SPECIALIZATION IN JUDICIAL DECISION MAKING: COMPARING BANKRUPTCY PANELS AND FEDERAL DISTRICT COURT JUDGES

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ABSTRACT

Federal courts created under Article III are generalist courts. In contrast, specialized federal courts are usually created under Article I. Article I and Article III courts thus have different institutional structures and purposes. One of the most prominent of the Article I specialized courts is the United States Bankruptcy Court, the primary court for the adjudication of bankruptcy filings. Losing litigants in the bankruptcy court have a choice of appealing to either the generalist federal district court or a specialized bankruptcy appellate panel ("BAP") made up of three Article I bankruptcy judges from that particular circuit. In this Article, we examine the different rulings made in these appeals to determine if there are any systematic differences between the specialized and generalist courts. One argument used to deny specialized courts Article III status is that specialized courts, but not generalist courts, are subject to "capture" by interests who regularly litigate in these courts. We find no evidence of capture, but we do find that the BAP and district court judges both use ideological preferences in decision making. Specifically, we find that

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conservative judges on both courts do not necessarily favor creditors over debtors, but favor business interests over the interests of individuals, regardless of creditor or debtor status.

INTRODUCTION

Federal courts are largely generalist courts. Despite the need and call for specialization in many other areas of human endeavor, including the practice of law and much of the United States government, specialization has been used somewhat reluctantly in the United States federal courts system.[1] In the United States, it has been somewhat of an ideal that judges are generalists, at least to the extent of subject matter expertise. This is particularly the case in the federal court system. Article III creates only one court, the United States Supreme Court, and all other courts are creations of the Congress of the United States.[2] Most of these courts, including the basic federal trial court, the federal district court, and the basic first level appeals court, the federal court of appeals, are generalist courts created under Article III, and are thus given full judicial independence with lifetime tenure and no diminution of salary.[3]

Congress has rarely used its Article III power to create specialized subject matter courts.[4] Instead, most of the specialized courts created by Congress have come through its Article I legislative power.[5] Judges who serve on Article I courts sit for a fixed, as opposed to a lifetime term, lack a salary guarantee, often have a lesser salary than federal district court judges, and thus operate without considerable judicial independence.[6] One of the most prominent of these Article I courts is the United States Bankruptcy Court, the primary court for the adjudication of bankruptcy filings.

This is largely the result of a legal culture that, in the words of one scholar, "celebrates the generalist judge . . . . [and has] a deep-seated aversion to specialization."[7] Federal judges have been among the most prominent supporters of generalization. One federal judge argued that "I like the fact that federal

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[1] *See* John B. Pelgram, *Should the U.S. Court of International Trade be Given Patent Jurisdiction Concurrent with that of the District Courts?*, 32 HOUS. L. REV. 67, 71 (1995) (noting considerable resistance to specialized courts in the United States).

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

[3] *Id.* ("The Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[4] *See* Ellen E. Sward, *Legislative Courts, Article III, And The Seventh Amendment*, 77 N.C. L. REV. 1037, 1054–55 (1998) (stating Article III specialized subject matter courts are not unknown but are less practical for Congress to create).

[5] *See id.* at 1055–56.

[6] *Id.*

[7] Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 520–21 (2008).

judges are generalists . . . . I have resisted mightily any suggestion that the federal courts become specialized in any particular area."[8] Numerous other sources and quotes can be found citing federal judicial support for generalization and disdain for specialization.[9]

While judges and others cite various reasons for resistance to specialization, some common themes emerge. One is that specialized courts, because of their expertise, would end necessary debate on an issue prior to a Supreme Court ruling that normally would have time to digest conflicting federal circuit opinions. A national appellate tax court, for example, would foreclose any generalist circuit from offering an opinion in that area and stop the Supreme Court from having the benefit of the conflict of ideas and opinions.[10]

The second is the idea of capture.[11] The idea is that a specialized court would favor one side or the other in the specialized tribunal proceedings. This idea is premised on a crude notion of judicial background determining voting behavior. That is, prior to their appointment, judges specialized in a particular area of law, and their rulings would reflect their background.[12] For example, tax court judges, coming mostly from the Internal Revenue Service, would favor the Internal Revenue Service over the taxpayer. National Labor Relations Administrative law judges who represented labor or management prior to their appointment would favor labor or management, respectively. Bankruptcy

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[8] Howard Bashman, *20 Questions for Chief Judge Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit*, HOW APPEALING, Jan. 5, 2004, http://howappealing.law.com/20q/. *See also* Diane P. Wood, Speech, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1756 (1997) (arguing despite increasingly specialized world, "we need generalist judges more than ever for the United States federal courts.").

[9] *See, e.g.*, Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 779–80 (1983) (arguing specialization inevitably leads to monotony and thus difficult to maintain high quality federal appeals bench).

[10] *See* Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts Of Appeals*, 28 GA. L. REV. 913, 950 (1994) (arguing "a specialized appellate court in an area such as tax law will prematurely end the judicial debate on any issue with its first opinion.").

[11] *See, e.g.*, Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135, 136 (2005) (describing critics' claims that specialized courts would fall under influence of industry interests); Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, 47 POL. RES. Q. 693, 696 (1994) (suggesting United States Court of Customs and Patent Appeals judges were sympathetic to patent experts); Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217, 222 (1991) (stating railroad companies wanted specialized court in order to "gain a sympathetic forum"); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 341 (1991) (asserting "a court for a single industry or a single agency is in jeopardy of capture by its clientele").

[12] *But see* Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1282 (2009) (positing personal background and professional experience are factors in judicial decision making).

judges would be captured by either the debtor or the creditor, depending upon their prior experience.

It is this latter idea that we examine in this paper. Bankruptcy appellate procedure offers a unique opportunity to test the idea of capture because in several federal circuits, losing litigants in the bankruptcy court have a choice of appealing to either the generalist federal district court or a specialized bankruptcy appellate panel ("BAP"), made up of three bankruptcy judges from that particular circuit.[13] In this paper, we examine the different rulings made in these appeals to determine if there are any systematic differences and thus if there has been any "capture" by one side or the other of the specialized court as compared to the generalist court.

There has been a recent systematic examination of the ideology in bankruptcy decision making.[14] However, this examination sought to determine if ideology mattered at the generalist appellate court level. This is the first systematic examination of the impact of ideology and other factors in generalist and specialized courts.

