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## Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals

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DOES IDEOLOGY MATTER IN BANKRUPTCY? VOTING  
BEHAVIOR ON THE COURTS OF APPEALS

JONATHAN REMY NASH\* & RAFAEL I. PARDO\*\*

ABSTRACT

*This Article empirically examines whether courts of appeals judges cast ideological votes in the bankruptcy context. The empirical study is unique insofar as it is the first to examine the voting behavior of circuit court judges in bankruptcy cases. More importantly, it focuses on a particular type of dispute that arises in bankruptcy: debt-dischargeability determinations. The study implements this focused approach in order to reduce heterogeneity in result. We find, contrary to our hypotheses, no evidence that circuit court judges engage in ideological voting in bankruptcy cases. We also find, however, non-ideological factors—including the race of the judge and the disposition of the case by lower courts—that substantially influence the voting pattern of the judges in our study.*

*The Article makes three broad contributions. First, it indicates that bankruptcy voting is comparatively non-ideological, at least at the level of the courts of appeals. Second, by identifying the influence of certain nonideological factors on voting behavior, the Article suggests avenues for profitable future research. And third, the*

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*Article makes a methodological contribution through its fine-grained approach, which demonstrates the importance of focusing on particular legal issues in order to reduce heterogeneity in, and bolster the reliability of, findings from empirical legal studies.*

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## INTRODUCTION

In 1935, legal historian Charles Warren proclaimed that, although the history of bankruptcy legislation is “colorful,” “[t]he law of bankruptcy is a dry and discouraging topic.”<sup>1</sup> Forty-six years later, in his opinion dissenting from the Court’s order denying a petition for writ of certiorari in a bankruptcy case, then-Justice William Rehnquist penned the following introductory words, which echoed Warren’s proclamation:

Bankruptcy cases seldom receive much notice outside of those who are familiar with this branch of the law, and it is therefore understandable that there is a dearth of recent bankruptcy precedents decided on the merits in this Court as compared with constitutional cases, labor cases, and *other more alluring subjects*.<sup>2</sup>

All of this might lead one to believe that “bankruptcy is a hypertechnical, code-based, number-crunching field of law where ideology has no role to play.”<sup>3</sup> Commentators have found evidence of ideological voting in other contexts among U.S. federal courts of appeals judges.<sup>4</sup> Yet even these commentators speculate that bankruptcy is a field that may not draw out ideological voting.<sup>5</sup>

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1. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 3 (Beard Books 1999) (1935).

2. *New Jersey v. Reading Co.*, 451 U.S. 918, 918 (1981) (Rehnquist, J., dissenting) (emphasis added).

3. Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. 633, 642 (2009).

4. See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718-20 (1997); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304-06 (2004).

5. See CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 16 (2006) (“Might ideological voting and panel effects be found in apparently nonideological cases involving, for example, bankruptcy, torts, and civil procedure?”); see also Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 842 (2008) (“Many areas of law remain entirely unstudied in the standard terms, including, for example, antitrust, intellectual property, and bankruptcy. It would be useful to know in which areas of law and

In this Article, we examine whether judges cast ideological votes in the bankruptcy context. We hypothesize that ideology influences voting in the bankruptcy context and draw on empirical evidence to evaluate our hypothesis.

Although many studies of ideological voting look broadly at cases falling within a subject matter—for example, all tax cases<sup>6</sup>—our empirical study examines a particular type of dispute that arises in bankruptcy. We opt for such a focused approach in order to reduce heterogeneity in result. It is quite possible that a study that sweeps in cases that raise large numbers of varied issues may reduce our ability to conclude how often ideological voting is occurring and indeed whether it is occurring at all.

Our study focuses on disputes involving the scope of an individual debtor's discharge in bankruptcy—specifically, whether a certain debt falls within the category of debts that Congress has defined as nondischargeable. We have chosen to study this subset of litigation for two reasons. First, forgiveness of debt constitutes the core substantive relief that bankruptcy law affords debtors and embodies the “fresh start” rationale that animates the law.<sup>7</sup> Whether to grant a debtor a discharge, and thus frustrate creditors' collection efforts, would seem to be highly ideologically charged. In short, if there is ideological voting in bankruptcy, this would seem to be a good place to find it. Second, deciding whether to discharge debt pits debtors against creditors in a predictable way. We thus avoid conflating ideological voting over debtor-creditor disputes with ideological voting over intra-creditor disputes, such as disputes between secured and unsecured creditors.

In the end, we find, contrary to our hypotheses, no evidence that ideological voting arises in voting by courts of appeals judges<sup>8</sup> in bankruptcy cases. We do find, however, other nonideological factors that influence circuit court judges' bankruptcy voting. For example,

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under what circumstances the judicial personality has the greatest (and the least) influence on decisions.”).

