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

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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 also 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 Paper, 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. This is because the existing structure 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

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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 regional federal 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 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.

The Paper proceeds as follows. 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, there is an argument that the

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

collegial nature of multimember appellate panels contributes to reflective decisionmaking and thus to the quality of appellate review.[2]

A second factor that contributes positively to appellate review is expertise of the appellate decisionmaking in the subject matter of the appeal.[3] Thus, for example, Congress created the United States Court of Appeals for the Federal Circuit with an eye to creating an appellate body with the expertise to deal effectively with the complex area of patent law.[4]

Third, courts and commentators identify general "lawfinding ability"—as distinct from expertise in particular areas of law—as a virtue for appellate review.[5] While the Supreme Court has characterized the presence of multijudge panels as "[p]erhaps most important" in assessing lawfinding ability,[6] 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;[7] (ii) the judges resolve legal issues once the factual record is fully developed;[8] and (iii) the attorneys may focus on the legal issues in question without the distraction of trial advocacy.[9]

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.[10]

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[2] *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).

[3] *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?* (SSRN working paper # 943369).

[4] *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).

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

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

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

[8] *Id.* at 232.

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

[10] *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."). [check]: *But cf.* Pauline T. Kim, *Lower Court Discretion*, N.Y.U. L. REV. (forthcoming 2006) (arguing that the common

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.[11] 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.[12] Further, vertical stare decisis binds inferior courts generally to follow governing precedents issued by superior courts within the hierarchy.[13]

It is true that court systems need not have the features of appellate hierarchy and stare decisis to function, and indeed to function well.[14] 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.[15] Nonetheless, whether it is

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principal-agent model for analyzing lower court efforts to fulfill appellate court mandates ignores the allocation of discretion to lower courts).

[11] *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).

[12] 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).

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 ("[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." (footnotes omitted)); Kornhauser, *supra* note [check], 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 [check] and accompanying text.

[13] *See, e.g.*, Kornhauser, *supra* note [check], 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 [check], at 111 ("[C]ourts generally issue written decisions that, when published, have precedential effect on future rulings involving different parties.").

[14] 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 AND ROBERT S. SUMMERS, eds., 1997); Caminker, *supra* note [check], at 826; Kornhauser, *supra* note [check], at 1608. For an exposition, and critique, of the necessity and desirability of stare decisis, see Caminker, *supra* note [check].

[15] *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 [check], at 828-34 (arguing that the constitutional case for the binding

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,[16] these standard rules of precedent presumably increase the quality 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.[17] 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.[18]

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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 [check] (arguing that some applications of stare decisis may implicate due process concerns).

[16] *See* Kornhauser, *supra* note [check], 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).

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* note [check], 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.

[17] *See* Kornhauser, *supra* note [check], 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)). *See also 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).

[18] *See* Kornhauser, *supra* note [check], at 1622-24; Caminker, *supra* note [check], 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 [check], 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 [check], 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 [check], 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 [check], at 105 (contrasting consistency, soundness, and coherence).

A fifth factor that many commentators identify as an ingredient of judicial quality is judicial independence.[19] 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,[20] and accordingly vested Article III judges with presumptive life tenure and the guarantee of no reduction in salary.[21]

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 so-called "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 Paper, 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 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

[19] *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*, USC Law Legal Studies Paper No. C06-1 ("There is some evidence that judicial independence is associated with economic growth, but the evidence is mixed and causation is unclear.").

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

[21] U.S. CONST., art. III, § 1.

performing appellate function at the first tier of review and develop a series of hypotheses to test the theory.

A. *The Bankruptcy Appellate Process*

The evolution of bankruptcy judicial structure to its current form is complicated. A review of the history reveals at least one tension: creating distinct bankruptcy courts staffed by judges with an expertise in bankruptcy law, yet withholding Article III status from those courts.

The precursor to the current Bankruptcy Code—the Bankruptcy Act of 1898—called for bankruptcy cases to be administered by so-called "bankruptcy referees."[22] Under rules of bankruptcy procedure promulgated by the Supreme Court in 1973, these referees were redesignated as "bankruptcy judges."[23] 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."[24] Moreover, some Article III judges continued to refer to bankruptcy judges as "referees" in spite of the statutory change.[25]

With the enactment of the Bankruptcy Code in 1978, Congress introduced the first major reformation of federal bankruptcy law in 80 years. While there were proposals to vest bankruptcy judges with Article III status,[26] Congress ultimately rejected that notion, at least in part with the support of current and former Article III judges.[27] 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.[28]

The Supreme Court rejected the 1978 Act's jurisdictional structure in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[29] 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

[22] For discussion of the appointment and role of bankruptcy referees, see, for example, Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 61-62 (1997).

[23] FED. R. BANKR. P. 901(7), 411 U.S. 995, 1092 (1973).