I. THE UNITED STATES BANKRUPTCY COURT AND BANKRUPTCY APPELLATE PANELS

The authority of the federal government over bankruptcy matters is premised on the United States Constitution. Article I, section 8 enables Congress to enact "uniform Laws on the subject of Bankruptcies[.]"[15] Under this section, Congress passed the "Bankruptcy Code" in 1978 which, with numerous amendments, is the uniform law that governs bankruptcies in the United States. Congress also enacted legislation to create the United States bankruptcy courts under its Article I power.[16] Bankruptcy courts are established with jurisdiction in each federal judicial district in the United States.[17]

Bankruptcy courts have non-exclusive subject matter jurisdiction over bankruptcy matters. In theory, they share bankruptcy jurisdiction with United States district courts, although in practice they exercise almost exclusive jurisdiction, as most district courts will routinely "refer" bankruptcy matters

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[13] *See* 28 U.S.C. § 158(c)(1) (2012) (providing appellant may choose district court to hear appeal rather than 3-judge bankruptcy appellate panel).

[14] *See* Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 981–82 (2012) (reinforcing that though results of study are not ideal regarding ideological preference, systematic examination and analysis should continue).

[15] U.S. CONST. art. I, § 8, cl. 4.

[16] *See* 28 U.S.C. § 151 (providing bankruptcy judges in each district shall constitute bankruptcy court).

[17] *Id.*

filed in their courts to the bankruptcy court.[18] Since each bankruptcy court is arranged by judicial district, there are ninety-four bankruptcy courts in the United States, with several judges usually appointed to each bankruptcy court.[19] Bankruptcy procedure is governed by the Federal Rules of Bankruptcy Procedure.[20]

The Federal Judgeship Act of 1984 (the "Act")[21] sets forth the current process by which bankruptcy judges are selected. Unlike other federal judges, bankruptcy judges are appointed by the majority of judges sitting on the United States Courts of Appeals for the circuit in which the district is situated.[22] If a majority of judges from the requisite court of appeals cannot make such appointment, the chief judge for the circuit appoints the judges.[23] Furthermore, the Act provides that "[b]ankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution."[24] Nevertheless, bankruptcy courts are not courts established pursuant to Article III, but rather pursuant to Article I of the Constitution.[25] Additionally, bankruptcy judges serve for a term of 14 years.[26] After the end of the term, a bankruptcy judge may continue upon the approval of the judicial council of the circuit.[27] In theory, bankruptcy judges are appointed on merit, not politics.[28] Both of the circuits under study herein explicitly mention the merit-based selection process.

Bankruptcy filings are a significant part of the federal court system, and with recent economic difficulties, bankruptcy judges assume a more prominent position in the federal judicial system. For example, in 2007, approximately

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[18] *See* 28 U.S.C. §1334(a) & (b) (setting forth concurrent jurisdiction); E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 DRAKE L. REV. 3, 5 (1995) (explaining district courts have local rules to refer certain matters to bankruptcy courts).

[19] *See* 28 U.S.C. §§ 151 & 152(a)(1).

[20] *See* 28 U.S.C. § 2075.

[21] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 151, 98 Stat. 333, 336 (codified as amended at 28 U.S.C. § 151 et seq.).

[22] *See* 28 U.S.C. §§ 133(a), 152(a)(1) (stating district court judges are appointed by President, while bankruptcy judges in each district are appointed by United States Court of Appeals in circuit where district is located).

[23] 28 U.S.C. § 152(a)(3).

[24] 28 U.S.C. § 152(a)(1).

[25] *See* U.S. CONST. art. I, § 8, cl. 4.

[26] 28 U.S.C. § 152(a)(1).

[27] *Id.*

[28] *See* MALIA REDDICK & NATALIE KNOWLTON, THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES 1 (2013), *available at* http://iaals.du.edu/images/wygwam/documents/publications/A_Credit_to_the_Courts.pdf (discussing selection of bankruptcy judges based on merit).

800,000 bankruptcy cases were filed in the United States courts.[29] One year later, the number jumped to over 1,100,000 filings.[30] However, despite the large number of filings and potential importance of bankruptcy to the national economy, judges appointed to the bankruptcy court are given fixed terms, lower salaries than federal district court judges, and limited independence. For example, in 2005 bankruptcy judges were paid $149,132, as compared to the $162,100 paid to federal district court judges.[31] Additionally, the decisions of the judge are not, initially at least, appealed to the circuit court.[32]

Congress has set forth bankruptcy law in the United States Bankruptcy Code (the "Code"). The Code is organized into various chapters. Some of the most common chapters for filing of bankruptcy include chapters 7, 11, and 13. Chapters 7 and 13 are often filed by individuals, while chapter 11 is normally filed by businesses.[33] Furthermore, chapter 12 specifically provides relief for farmers and fishers.[34]

Chapter 7 is filed to liquidate the debtor's estate.[35] It is, in effect, a restart button, and is by far the most common filing in bankruptcy. Almost 67% of all bankruptcy filings in 2008 were chapter 7 filings.[36] Persons eligible to file under chapter 7 include individuals, partnerships, businesses, and corporations. An action can be commenced voluntarily by the debtor or involuntarily by a creditor.[37] Once the bankruptcy petition is filed, a trustee, a party appointed by the U.S. trustee or bankruptcy administrator, is usually appointed in such cases.[38] The trustee gathers the debtor's assets that are nonexempt from the bankruptcy estate, sells those assets, and uses the proceeds to satisfy the debts of

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[29] ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 31–32 (2007), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/front/JudicialBusinespdfversion.pdf.

[30] ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 25–26 (2008), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/front/JudicialBusinespdfversion.pdf.

[31] *See* BARBARA L. SCHWEMLE, CONG. RESEARCH SERV., 98-53 GOV, SALARIES OF FEDERAL OFFICIALS: A FACT SHEET, CRS-2 tbl.1 (2005) *available at* http://www.senate.gov/reference/resources/pdf/98-53.pdf.

[32] *See* 28 U.S.C. § 158(a).

[33] *See* Amy Y. Landry & Robert J. Landry, III, *Medical Bankruptcy Reform: A Fallacy of Composition*, 19 AM. BANKR. INST. L. REV. 151, 154 (2011); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1091 (1992).

[34] *See* Rowley v. Yarnall, 22 F.3d 190, 193 (8th Cir. 1994).

[35] *See In re* W.R. Grace & Co., 475 B.R. 34, 147 (D. Del. 2012), *aff'd In re* WR Grace & Co., 729 F.3d 332 (3d Cir. 2013) ("The purpose of Chapter 7 is to fairly distribute the debtor's assets among its creditors, and to give the debtor a fresh start through discharge in bankruptcy.").

[36] *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR, *supra* note 30, at 27.

[37] *See* 11 U.S.C. § 303(a) (2012) (providing creditor may commence involuntary chapter 7 against debtor).

