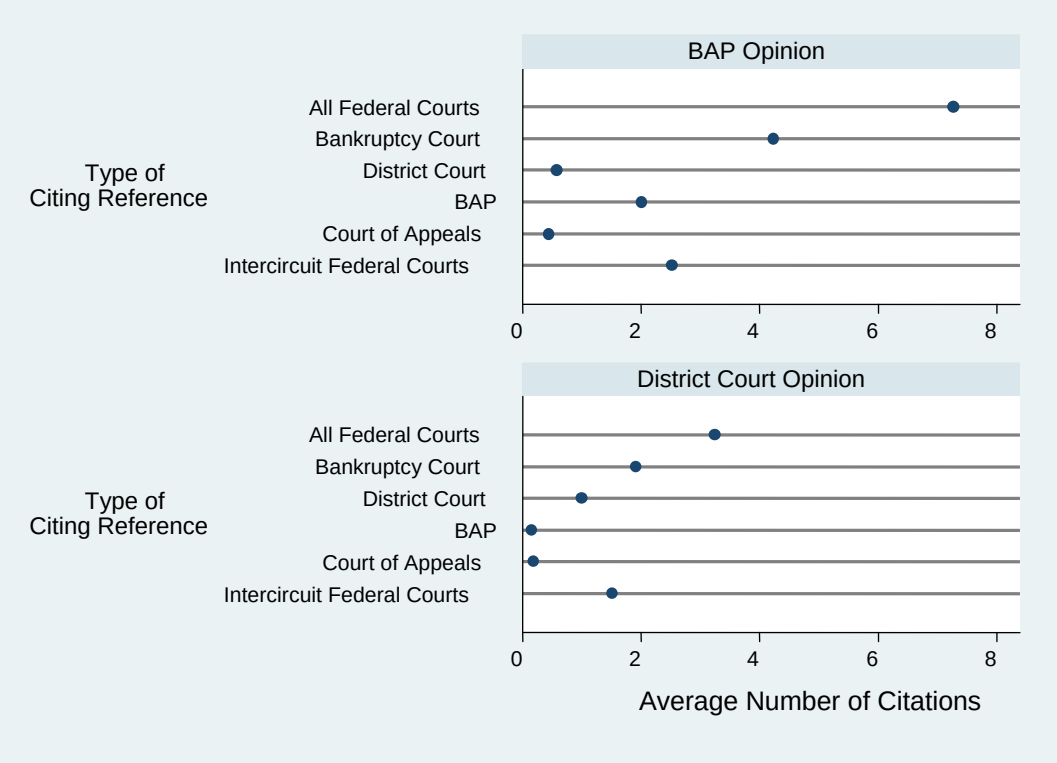
[138] *See infra* Appendix tbl.1 (indicating that 33 of 200 opinions in the second-tier database consist of BAP opinions).

[139] The first-tier database contained 202 observations in which a federal court positively cited to the opinion issued by the first-tier appellate court. In conducting our bivariate analyses, we exclude extreme outliers (i.e., those observations involving extreme values in the tails of the distribution of the positive citing reference data). We define an extreme outlier to be any observation with a total number of positive citations that falls above the third quartile of the positive citing reference data (7 citations) by more than 3 times the interquartile range for such data (5 citations). *See infra* Appendix tbl.3 (describing distribution of positive citing references to first-tier opinions). Accordingly, we excluded any observations with more than 22 positive citing references. Pursuant to this measure, we eliminated 2 observations from our analysis—leaving us with a total of 200 observations for analysis. Accordingly, approximately 99% of the first-tier appellate opinions in our sample that were cited positively by other federal courts are included in our bivariate analyses of the citing reference data.

slightly favor district court opinions.[140] Our data, however, generally show that citation rates favor BAP opinions. Specifically, we find strong differences between the BAP and district court samples that are statistically significant at both the mean and the median. For example, a BAP opinion that was positively cited had, on average, approximately 7 citations by other federal courts, whereas its district court counterpart averaged approximately 3 citations. Furthermore, by disaggregating our citation data according to the type of federal court that cited the first-tier appellate opinion, we see that the BAP opinions in our study had a statistically significantly greater number of citing references by courts of appeals, BAPs, bankruptcy courts than did district court opinions. On the other hand, district court opinions had a statistically significantly greater number of citing references by other district courts than did BAP opinions. Finally, the data evidence that federal courts in other circuits cited more to BAP opinions than to district court opinions and that the difference is statistically significant. Some of these results are illustrated below in Figure 2.[141]

FIGURE 2

AVERAGE NUMBER OF POSITIVE CITING REFERENCES TO
FIRST-TIER APPELLATE OPINION BY CITING REFERENCE TYPE



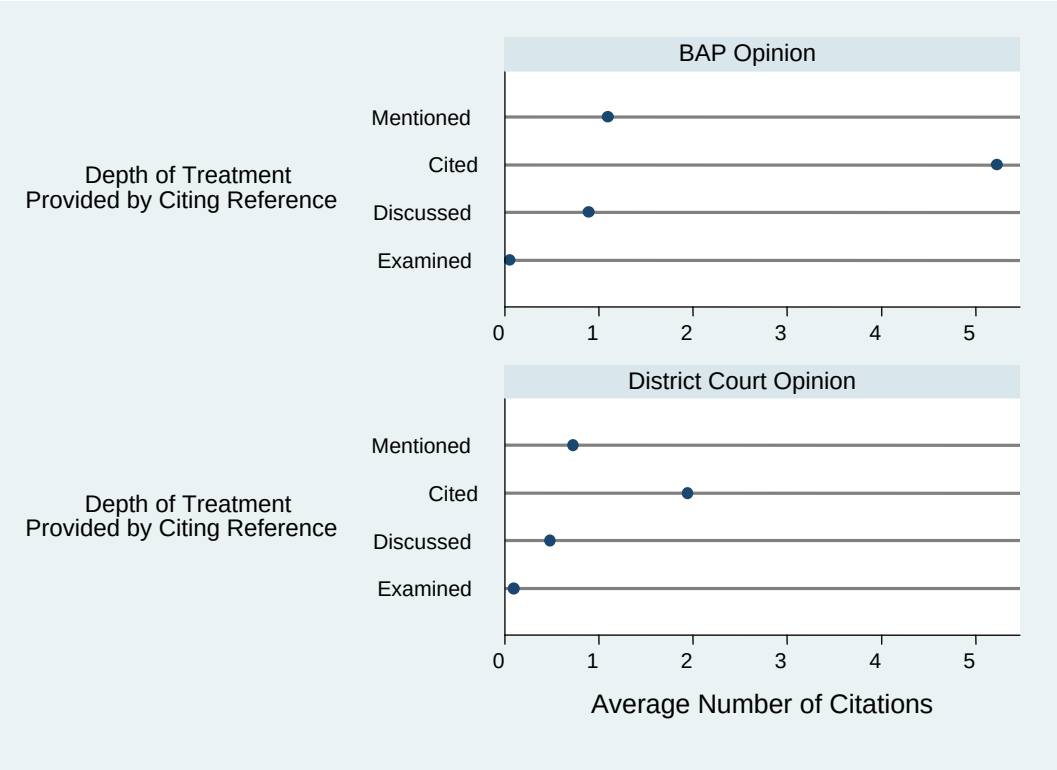
[140] *Cf.* Merryman, *Toward a Theory of Citations*, *supra* note 101, at 403 (arguing that the larger number of citations by the California Supreme Court to opinions issued by the courts of New York State may be due to the large case literature arising out of New York).

[141] For a full accounting of these results, see *infra* Appendix tbl.5.