[24] 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).

[25] Posner, *supra* note [check], at 61 & n.25.

[26] *See* Countryman, *supra* note [check], at 7-8.

[27] *See id.* at 8-9; Posner, *supra* note [check], 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."). For a political economic analysis of the 1978 Act's treatment of bankruptcy judges, see Posner, *supra* note [check], at 74-94.

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

[29] 458 U.S. 50 (1982).

bankruptcy judges Article III status.[30] 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,[31] as "unit[s]" of the district courts.[32] Thus, parties technically 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.[33] District courts in turn have implemented "standing orders" that refer in the first instance bankruptcy cases to the bankruptcy courts.[34]

In determining the scope of the bankruptcy judge's authority to resolve a dispute within a bankruptcy case,[35] it is necessary under the Act 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.[37] 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.[38]

[30] *See* Countryman, *supra* note [check], at 31.

[31] 28 U.S.C. § 152(a)(1).

[32] 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.").

[33] 28 U.S.C. § 157(a).

[34] 9 AM. JUR. 2d (Bankruptcy) § 731; Bussel, *supra* note [check], at 1066 & n.12.

[35] Disputes in bankruptcy cases generally assume one of two forms: (1) an adversary proceeding or (2) a contested matter. The Federal Rules of Bankruptcy Procedure explains that

> the following are adversary proceedings:
>
> **(1)** a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;
>
> **(2)** a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);
>
> **(3)** a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a co-owner in property;
>
> **(4)** a proceeding to object to or revoke a discharge;
>
> **(5)** a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
>
> **(6)** a proceeding to determine the dischargeability of a debt;
>
> **(7)** a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
>
> **(8)** a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
>
> **(9)** a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
>
> **(10)** a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452.

FED. R. BANKR. P. 7001. Disputes between parties that are not adversary proceedings are called "contested matters." *See* FED. R. BANKR. P. 9014.

[37] 28 U.S.C. § 157(c)(1).

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

Core proceedings, on the other hand, are those that, in effect, lie at the heart of a bankruptcy case,[39] and that bankruptcy judges are empowered to resolve definitively, in the first instance, with appellate review to follow.[40] 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.[41] BAPs are now constituted—and have been constituted since 1996—in the First, Sixth, Eighth, Ninth, and Tenth Circuits.[42] For a circuit BAP to be

[39] 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) explains that core proceedings

> include, but are not limited to—
>
> **(Q)** matters concerning the administration of the estate;
> **(R)** allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> **(S)** counterclaims by the estate against persons filing claims against the estate;
> **(T)** orders in respect to obtaining credit;
> **(U)** orders to turn over property of the estate;
> **(V)** proceedings to determine, avoid, or recover preferences;
> **(W)** motions to terminate, annul, or modify the automatic stay;
> **(X)** proceedings to determine, avoid, or recover fraudulent conveyances;
> **(Y)** determinations as to the dischargeability of particular debts;
> **(Z)** objections to discharges;
> **(AA)** determinations of the validity, extent, or priority of liens;
> **(BB)** confirmations of plans;
> **(CC)** orders approving the use or lease of property, including the use of cash collateral;
> **(DD)** orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
> **(EE)** other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
> **(FF)** recognition of foreign proceedings and other matters under chapter 15 of title 11.

Id. § 157(b)(2).

[40] 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 [check], at 1067, 1100.

[41] 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.

[42] 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

> **(A)** there are insufficient judicial resources available in the circuit; or
> **(B)** establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

28 U.S.C. § 158(b)(1). 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*

empowered to hear appeals from bankruptcy courts in a given district, a majority of district judges in the district must vote to authorize it.[43] 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).[44] Appeals from BAP rulings lie to the court of appeals.[45] 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.[46] The judgment of the district court may then be appealed to the appropriate federal court of appeals,[47] with discretionary Supreme Court review the remaining appellate step.

In short, then, parties in some circuits have an option between two possible appellate paths.[48] This option is presented in Figure 1.

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.

[43] 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 [check], at 1660. These facts, presumably, played a large role in the ultimate decision to disband the Second Circuit BAP.

[44] 28 U.S.C. § 158(c).