[38] *See* 11 U.S.C. § 701(a)(1).

various creditors.[39] Furthermore, the Code provides exemption for certain property. Specifically, the Code permits states to exempt certain property from bankruptcy.[40] Some states allow debtors to choose between electing the federal and state exemptions, while other states elect to apply their exemption to debtors.[41] Once the proceeds from nonexempt assets are exhausted, certain debtors receive a discharge of the remaining debt.[42] Additionally, creditors are automatically stayed from collecting from the debtor once the petition is filed.[43] Nevertheless, partnerships and corporations are not eligible for discharge of debt pursuant to chapter 7.[44] Only individuals receive a discharge of debt under a chapter 7 bankruptcy.[45]

In contrast, one of the primary purposes of a chapter 13 bankruptcy is to structure a repayment plan of a debtor who earns a regular income.[46] It is the next most common filing option, with 32% of all filings in 2008.[47] Under chapter 13, a debtor repays creditors pursuant to a plan over a three to five year period.[48] One of the primary advantages of a bankruptcy pursuant to chapter 13 is the prevention of the foreclosure of the debtor's residence.[49] Individuals, including those who own an unincorporated business, can file under chapter 13.[50] Furthermore, as during a chapter 7 bankruptcy proceeding, most creditors are stayed from collecting from the debtor when that debtor files for bankruptcy.[51] Debts for debtors filing under chapter 13 also are subject to discharge.[52] However, some debts that are dischargeable under a chapter 13 plan are not dischargeable under chapter 7.[53]

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[39] *See* 11 U.S.C. § 704(a)(1) ("The trustee shall collect and reduce to money the property of the estate for which such trustee serves and close such estate as expeditiously as is compatible with the best interests of the parties in interest[.]").

[40] *See* 11 U.S.C. § 522.

[41] *See In re* Kane, 336 B.R. 477, 484 (Bankr. D. Nev. 2006).

[42] *See* 11 U.S.C. § 727.

[43] *See* 11 U.S.C. § 362.

[44] *See* 11 U.S.C. § 727(a)(1) (denying discharge in cases where debtor is not an individual).

[45] *Id.*

[46] Litton v. Wachovia Bank (*In re* Litton), 330 F.3d 636, 640 (4th Cir. 2003).

[47] *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR, *supra* note 30, at 98 tbl. F.2 (showing 362,762 chapter 13 filings of 1,117,771 total filings in 2008).

[48] *See* 11 U.S.C. § 1322(d) ("[T]he plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years.").

[49] *See* 11 U.S.C. § 1322(b) & (c) (allowing debtors to cure their mortgage defaults to avoid foreclosure).

[50] *See* 11 U.S.C. § 1304(a).

[51] *See* 11 U.S.C. § 362.

[52] *See* 11 U.S.C. § 1328.

[53] *See* Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990) (remarking on Congress's intent to secure broader discharge for debtors under chapter 13 than chapter 7 by extending some of § 523(a)'s exceptions to discharge to chapter 13 proceedings).

A chapter 11 bankruptcy is the third most common filing plan, although it represents just about one percent of all filings. It is primarily used to reorganize business entities, which usually consist of sole proprietorships, partnerships, or corporations. A chapter 11 plan can be filed voluntarily by the debtor or involuntarily by the debtor's creditors.[54] The plan usually provides for the reorganization of a business while providing a repayment plan for creditors. Unlike bankruptcies filed under chapters 7, 12, and 13, a trustee usually is not appointed under a chapter 11 case. However, the U.S. trustee plays a larger role by monitoring the debtor's business and facilitating meetings with creditors.[55] Like a bankruptcy filed pursuant to the aforementioned chapters, most creditors are also stayed from collecting from the debtor under chapter 11.[56] Additionally, certain debts of a debtor are subject to discharge according to the plan devised while in bankruptcy.[57]

There are several other plans permitted under the Code. For example, chapter 12 limits remedies to farmers and fishers, which may include an individual, corporation or partnership.[58] Under chapter 12, the debtor proposes a repayment plan to satisfy debts. The repayment plan is the same time period as with a chapter 13 plan: three to five years.[59] As with chapter 7 and 13 cases, a U.S. trustee appoints a standing trustee to administer the bankruptcy estate.[60] Stay provisions are similar to those filed pursuant to the aforementioned chapters.[61] Debtors are likewise discharged from certain remaining debts.[62] Other chapters include chapter 9, municipality bankruptcies,[63] and chapter 15, ancillary and cross-border cases.[64]

One intriguing aspect of bankruptcy is the initial appeal from the decision of the bankruptcy judge. Parties to a bankruptcy proceeding may appeal three categories of orders in bankruptcy: "final judgments, orders, and decrees," interlocutory orders increasing or decreasing the time for filing a plan for

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[54] *See* 11 U.S.C. § 301 (stating debtor can file chapter 11 voluntarily); 11 U.S.C. § 303 (stating chapter 11 can be filed involuntary by debtor's creditors).

[55] *See* 11 U.S.C. § 1104 (stating at any time after commencement of chapter 11 case, but before confirmation of plan, court shall order appointment of trustee to monitor debtor's business and facilitate creditors interests).

[56] *See* 11 U.S.C. § 362.

[57] *See* 11 U.S.C. § 1141.

[58] *See id.* at § 109(f) (limiting chapter 12 to family farmers or fishermen); 11 U.S.C. § 101(18) (defining "family farmer"); 11 U.S.C. § 101(19A) (defining "family fisherman").

[59] *See* 11 U.S.C. § 1222(c).

[60] *See* 11 U.S.C. § 1202(a).

[61] *See* 11 U.S.C. § 362.

[62] *See* 11 U.S.C. § 1228.

[63] *See* 11 U.S.C. § 109(c) (providing entity may be debtor under chapter 9 only if such entity is municipality).

[64] *See* 11 U.S.C. §§ 1501 (providing effective mechanisms for cases of cross-border insolvency).

reorganization under chapter 11, and a third category of interlocutory orders and decrees that may be appealed by leave of the court.[65]

Until 1978, the initial appeal would go to the district court in the district within which the bankruptcy court sat.[66] However, the Bankruptcy Reform Act of 1978 provided for the creation and establishment of bankruptcy appellate panels, which would be comprised of three bankruptcy judges from the same circuit.[67] The legislation was the result of a compromise between those who favored greater specialization and those who favored keeping ultimate control in the general Article III courts.[68] Each circuit was given the option of establishing BAPs, and initially only two circuits, the First and Ninth, established a BAP pursuant to the 1978 legislation.[69]

The Supreme Court's opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[70] was thought by many to invalidate the jurisdiction of the bankruptcy appellate panels, and following the decision, the First Circuit ended its use of the BAP.[71] The Ninth Circuit, however, continued the use of the BAP. It was the only Circuit to use it until the Bankruptcy Reform Act of 1994, which directed the judicial council of each circuit to establish a BAP, unless the council determined that the circuit had insufficient judicial resources or that the establishment of a BAP would result in undue delay or increased cost to the parties.[72] Following the 1994 Act, five circuits established BAPs—the First, Second, and Tenth Circuit BAPs began operating on July 1, 1996, and the Sixth and Eighth Circuit BAPs began operating on January 1, 1997.[73]

Within these circuits, appeals of bankruptcy court decisions can go either to the BAP panel comprised of specialized Article I judges, or an Article III

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[65] *See* 28 U.S.C. § 158(a) (2012) (explaining situations in which designated courts may exercise appellate jurisdiction over bankruptcy courts).