6. See Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1800 (2006).

7. See *infra* notes 56-57.

8. We use the phrases “courts of appeals judges” and “circuit court judges” broadly to refer to any judge sitting on a three-judge panel of a U.S. Court of Appeals, whether a judge of that court or a judge, including a federal district court judge, sitting by designation. See *infra* note 139.

the race of the judge and the disposition of the case by the lower courts are substantial influences on how courts of appeals judges vote.

This Article makes three broad contributions. First, it refutes the notion that ideological voting is rampant in bankruptcy. If anything, it lends support to the view that bankruptcy voting is comparatively nonideological, at least at the level of the courts of appeals.

Second, the Article identifies nonideological factors that do influence how circuit judges vote in bankruptcy. This suggests avenues for profitable future research, both in bankruptcy and beyond.

Third, the Article makes the methodological contribution of emphasizing the importance of focusing on particular legal issues in order to reduce heterogeneity in empirical legal studies. Many empirical studies of judicial voting are susceptible to the criticism that their broad scope reduces the reliability of their findings. We endeavor to ameliorate this complaint by taking a more fine-grained approach.

This Article proceeds as follows: In Part I, we explicate the role that ideology might play in resolving disputes arising in bankruptcy. In light of speculation by some commentators that bankruptcy is comparatively nonideological, we consider two bases for that conclusion: the technical nature of bankruptcy law and the specialization of lower court judges who hear bankruptcy cases. We develop hypotheses for testing whether the ideological preferences of judges on the courts of appeals influence their votes in bankruptcy cases.

In Part II, we present our empirical study. We first explain our rationale for focusing on a single type of case—a debt-dischargeability determination in consumer bankruptcy cases. We then discuss the method by which we gathered our data. After that, we report and discuss our findings. Although we find statistically significant predictors of voting behavior in the study sample, the ideological preference of a judge is not among those predictors.

## I. BANKRUPTCY AND IDEOLOGY

Scholars have analyzed courts of appeals voting and found that circuit judges engage in ideological voting.<sup>9</sup> They have also discovered evidence of panel effects on federal courts of appeals—that is, the tendency of a judge to vote differently depending on the ideological preferences of the other judges on the panel with whom the voting judge sits.<sup>10</sup>

There are two reasons that, notwithstanding evidence of ideological voting in other areas, one might not expect to find ideological voting—or as robust ideological voting—in the bankruptcy context. We examine, and critique, those arguments here.

A. *Subject Matter of Cases*

Following up on Jeffrey Segal and Harold Spaeth's evidence of ideological voting among Supreme Court Justices in the civil liberties area,<sup>11</sup> some commentators have found evidence of ideological voting even in areas often considered to be more technical—and perhaps therefore less ideological—in nature.<sup>12</sup> On the

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9. We mean to refer to ideological voting as voting in line with certain preferences. *See, e.g.*, CROSS, *supra* note 4, at 13 (“Judicial ideology generally does not mean partisan politics. An ideological judicial activist does not have his political party’s interests at heart, according to the attitudinal model. Instead, the judge has a personal ideology, on a two-dimensional liberal to conservative scale, that drives his or her rulings. Such judges are presumed not to be involved in political bargaining or lobbying within the court or with members of the other branches of government, but are sincerely voting their personal preferences, conservative or liberal.”). We recognize that other incentives may lead judges to cast votes for other nonideological, but also nonlegal, reasons. *See, e.g.*, Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1182 (2006).

10. *See* SUNSTEIN ET AL., *supra* note 5, at 7 (discussing panel effects); Revesz, *supra* note 4, at 1751-56 (same).

11. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 312-26 (2002).

12. *See* Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC’Y REV. 839, 855-57 (2009) (finding evidence of ideological voting in patent cases at the Federal Circuit); Staudt et al., *supra* note 6, at 1800 (finding evidence of ideological voting in tax cases at the Supreme Court).



other hand, other commentators have found that some more technical areas exhibit comparatively less ideological voting.<sup>13</sup>

Along these lines, some commentators have suggested that bankruptcy cases differ fundamentally from other areas in terms of the frequency with which politically polarizing issues arise.<sup>14</sup> The assumption here seems to be that bankruptcy, as a field, is comparatively nonideological. Note that this assumption does not turn on the ideological bent of circuit court judges; the point is simply that the issues that tend to arise in bankruptcy cases do not invite ideological disagreement and therefore do not invite ideological voting.<sup>15</sup> On this reasoning, ideological voting in bankruptcy cases is less frequent simply because issues that invite such voting arise less frequently.<sup>16</sup>

To the extent that this argument suggests that the field of bankruptcy is nearly devoid of ideologically charged topics, we do not find this reasoning terribly persuasive. It is conceivable that one has to look harder for divisive issues in bankruptcy, but they are surely there.<sup>17</sup> Nor is it at all clear to us that politically

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13. See Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 270, 278 (1996) (finding no evidence of ideological voting by Supreme Court Justices in tax and federalism cases and only limited evidence of such voting by the Justices in union cases); 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, 546 (1995) (finding weak evidence of ideological voting in international trade cases at the Court of International Trade).