Additional evidence of the perceived correctness of the first-tier appellate opinions can be gleaned from examining the depth of treatment provided to those opinions by the federal courts that cited to them. Hypothesis 8 predicts that the citing references to BAP opinions will have afforded a greater depth of treatment than district court opinions. Our data generally support this hypothesis. We find that, at both the median and the mean, BAP opinions had a statistically significant higher number of citing references by other federal courts that cited (i.e., provided discussion of less than a paragraph) and discussed (i.e., provided discussion of more than a paragraph but less than a printed page) the opinion.[142] We also find that, at the median (but not the mean), BAP opinions had a statistically significant higher number of citing references by other federal courts that mentioned the opinion (i.e., contained a brief reference to the cited opinion, usually in a string citation). We do not find, however, either at the median or the mean, any association between the type of first-tier appellate opinion and the number of positive citing references that examine the opinion (i.e., contain an extended discussion of the cited opinion usually more than a printed page of text). Figure 3 illustrates some of these results.[143]

FIGURE 3

AVERAGE NUMBER OF POSITIVE CITING REFERENCES TO FIRST-TIER APPELLATE OPINION BY DEPTH OF TREATMENT



[142] For purposes of this analysis, we once again exclude extreme outliers according to the criteria discussed in *supra* note 139.

[143] For a full accounting of these results, see *infra* Appendix tbl.5.

We tracked the number of citing references that directly quoted the first-tier appellate opinion as yet another metric for evaluating the perceived correctness of the first-tier appellate opinions in our study. First, we find evidence to support our hypothesis that a greater likelihood exists that positive federal citing references will have quoted BAP opinions as opposed to district court opinions. Approximately 65% of the federal courts that positively cited BAP opinions also directly quoted those opinions, whereas only 38% of district court opinions with positive federal citing references were directly quoted. If no relationship existed between the type of first-tier appellate opinion and positive direct quotation thereto by other federal courts, we would have expected to see slightly more than half (51%) of the BAP opinions to have been directly quoted. Our analysis confirms that there is less than a 0.01% probability that random chance alone would have yielded a difference as large as this, thus suggesting that the type of first-tier appellate opinion partly influences a federal court's decision to quote the opinion directly when positively citing to it. Furthermore, we observe that, on average, approximately 1.5 of the positive citing references to BAP opinions directly quote such opinions as opposed to only 0.58 of the positive citing references to district court opinions. Also, whereas 65% of the positively cited BAP opinions have at least one directly quoting citing reference, only 39% of the positively cited district court opinions did so. These differences are highly statistically significant and further support our contention that positive federal citing references will have directly quoted BAP opinions more frequently than district court opinions.[144]

Finally, it strikes us that the immediacy with which a federal court cites to such an opinion can serve as yet another indicator of its perceived quality. Accordingly, we consider the period of time for which it took a first-tier appellate opinion to be positively cited by a federal court.[145] Our data show that, for the group of positively cited first-tier appellate opinions, a BAP opinion would receive its first positive citing reference by another federal court, on average, in approximately 10 months' time (306 days), whereas it took nearly twice as long—approximately 17 months' time (530 days)—for a district court opinion. Moreover, slightly more than half (51%) of the BAP opinions from this group received their first positive citation within approximately a 6-month period. This starkly contrasts with district court opinions, only nearly a quarter (24%) of which received their first positive citation within the same period of time. We infer from these highly statistically significant differences that the type of first-tier appellate opinion has

[144] For purposes of this analyses, we excluded extreme outliers according to the criteria discussed in *supra* note 139. For a full accounting of these results, see *infra* Appendix tbl.5.

[145] We might assume that an opinion that comprehensively and effectively addresses an unresolved or debated issue of law that has repeated occasion to be litigated not only will be heavily cited, but that such an opinion will also have the tendency to be cited more quickly. Thus, for purposes of this analysis, we exclude the extreme outliers we identified with respect to total number of positive citing references. *See supra* note 139. We further sought to identify whether there were any extreme outliers in terms of the number of days it took for the first-tier appellate opinions to be cited. In this instance, we define an extreme outlier to be any observation with a total number of days that falls above the third quartile of the immediacy data (638 days) by more than 3 times the interquartile range for such data (520.5 days). On the basis of these parameters, there were no additional extreme outliers to be excluded.

some association with the time within which the opinion will garner its first positive citation by another federal court.[146]

In summary, based on the dispositions rendered by courts of appeals on subsequent review of BAP and district court opinions, we find limited evidence that courts of appeals perceive BAPs to provide a better quality of appellate review than district courts. On the other hand, based on citations to the opinions issued by BAPs and district courts, we find strong evidence that most nonreviewing federal courts perceive the quality of BAP opinions to be better. We now look to confirm whether these associations will persist and, if so, the strength of such associations when controlling for other potential explanatory variables.

C. *Regression Analyses*

Here, we seek to provide a more comprehensive analysis of the perceived quality of appellate review by constructing a series of regression models that will test whether the statistically significant relationships we identified in Part III.B persist when controlling for the independent variables discussed in Part III.A.

1. *Subsequent Disposition by Court of Appeals*

For the 77 observations in the first-tier database that involved subsequent appeal to the court of appeals, we use an ordinal logistic regression model to predict the disposition rendered by the court of appeals (with *negative* coded as 0, *hybrid* coded as 1, and *positive* coded as 2) based on the following independent variables:

- whether the first-tier appellate court was a district court (coded 0) or a BAP (coded 1) (Court);
- whether the appeal arose within the context of an adversary proceeding (coded 0) or contested matter (coded 1) (Dispute Type);
- the fiscal year in which the first-tier appellate court issued its opinion (for which we created three dichotomous variables with the response categories 0 for those opinions issued outside the fiscal year in question and 1 for those opinions issued during the fiscal year in question) (Fiscal Year);[147]
- whether the first-tier appellate court had published its disposition (Published);
- whether the only party to appeal to the first-tier level court was the debtor (Appellant);
- whether the debtor was the only party appearing as an appellee at the first-tier level of review (Appellee);
- whether the appeal arose in the context of a Chapter 7 case (Chapter 7),

[146] For a full accounting of these results, see *infra* Appendix tbl.5.

[147] The opinions in the database were issued during one of three government fiscal years—1998, 1999 or 2000. *See supra* note 120 and accompanying text.

- whether the bankruptcy case in which the appeal arose was that of an individual (coded 0) or business entity (coded 1) (Debtor Type); and

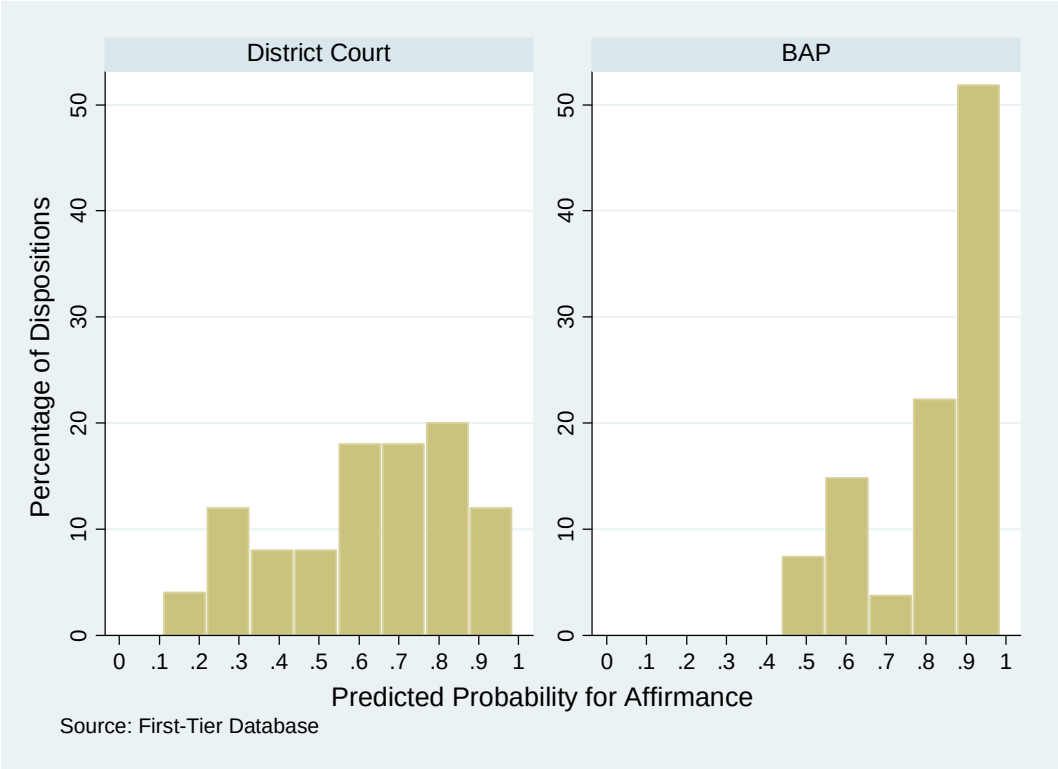
- whether the subject of the appeal could be classified as falling into one of the four most frequently occurring subjects of appeal heard by first-tier appellate courts for which there was subsequent appeal to the court of appeals (Subject).[148]