[66] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982).

[67] *See* 28 U.S.C. § 158(c)(1) (providing appellant may choose district court to hear appeal rather than 3-judge bankruptcy appellate panel).

[68] *See* Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 638–39 (2002) (explaining Bankruptcy Reform Act of 1978 allowed circuit courts discretion in either establishing bankruptcy appellate panels or using district courts for appeal).

[69] *See id.* at 640 (noting circuits other than the First and Ninth considered establishing BAPs, but ultimately declined to do so).

[70] 458 U.S. 50 (1982).

[71] *See* Judge Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 GEO. MASON L. REV. 1, 1 (1995) (stating First Circuit's termination of B.A.P. stemmed from Supreme Court's decision in *Northern Pipeline*).

[72] *See id.* at 2 (noting two exceptions to 1994 Act's mandate to establish BAP: 1) insufficient judicial resources or 2) undue delay or increased costs to parties).

[73] *See* Donald A. Brittenham Jr., Note, *The Pros and Cons Behind the First Circuit's Decision to Establish Bankruptcy Appellate Panels and the Growing Question of Whether the Panels Will Last*, 32 NEW ENG. L. REV. 215, 215, 231 (1997).

district court judge.[74] Thus, in these circuits we have a rare opportunity for a natural experiment to see if there are substantive differences in the decision making of Article I and Article III judges.

II. SPECIALIZED COURTS AND DECISION MAKING

Despite the aversion to specialized courts within the federal system, there are several examples of such courts, such as the United States Tax Court, the United States Court of International Trade, and of course, the United States Bankruptcy Court.[75] These specialized courts are created to deal with specific subject areas and often have a different institutional structure and constraints. The courts are created to handle complex, intricate, frequently litigated issues.[76] Generally, they have limited independence, compared to Article III courts. The judges sit for a fixed, not unlimited term, and the jurisdiction is limited to the specific issues within the area of expertise.[77]

Often these courts are created to deal with specialized governmental areas dominated by federal agencies. It is thought that the expertise of these courts will allow the judges to understand and deal with the complex issues raised by the agencies in the litigation.[78] Specialized courts in other areas (i.e., International Court of Trade, Patent Court, Court of Appeals for the Federal Circuit, United States Tax Court) and even administrative law judges behave as theoretically expected. The specialized courts are less deferential to agencies than the non-specialized federal courts of general jurisdiction.[79] These specialized courts have expertise in these areas of law and do not have to rely on agency interpretation. This expertise extends to their relationship with hierarchically superior courts. One scholar examining the Court of Customs and

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[74] *See* 28 U.S.C. § 158(c)(1) (2012) (providing appellant may choose district court to hear appeal rather than 3-judge bankruptcy appellate panel).

[75] *See* 26 U.S.C. § 7441 (2012) (establishing and explaining structure of United States Tax Court); 28 U.S.C. § 1581 (establishing and explaining structure of Court of International Trade); 28 U.S.C. § 157 (establishing and explaining structure of United States Bankruptcy Court).

[76] *See generally* Wendy L. Hansen, Renée J. Johnson & Isaac Unah, *Specialized Courts, Bureaucratic Agencies, and the Politics of U.S. Trade Policy*, 39 AM. J. POL. SCI. 529 (1995) (analyzing how practices and procedures of specialized courts impact United States politics).

[77] *See* Howard, *supra* note 11, at 136 (comparing district courts and tax courts).

[78] *See* Issac Unah, *Specialized Courts of Appeals' Review of Bureaucratic Action and the Politics of Protectionism*, 50 POL. RES. Q. 851, 858 (1997) (stating judicial expertise facilitates problem-solving of especially complex policy issues).

[79] *See* Hansen, et al., *supra* note 76, at 542 (concluding "judicial specialization does make a significant difference in judicial review"); Unah, *supra* note 78, at 858 (stating due to expertise in a particular area, "specialized court judges are able to make principled decisions that limit the strategic advantages of bureaucrats").

Patent Appeals found that the court was significantly less likely than the Courts of Appeals to rely on Supreme Court authority when making decisions.[80]

In bankruptcy litigation there is no specialized agency, although the state and federal governments often assert claims against the debtor. The alignment is usually that of creditors against the bankrupt debtor. Debtors are usually businesses or individuals seeking to erase or restructure their debt. Sometimes the government is involved as a creditor—often either the Internal Revenue Service or some state agency is seeking a tax payment that is generally not dischargeable in bankruptcy.[81] Other prominent creditors include banks seeking to foreclose a preferred mortgage, businesses seeking payment for goods or services rendered, or occasionally, individual creditors seeking payment for the provision of the same.[82]

Scholars have long acknowledged the importance of ideology in judicial decision making for the United States Supreme Court and for lower courts[83] to the extent that it is now a scholarly given.[84] The ability of a Supreme Court justice to use ideology is premised on judicial independence, with the guarantee of lifetime tenure and the lack of any realistic constraints.[85] Attitudes are premised on case facts.[86] For example, the presence or absence of a warrant or a search of a home or business is likely to trigger the ideological predisposition.[87]

Recently, literature on law and courts has extended this research to specialized courts. Several recent studies have shown that ideology, or policy preference, plays a role in decision making of lower level courts.[88] However,

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[80] *See* Baum, *supra* note 11, at 700 (studying behavior of Court of Customs and Patent Appeals over four decades).

[81] *See* 11 U.S.C. § 101(5), (10), (15) (2012) (including "governmental unit" under types of entities that may be creditors and have claims against debtor).

[82] *See id.* (defining creditor, entity, and claim).

[83] *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 65 (1993) [hereinafter THE ATTITUDINAL MODEL] (explaining "attitudinal model" theory, which holds Supreme Court decides cases in light of facts based on justices' ideologies); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002) [hereinafter THE ATTITUDINAL MODEL REVISITED] (reiterating and expanding upon attitudinal model); Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. OF POL. SCI. 123, 129 (2004) (finding ideology is consistent predictor of judicial voting behavior).