14. See, e.g., David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1072 (2008) (reviewing JAN CRAWFORD, *SUPREME CONFLICT* (2007)) (“If the federal courts decided issues solely of technical federal law, such as tax, bankruptcy, and even federal-preemption cases, the judicial appointments process would hardly be controversial except in extreme and rare cases.”).

15. Cf. R. Wilson Freyermuth, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069, 1076 n.27 (2006) (“One might posit that bankruptcy cases are most likely to produce statutory interpretation questions of a type that would be relatively uninteresting to generalist judges.”).

16. Cf. CROSS, *supra* note 4, at 20 (“Political science researchers have developed a consistent system of coding judicial decisions for whether they were liberal or conservative. The accuracy of this system surely varies by type of case, as some technical disputes have no clear ideological significance.”).

17. See Staudt et al., *supra* note 6, at 1799 (“[W]hy do judges appear to stand above politics in the areas of the law that are rife with conflict and controversy in the other two branches of government? Lawmaking in the context of taxation, bankruptcy, securities, antitrust, and corporate law, to name just a few examples, is highly political in both the legislative and executive branches, as many empirical scholars have documented. For this reason, we seriously question the claim that judges are unique in that they have no political

controversial issues in bankruptcy are so few and far behind as these commentators implicitly suggest. The creditor-debtor divide pervades bankruptcy, a divide that James Madison categorized as a “common and durable source of faction[ ]” necessitating government regulation.<sup>18</sup> Indeed, in an experimental study involving hypothetical cases, Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich found empirical evidence that bankruptcy judges tend to cast votes in either pro-creditor or pro-debtor directions based on their self-reported political affiliation.<sup>19</sup>

In sum, to the extent that the argument is that bankruptcy is essentially devoid of issues over which judges divide ideologically, we flatly disagree. Although it may be that courts of appeals confront ideologically charged issues less frequently in bankruptcy cases, our suspicion nonetheless is that there are far more such

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or ideological preferences when it comes to business and finance. Our hypothesis is that the null findings in the literature are due to the technical difficulties associated with uncovering politics in large-*n* quantitative studies addressing economic decision making, rather than to a lack of judicial interest in these issues.” (footnote omitted); *see also* Pardo, *supra* note 3, at 643-44 (citing the partisan divide in congressional voting on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as an “example illustrat[ing] how the scope of substantive relief in bankruptcy and the role of judges within the bankruptcy system are partisan issues”).

18. THE FEDERALIST NO. 10, at 55 (James Madison) (Belknap Press 2009) (“But the most common and durable source of factions has been the various and unequal distribution of property.... Those who are creditors, and those who are debtors, fall under a like discrimination.... The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.”). We thank Hanah Volokh for bringing this passage to our attention.

19. Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227, 1236, 1247-48, 1257-58 (2006) (finding some statistically significant differences in terms of judges’ party affiliation and voting on issues—in particular that Republican judges tend to be more pro-creditor—with party affiliation measured based on self-reporting). Furthermore, various studies have documented statistically significant associations between certain bankruptcy outcomes, whether pro-debtor or pro-creditor, and the identity of the bankruptcy judge to whom the matter was assigned. *E.g.*, Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors’ Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 458-63 (2007) (dismissal and discharge rates in Chapter 13 cases); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 223-34 (2009) (debt-dischargeability determinations involving student loans); Tom Chang & Antoinette Schoar, *Judge Specific Differences in Chapter 11 and Firm Outcomes 2-4* (Nov. 24, 2008) (unpublished manuscript), *available at* <http://personal.anderson.ucla.edu/policy.area/seminars/winter2009/chang/tomchangpaper.pdf>.

issues that arise in bankruptcy on a regular basis than most people think.<sup>20</sup>

### *B. Specialization in the Lower Courts in Bankruptcy Cases*

Bankruptcy cases also differ from many other cases that arrive at the courts of appeals in that the lower courts that handle the cases almost always include some specialized judges. Indeed, in some cases, only judges who specialize in bankruptcy will have heard the case below.<sup>21</sup>

Original bankruptcy jurisdiction is technically vested in the U.S. district courts.<sup>22</sup> The statute anticipates, however, that the district courts may enter “standing orders” that refer bankruptcy matters to bankruptcy judges.<sup>23</sup> Bankruptcy judges are Article I judges appointed by the court of appeals;<sup>24</sup> they inevitably have considerable experience in bankruptcy.

Core proceedings that “arise in” or “arise under” the Bankruptcy Code<sup>25</sup> constitute the overwhelming majority of disputes in bank-

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20. See, e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 4 (1986) (“The policy relating to discharge and notions of a fresh start ... addresses the question of whether limits should be established on what creditors can get from their debtor.”); William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 *YALE L.J.* 591, 592-93 (1933) (“The bankruptcy power in general entails a determination of legislative policy on two problems.... The second problem entails primarily a determination of the debts from which a debtor may be discharged, the conditions if any for a discharge, and the grounds upon which it may be refused.”); Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 *DUKE L.J.* 1229, 1233-34 (2010) (“[I]n bankruptcy, the particular rules are not neutral because societal and economic factors larger than the mere preferences of private parties are at stake.”); Bruce H. Mann, *Failure in the Land of the Free*, 77 *AM. BANKR. L.J.* 1, 1 (2003) (“Whether a society forgives its debtors and how it bestows or withholds forgiveness are more than matters of economic or legal consequence. They go to the heart of what a society values.”).