According to the model, even when controlling for other potential explanatory variables, the type of first-tier appellate court to have initially determined the appeal remains a statistically significant predictor of the subsequent disposition rendered by the court of appeals.[149] To further elaborate, using the actual values for all of the independent variables included in the model, we can calculate the predicted probability of affirmance by the court of appeals for each of the 77 first-tier appellate dispositions upon which the model is based. In Figure 4 below, we present the predicted probabilities for affirmance of the actual observations in our regression model through use of a histogram that displays the distribution of those probabilities for district court dispositions and BAP dispositions separately. The width of each bar represents a specific interval of predicted probability of affirmance, and the height of each bar represents the percentage of dispositions that fall within that interval. A comparison of the two distributions reveals some interesting figures.

[148] For the 77 observations in the first-tier database involving subsequent appeal to the court of appeals, the four most frequently occurring subjects were matters relating to discharge (23%), procedure/jurisdiction (14%), multiple subjects (14%), and avoiding powers (10%). For the variables Published, Appellant, Appellee, Chapter 7, and Subject, we coded negative responses as 0 and positive responses as 1.

[149] Both the Court and Chapter 7 variables are significant predictors of the disposition rendered on subsequent appeal from the first-tier appellate court to the court of appeals, while the other variables have no association with a court of appeals' disposition. For detailed results from the regression model, see *infra* Appendix tbl.6.

FIGURE 4
PREDICTED PROBABILITIES FOR AFFIRMANCE OF
FIRST-TIER APPELLATE DISPOSITIONS BY COURTS OF APPEALS



First, we find for this limited subset of data that, on average, a BAP disposition had an 83% chance of being affirmed by the court of appeals in contrast to 61% for district court dispositions. Put another way, the likelihood of affirmance by the court of appeals increased by 36% when it reviewed BAP dispositions. Second, while approximately 52% of the BAP disposition had a 90% or greater predicted probability of affirmance, only 4% of the district court dispositions did so. Perhaps even more striking, *no* BAP disposition had less than a 50% predicted probability of affirmance whereas slightly more than one-quarter (28%) of district court dispositions did. These findings support our hypothesis that courts of appeals will more likely uphold the dispositions rendered by BAPs than those rendered by district courts. As this model is limited to a narrow subset of our data, and since our bivariate analyses in Part III.B of observations from the second-tier database suggested that no statistically significant relationship existed between the type of first-tier appellate court and the subsequent disposition rendered by the court of appeals, we are cautious about reading too much into these numbers. We would emphasize, however that, although we cannot say that we have statistically significant evidence in the second-tier database that the type of first-tier appellate court influences subsequent disposition by the court of appeals, the absence of such evidence does not mean that such an association does not exist. And, in fact, we have found evidence of such an association in the first-tier database. It would be

inappropriate, in our view, to interpret the lack of evidence in the second-tier database to negate the evidence unearthed in the first-tier database.

2. Positive Citing References by Other Federal Courts

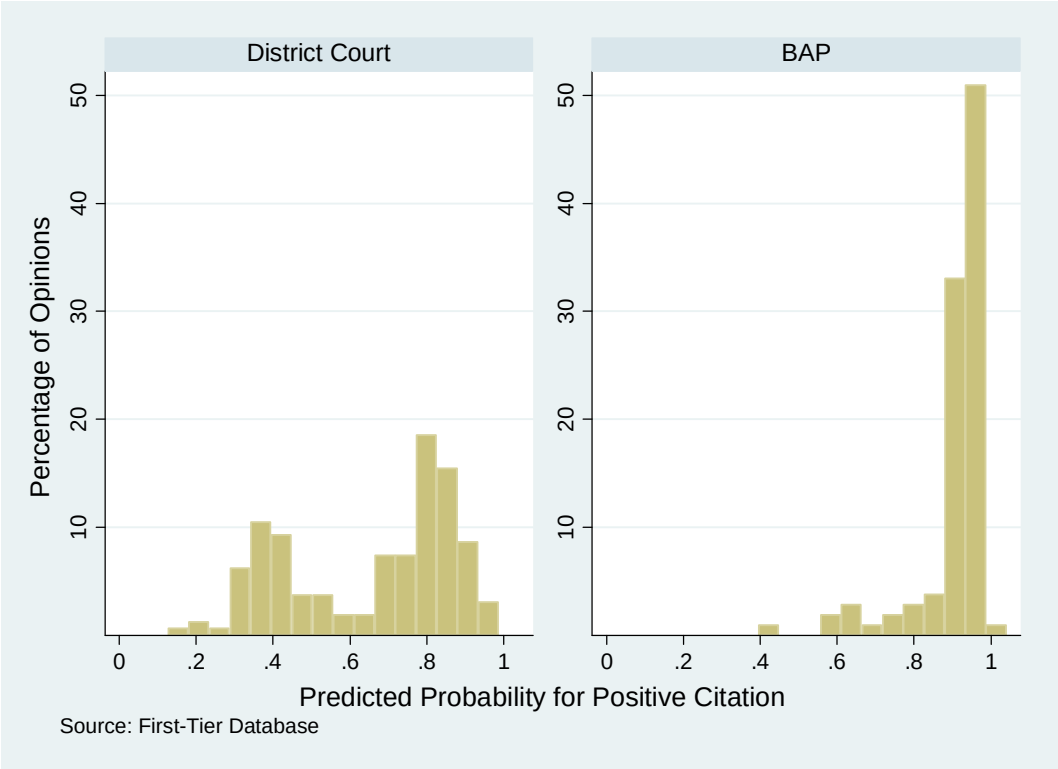
To further explore (1) the decision of federal courts to cite positively to the opinions issued by first tier appellate courts, (2) the extent to which they do so, (3) the manner in which they do so, and (4) the immediacy with whey they do so, we construct a series of binary logistic regression models and multiple linear regression models. First, we examine whether the association between the identity of the first-tier appellate court and positive citation to its opinion persists when controlling for other factors. For all 286 observations in the first-tier database, we use a binary logistic regression model to predict whether a federal court will have cited positively to the first tier appellate opinion (coding opinions with no positive citations as 0 and coding opinions with at least one positive citation as 1) based on the following independent variables: (1) Court; (2) whether the first-tier appellate court determined that error had occurred in the disposition rendered by the bankruptcy court, with "error" coded as 1 and "no error" coded as 2 (Disposition—Narrowly Defined);[150] (3) Published; (4) Appellant; (5) Appellee; (6) Chapter 7; (7) Debtor Type; (8) Dispute Type, (9) Subject; (10) whether the first-tier court's disposition was subsequently appealed to the court of appeals (Subsequent Appeal); and (11) Fiscal Year.