[84] C. K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS vii (1996) (exploring past scholarship about personal values and policy preferences influencing federal judges).

[85] *See* THE ATTITUDINAL MODEL, *supra* note 83, at 236 (highlighting reasons for judicial restraint). *See also* THE ATTITUDINAL MODEL REVISITED, *supra* note 83, at 19 (illustrating importance of judicial independence from other branches of government).

[86] *See* THE ATTITUDINAL MODEL, *supra* note 83, at 215 (explaining "case stimuli of facts are central to the decision making of all judges"); THE ATTITUDINAL MODEL REVISITED, *supra* note 83, at 312–313 (same).

[87] *See* THE ATTITUDINAL MODEL, *supra* note 83, at 215; THE ATTITUDINAL MODEL REVISITED, *supra* note 83, at 312–313.

[88] *See, e.g.*, Robert M. Howard, GETTING A POOR RETURN: COURTS, JUSTICE AND TAXES 94–95 (2009) (explaining federal trial court rulings reflect party leanings because nomination and confirmation are

given the presence of constraints that are not present at the Supreme Court level, decisions of lower courts, including specialized courts, are often a function of ideology and additional factors, such as institutional structure and local conditions. For example, studies of state supreme courts show how institutional structure and design influence decision making with elected judges or judges facing retention or reelection; those judges are less likely to vote their sincere preferences.[89] Giles and Walker in a seminal early study showed that district court judges were sensitive to socioeconomic influences.[90]

Bankruptcy litigation would seem to fit into ideological dimensions. In general, one would expect more liberal judges to be sympathetic to the claims of the debtor and more conservative judges to be sympathetic to the claims of creditors. This would be analogous to expecting liberal judges to favor criminal defendants and conservatives to favor the state. In the Spaeth coding of the United States Supreme Court database, decisions favoring the former are coded as liberal, while decisions favoring the latter are coded as conservative.

However, there are some caveats to this simple ideological alignment. Often one might have a business debtor aligned against an individual creditor or the government as a creditor aligned against either an individual or a business. Thus the simple dichotomy might be entwined with a more complex attitudinal situation. However, one would expect more conservative judges to favor business interests and more liberal judges to favor individuals.

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politicized); Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts*, 43 LAW & SOC'Y REV. 839, 858 (2009) (observing experts in specialized courts are "more ideological in their voting behavior in . . . technical area[s] of the law than are similarly situated nonexperts"); Howard, *supra* note 11, at 146 (explaining political ideologies enter lower and specialized court decision making, in particular when judges interpret complex law); Cole Donovan Taratoot, *Administrative Law Judge Decision Making In a Political Environment, 1991–2007*, at 204–05 (June 25, 2008) (unpublished Ph.D. dissertation, Georgia State University) (on file with Department of Political Science Digital Archive, Georgia State University) (concluding National Labor Relations Board administrative rulings influenced decision making of federal circuit courts of appeals). *But see* Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1820 (2006) (finding in empirical study "[j]ustices do not appear to be politically motivated in individual taxpayer cases").

[89] *See* Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 431 (1992) (concluding "in elected state supreme courts, justices who have preferences contrary to those of their constituents and who are ordinarily in the minority can be expected not to distinguish themselves from the rest of the court by dissenting on the limited types of issues important to the public"); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 57 (1990) (describing study that concluded that the "electoral incentive may produce unanimity on highly visible issues in elected state supreme courts").

[90] *See* Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 932 (1975) (explaining Southern judges' personal attitudes were "greatly activated" when ruling on cases calling for desegregation cases in their own community).

As shown by Segal and Spaeth, ideology is triggered by facts.[91] Some fact patterns in bankruptcy appellate litigation occur far more frequently than others. For example, banks and other creditors often argue that a priority lien or debt that they assert should be given preference over other debts. In addition, these creditors and government creditors often seek to lift the automatic stay on the debtor's property, which is enforced upon filing.[92] The stay prevents creditors from pursuing any action against the debtor.[93] Often entwined with these, or asserted separately, are allegations of debtor fraud.[94] The creditor asserts that the debtor is fraudulently hiding assets or has engaged in some other underhanded activity.

In addition, BAP judges are bankruptcy judges, and therefore sit for fixed terms.[95] While they are not appointed by the President, BAP judges are certainly dependent upon congressional legislation for their existence, salary, and even offices.[96] While expertise is undoubtedly a consideration in their creation, the failure to guarantee lifetime tenure or salary allows greater legislative control over outcomes, in comparison to the outcomes of a more general, lifetime tenured, independent Article III court.[97] Thus, one would expect BAP judges to follow congressional preferences more than district court judges.

III. HYPOTHESES

Given these basic facts, we can posit several hypotheses. First, given the research on specialized courts and ideological decision making and the division of debtors and creditors, we can offer Hypotheses 1 and 1a.

Hypothesis 1: More conservative judges on both the district courts and BAP will be more likely to rule in favor of creditors and not debtors.

Hypothesis 1a: More conservative judges on both the district courts and BAP will be more likely to rule in favor of business creditors and debtors and less likely to rule in favor of individual debtors and creditors.

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[91] THE ATTITUDINAL MODEL, *supra* note 83 at 215; THE ATTITUDINAL MODEL REVISITED, *supra* note 83, at 312 (stating "the attitudinal model holds that the justices base their decisions on the merits on the facts of the case juxtaposed against their personal policy preferences.").

[92] *See, e.g.*, Capital Commc'n Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 45 (2d Cir. 1997) (describing creditor's attempt to obtain relief from automatic stay).

[93] 11 U.S.C. § 362(a) (2012).

[94] *See* 11 U.S.C. § 362(d)(4) (providing creditor relief from automatic stay due to debtor's fraudulent activity regarding real property).

[95] 28 U.S.C. § 152(a)(1) (2012) (providing each "bankruptcy judge shall be appointed for a term of fourteen years").

[96] *See* 28 U.S.C. §§ 151 & 153 (establishing bankruptcy courts, judgeships, and judges' salaries).

[97] *See generally* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

Because both district court judges and BAP judges are situated within districts, one would expect both to pay attention to socioeconomic conditions. Economic conditions, such as unemployment and inflation, will influence the outcomes. One would assume that greater unemployment and greater hardship will lead to more bankruptcies and thus should lead to greater efforts to protect debtors caught in hard economic times. This leads to Hypothesis 2.

Hypothesis 2: Increased unemployment and increased inflation will lead to greater deference to debtors by district court judges and BAP judges.

Then, given the limited independence of BAP judges, we can offer Hypothesis 3.

Hypothesis 3: BAP judges with limited tenure and lower salary will be more likely to follow congressional preferences.