21. The following discussion draws on Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 *VAND. L. REV.* 1745 (2008).

22. 28 U.S.C. § 1334(a), (b) (2006).

23. § 157(a).

24. § 152(a)(1).

25. This Article uses the terms “Bankruptcy Code” and “Code” to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101-1532 (2006)).

ruptcy cases. Congress has authorized bankruptcy judges to rule definitively on such proceedings in the first instance.<sup>26</sup>

From a bankruptcy court ruling, a losing party may appeal to the district court,<sup>27</sup> then to the court of appeals, and thereafter seek certiorari from the U.S. Supreme Court.<sup>28</sup> But that is not the only appellate path that Congress has authorized. Congress has also invited each court of appeals to create a “bankruptcy appellate panel” (BAP).<sup>29</sup> The members of the BAP are themselves bankruptcy judges—that is, judges trained in bankruptcy.<sup>30</sup> BAPs are authorized to hear appeals from bankruptcy courts to the extent that no party objects to BAP jurisdiction.<sup>31</sup> Thus, any party may assert a right to have an appeal heard by the district court.<sup>32</sup> However, if no one does, then a lone bankruptcy judge will hear the core proceeding first, followed by a BAP hearing; in other words, only specialist judges trained in bankruptcy will have heard the case before it reaches the court of appeals.

Commentators have uncovered evidence that specialized judges still may engage in ideological voting.<sup>33</sup> In the setting of bankruptcy cases heard by the court of appeals, however, we are faced with generalist judges voting in cases that specialist judges have already

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26. See 28 U.S.C. § 157(b)(1) (referring to “core proceedings arising under title 11 or arising in a case under title 11”). In turn, § 157(b)(2) lists examples of core proceedings, which include matters concerning estate administration, claim allowance, discharge objections, and plan confirmation. Bankruptcy courts have the statutory authority to definitively resolve such proceedings in the first instance, with appellate review to follow. § 157(b)(1). The constitutional authority of bankruptcy courts to definitively resolve all such proceedings, however, has recently been called into question. See *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (holding that the bankruptcy court “lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim”). Finally, if a district court has withdrawn the reference to the bankruptcy court, then the district court will hear the matter in the first instance. See § 157(d).

27. § 158(c)(1).

28. §§ 158(d)(1), 1254(1).

29. § 158(b)(1).

30. *Id.*

31. *Id.*

32. See § 158(c)(1).

33. See Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135 (2005) (finding greater ideological voting in tax cases heard by the specialized judges of the U.S. Tax Court than by generalist federal district court judges); Miller & Curry, *supra* note 12 (Federal Circuit judges); Rachlinski et al., *supra* note 19 (bankruptcy judges).

heard. We concede that circuit court judges may be inclined to abandon pure ideological voting and instead to defer to the expertise of the specialist judges who decided the case below.<sup>34</sup>

The alternate first-tier appellate courts—district courts and BAPs—offer a natural experiment. To the extent that circuit judges are less likely to vote their own ideologies when they defer to specialist judges below, we would expect less ideological voting at the court of appeals level in cases that have been heard by BAPs—and therefore only by specialist judges below—than in cases that have been heard by district judges—and therefore only by a lone specialist bankruptcy judge. The appellate structure in the bankruptcy system is depicted below in Figure 1.<sup>35</sup>

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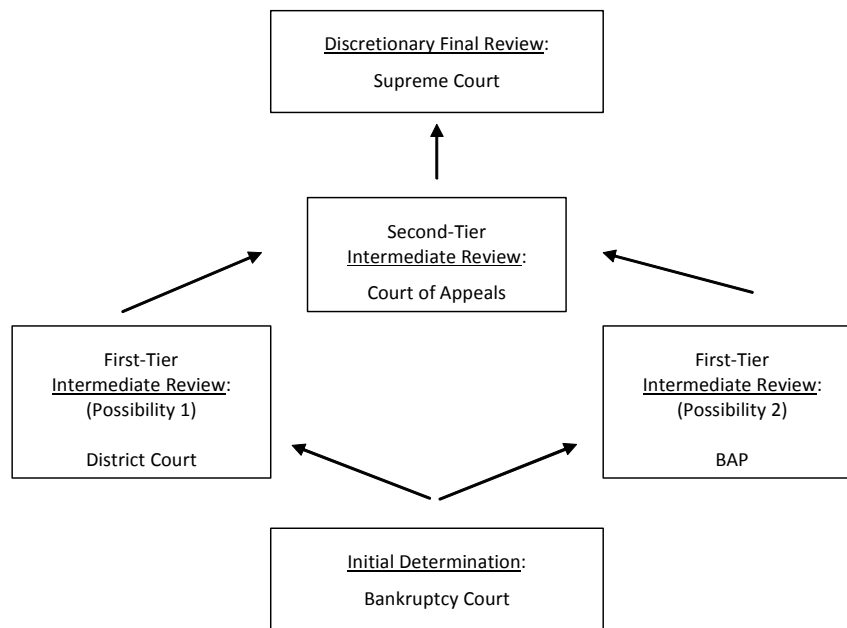
34. Cf. Isaac Unah, *Specialized Courts of Appeals' Review of Bureaucratic Actions and the Politics of Protectionism*, 50 POL. RES. Q. 851, 863 (1997) (finding that the Federal Circuit was generally deferential to agency findings in cases originating at both the International Trade Commission (ITC) and the Department of Commerce, although more so to the ITC).