The model identifies the type of first-tier appellate court to have initially determined the appeal as a statistically significant predictor of whether the court's opinion will have been positively cited by another federal court.[151] Figure 5 below illustrates the predicted probability of positive citation to the first-tier appellate opinion based on the actual values for all of the independent variables included in the model.

[150] By coding the disposition of the first-tier appellate court in this manner, this had the effect of collapsing the first two outcomes (i.e., "negative" and "hybrid") in our ordinally defined version of the variable into the category of "error" since a partial affirmance also entails a conclusion that some error occurred below.

[151] For detailed results from the regression model, see *infra* Appendix tbl.7.

FIGURE 5
PREDICTED PROBABILITIES FOR POSITIVE CITATION OF
FIRST-TIER APPELLATE OPINIONS BY FEDERAL COURTS



On average, a BAP opinion had approximately a 90.6% chance of being positively cited by another federal court whereas a district court had a 65.4% chance. Accordingly, the likelihood of positive citation to a first-tier appellate opinion by another federal court increased by approximately 38.5% for BAP opinions. Furthermore, approximately 80% of the BAP opinions, as opposed to only 7% of the district court opinions, had a 90% or greater predicted probability of being positively cited by another federal court. Finally, nearly a third (32%) of the district court opinions had less than a 50% predicted probability of being positively cited. In stark contrast, only 1% of BAP opinions did so. These data support our hypothesis that, if a BAP issued the first-tier appellate opinion, it will increase the chances of the opinion being positively cited by other federal courts.[152]

The question arises whether this association persists when analyzing the extent to which other federal courts cite to first-tier appellate opinions, whether analyzing citations in the aggregate (i.e., total number of positive citations) or disaggregated according to the type of citing federal court. To answer the question, we implement a variety of regression models that analyze the 200 observations in the first-tier database where a federal court

[152] The model also identifies the Published, Dispute and Subject variables as significant predictors of whether the first-tier appellate opinion will have been cited by other federal courts.

positively cited to the opinion issued by the BAP or district court.[153] First, in order to predict the aggregate number of positive citations, we conduct a zero-truncated negative binomial regression analysis.[154] We then proceed to analyze the number of positive citations by citing court type pursuant to a negative binomial regression model.[155] For both of these models, we incorporate the same independent variables from the binary logistic regression analysis conducted to predict whether the first-tier appellate opinion would be cited.

The models indicate that a statistically significant relationship exists between the type of first-tier appellate court that issued the opinion and the total number of positive citing references as well as positive citing references by bankruptcy courts, BAPs, district courts, courts of appeals, and federal courts from other circuits. With all variables held constant at their mean, BAP opinions were predicted to receive over a five-year period approximately 3.7 more positive citations than district court opinions. Focusing on the type of citing federal court, BAP opinions were predicted to receive approximately (1) 2 more bankruptcy court citations, (2) 1.3 more BAP citations, (3) 0.2 more court of appeals citations, and (4) 0.64 more citations by federal courts from other circuits. These results support Hypotheses 2B, 3, 4, 5 and 7. We also found that district court opinions were predicted to receive approximately 0.34 more district court citations than BAP opinions, thus confirming the distinction we drew in Hypothesis 6.[156] Overall, the bulk of our evidence suggests that other actors within the bankruptcy judicial system perceived BAPs to provide a better quality of appellate review than district courts.[157]

Using the same negative binomial regression model we used to predict the extent to which federal courts would cite to the first-tier appellate opinions, we find limited results for whether the type of first-tier appellate opinion will be a statistically significant predictor of the depth of treatment provided to the opinion by the citing federal court when controlling for other factors.[158] Again, when holding all other variables constant at

[153] There were actually 202 such observations. For purposes of our regression analyses, however, we eliminated 2 extreme outliers, which left 200 observations to be analyzed. *See* supra note 139.

[154] A negative binomial regression model is appropriate here since (1) the aggregate number of positive citations is a count variable that is overdispersed and (2) there are no zero values for this subset of observations (i.e., all opinions have at least one positive citing reference).

[155] We run the regression model five times to account for the five different types of citing federal courts (i.e., bankruptcy court, district court, BAP, court of appeals, and federal courts from other circuits). We do not use a zero-truncated model for these dependent variables since some of the observations do have zero values.

[156] To predict the total number of positive district court citations to first-tier appellate opinions, we initially fitted a negative binomial regression model that included all of the independent variables included in the negative binomial regression model used for the other types of citations (the full model). Although the Court variable was a statistically significant predictor in the full model, the model as a whole was not statistically significant (chi-squared = 19.21, df = 12, $p = 0.0836$). Accordingly, using a backward-selection stepwise regression, we fitted a partial model that only included the Court, Debtor, Subject, and Fiscal Year variables. This partial model was statistically significant (chi-squared = 16.70, df = 5, $p = 0.0051$), and the Court variable continued to be a statistically significant predictor ($p = 0.032$).

[157] For detailed results from these regression models, see *infra* Appendix tbl.8.

[158] For one exception, we do not use a negative binomial regression model: In order to predict the number of citing references that examined the first-tier appellate opinion (i.e., an opinion that contains an extended discussion of the cited opinion usually more than a printed page of text), we used a Poisson regression analysis since the values for this variable were not overdispersed.

their mean, we find that BAP opinions had a statistically significant higher number of citing references by other federal courts that (1) provided discussion of less than a paragraph but more than a brief reference to the cited opinion—approximately 3 more citing references of this type—and (2) provided discussion of more than a paragraph but less than a printed page of the opinion—approximately 0.39 more citing references of this type of this type.[159] On the other hand, we found no statistically significant relationship between the type of first-tier appellate court that issued the opinion and the number of citing references that either mentioned the opinion (i.e., contained a brief reference to the cited opinion, usually in a string citation) or examined the opinion (i.e., contained an extended discussion of the cited opinion usually more than a printed page of text).[160]

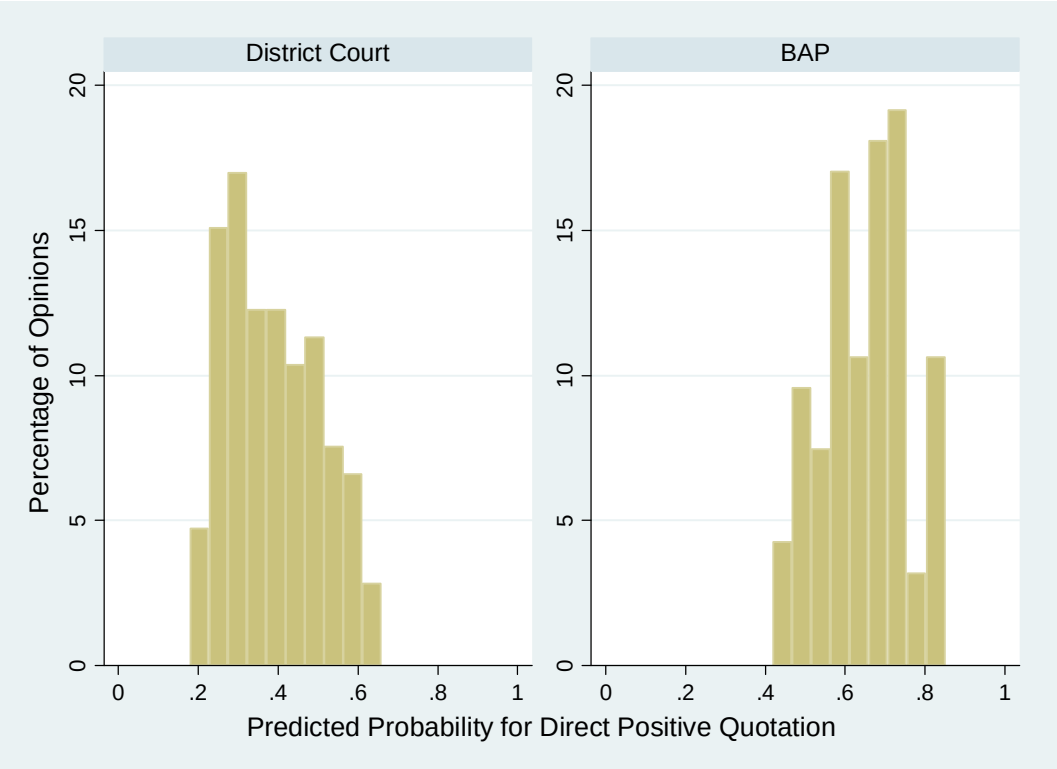
Including the same observations and independent variables from the regression models we used to predict the extent of citation and depth of treatment by citing references, we predict through binary logistic regression the tendency of first-tier appellate opinions to be directly quoted by federal courts that positively cite to those opinions. We find that, all other things being equal, BAP opinions had a statistically significant greater chance of being directly quoted than district court opinions.[161] Based on the predicted probabilities of direct quotation calculated from the actual values of the independent variables included in the model, BAP opinions, on average, had approximately a 65% chance of being directly quoted in contrast to 39% for district court opinions. While only 8.5% of the BAP opinions had less than a 50% chance of being directly quoted, four-fifths (80%) of the district court opinions had this predicted probability. We present the distribution of predicted probabilities for direct quotation in Figure 6 below.