Finally, given the expertise of the BAP judges, one would expect them to rule differently on issues. One would assume BAP judges would be more skeptical of priority and preference claims, as well as reorganization plans, than would the more generalist district court judges. This leads to our final two hypotheses.

Hypothesis 4: BAP judges will be more likely to rule for debtors than district court judges when creditors make claims of priority or preference, or seek a stay of relief.

Hypothesis 5: BAP judges will be more likely to rule against debtors presenting reorganization plans than would district court judges.

IV. DATA AND METHODS

Data for this project was collected through Lexis/Nexis. We used the Ninth Circuit and the First Circuit as our units of study. Data was searched from the years 1995 through 2004 by searching for the words "bankruptcy appeals." We chose the year 1995 because that is the year that circuits reestablished BAPs (except the Ninth Circuit, which was the sole circuit that had continued them). All published and unpublished cases were added to the dataset. Obviously, because the Ninth Circuit is much larger than the First Circuit, there were many more cases in the Ninth Circuit than in the First Circuit. What perhaps is not so obvious is that there were far more bankruptcy appeals through the BAPs than through the district courts. Our dataset includes 543 BAP cases and 100 district court cases.

We coded several basic items from our data search. For each case we listed information, including the date, the citation, the docket number, the name of the bankruptcy judge when available, the name of the district court judge, or the names of the BAP judges. In addition to this basic information, we coded whether the debtor was an individual or a business entity and whether the

creditor was an individual, business entity, bank, or a governmental agency. We also coded whether the creditor or debtor appealed and whether the creditor or debtor won. Finally, from these data we coded whether or not the cases involved claims of fraud, a stay of relief, or a secured or priority claim. We also coded whether the case involved a chapter 7, chapter 11 or chapter 13 filing.

To this information we added several other measures. For district court ideology we used Giles, Hettinger, and Peppers' (GHP) nominate scores.[98] For the BAP, it was not so simple. Since BAP judges are not nominated by the President or confirmed by the Senate, the logic of the GHP scoring does not apply. As mentioned, bankruptcy judges, and hence BAP judges, are appointed by the judges of the circuit court within which they sit.[99] Accordingly, our solution was to use the yearly median GHP score for each circuit for each judge based on the year of his or her appointment. Since we argue that ideology alone might not be dispositive, but rather the type of debtor or creditor, we created interactive variables for ideology and individual and business debtors and ideology and individual and business creditors.

Finally, we added some political and economic data. For political control, we added the median nominate scores of the House and the Senate for each respective year of our dataset. For economic data, we added yearly unemployment, yearly change in unemployment and yearly inflation data.

For an initial examination, we simply looked at the types of cases filed in each "appeals" court. We present this information in Table 1:

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[98] *See generally* Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 623–41 (2001) (providing statistics evaluating partisan and policy models of judicial nominee selection); Michael W. Giles, Virginia A. Hettinger & Todd C. Peppers, *Measuring the Preferences of Federal Judges: Alternatives to Party of the Appointing President*, Emory University Typescript (2002).

[99] 28 U.S.C. § 152(a)(1).

Table 1: Comparison of District Court and BAP

	District Court	BAP
Debtor Win	.48	.26
Affirmance Rate	.72	.59
Debtor Appeals	.55	.52
Chapter 7	.39	.54
Chapter 11	.47	.22
Chapter 13	.05	.18
Ideology	.09	.10
Creditors – Bank	.17	.18
Creditor – Government	.23	.12
Fraud	.10	.03
Stay of Relief	.10	.15
Secured Claim	.21	.04

Preliminary examination shows that there are distinctions between the courts. For example, debtors are far more likely to win in the district court as compared to the BAP. Almost half of debtors win in the district court (.48) as compared to the BAP (.26). Appellants do well in both courts, but again there are differences. Appellants win almost three quarters of the time in the district court (.72), as compared to about 60% of the time in the BAP (.59). However, despite these differences, debtors and creditors are equally likely to appeal to the district court as they are to the BAP.

The types of cases appealed do not follow the national averages in either court with 39% of the appealed cases involving chapter 7 claims, while 66% of all bankruptcies are filed under chapter 7. Chapter 11 cases, which make up one percent of all filings, take up a significant portion of both courts' dockets. Chapter 11 appeals comprise 47% of district court appeals and 22% of BAP appeals. Thus, bankruptcy filings that involve business reorganizations present greater areas for conflict, and thus, appeals. It is likely that debtor businesses and creditors of these businesses also have more resources to appeal matters than individual debtors and creditors.

Thus this preliminary examination shows some differences and some similarities. Our next step was to develop a multivariate analysis to control for these specific factors and determine which factor, if any, is likely to determine district court and BAP outcomes. Our dependent variable is whether or not the debtor won the appeal, coded "1" if the debtor won, "0" otherwise. Because the dependent variable is dichotomous, we used probit regression. We ran separate

analyses for the district court and the BAP. We used the same variables for each model.

To test our primary hypotheses, we used the ideology measures previously discussed and added two interactive ideology measures: individual debtor and ideology and individual creditor and ideology. We then added a variable for whether or not the debtor was an individual (leaving a business debtor as the baseline) and whether or not the creditor was a business, a bank, or an individual (leaving the government as a baseline). We also added variables as to the type of filing—chapter 7 or chapter 13, with chapter 11 as our baseline for comparison. We then added the type of issue—whether or not it was a fraud claim against the debtor, a creditor seeking a stay of relief, or a priority or preferred claim by a creditor.

Finally, we added several political and economic control variables. For congressional control, we used the median nominate score for each chamber in the years of our study, while we added the previously discussed economic variables—unemployment, change in unemployment, and inflation. Thus our models for both the district court and the BAP take the following form:

$$\textbf{Decision} = \beta_0 + \beta_1\,\textbf{Ideology} + \beta_2\,\textbf{ideology * individual debtor} + \beta_3\,\textbf{ideology * individual creditor} + \beta_4\,\textbf{individual debtor} + \beta_5\,\textbf{Individual creditor} + \beta_6\,\textbf{Chapter 7} + \beta_7\,\textbf{Chapter 11} + \beta_8\,\textbf{Chapter 13} + \beta_9\,\textbf{Stay of relief} + \beta_{10}\,\textbf{Fraud} + \beta_{11}\,\textbf{Unemployment Rate} + \beta_{12}\,\textbf{Changes in Unemployment Rate} + \beta_{12}\,\textbf{Inflation Rate} + \beta_{13}\,\textbf{House Median Ideology} + \beta_{14}\,\textbf{Senate Median Ideology} + \varepsilon$$

We present the results in two tables: first we present and discuss the coefficients in Table 2, then we present and discuss the probabilities of key variables in Table 3.