It may be that the bankruptcy judges and BAP judges who hear the cases below decide cases ideologically. Cf. Freyermuth, *supra* note 15, at 1076 n.27 (“[O]ne might expect that BAP judges—who are more frequent participants within the bankruptcy system—might produce more engaged decisionmaking than generalist appellate judges.”). *But see* Pardo, *supra* note 3, at 644-45 (“Unfortunately, very little research exists that has empirically examined whether decisionmaking by bankruptcy judges can be characterized as ideological. The research that does exist on the subject provides limited and mixed evidence that prevents a definitive conclusion from being drawn either way. The views expressed by other bankruptcy scholars, however, suggest that the bankruptcy bench is unlikely to be ideological.” (footnotes omitted)).

Given this possibility, one might distinguish between two types of deference by court of appeals judges—expertise deference and ideological deference. If court of appeals judges simply defer to the specialized judges below on the basis of their expert decision making, then the court of appeals judges do not vote ideologically. If, on the other hand, the court of appeals judges defer based on the perception that the ideological preferences of the specialized judges below are aligned with their own ideological preferences, one might categorize such deference as ideological. For commentary exploring the possibility that courts of appeals judges may appoint bankruptcy judges whose ideological preferences mirror their own, see Pardo, *supra* note 3, at 648-51.

35. A third possible appellate path—that of direct appeal from the bankruptcy court to the court of appeals—exists for a limited set of circumstances. Appeal may proceed directly to the court of appeals pursuant to a certification procedure if one of the following circumstances exists: (1) the appeal involves a question of law unresolved by the court of appeals for the circuit or by the Supreme Court; (2) the appeal involves a matter of public importance; (3) the appeal involves a question of law requiring resolution of conflicting decisions; or (4) the appeal may materially advance the progress of the case or proceeding in which the appeal is taken. *See* § 158(d)(2)(A).

Figure 1  
Federal Bankruptcy Appellate Structure for  
Core Proceedings



\* \* \*

From the foregoing, we derive and empirically test the following hypotheses.

First, because we are dubious that bankruptcy is devoid of ideological content, and because we doubt that the presence of expert lower-court judges removes all incentives for circuit court judges to vote ideologically, we anticipate finding evidence of circuit court judges voting ideologically in bankruptcy cases.

- **Hypothesis 1.** Circuit court judges will exhibit ideological voting in bankruptcy cases.

Second, Hypothesis 1 notwithstanding, we do believe that having a case heard by a BAP as opposed to by a district court at the first

tier of intermediate appellate review—and thus having a case heard by four experts in bankruptcy law before the case reaches the court of appeals—will reduce the incentive for circuit judges to vote ideologically.

- **Hypothesis 2.** Ideological voting by circuit court judges will be more muted in cases that actually are heard by BAPs as opposed to those that are not.

Third, in keeping with Hypothesis 1’s prediction of ideological voting by circuit court judges in bankruptcy cases, we anticipate that such judges will be subject to panel effects—that is, their voting behavior will be influenced by the ideologies of the other judges who sit on panels with them—just as commentators have found in other areas of the law.

- **Hypothesis 3.** Circuit court judges will be subject to panel effects in bankruptcy cases.

## II. THE ROLE OF IDEOLOGY IN BANKRUPTCY: A CASE STUDY IN DEBT-DISCHARGEABILITY DETERMINATIONS

To test our hypotheses regarding the relationship between ideology and the voting behavior of courts of appeals judges in bankruptcy cases, we focus our investigation on a subset of cases—specifically, determinations of whether a particular type of debt was excepted from an individual debtor’s discharge, which we refer to as “debt-dischargeability determinations.” We focus on a particular type of bankruptcy issue in order to render our dataset more homogeneous, and thus to render our results more reliable. We choose to focus on debt-dischargeability determinations because, insofar as they pit debtors against creditors and directly raise the “fresh start” rationale for bankruptcy, they are a likely place to find ideological voting to the extent there is any.