[159] To predict the total number of positive citations that provided discussion of more than a paragraph but less than a printed page of the opinion, we initially fitted a negative binomial regression model that included all of the independent variables included in the negative binomial regression model used for the other types of citations (the full model). Although the Court variable was a statistically significant predictor in the full model, the model as a whole was not statistically significant (chi-squared = 15.41, df = 12, p = 0.2200). Accordingly, using a backward-selection stepwise regression, we fitted a partial model that only included the Court and Subject variables. This partial model was statistically significant (chi-squared = 9.67, df = 2, p = 0.0080), and the Court variable continued to be a statistically significant predictor (p = 0.008).

[160] For detailed results from this regression model, see *infra* Appendix tbl.9.

[161] None of the other independent variables was a statistically significant predictor of direct quotation of the first-tier appellate opinion by its citing reference. For detailed results from the regression model, see *infra* Appendix tbl.11.

FIGURE 6
PREDICTED PROBABILITIES FOR DIRECT QUOTATION OF
FIRST-TIER APPELLATE OPINIONS BY FEDERAL COURTS



Moreover, if we look to the extent of direct quotation of first-tier appellate opinions, a negative binomial regression model indicates that a statistically significant relationship existed between the type of first-tier appellate court to have issued the opinion and the extent to which other federal courts directly quoted the opinion.[162] Specifically, we find that, holding all other variables constant at their mean, a BAP opinion was predicted to have approximately 0.75 more citing references that directly quoted it than did a district court opinion.[163] These findings support Hypotheses 9A and 9B.

Finally, we find support for Hypothesis 10, even when controlling for other factors. A zero-truncated negative binomial regression model indicates that the type of first-tier appellate court to have issued the opinion influenced the immediacy with which it was cited. With all variables held at their mean for positively cited opinions, the shift from a district court opinion to a BAP opinion was predicted to decrease the amount of time within which the opinion was first cited by approximately 224 days. It would seem,

[162] The model incorporates the same independent variables and observations from the binary logistic regression model used to predict the tendency for direct quotation of first-tier appellate opinions.

[163] No statistically significant relationship existed between any of the other independent variables and the number of citations that directly quoted the first-tier appellate opinion. For detailed results from the regression model, see *infra* Appendix tbl.9.

therefore, that BAP opinions commanded the attention of other federal courts more quickly than did district court opinions.[164]

D. Interpretation of Results

Our inquiry into the perceived quality of appellate review has focused on two types of perception: (1) the manner in which courts of appeals, upon direct review, have perceived BAPs and district courts to perform their error-finding function; and (2) the manner in which other federal courts have signaled, through citation practices, their perception of the quality of appellate review provided by BAPs and district courts. We conducted our inquiry by testing a series of hypotheses predicting that BAPs, by virtue of their structural features, would be perceived to provide a quality of appellate review superior to that of their district court counterparts. In the end, our statistical analyses generated considerable evidence in support of our hypotheses. We repeatedly found a statistically significant, positive association between BAPs and various measures for the perception of the quality of appellate review. However, as statistical significance does not necessarily translate into substantive significance, we seek to give a richer account of the different ways in which our results buttress our claims.

First, we found for a limited subset of data that, even when controlling for other factors, the likelihood of full affirmance by the court of appeals increased from 61% for district courts to 83% for BAPs. Given that affirmance deference has been documented to be a major determinant of circuit court outcomes,[165] the statistically significant difference in affirmance rates takes on added significance. While legal procedural requirements generally require a circuit court to accord deference to a lower court's findings of fact, the legal standard most often applicable to a lower court's conclusions of law—*de novo* review—calls for no such deference. If circuit courts affirm BAPs at a statistically significant greater rate than district courts, notwithstanding the affirmance bias created by legal review standards, our results suggest that the circuit courts perceive the BAP to perform its error-finding function better than the district court.[166]

Second, we generally found statistically significant evidence that, all other things being equal, BAP opinions enjoyed higher numbers of positive citations by other federal courts; BAP opinions were cited in greater depth; and BAP opinions were cited with greater immediacy. We noted above that citations rates are most relevant and most informative in the absence of a stare decisis obligation.[167] Accordingly, we find that our

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[164] For detailed results from the regression model, see *infra* Appendix tbl.10.

[165] *See* CROSS, *supra* note 92, at 39-68.

[166] Although we did not find a similar statistically significant relationship for the observations in our second-tier database, our bivariate analysis nonetheless showed a distinct difference existed in the affirmance rates of BAP dispositions (82%) and district court dispositions (68%)—a difference that had a 9.2% probability of being the product of random chance alone. When one considers that a study conducted by the Federal Judicial Center (FJC) found that courts of appeals fully affirmed the judgments of district courts in bankruptcy appeals approximately 73% of the time and that the study further estimated that the affirmance rates for BAP judgments would be similar, *see* McKenna & Wiggins, *supra* note 62, at 630, we conclude that our evidence, and in particular our statistically significant evidence, contravenes the prior understanding of outcomes in the bankruptcy appeals system.

[167] *See supra* notes 103-104 and accompanying text.

results regarding the citation practices of courts of appeals and federal courts in other circuits merit particular attention.

At first blush, one might not consider our statistically significant finding that BAP opinions were predicted to receive approximately 0.2 more citations by courts of appeals to be substantively significant. Placed in its proper context, however, this finding takes on new light. As an initial matter, courts of appeals were incredibly parsimonious in their citing of first-tier appellate opinions. Specifically, 82% of the first-tier appellate opinions did not receive *any* circuit court citations, thus making any amount of citation by the courts of appeals impressive. Furthermore, we estimate pursuant to our regression analysis that the rate of citation over a five-year period to BAP opinions by courts of appeals was 2.33 times greater than that for district court opinions.[168] These findings confirm anecdotal evidence reported by the Federal Judicial Center that circuit judges perceive BAP opinions to be of a higher quality than district court opinions.[169] Thus, although the size of the statistically significant effect we witness with respect to circuit court citations appears small, we interpret it to have substantive significance. Finally, we uncovered statistically significant evidence to support our hypothesis that federal courts in other circuits would positively cite with greater frequency to BAP opinions—specifically, a rate predicted to be 1.45 times greater than that for district court opinions.[170] In light of "the dearth of binding precedent [on questions of substantive bankruptcy law] from the courts of appeals or the Supreme Court,"[171] one might interpret the intercircuit favoritism of BAP opinions over district court opinions as the next-best source of authority.