Table 2: Probit Regression Debtor Winning (Standard Errors in Parentheses)

	District Court	BAP
Ideology	2.67**	1.84
	(1.05)	(1.21)
Ideology* Debtor Person	-3.09*	-.72
	(1.25)	(1.19)
Ideology*Creditor Person	1.29	-.32
	(1.54)	(1.13)
Ideology *Creditor Business	-1.15	-2.65*
	(1.91)	(1.34)
Debtor Person	-.27	-.16
	(.60)	(.16)
Creditor Person	.01	.16
	(.39)	(.15)
Creditor Business	.91^{+}	-.04
	(.49)	(.16)
Creditors – Bank	.38	.16
	(.48)	(.17)
Chapter 7	-.51	.003
	(.36)	(.16)
Chapter 13	-.93	-.36^{+}
	(.81)	(.21)
Stay of Relief	.35	-.15
	(.52)	(.27)
Secured Claim	.88^{+}	-.05
	(.47)	(.29)
Unemployment	.23	.40*
	(.31)	(.21)
Unempl. Change	.02	-.21
	(.27)	(.17)
Inflation	-.01	.01
	(.02)	(.01)
House Median	.99	-2.11*
	(4.12)	(1.10)
Senate Median	.82	3.59
	(3.67)	(2.22)
Constant	.69	-3.48*
	(3.15)	(1.70)
	N = 100	N = 544
	Chi^2 = 24.63**	Chi^2 = 19.62

$^{+}$ = p<.10, * = p<.05, ** = p<.01, *** = p<.001

Table 3: Changes in Probability*

	District Court	BAP
Ideology	.47	
Ideology* Debtor person	-.55	
Ideology*Creditor business	-.24	-.23
House Median Ideology		-.12
Creditors – Business	.33	
Chapter 13		-.11
Secured Claim	.33	
Unemployment		.16

*The change represents moving from 0 to 1 for dichotomous variables and moving from one standard deviation above the mean to one standard deviation below the mean for continuous variables.

While some differences remain between the two courts, there are many similarities in the treatment of the appeals. First, in analyzing the results, it appears that ideology preferences are triggered not by the status of debtor or creditor but instead by whether or not the debtors or creditors are individuals or businesses. In general, more conservative judges in both courts favor businesses, while more liberal judges favor individuals.

First, turning to the district court results, contrary to Hypothesis 1, ideology matters, but it appears that the more conservative the judge, the more likely the judge is to favor the debtor (2.67 $p < .01$). However, this result masks the true impact of ideology as revealed through the interactions. When the debtor is an individual, the more conservative the judge, the more likely it is that the judge will rule against the debtor (-3.09 $p < .05$), and when the creditor is a business, the more conservative judge will be more likely to rule against the debtor. However, when the creditor is an individual, the more conservative judge is more likely to rule in favor of the debtor.

The BAP follows a similar but not as pronounced pattern. The median ideology of the BAP fails to achieve statistical significance, although it is in the same direction as the district court ideology. That is, more conservative judges appear to favor the debtor. Again, it is the interaction that shows the ideological dimension of the decision making process. The more conservative the BAP, the more likely it is to rule against a debtor when it is a business creditor opposing

the debtor (-2.65, $p < .05$). Thus it appears that Hypothesis 1 is not confirmed, but Hypothesis 1a is confirmed.

Conservatives favoring business interests makes sense and comports with other scholarship. For example, in two important articles published on the responsiveness of the IRS to political control, Scholz and Wood[100] showed that the IRS would audit more individuals and fewer corporations as the political controls, such as the President, became more conservative.[101] The BAP follows the same pattern.

In addition, as hypothesized, the BAP is more susceptible to political control. As the House becomes more conservative, the BAP (-2.11, $p < .05$), but not the more independent district court, is more likely to rule against the debtor. This makes sense because ideology is related to leniency for debtors in bankruptcy matters. For example, the Republican majority in Congress succeeded in passing a much more stringent bankruptcy bill in 2005. The bill made it more difficult to eliminate debts and required all debtors to undergo mandatory credit counseling.[102]

In addition, only the BAP showed deference to economic conditions. As unemployment worsened, BAP rulings were more favorable to the debtor (.40, $p < .05$), while the district court judges did not show they were influenced by any economic indicator. It is possible that since the BAP judges also sit as bankruptcy court judges,[103] they are more aware of the impact of unemployment on bankruptcy and more inclined to favor debtors in poor economic circumstances.

Figures 1 and 2 demonstrate the impact of the two key interaction variables on the probability of each court ruling in favor of the debtor. In Figure 1, using

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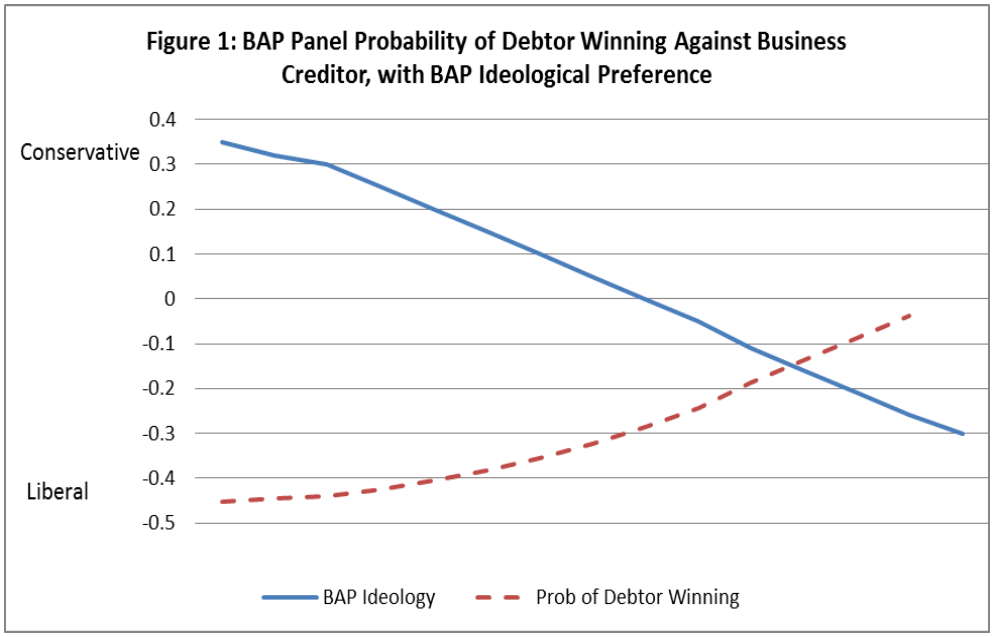
[100] *See* John T. Scholz & B. Dan Wood, *Efficiency, Equity and Politics: Democratic Controls Over the Tax Collector*, 43 AM. J. POL. SCI. 1166, 1167 (1999) (using model to examine impact of partisan changes in Congress, the presidency, and states on IRS' efficiency-equity tradeoffs); John T. Scholz & B. Dan Wood, *Controlling the IRS: Principals, Principles, and Public Administration*, *See* 42 AM. J. POL. SCI. 141, 142 (1998).