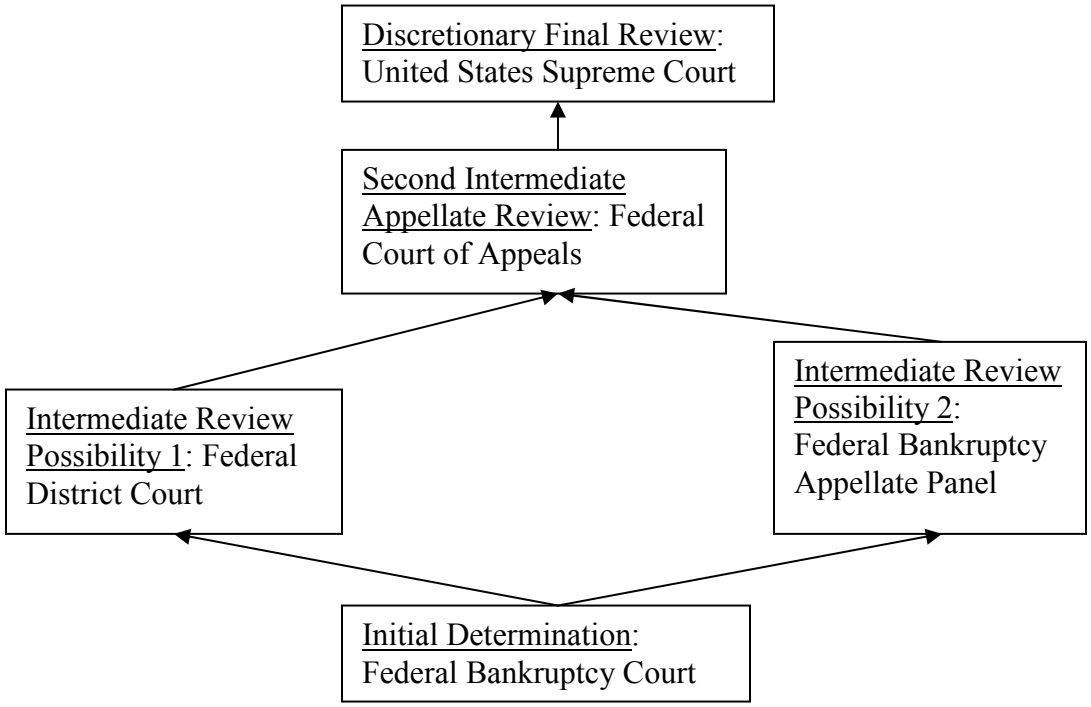
[45] 28 U.S.C. § 158(d).

[46] 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.").

[47] 28 U.S.C. § 158(d).

[48] *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 [check], at 1644 ("BAPs . . . shake up the normal hierarchical structure dear to many attorneys' hearts.").

FIGURE 1: Bankruptcy Appellate Structure for Core Proceedings



It seems, a priori, that the bankruptcy appellate panels have more of the features of quality appellate review in greater amounts than do the federal district courts. This is summarized in Table 1.

TABLE 1: Structure of District Courts and Bankruptcy Appellate Panels

Appellate Actor:	Panel or Single Judge?	Bankruptcy Expertise?	Other Lawfinding Ability?	Traditional Appellate Hierarchy?	Article III Status?
District Judge	Single judge.	Unlikely.	No.	No.	Yes.
Bankruptcy Appellate Panel	Panel of three judges.	Yes.	No.	Yes.	No.

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.[49] By contrast, bankruptcy appeals to district courts are heard by a single district judge.

[49] Mabey, *supra* note [check], 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.").

Second, the bankruptcy judges who comprise bankruptcy appellate panels are (by virtue of their appointment as bankruptcy judges) presumably experts in bankruptcy law.[50] Thus, they are well suited to resolve legal issues that might arise in core bankruptcy proceedings. District judges, by contrast, are not generally versed in bankruptcy law.[51]

The third factor—"other" lawfinding ability[52]—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.[53]

Fourth, bankruptcy appellate panels conform to traditional notions of appellate review: Their rulings are generally seen to be binding on future bankruptcy appellate

[50] *See, e.g.*, Mabey, *supra* note [check], 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 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).

[51] One might argue, however, 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. Still, however valuable that experience might be, it would seem to pale in comparison to the expertise of bankruptcy judges in the field. *See* Chemerinsky, *supra* note [check], at 128 ("[T]he BAP is desirable because it allows specialist bankruptcy judges to replace nonspecialist federal judges.").

[52] 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* [check].

[53] 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. *Cf.* 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."). 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 [check], at 122 (footnote omitted).

panels drawn from the same circuit.[54] Further, at least one BAP has held that its decisions are binding on all bankruptcy courts within that circuit[55] (even if the bankruptcy courts themselves do not share this view[56]). In contrast, one district judge is generally seen to be under no obligation to follow the ruling of another district judge—

[54] BAPs in three circuits—the Eighth, Ninth, and Tenth—have reached this conclusion. *E.g.*, In re Luedtke, 215 B.R. 390, 391 (8th Cir. BAP 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 (9th Cir. BAP 1995) ("We will not overrule our prior rulings unless a Ninth Circuit Court of Appeals decision, Supreme Court decision or subsequent legislation has undermined those rulings."); Salomon N. Am. v. Knupfer (In re Wind N' Wave), 328 B.R. 176, 181 (9th Cir. BAP 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 (9th Cir. BAP 2006) (same); In re Blagg, 223 B.R. 795, 804 (10th Cir. BAP 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 (10th Cir. BAP 1998) (same), *aff'd*, 194 F.3d 1320 (10th Cir. 1999).