When we consider these findings in concert with the rest of our findings on citation practices, we conclude that there exists strong support for the notion that, in a variety of ways, other judicial actors in the bankruptcy appeals process perceive BAPs to provide a better quality of appellate review than district courts. These conclusions, then, provide strong validation to commentators who have theorized about the ideal attributes of appellate review. To the extent that courts in fact strive to resolve cases correctly, the findings suggest that BAPs in fact offer higher quality appellate review than do district courts. That conclusion, in turn, has important ramifications for policymakers. It would seem desirable for policymakers to introduce more multimember appellate tribunals staffed by judges with particular expertise in the subject matter of the appeals that the tribunals will hear.[172]

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[168] *See* infra Appendix tbl.8. We are 95% certain that this rate is in the range of 1.30 to 4.21. *See id.*

[169] *See* McKenna & Wiggins, *supra* note 62, at 678 ("There is anecdotal evidence that circuit judges find the BAP decisions they review better reasoned and the cases better prepared for review than decisions from the district courts, *and that this impression is independent of the likelihood of affirmance or reversal*." (emphasis added)).

[170] *See* infra Appendix tbl.8. We are 95% certain that this rate is in the range of 1.03 to 2.03. *See id.*

[171] *See* McKenna & Wiggins, *supra* note 62, at 628.

[172] *See, e.g., id.* at 634 ("[U]sers of the complex bankruptcy system probably want precedent not just settled, but settled right . . . . If early (and in the Ninth Circuit, not so early) impressions about the quality of work by the bankruptcy appellate panels hold up, the dual needs for binding authority and substantive correctness . . . argue for some sort of a dual or hybrid system involving bankruptcy appellate panels in some form.").

It is important to emphasize again that those conclusions clearly result only if courts in fact strive to reach correct resolution of cases and issues. And that is a question on which our data do not, and cannot shed light. It may be the case that, partly as a result of theoreticians' writings, courts favor BAPs over district courts not because they truly conclude that BAPs are correct more often, but rather because they simply *believe* (without truly examining) that BAPs are correct, which in turn inclines them simply to affirm the conclusions of BAPs. If so, the lesson for policymakers is murkier.

CONCLUSION

In this Article, we have shown, as a general matter, that federal courts, in different ways, have expressed a general preference for the quality of appellate review afforded by BAPs as opposed to district courts. On the hardly implausible assumption that courts in fact strive to resolve cases and issues correctly, this finding tends to validate theoreticians' claims about the ideal attributes of appellate review, since BAPs, more so than district courts, tend to feature those attributes. Upon the same assumption, the finding also should prompt policymakers to introduce more appellate tribunals with these attributes—specifically multimember panels whose members enjoy an expertise in the types of matters likely to fill up the docket of the tribunals.

We believe that future research in the area will offer even more insights. We intend to continue our exploration by refining our consideration of issues that come before courts. Perhaps, for example, some issues lend themselves more to solution by expert panels than do others. We also hope to consider the effect of having competition between appellate tribunals, such as exists between BAPs and district courts in the bankruptcy appeals context.

We emphasize that our findings do not speak to whether it is more desirable to have many such tribunals—as is the case with BAPs—or just one national tribunal—as is the case, for example, with the United States Court of Appeals for the Federal Circuit for patent appeals. That issue would seem to turn on how important it is to have an intermediate appellate tribunal announce legal rules with national uniformity. *See, e.g., id.* at 649 ("Structural nonuniformity may or may not detrimentally affect the functioning of the system and the practice of bankruptcy law. Although nonuniform interpretation of the bankruptcy laws is undesirable (at least beyond a certain healthy percolation), it is likely that intercircuit nonuniformity of structure affects few users of the system. Intracircuit nonuniformity, on the other hand, may raise costs somewhat for those litigants whose counsel must evaluate the likelihood of success under alternate routes by researching different lines of (nonbinding) authority.").

APPENDIX

Table 1: Sample of Appellate Bankruptcy Opinions

Panel A: District Court and Bankruptcy Appellate Panel (BAP) Opinions by Fiscal Year

Fiscal Year	*District Court Opinions*	*Column Percentage*	*BAP Opinions*	*Column Percentage*
1998	56	34.57	34	32.08
1999	53	32.72	44	41.51
2000	53	32.72	28	26.42
Total	162	100.00	106	100.00

Source: First-Tier Database

Panel B: District Court and Bankruptcy Appellate Opinions by Circuit

Circuit	*District Court*	*Column Percentage*	*BAP*	*Column Percentage*	*Total*	*Column Percentage*
First	7	4.32	10	9.43	17	6.34
Second	32	19.75	5	4.72	37	13.81
Third	26	16.05	0	0.00	26	9.70
Fourth	9	5.56	0	0.00	9	3.36
Fifth	14	8.64	0	0.00	14	5.22
Sixth	16	9.88	11	10.38	27	10.07
Seventh	23	14.20	0	0.00	23	8.58
Eighth	2	1.23	22	20.75	24	8.96
Ninth	14	8.64	31	29.25	45	16.79
Tenth	7	4.32	27	25.47	34	12.69
Eleventh	12	7.41	0	0.00	12	4.48
District of Columbia	0	0.00	0	0.00	0	0.00
Total	162	100.0	106	100.00	268	100.00

Source: First-Tier Database

Panel C: Court of Appeals Opinions by Fiscal Year and First-Tier Court Reviewed

Fiscal Year	*Reviewing District Court*	*Column Percentage*	*Reviewing BAP*	*Column Percentage*
1998	42	30.66	13	39.39
1999	44	32.12	9	27.27
2000	51	37.23	11	33.33
Total	137	100.00	33	100.00

Source: Second-Tier Database

Panel D: Court of Appeals Opinions by Circuit and First-Tier Appellate Court Reviewed

Circuit	*District Court*	*Column Percentage*	*BAP*	*Column Percentage*	*Total*	*Column Percentage*
First	3	2.19	3	9.09	6	3.53
Second	14	10.22	2	6.06	16	9.41
Third	7	5.11	0	0.00	7	4.12
Fourth	8	5.84	0	0.00	8	4.71
Fifth	23	16.79	0	0.00	23	13.53
Sixth	15	10.95	2	6.06	17	10.00
Seventh	16	11.68	0	0.00	16	9.41
Eighth	10	7.30	2	6.06	12	7.06
Ninth	26	18.98	23	69.70	49	28.82
Tenth	8	5.84	1	3.03	9	5.29
Eleventh	6	4.38	0	0.00	6	3.53
District of Columbia	0	0.00	0	0.00	0	0.00
Total	137	100.00	33	100.00	170	100.00

Source: Second-Tier Database

Table 2: Frequency of Dispositions Rendered on Appeal

Panel A: First-Tier Dispositions

Disposition	*Frequency*	*Percentage*
Negative	78	29.10
Hybrid	22	8.21
Positive	168	62.69
Total	268	100.00

Source: First-Tier Database

Panel B: Second-Tier Dispositions

Disposition	*Frequency*	*Percentage*
Negative	33	19.41
Hybrid	17	10.00
Positive	120	70.59
Total	170	100.00

Source: Second-Tier Database

Table 3: Data for First-Tier Appellate Bankruptcy Opinions with Positive Citing References

Panel A: Frequency of Positive Citation to First-Tier Appellate Opinions

Number of Citations	*Frequency*	*Percentage*
1	45	22.28
2	35	17.33
3	24	11.88
4	17	8.42
5	18	8.91
≥ 6	63	31.18
Total	202	100.00

Source: First-Tier Database

Panel B: Distribution of Positive Citations to First-Tier Appellate Opinions

N	*25%*	*Median*	*75%*	*Mean*
202	1	2	5	4

Source: First-Tier Database

Table 4: Court of Appeals Disposition by First-Tier Appellate Court

Panel A: Second-Tier Database

	Court of Appeals Disposition			
First-Tier Court	*Negative*	*Hybrid*	*Positive*	**Total**
BAP	2	4	27	33
	(6.06)	(12.12)	(81.82)	(100.00)
District Court	31	13	93	137
	(22.63)	(9.49)	(67.88)	(100.00)
Total	33	17	120	170
	(19.41)	(10.00)	(70.59)	(100.00)

Note: Row percentages are reported in parentheses. The p-value from a two-sided Fisher test is 0.092.