[101] *Cf.* Scholz & Wood, *Controlling the IRS: Principals, Principles, and Public Administration*, *supra* note 100, at 141 (1998) (concluding odds of corporate versus individual audits increase with increased Democratic control over presidential administrations).

[102] Allen Mattison, *Can the New Bankruptcy Law Benefit Debtors, Too? Interpreting the 2005 Bankruptcy Act to Clean Up the Credit-Counseling Industry and Save Debtors from Chronic Poverty*, 13 GEO. J. ON POVERTY L. & POL'Y 513, 515, 519 (2006) (discussing new bankruptcy law's effects, including making it more difficult for individuals to discharge debts in bankruptcy, removing some obstacles to creditors in recovering money owed, and requiring debtors to receive credit counseling).

[109] *See, e.g.*, David Madden, *Judge Jim D. Pappas Reappointed to Ninth Circuit Bankruptcy Appellate Panel*, United States Courts for the Ninth Circuit (June 25, 2012), http://www.id.uscourts.gov/announcements/Pappas_Reappointed_BAP.pdf (announcing reappointment of Judge Pappas to Ninth Circuit BAP, coinciding with his judgeship on U.S. Bankruptcy Court for District of Idaho).

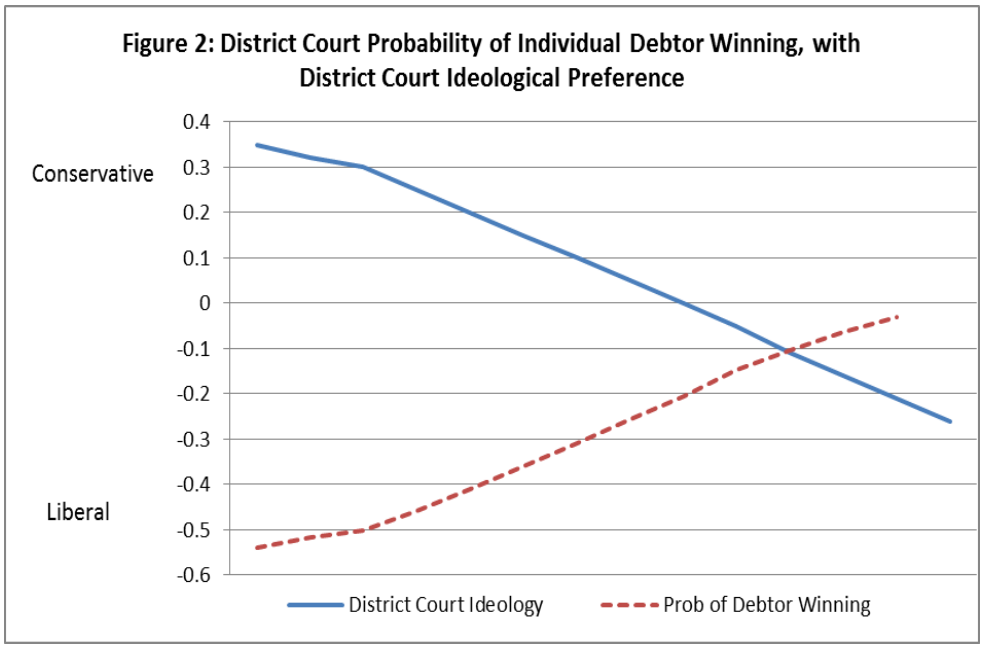
the Clarify Estimation Procedure,[104] we held the dummy interactive term constant and varied the ideology term for the BAPs.



There is a clear and unmistakable trend in the BAPs. Where a business creditor is pressing a claim, the probability of the debtor winning decreases dramatically as the median ideology of the appellate panel moves in a conservative direction.

The same trend manifests itself in the district courts, although here it shows when the debtor is an individual. This trend is shown in figure 2.

[110] Clarify uses a computer simulation technique to help researchers interpret and present statistical results in an easy to understand format by converting difficult to interpret coefficients into easily interpretable probabilities. *See* Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000) (discussing approach built on technique of statistical simulation to extract overlooked information and present in reader-friendly format); Michael Tomz, Jason Wittenberg & Gary King, *CLARIFY: Software for Interpreting and Presenting Statistical Results*, Version 2.0 Cambridge, MA: Harvard University (2003), *available at* http://gking.harvard.edu/clarify.



Here, when it is an individual debtor seeking relief, the more conservative the district court judge, the less likely the debtor is to win.

V. DISCUSSION AND CONCLUSIONS

Clearly there are some differences in the decision making of the BAP and the district court. BAP judges are sensitive to the political and economic environment in a way that is not observed in the voting patterns of the district court judges. The BAP judges who have limited tenure and lower compensation do follow, to some degree, the policy preferences of Congress. In addition, the BAP is more sensitive to the economy, at least to the extent that the BAP judges change voting patterns in response to the unemployment rate.

However, both courts have policy preferences, with conservative judges on both courts favoring business interests, and it is less important whether the business interest is a creditor or a debtor. This confirms much of the recent research showing the ideological basis of specialized court voting.[105] To some degree, judges on specialized courts and general courts are the same in that, like most humans, they have preferences, and within the extent possible permitted by the facts and the law, they will vote according to those policy preferences.

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[111] *See, e.g.*, Miller & Curry, *supra* note 88, at 850 (2009) (testing hypotheses of how political ideologies would affect outcomes in patent validity cases).

However, this also means that the concerns of "capture" appear to be misplaced. BAP support for the debtor or creditor is more dependent upon business status than anything else. In this preference, they are no different than district court judges. Therefore it is difficult to argue that bankruptcy judges, at least in their role as BAP judges, are "captured" by either debtors or creditors. In this case, the fear of specialization seems misplaced.

Of course much work remains to be done before definitive conclusions can be reached. The data for the district court is limited, with only 100 observations. Given the large number of variables, one can only tentatively assert the findings herein. In addition, perhaps there are better measures of ideology, particularly for the BAP and bankruptcy judges in general. Since the BAP ideology measure is closely tied to the median ideology of the relevant circuit court of appeals, it is difficult to measure the influence of the ideology of the court of appeals on the BAP. Because both measures are highly correlated, we are unable to determine whether the ideology of the circuit court of appeals has any effect on the decisions of the BAP.