[55] Philadelphia Life Ins. Co. v. Proudfoot (In re Proudfoot), 144 B.R. 876, 879 (9th Cir. BAP 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 (9th Cir. BAP 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).

[56] *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) *with* 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). *See also 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"); Chemerinsky, *supra* note [check], 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 [check], at 494 n.23 (arguing that BAPs function as district courts, and accordingly cannot issue binding opinions).

even one in the same district—whether on matters of bankruptcy or otherwise.[57] And bankruptcy courts have held that they are not bound at least by the holding of a single district judge on a multijudge district court.[58] As such, BAPs comport more with the standard model of appellate hierarchy than do district courts sitting on appeal.[59]

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[57] *See supra* note [check] and accompanying text. *But see* Bussel, *supra* note [check], at 1095-1096 (footnotes omitted):

> Even where review lies in a district court 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.

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.").

[58] *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 [check], 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 [check], 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.").

[59] Our point here is simply that BAPs seem to fit more cleanly into the standard hierarchical appellate model than to 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) ("It should be recognized that the creation of a bankruptcy appellate panel service can help to establish a dependable body of case law." (statement of Sen. Heflin)). 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 also 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.").

Commentators are divided over whether BAP decisions bind bankruptcy courts. *Compare, e.g.*, Bussel, *supra* note [check] at 1098 (arguing that bankruptcy courts should consider both BAP and district court decisions as binding precedent); Chemerinsky, *supra* note [check], at 128 ("From [a] functional perspective, I think that BAP decisions clearly should be binding on bankruptcy courts."); Camp, *supra* note [check], at 1676-84 (arguing that BAPs should bind both bankruptcy and district courts) *with* Trujillo, *supra* note [check], 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 [check], 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 [check], 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 [check], 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 [check], at 772 (arguing that the absence of stare decisis across circuits is justified on the ground that "an agreement to follow an other 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 [check], 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 [check] 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

It is only the final criterion—the question of judicial independence—on which district judges outperform bankruptcy appellate panels. District judges enjoy Article III status, while the bankruptcy judges who comprise bankruptcy appellate panels do not.[60]

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

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to textual or plain meaning methods of interpretation in bankruptcy cases, particularly in the decisions of the circuit courts of 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* note [check] 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 [check], at 1091. *Cf.* Chemerinsky, *supra* note [check], 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 [check], 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.").

[60] *See supra* [check].

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.

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.

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.[61] 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.[62] The law generally calls upon appellate courts to examine legal issues de novo, without deference to the reasoning or conclusion of the court below.[63] Still, if the appellate court ultimately reaches the same conclusion as the court below, then it is accurate to say that, judging from the

[61] *But cf.* Polk & Petheridge, *supra* note [check], at 1127-28 (noting the limits of "result-oriented statistical studies"). *See also* Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A New Window into the Behavior of Judges?*, SSRN working paper # 913663 (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). [check] [not likely the case here]

[62] *See supra* [check].

[63] *See, e.g.*, Concannon v. Imperial Cap. Bank (In re Concannon), 338 B.R. 90, 93 (9th Cir. BAP 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 (6th Cir. BAP 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).

appellate court's decision, the appellate court perceived the lower court's conclusion to be correct.[64]

It is possible that, notwithstanding the legal standard to the contrary, appellate courts do not always reexamine legal issues de novo in practice. Perhaps, for example, courts of appeals are (sub rosa, of course, since the law dictates otherwise) inclined to rely upon the expertise of BAPs 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.

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.[65] 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.[66] Article III judges—and, for that matter, bankruptcy appellate panels—may also wish to avoid the "ignominy" of reversal by a higher court.[67]

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 reasoning of lower court decisions, assuming at least that the reappointment or elevation process does not demand political decisionmaking.[68] 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

[64] 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 (sub rosa, of course, since the law dictates otherwise) inclined to rely upon the expertise of BAPs 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.

[65] *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); and to Posner's book on The Federal Courts [check]; *supra* note [check].

[66] *See* Nash, *Prejudging Judges*, *supra* note [check], at 2197. Mention also possibility of impeachment [check]. 2197-98 (impeachment, public chastisement, overruling).

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

[68] 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).

first-level intermediate bankruptcy appellate decision—whether a panel of a court of appeals or the Supreme Court—should adopt the reasoning of the lower court if it deems that reasoning 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 three hypotheses.

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

Hypothesis 2: BAPs more likely will find error upon appeal than district courts for those appeals in which the court of appeals subsequently determines that the bankruptcy court committed error in its disposition.