Panel B: First-Tier Database

	Court of Appeals Disposition			
First-Tier Court	*Negative*	*Hybrid*	*Positive*	**Total**
BAP	3	2	22	27
	(11.11)	(7.41)	(81.48)	(100.00)
District Court	18	1	31	50
	(36.00)	(2.00)	(62.00)	(100.00)
Total	21	3	53	77
	(27.27)	(3.90)	(68.83)	(100.00)

Note: Row percentages are reported in parentheses. The p-value from a two-sided Fisher test is 0.029.

Table 5: Citing Reference Data

Panel A: Federal Court Positive Citing Reference by Type of First-Tier Appellate Opinion

	Positive Citing Reference by Federal Court		
First-Tier Appellate Opinion Type	*No*	*Yes*	**Total**
BAP	10 (9.43)	96 (90.57)	106 (100.00)
District Court	56 (34.57)	106 (65.43)	162 (100.00)
Total	66 (24.63)	202 (75.37)	268 (100.00)

Source: First-Tier Database
Note: Row percentages are reported in parentheses. The p-value from a chi-square test with one degree of freedom is less than 0.0001.

Panel B: Citing Reference Data by Type of Citing Court for Positively Cited First-Tier Bankruptcy Appellate Opinions

	Citing References		
***Citing Court**: All Federal Courts*	*Median*	*Mean*	*N*
BAP Opinions	6.00	7.27	94
District Court Opinions	2.00	3.25	106
t-test of difference in means: t = 6.5107 (p < 0.0001)*** Wilcoxon rank-sum test: z = 6.257 (p < 0.0001)***			
***Citing Court**: Court of Appeals*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.45	94
District Court Opinions	0.00	0.19	106
t-test of difference in means: t = 2.7414 (p = 0.0067)** Wilcoxon rank-sum test: z = 2.560 (p = 0.0105)*			
***Citing Court**: Bankruptcy Appellate Panel*	*Median*	*Mean*	*N*
BAP Opinions	1.00	2.01	94
District Court Opinions	0.00	0.15	106
t-test of difference in means: t = 9.7270 (p < 0.0001)*** Wilcoxon rank-sum test: z = 9.368 (p < 0.0001)***			

***Citing Court**: District Court*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.57	94
District Court Opinions	1.00	0.99	106
t-test of difference in means: t = -2.0821 (p = 0.0386)* Wilcoxon rank-sum test: z = -3.194 (p = 0.0014)**			

***Citing Court**: Bankruptcy Court*	*Median*	*Mean*	*N*
BAP Opinions	3.00	4.23	94
District Court Opinions	1.00	1.92	106
t-test of difference in means: t = 5.2142 (p < 0.0001)*** Wilcoxon rank-sum test: z = 4.593 (p < 0.0001)***			

***Citing Court**: Federal Courts from Other Circuits*	*Median*	*Mean*	*N*
BAP Opinions	1.50	2.52	94
District Court Opinions	1.00	1.50	106
t-test of difference in means: t = 3.0581 (p = 0.0025)** Wilcoxon rank-sum test: z = 3.337 (p = 0.0008)***			

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Panel C: Citing Reference Data by Depth of Treatment for Positively Cited First-Tier Bankruptcy Appellate Opinions

	Citing References		
***Depth of Treatment**: Mentioned*	*Median*	*Mean*	*N*
BAP Opinions	1.00	1.09	94
District Court Opinions	0.00	0.73	106
t-test of difference in means: t = 1.8837 (p = 0.0611) Wilcoxon rank-sum test: z = 2.288 (p = 0.0221)*			
***Depth of Treatment**: Cited*	*Median*	*Mean*	*N*
BAP Opinions	4.50	5.22	94
District Court Opinions	1.00	1.94	106
t-test of difference in means: t = 7.3435 (p < 0.0001)*** Wilcoxon rank-sum test: z = 6.941 (p < 0.0001)***			
***Depth of Treatment**: Discussed*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.89	94
District Court Opinions	0.00	0.48	106
t-test of difference in means: t = 2.8311 (p = 0.0051)** Wilcoxon rank-sum test: z = 2.349 (p = 0.0188)*			
***Depth of Treatment**: Examined*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.05	94
District Court Opinions	0.00	0.09	106
t-test of difference in means: t = -1.0285 (p = 0.3050) Wilcoxon rank-sum test: z = -0.889 (p = 0.3741)			

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Panel D: Federal Court Positive Quoting References by Type of First-Tier Appellate Opinion

	Positive Quoting Reference by Federal Court		
First-Tier Appellate Opinion Type	*No*	*Yes*	**Total**
BAP	33 (35.11)	61 (64.89)	94 (100.00)
District Court	65 (61.32)	41 (38.68)	106 (100.00)
Total	98 (49.00)	102 (51.00)	200 (100.00)

Note: Row percentages are reported in parentheses. The p-value from a chi-square test with one degree of freedom is less than 0.0001.

Panel E: Citing Reference Data for Positively Quoted First-Tier Bankruptcy Appellate Opinions

	Citing References		
First-Tier Appellate Opinion Type	*Median*	*Mean*	*N*
BAP Opinions	1.00	1.43	94
District Court Opinions	0.00	0.58	106
t-test of difference in means: t = 4.4839 (p < 0.0001)*** Wilcoxon rank-sum test: z = 4.473 (p < 0.0001)***			

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Panel F: Immediacy Data for Positively Quoted First-Tier Bankruptcy Appellate Opinions

	Number of Days		
First-Tier Appellate Opinion Type	*Median*	*Mean*	*N*
BAP Opinions	177	306	94
District Court Opinions	387	530	106
t-test of difference in means: t = -3.9754 (p = 0.0001)*** Wilcoxon rank-sum test: z = -4.089 (p < 0.0001)***			

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Table 6: Ordinal Logistic Regression Model of Court of Appeals Disposition of Appeals from First-Tier Court

Variable	Odds Ratio	95% Confidence Interval
Court	5.465*	(1.266, 23.594)
Published	0.601	(0.142, 2.534)
Appellant	2.139	(0.379, 12.081)
Appellee	1.681	(0.377, 7.493)
Chapter 7	8.008**	(1.977, 32.440)
Debtor Type	2.545	(0.461, 14.055)
Dispute Type	1.074	(0.249, 4.633)
Subject	0.296	(0.071, 1.236)
FY 1998	1.050	(0.236, 4.675)
FY 1999	1.054	(0.240, 4.624)
N	77	
Log likelihood	-46.943	
Pseudo R^2	0.174	

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. We conducted a likelihood-ratio test of proportionality of odds across response categories to verify that our model did not violate the proportional odds assumption. A likelihood-ratio chi-square value of 8.24 ($p = 0.6050$) indicated that no violation occurred.