Part II.A situates debt-dischargeability determinations within bankruptcy law and litigation. Part II.B describes our data-collection procedures. Part II.C sets forth summary statistics and bivariate analyses of the data included in our study. Part II.D reports the findings from our multivariate logistic regression model

for predicting judicial voting behavior in the collected cases. Finally, Part II.E interprets our results.

#### A. *Debt-Dischargeability Determinations*

To place our subset of cases in the proper context, it is important to understand that, although formally a judicial process, bankruptcy has been and continues to be substantively administrative in nature.<sup>36</sup> For a debtor to voluntarily obtain relief, he or she must file a petition under one of the operative chapters of the Bankruptcy Code—for example, Chapter 7.<sup>37</sup> The case itself is an administrative proceeding within which disputes may, but need not, arise.<sup>38</sup> The Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) sort disputes into one of two categories: adversary proceedings or contested matters. The former resemble other federal lawsuits insofar as the Bankruptcy Rules governing such proceedings virtually incorporate, with occasional modification, the Federal Rules of Civil Procedure.<sup>39</sup> The Bankruptcy Rules categorize only a limited number of disputes as adversary proceedings,<sup>40</sup> including any proceeding to determine the dischargeability of a debt.<sup>41</sup> If a dispute does not constitute an adversary proceeding, it is deemed to be a “contested matter” and proceeds according to less complex procedures than an adversary proceeding.<sup>42</sup> For example, a party can request relief by motion in a contested matter,<sup>43</sup> whereas a party can commence an adversary proceeding only by filing a complaint.<sup>44</sup>

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36. See Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 965-68 (1993).

37. 11 U.S.C. § 301(a) (2006).

38. *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 910 (B.A.P. 9th Cir. 1999); cf. S. REP. NO. 95-989, at 31 (1978) (“The term adjudication is replaced by [order for relief] in light of the clear power of Congress to permit voluntary bankruptcy without the necessity for an adjudication, as under the 1898 act, which was adopted when voluntary bankruptcy was a concept not thoroughly tested.”), reprinted in 1978 U.S.C.C.A.N. 5787, 5817.

39. See FED. R. BANKR. P. pt. VII.

40. See FED. R. BANKR. P. 7001.

41. FED. R. BANKR. P. 7001(6).

42. See *Khachikyan v. Hahn (In re Khachikyan)*, 335 B.R. 121, 125 (B.A.P. 9th Cir. 2005) (“In a contested matter, there is no summons and complaint, pleading rules are relaxed, counterclaims and third-party practice do not apply, and much pre-trial procedure is either foreshortened or dispensed with in the interest of time and simplicity.”).

43. FED. R. BANKR. P. 9014(a).

44. FED. R. BANKR. P. 7003.



In addition to procedural distinctions in the types of disputes that arise in a bankruptcy case, the disputes themselves involve a variety of litigants—for example, debtors, creditors, the bankruptcy trustee, and the U.S. Trustee—and subject areas. The diversity of disputes and litigants will partly be a function of whether the case involves an individual debtor—that is, a consumer case—or a nonindividual debtor—that is, a business case. The following description illustrates the nature and extent of disputes that can arise in the context of a consumer case.

First, consider disputes involving a consumer debtor. A debtor who seeks a fresh start from his or her past debts may encounter opposition from creditors who object to the property that the debtor claims as exempt from the bankruptcy process,<sup>45</sup> from creditors who assert that the debts owed to them are nondischargeable,<sup>46</sup> or from creditors who assert that the debtor is not entitled to a discharge of any of his or her debts.<sup>47</sup> A debtor may end up litigating against creditors who continue their collection efforts in contravention of the Bankruptcy Code's automatic stay or discharge injunction,<sup>48</sup> and a debtor may also encounter motions to dismiss the bankruptcy case.<sup>49</sup>

Next, consider disputes between and among creditors. Because of the common pool problem that arises when a debtor has insufficient assets to pay creditor claims in full,<sup>50</sup> creditors will litigate against one another, jockeying for a position that will increase the distribution the creditor receives on account of its claim against the debtor. Such litigation may include challenges by unsecured creditors against secured creditors<sup>51</sup> and challenges by unsecured creditors against other unsecured creditors.<sup>52</sup> For the bankruptcy trustee charged with administering the debtor's estate,<sup>53</sup> he or she

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45. See 11 U.S.C. § 522 (2006).

46. See § 523.

47. See, e.g., § 727(a).

48. See §§ 362(a), 524(a).

49. See, e.g., §§ 707, 1112, 1307.

50. See JACKSON, *supra* note 20, at 7-19.

51. See § 506(a). Creditors with allowed secured claims are entitled to distribution from estate property prior to creditors with allowed unsecured claims. See, e.g., §§ 725, 726(a).