Hypothesis 3: BAPs more likely will *not* find error upon appeal than district courts for those appeals in which the court of appeals subsequently determines that the bankruptcy court did *not* commit error in its disposition.

Yet another way to test empirically the ***perceived*** correctness of an appellate opinion would be the propensity of other courts within the bankruptcy judicial structure to cite the opinion issued by the first-tier appellate court. Accordingly, we offer the following additional hypotheses.

Hypothesis 4: Courts of appeals more likely will cite to the opinions issued on appeal by BAPs than to those issued by district courts.

Hypothesis 5: Bankruptcy courts more likely will cite to the opinions issued on appeal by BAPs than to those issued by district courts.

Hypothesis 6: BAPs more likely will cite to the opinions issued on appeal by BAPs than will district courts.

Hypothesis 7: District courts more likely will cite to the opinions issued on appeal by district courts than will BAPs.

Hypothesis 8: Courts in other circuits more likely will cite the opinions issued on appeal by BAPs than to those issued by district courts.

Notably, in Hypotheses 4, 5, 6, and 8, 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 Article III status—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. Accordingly, we have developed Hypotheses 5 and 6.

Hypothesis 4 is to similar effect. It seems to us that courts of appeals would be more impressed with the factors favoring BAP interpretations than the lack of Article III status. 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 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.

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.[69] Further, district judges lie on the same level as BAPs on the bankruptcy appellate hierarchy.[70] 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 7.

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. Our goal is to shift the dialogue away from generalization and abstraction and thereby generate a more concrete understanding of how differences in appellate structure affect the quality of appellate review.

[69] *See supra* [check].
[70] *See supra* Fig. 1.

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.

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 weak 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 do lend 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, Variables of Interest, and General Characteristics of the Data*

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.[71] 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,[72] 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

[71] Reported case law documents are those released for publication in West Federal Reporters.
[72] Coverage for the FBKR-CS database begins with the year 1789.

panel," but not "court of appeals."[73] The second query mirrored the first query with the exception that field restriction limited query retrieval to decisions and orders whose preliminary field only contained the term "court of appeals."[74] 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. We then begin 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.[75] 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 Paper.) 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.[76]

[73] 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 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).

[74] 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).

[75] See supra note [check].

[76] 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 Judgeship Act to address the *Marathon* decision, the First Circuit Judicial Council chose not to reauthorize

Pursuant to these selection procedures, our first-tier database consists of 268 observations drawn from 264 opinions,[77] four of which produced a second observation. Our second-tier database consists of 170 observations drawn from 165 opinions,[78] 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%). As demonstrated by Table 2, the distributions of opinions by circuit in each database roughly approximate one another.

Table 2: Sample of Appellate Bankruptcy Opinions

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

Fiscal Year	*District Court Opinions*	*BAP Opinions*
1998	56	34
1999	53	44
2000	53	28
Total	162	106

Source: First-Tier Database

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.

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

[78] Similar to the first-tier database, see supra note 77, our selection criteria reduced the random sample of documents relating to the second-tier database by approximately 17%.

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*	*Reviewing BAP*
1998	42	13
1999	44	9
2000	51	11
Total	137	33

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

2. Variables

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 appellate court both at the first-tier and second-tier levels of review and (2) 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.

We define the disposition rendered on appeal broadly and narrowly. First, we coded 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. Alternatively, we coded the disposition rendered on appeal by asking whether the reviewing court determined that error had occurred in the disposition rendered below. By

doing so, we operationalized the disposition rendered on appeal as one of two outcomes, either "error" or "no error." This collapsed 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. Table 3 presents the frequency of the dispositions rendered on appeal in first-tier and second-tier level opinions.

Table 3: Frequency of Dispositions Rendered on Appeal

Panel A: Frequency of First-Tier Dispositions (Broadly Defined)

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: Frequency of First-Tier Dispositions (Narrowly Defined)

Disposition	*Frequency*	*Percentage*
Error	100	37.31
No Error	168	62.69
Total	268	100.00

Source: First-Tier Database

Panel C: Frequency of Second-Tier Dispositions (Broadly Defined)

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

Source: Second-Tier Database

Panel B: Frequency of Second-Tier Dispositions (Narrowly Defined)

Disposition	*Frequency*	*Percentage*
Error	50	29.41
No Error	120	70.59
Total	268	100.00

Source: Second-Tier Database

In order to document citation data to the opinions in our databases, we relied upon KeyCite, West's citation research service. 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.

We documented for each first-tier level opinion all 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, slightly more than three-quarters (approximately 76%) of the first-tier appellate opinions had citing references. For both positive and negative citations, we further documented (1) citations by type of court, (2) citations by depth of treatment, (3) citations directly quoting the cited opinion, and (4) intercircuit and intracircuit citations. Table 4 presents our citation data for those first-tier appellate opinions with citing references.