Table 7: Binary Logistic Regression Model of Positive Citation by a Federal Court to First-Tier Appellate Opinion

Variable	Odds Ratio	95% Confidence Interval
Court	3.445**	(1.515, 7.836)
Disposition—Narrowly Defined	1.459	(0.724, 2.942)
Published	6.810***	(3.391, 13.673)
Appellant	0.868	(0.361, 2.086)
Appellee	1.278	(0.524, 3.118)
Chapter 7	1.335	(0.644, 2.765)
Debtor Type	1.278	(0.644, 2.765)
Dispute Type	2.881*	(1.148, 7.231)
Subject	3.392**	(1.379, 8.346)
Subsequent Appeal	0.937	(0.450, 1.951)
FY 1998	0.745	(0.336, 1.653)
FY 1999	1.072	(0.469, 2.452)
N	268	
Log likelihood	-116.625	
Pseudo R^2	0.220	

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Table 8: Regression Analyses of Number of Positive Federal Court Citing References to Positively-Cited First-Tier Appellate Bankruptcy Opinions (by Type of Federal Court)

Variable	All Federal Court Citations[a]	Bankruptcy Court Citations[b]	District Court Citations[c]	BAP Citations[b]	Court of Appeals Citations[d]	Intercircuit Citations[b]
Court	2.538*** (1.836, 3.509)	2.072*** (1.509, 2.845)	0.628* (0.410, 0.962)	9.702*** (5.462, 17.231)	2.336** (1.297, 4.206)	1.447* (1.030, 2.031)
Disposition	0.995 (0.732, 1.352)	0.985 (0.726, 1.337)		1.088 (0.738, 1.605)	0.873 (0.517, 1.473)	1.000 (0.716, 1.397)
Published	1.838** (1.128, 2.994)	1.563 (0.968, 2.526)		4.276 (0.985, 18.560)	3.524 (0.820, 15.141)	1.552** (0.502)
Appellant	1.020 (0.685, 1.519)	1.023 (0.686, 1.527)		0.925 (0.573, 1.493)	1.381 (0.614, 3.104)	4.814*** (2.443, 9.488)
Appellee	1.005 (0.681, 1.519)	1.096 (0.740, 1.623)		0.470** (0.275, 0.802)	2.306* (1.101, 4.830)	1.055 (0.681, 1.633)
Chapter 7	1.395* (1.011, 1.924)	1.386* (1.010, 1.904)		1.330 (0.873, 2.026)	1.629 (0.901, 2.948)	1.112 (0.783, 1.581)
Debtor Type	1.349 (0.893, 2.040)	1.279 (0.845, 1.936)	1.485 (0.953, 2.316)	0.678 (0.369, 1.245)	2.498* (1.174, 5.312)	1.251 (0.801, 1.953)
Dispute Type	0.817 (0.550, 1.212)	0.796 (0.538, 1.178)		1.452 (0.871, 2.418)	0.678 (0.326, 1.413)	0.930 (0.614, 1.408)
Subject	1.435 (0.971, 2.121)	1.160 (0.783, 1.720)	1.492 (0.976, 2.280)	1.870* (1.125, 3.107)	1.341 (0.634, 2.838)	1.202 (0.797, 1.814)
Subsequent Appeal	1.092 (0.795, 1.501)	1.063 (0.777, 1.455)		1.169 (0.789, 1.731)	0.949 (0.536, 1.682)	1.127 (0.805, 1.579)
FY 1998	1.134 (0.778, 1.651)	0.845 (0.584, 1.223)	1.687* (0.999, 2.847)	1.657* (1.018, 2.687)	0.700 (0.376, 1.302)	0.194 (0.606, 1.378)
FY 1999	1.004 (0.711, 1.418)	0.926 (0.659, 1.301)	1.324 (0.789, 2.223)	1.237 (0.799, 1.915)	0.447* (0.240, 0.832)	0.867 (0.595, 1.263)
N	200	200	200	200	200	200
Pseudo R^2	0.063	0.050	0.034	0.242	0.124	0.053

Source: First-Tier Database

Note: Incidence rate ratios presented with 95% confidence intervals in parentheses; ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

[a] Zero-truncated negative binomial regression model.

[b] Negative binomial regression model.

[c] We have fitted a negative binomial regression model that does not include all of the independent variables in the table for the reasons set forth in *supra* note 156.

[d] Poisson regression model.

Table 9: Regression Analyses of Number of Positive Federal Court Citing References to Positively-Cited First-Tier Appellate Bankruptcy Opinions (by Depth of Treatment)

Variable	Cited[a]	Discussed[b]	Quoted[a]
Court	2.525*** (1.922, 3.317)	1.798** (1.164, 2.779)	2.338*** (1.527, 3.580)
Disposition	1.023 (0.789, 1.325)		0.828 (0.561, 1.222)
Published	1.521 (0.997, 2.321)		1.535 (0.771, 3.056)
Appellant	1.127 (0.809, 1.569)		1.288 (0.761, 2.179)
Appellee	1.021 (0.735, 1.420)		1.373 (0.817, 2.307)
Chapter 7	1.352* (1.027, 1.779)		1.302 (0.853, 1.988)
Debtor Type	1.305 (0.922, 1.847)		1.508 (0.881, 2.580)
Dispute Type	0.853 (0.608, 1.197)		0.913 (0.549, 1.517)
Subject	1.174 (0.839, 1.643)	1.397 (0.882, 2.213)	1.059 (0.645, 1.741)
Subsequent Appeal	0.915 (0.699, 1.197)		0.676 (0.438, 1.043)
FY 1998	1.101 (0.804, 1.506)		1.450 (0.885, 2.374)
FY 1999	0.969 (0.725, 1.296)		1.366 (0.862, 2.163)
N	200	200	200
Pseudo R^2	0.076	0.021	0.060

Source: First-Tier Database

Note: Incidence rate ratios presented with 95% confidence intervals in parentheses; ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. We have only presented the results from those regression analyses in which the Court variable was a statistically significant predictor.

[a] Negative binomial regression model.

[b] We have fitted a negative binomial regression model that does not include all of the independent variables in the table for the reasons set forth in *supra* note 159.

Table 10: Zero-Truncated Negative Binomial Regression Model of Number of Days for First Positive Federal Court Citing Reference to Positively-Cited First-Tier Appellate Bankruptcy Opinions

Variable	Incidence Rate Ratio	95% Confidence Interval
Court	0.565***	(0.423, 0.753)
Disposition—Narrowly Defined	0.913	(0.698, 1.194)
Published	0.922	(0.631, 1.345)
Appellant	1.116	(0.781, 1.595)
Appellee	1.097	(0.761, 1.582)
Chapter 7	0.767	(0.579, 1.016)
Debtor Type	1.125	(0.784, 1.615)
Dispute Type	0.836	(0.596, 1.174)
Subject	0.670*	(0.480, 0.937)
Subsequent Appeal	0.681*	(0.507, 0.914)
FY 1998	0.860	(0.607, 1.220)
FY 1999	0.927	(0.676, 1.272)
N	200	
Pseudo R^2	0.013	

Source: First-Tier Database

Note: Incidence rate ratios presented with 95% confidence intervals in parentheses; ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Table 11: Binary Logistic Regression Model of Direct Quotation of Positively-Cited First-Tier Appellate Opinion by Positive Citing Federal Courts

Variable	Odds Ratio	95% Confidence Interval
Court	2.727**	(1.393, 5.339)
Disposition—Narrowly Defined	0.563	(0.297, 1.067)
Published	1.142	(0.455, 2.868)
Appellant	1.079	(0.473, 2.461)
Appellee	1.173	(0.514, 2.681)
Chapter 7	1.083	(0.555, 2.112)
Debtor Type	0.769	(0.339, 1.748)
Dispute Type	0.861	(0.381, 1.946)
Subject	1.050	(0.474, 2.328)
Subsequent Appeal	0.702	(0.360, 1.370)
FY 1998	1.079	(0.501, 2.323)
FY 1999	2.007	(0.964, 4.178)
N	200	
Log likelihood	-126.033	
Pseudo R^2	0.091	

Source: First-Tier Database
Note: ***$p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

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