52. See, e.g., §§ 507(a), 726(a).

53. See, e.g., § 704(a). The following description from the legislative history to the Bankruptcy Code nicely summarizes the role of a Chapter 7 trustee:

The trustee's principal duty is to collect and reduce to money the property of

may challenge the claims of both secured and unsecured creditors in an attempt to enlarge the distribution available for creditors whose claims the trustee considers to be valid.<sup>54</sup> The trustee may also litigate against the debtor, again representing the interests of the estate.<sup>55</sup>

The heterogeneity and permutations of litigants and disputes throughout the life of a bankruptcy case demand careful attention in designing an empirical study of the voting behavior of circuit court judges who decide bankruptcy appeals. Beyond differences in the procedural nature, litigant identity, and subject matter of bankruptcy disputes, one must also be mindful of a variety of other considerations that could influence statistical analyses and the inferences to be drawn therefrom—considerations such as potential selection effects in the decision to bring an appeal, burdens of proof, and standards of appellate review. In order to reduce the problems associated with controlling for heterogeneity across cases, prudence dictates confining our investigation to a specific subset of cases. By doing so, we can largely minimize the above-referenced concerns.

Our focus is on disputes that arise in consumer cases and that involve a determination of the dischargeability of a particular type of debt. The bankruptcy discharge is the core mechanism that effectuates the fresh-start policy in bankruptcy<sup>56</sup>—that is, restoring to economic productivity a debtor who suffers from financial distress.<sup>57</sup> As a general matter, the Bankruptcy Code assigns a limited monitoring role to the court in determining discharge eligibility and does not invite inquiry as to whether a debtor's particular

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the estate for which he serves, and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. He must be accountable for all property received, and must investigate the financial affairs of the debtor. If a purpose would be served (such as if there are assets that will be distributed), the trustee is required to examine proofs of claims and object to the allowance of any claim that is improper. If advisable, the trustee must oppose the discharge of the debtor, which is for the benefit of general unsecured creditors whom the trustee represents.

H.R. REP. NO. 95-595, at 344 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6335.

54. *See, e.g.*, § 704(a)(5).

55. *See, e.g.*, §§ 704(a)(6), 707(b).

56. *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 415-16 & n.39 (2005).

57. Pardo & Lacey, *supra* note 56, at 414.

circumstances warrant forgiveness of debt.<sup>58</sup> For example, in Chapter 7 cases, a court must grant an individual debtor a discharge unless the debtor falls within a particular class of individual, generally defined by reference to a limited set of circumstances relating to debtor fraud or misconduct in connection with the bankruptcy case.<sup>59</sup> The court is not an autonomous entity and must be prompted into action by a party in interest.<sup>60</sup> Even if a basis exists for denying the debtor's discharge, failure of the party in interest—such as a creditor, the trustee, or the U.S. Trustee<sup>61</sup>—to file a complaint objecting to discharge within the time prescribed by the Bankruptcy Rules will preclude denial of the discharge, unless procedural considerations warrant otherwise.<sup>62</sup> Without such

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58. See Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 128 (1990); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 363 (1991); see also S. REP. NO. 95-989, at 6 (1978) (“At the heart of the fresh start provisions of the bankruptcy law is section 727 covering discharge. The discharge provisions require the court to grant the debtor a discharge of all his debts except for very specific and serious infractions on his part.”), reprinted in 1978 U.S.C.C.A.N. 5787, 5793. The exception is the Chapter 13 “hardship discharge,” H.R. REP. NO. 95-595, at 392 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6386, which requires a finding, among others, that “the debtor’s failure to complete such payments was due to circumstances for which the debtor should not justly be held accountable,” § 1328(b)(1). See Pardo & Lacey, *supra* note 56, at 516.

59. See § 727(a) (setting forth twelve grounds for denial of a Chapter 7 discharge). In Chapter 13, the grounds for denial of discharge are substantially more limited. A Chapter 13 debtor may be denied a discharge only if he or she has failed to complete all payments under the repayment plan, § 1328(a), and does not qualify for a hardship discharge, § 1328(b); or, under certain circumstances, if the debtor received a discharge in a prior bankruptcy case, § 1328(f); or if the debtor has failed to complete a personal financial management instructional course, § 1328(g)(1).

60. See *In re Harmon*, 324 B.R. 383, 387 (Bankr. M.D. Fla. 2005).

61. § 727(c)(1). The U.S. Trustee, supervised by the U.S. Attorney General, see 28 U.S.C. § 586(c) (2006), has various duties, including the establishment and supervision of a panel of private trustees who will serve in cases under the various chapters of the Bankruptcy Code, see § 586(a)(1); monitoring the administration of cases, see § 586(a)(3); performing the duties of a private trustee when required to do so, see, e.g., 11 U.S.C. § 701(a)(2); 28 U.S.C. § 586(a)(2); reviewing—and objecting to when appropriate—applications for compensation and reimbursement of fees and expenses, see 28 U.S.C. § 586(a)(3)(A); and monitoring repayment plans under Chapters 11, 12 and 13, see § 586(a)(3)(B), (C).