Table 4: Data for First-Tier Appellate Bankruptcy Opinions with Citing References

Panel A: Frequency of Citation to Opinions

Number of Citations	*Frequency*	*Percentage*
1	44	21.57
2	32	15.69
3	21	10.29
4	19	9.31
5	19	9.31
≥ 6	69	33.82
Total	204	100.00

Source: First-Tier Database

Panel B: Distribution of Positive and Negative Citations

	N	*25%*	*Median*	*75%*	*Mean*
Positive	204	2	3	7	5.36
Negative	204	0	0	0	0.44

Source: First-Tier Database

The major explanatory variables (i.e., independent variables) in the databases include (1) whether the BAP or district court heard the appeal, (2) the federal judicial district in which the bankruptcy court whose disposition was appealed is located, (3) the federal regional circuit in which the first-tier appellate court is located, (4) whether the appellant was the debtor in whose case the appeal arose, (5) whether the appellee was the debtor in whose case the appeal arose, (6) the Bankruptcy Code chapter of the case in which the appeal arose, (7) whether the bankruptcy case in which the appeal arose was filed by an individual or a business entity, (8) the type of dispute proceeding within which the appeal arose (i.e., an adversary proceeding or contested matter), and (9) 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 disposition rendered by the first-tier appellate court in those disputes where the court of appeals subsequently determined that the bankruptcy court committed error, (3) the disposition rendered by the first-tier appellate court in those disputes where the court of appeals subsequently determined that the bankruptcy court did *not* commit error, and (4) the number of citations to the opinion

issued by the first-tier appellate court. 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. As a general matter, we do not find that a statistically significant relationship exists between the first-tier appellate court and the subsequent disposition rendered on appeal (both broadly and narrowly defined) by the court of appeals. The one exception is for the sample of first-tier opinions for which there was a subsequent appeal to the court of appeals and for which we broadly define the disposition rendered by the court of appeals (i.e., negative, hybrid, or positive). Table 5 sets forth these results.

Table 5: Court of Appeals Disposition by First-Tier Appellate Court

Panel A: Disposition (Broadly Defined)

(1) 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 Fisher's exact test is 0.092.

(2) 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)	(62.0)	(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 Fisher's exact test is 0.029, which is significant at the 5% level.

Panel B: Disposition (Narrowly Defined)

(1) Second-Tier Database

	Court of Appeals Disposition		
First-Tier Court	*Error by First-Tier Court*	*No Error by First-Tier Court*	**Total**
BAP	6	27	33
	(18.18)	(81.48)	(100.00)
District Court	44	93	137
	(32.12)	(67.88)	(100.00)
Total	50	120	170
	(29.41)	(70.59)	(100.00)

Note: Row percentages are reported in parentheses. The p-value from Fisher's exact test is 0.139.

(2) First-Tier Database

	Court of Appeals Disposition		
First-Tier Court	*Error by First-Tier Court*	*No Error by First-Tier Court*	**Total**
BAP	5	22	27
	(18.52)	(81.48)	(100.00)
District Court	19	31	50
	(38.00)	(62.00)	(100.00)
Total	24	53	77
	(31.17)	(68.83)	(100.00)

Note: Row percentages are reported in parentheses. The p-value from Fisher's exact test is 0.121.

Hypotheses 2 and 3 essentially posit that a district court's dispositions are more likely to be deemed false positives and false negatives than will a BAP's dispositions—that is, the district court will be more likely to find error where none occurred (false positive) and to miss error where it in fact occurred (false negative). Our data do not bear out these hypotheses. Surprisingly, in the second-tier database, both the BAP and the district court mirrored one another in the frequency with which they rendered false positive and false negative dispositions.[79] For matters ultimately deemed by the court of appeals to have been correctly adjudicated by the bankruptcy court, the BAP rendered a false positive in approximately 16% of its dispositions while the district court did so approximately 14% of the time. For matters ultimately deemed by the court of appeals to have involved error by the bankruptcy court, both the BAP and the district court rendered false negatives in approximately 93% of their respective dispositions. In the first-tier database, 77 observations involved subsequent appeal to the court of appeals. Even though the BAP committed false positives and false negatives with less frequency than

[79] One hundred-sixteen (116) observations involved dispositions where the court of appeals concluded that the bankruptcy court did not commit error, while the remaining 54 observations involved dispositions where the court of appeals concluded that the bankruptcy court did commit error.

the district court in these observations—false positives approximately 10% of the time as compared to 19% of the time by the district court and false negatives approximately a third of the time (33%) as compared to half of the time (50%) by the district court—the difference did not prove to be statistically significant.[80]

Hypotheses 4 through 8 generally predict that, with the exception of district courts, other federal courts will cite to BAP opinions more than they 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. Among those observations in the first-tier database that have positive citing references, we find strong differences between the BAP and district court samples that are statistically significant at both the mean and the median—with the exception of citing references by the district court, where the difference is statistically insignificant at the mean. The data indicate that, at both the mean and median, BAP opinions have a statistically significantly greater number of citing references by courts of appeals, BAPs and bankruptcy courts than do district court opinions. On the other hand, at the median, district court opinions have a statistically significantly greater number of citing references by other district courts than do BAP opinions. Finally, the data show that, at both the mean and median, courts in other circuits cite more to BAP opinions than to district court opinions and that the difference is highly statistically significant. Table 6 illustrates these comparisons.

[80] For the group of observations tracking false positives, the p-value from Fisher's exact test is 0.436. For the group of observations tracking false negatives, the p-value from Fisher's exact test is 0.657.

Table 6: Citing Reference Data for Positively Cited First-Tier Bankruptcy Appellate Opinions

Panel A: Citing Reference Data by Type of Citing Court

	Citing References		
***Citing Court**: Court of Appeals*	*Median*	*Mean*	*n*
BAP Opinions	0.00	0.49	96
District Court Opinions	0.00	0.19	106
t-test of difference in means: t = 3.0171 (p = 0.0029)** Wilcoxon rank-sum test: z = 2.802 (p = 0.0051)**			
***Citing Court**: Bankruptcy Appellate Panel*	*Median*	*Mean*	*n*
BAP Opinions	1.50	2.05	96
District Court Opinions	0.00	0.15	106
t-test of difference in means: t = 9.9163 (p < 0.0001)*** Wilcoxon rank-sum test: z = 9.476 (p < 0.0001)***			
***Citing Court**: District Court*	*Median*	*Mean*	*n*
BAP Opinions	0.00	0.67	96
District Court Opinions	1.00	0.99	106
t-test of difference in means: t = -1.56 (p = 0.1195) Wilcoxon rank-sum test: z = -2.866 (p = 0.0042)**			
***Citing Court**: Bankruptcy Court*	*Median*	*Mean*	*n*
BAP Opinions	3.00	4.60	96
District Court Opinions	1.00	1.92	106
t-test of difference in means: t = 5.2264 (p < 0.0001)*** Wilcoxon rank-sum test: z = 4.780 (p < 0.0001)***			

Source: First-Tier Database
Note: ***significant at the 0.1% level, **significant at the 1% level, *significant at the 5% level

Panel B: Intercircuit Citing Reference Data

***Citing Courts**: All Courts from Other Circuits*	*Median*	*Mean*	*n*
BAP Opinions	2.00	2.85	96
District Court Opinions	1.00	1.51	106

Source: First-Tier Database
Note: t-test of difference in means (t = 3.1811, p =0.0017) significant at the 1% level and Wilcoxon rank sum test (z = 3.538, p = 0.0004) significant at the 0.1% level.

In summary, based on the dispositions rendered by courts of appeals on subsequent review of BAP and district court opinions, we find limited and virtually nonexistent 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.

C. *Regression Analyses*

We now seek to provide a more comprehensive analysis of the perceived quality of appellate review by constructing an ordinal logistic regression model and a multiple linear regression model 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.

For the 77 observations in the first-tier database that involved subsequent appeal to the court of appeals, we used an ordinal logistic model to predict the disposition rendered by the court of appeals (negative = 0, hybrid =1, positive = 2) based on the following independent variables: (1) whether the first-tier appellate court was the BAP (coded 0) or district court (coded 1) (Court), (2) whether the first-tier appellate court had published its disposition (Published), (3) whether the only party to appeal to the first-tier level court was the debtor (Appellant), (4) whether the debtor was the only party appearing as an appellee at the first-tier level of review (Appellee), (5) whether the appeal arose in the context of a Chapter 7 case (Chapter 7), (6) whether the bankruptcy case in which the appeal arose was that of an individual or business entity (Debtor Type), (7) whether the appeal arose within the context of an adversary proceeding or contested matter (Dispute Type), and (8) whether the subject of the appeal was a matter relating to discharge (Discharge). Both the Court and Chapter 7 variables were significant predictors of the disposition rendered on subsequent appeal from the first-tier appellate court to the court of appeals, while the other variables were not associated with the court of appeals' disposition.[81]

According to the model, the predicted probability of the court of appeals *rejecting* the conclusion reached by the first-tier appellate court was 9.5% if the first-tier court was the BAP and was 33.5% if it was the district court. On the other hand, the predicted probability of the court of appeals *upholding* the conclusion reached by the first-tier court was 88% if the first-tier appellate court was the BAP and was 61% if it was the district court.[82] These findings support our hypothesis that the courts of appeals will more likely uphold the dispositions rendered by BAPs than those rendered by district courts.

[81] A likelihood ratio chi-square of 16.50 with a p-value of 0.0357 confirmed that our model as a whole is statistically significant.

[82] For the middle category of disposition (i.e., hybrid), the predicted probabilities for the BAP and the district court were respectively 2% and 5%.

However, 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 first-tier court type and disposition rendered by the court of appeals, we are cautions about reading too much into these findings. Table 7 reports the results of our ordinal logistic model.

Table 7: Ordinal Logistic Model of Court of Appeals Disposition of Appeals from First-Tier Court

Variable	Coefficient	(Std. Error)
Court	-1.568*	(0.727)
Published	-0.585	(0.737)
Appellant	0.869	(0.894)
Appellee	0.509	(0.753)
Chapter 7	1.946**	(0.665)
Debtor Type	0.896	(0.817)
Dispute Type	0.631	(0.662)
Discharge	-0.097	(0.835)
N	77	
Log likelihood	-48.566	
Pseudo R^2	0.145	

Source: First-Tier Database
Note: **significant at the 1% level, *significant at the 5% level. 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 0.76 ($p = 0.993$) indicated that no violation occurred.

For the 202 observations in the first-tier database where a federal court positively cited to the opinion issued by the BAP or district court, we used a multiple linear regression model to predict the number of positive citations by citing court type based on the following independent variables: (1) Court, (2) the disposition rendered by the first-tier appellate court (narrowly defined with "error" coded as 1 and "no error" coded as 2) (Disposition), (3) Published, (4) Appellant, (5) Appellee, (6) Chapter 7, (7) Debtor Type, (8) Dispute Type, (9) Discharge, and (10) whether the first-tier court's disposition was subsequently appealed to the court of appeals (Subsequent History). We ran the regression model four times to account for the four different types of citing federal courts (i.e., bankruptcy court, district court, BAP, and court of appeals).

For every run of the model, except for the run that sought to predict the number of positive citations by district courts, the regression indicated a statistically significant relationship between the type of first-tier appellate court that issued the opinion and the number of citing references by bankruptcy courts, BAPs, and courts of appeals to the first-tier opinion. The model predicted that, when controlling for other factors, BAP

opinions are cited more often than are district court opinions. Specifically, BAP opinions receive approximately (1) 2.5 more bankruptcy court citations, (2) 1.8 more BAP citations, and (3) 0.27 more court of appeals citations. These results support Hypotheses 4, 5, 6, and 8. No statistically significant relationship existed, however, between the type of first tier appellate court that issued the opinion and the number of citing references by district courts to the opinion.[83] Thus our regression model failed to provide evidence supporting Hypothesis 7, although the absence of a statistically significant relationship here—as compared to hypotheses 4, 5, 6, and 8—suggests that the distinction we drew here was not inappropriate.

Nonetheless, the rest of the evidence suggests that other actors within the bankruptcy judicial system perceive the BAPs to provide a better quality of appellate review than district courts. We present our results in Table 8 below.

Table 8: Multiple Linear Regression Model of Number of Positive Citing References by Federal Courts to First-Tier Appellate Bankruptcy Opinions

Variable	Bankruptcy Court Citations	District Court Citations	BAP Citations	Court of Appeals Citations
Court	-2.457 (0.580)***	0.273 (0.238)	-1.803 (0.217)***	-0.274 (0.113)**
Disposition	0.309 (0.544)	0.270 (0.223)	0.187 (0.203)	0.008 (0.106)
Published	0.969 (0.778)	0.115 (0.319)	0.284 (0.290)	0.187 (0.152)
Appellant	-0.186 (0.745)	0.117 (0.306)	0.299 (0.278)	0.028 (0.145)
Appellee	0.615 (0.740)	0.340 (0.303)	-0.278 (0.276)	0.263 (0.144)
Chapter 7	0.674 (0.573)	0.064 (0.235)	0.190 (0.214)	0.055 (0.111)
Debtor Type	0.554 (0.712)	0.454 (0.292)	-0.181 (0.266)	0.185 (0.139)
Dispute Type	-1.099 (0.616)	-0.486 (0.253)	-0.212 (0.230)	-0.207 (0.120)
Discharge	0.672 (0.758)	-0.336 (0.311)	-0.411 (0.283)	0.052 (0.149)
Subsequent History	0.398 (0.574)	-0.078 (0.236)	0.228 (0.214)	0.005 (0.112)
Constant	3.862 (1.61)	0.662 (0.661)	1.718 (0.601)	0.419 (0.314)
N	202	202	202	202
Adjusted R^2	0.144	0.001	0.345	0.057

Source: First-Tier Database
Note: Regression coefficients presented with standard errors in parentheses; ***significant at the 0.1% level, **significant at the 1% level.

IV. CONCLUSION [forthcoming]

[83] Furthermore, no statistically significant relationship existed between any of the other independent variables and the number of citations, regardless of the type of court making the citing reference.