62. Examples include an extension of time or a pending motion to dismiss the case. See FED. R. BANKR. P. 4004; *In re Harmon*, 324 B.R. at 386-89. The procedural deadline for filing a complaint objecting to discharge is, however, a claim-processing rule that the debtor will forfeit if he or she fails to timely assert it as an affirmative defense. See *Kontrick v. Ryan*, 540 U.S. 443, 456-60 (2004). Also, a court may revoke a Chapter 7 discharge if the debtor obtained it fraudulently and the party requesting revocation lacked knowledge of the fraud when the discharge was originally granted. 11 U.S.C. § 727(d)(1).

prompting, the debtor will automatically be granted a discharge without any inquiry by the court.<sup>63</sup>

Upon receiving a discharge, the debtor will be released from personal liability on all discharged debts.<sup>64</sup> In its most expansive form, the discharge would extend to all prebankruptcy debts, regardless of the identity of the creditors to whom the debts were owed or the circumstances under which such debts were incurred. But the reality is that our bankruptcy law has never provided an absolute discharge. Time and time again, society has determined that the repayment of certain types of debts ought to trump debtor relief. The manner in which the scope of debtor relief is tailored mirrors the normative judgments regarding the extent to which society desires to facilitate “a new opportunity in life and a clear field for future effort”<sup>65</sup> for individuals who seek debt relief through the bankruptcy system.<sup>66</sup>

A review of the historical record reveals Congress’s ongoing tendency to carve out more and more exceptions to the discharge in bankruptcy. Initially, very few debts were nondischargeable. Under the Bankruptcy Act of 1800, repealed in 1803, only debts owing to the federal government or state governments were excepted from discharge.<sup>67</sup> Under the Bankruptcy Act of 1841, repealed in 1843, only debts resulting from defalcation by the debtor while acting as a public officer or in a fiduciary capacity did not qualify for discharge.<sup>68</sup> Somewhat similarly, under the Bankruptcy Act of 1867, repealed in 1878, any debt “created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character” fell outside the scope of discharge.<sup>69</sup>

Congress, however, changed its approach to the scope of discharge with the Bankruptcy Act of 1898, repealed in 1978, by broadening the categories of nondischargeable debt to include tax debts; judgment debts “for frauds, or obtaining property by false

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63. *In re Harmon*, 324 B.R. at 387.

64. *See* § 524(a)(2).

65. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

66. *See* KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 1* (paperback ed. 1999); Mann, *supra* note 20, at 1.

67. Act of Apr. 4, 1800, ch. 19, § 62, 2 Stat. 19, 36 (repealed 1803).

68. Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441 (repealed 1843).

69. Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 517, 533 (repealed 1878).

pretenses or false representations, or for willful and malicious injuries to the person or property of another;” unscheduled debts; and debts arising from the debtor’s fraud.<sup>70</sup> One might attribute this shift in policy, at least initially, to a congressional reconceptualization of tailoring discharge relief primarily with a scalpel—that is, discharge exceptions for particular debts related to fraud or misconduct—instead of a hatchet—that is, an absolute bar to discharge based on the debtor’s fraud or misconduct.<sup>71</sup> Yet shortly after passage of the 1898 Act, Congress confirmed its willingness to curtail the scope of discharge on the basis of the identity of the creditor rather than the circumstances giving rise to the debt. Already having given protected status to tax creditors,<sup>72</sup> in 1903 Congress added support creditors—those owed domestic support obligations—to the list of creditors whose debt was nondischargeable.<sup>73</sup> This trend continued when Congress enacted the modern Bankruptcy Code in 1978, which originally excluded nine categories of debt from discharge.<sup>74</sup> Presently, as a result of various amend-

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70. Act of July 1, 1898, ch. 541, § 17, 30 Stat. 544, 550 (repealed 1978). The 1898 Act marked a substantive departure from past bankruptcy laws insofar as the law came to be viewed primarily as one favoring the debtor rather than a device for creditor collection. See Tabb, *supra* note 58, at 364-65. One commentator at the time predicted that, like its predecessors, the 1898 Act would be short-lived. See Henry G. Newton, *The United States Bankruptcy Law of 1898*, 9 YALE L.J. 287, 296 (1900) (“[A]fter [the 1898 Act] has been in operation for a few years, and most of the insolvents in the country have obtained their discharge, it will doubtless be repealed, as in former cases.”). In this instance, however, history would not repeat itself. Instead, the law persisted for eighty years and, although repealed in 1978, was simultaneously replaced with a new bankruptcy law that has been in place ever since. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101-1532 (2006)). Thus, 1898 marks the beginning in this nation of a continuously operating bankruptcy law. For a discussion of the instability of bankruptcy legislation prior to 1898 and the changes that reversed this state of affairs, see DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 23-47 (2001).

71. See Tabb, *supra* note 58, at 368 (“Congress in 1898 did not suddenly decide to be totally forgiving of fraudulent and dishonest bankrupts; it just wanted to make the punishment fit better the financial ‘crime.’”); cf. GROSS, *supra* note 66, at 27-28 (noting that discharge denial and discharge exceptions “are like bankruptcy’s gatekeepers: they permit the ‘good’ individual debtors or at least the good debts to be discharged, and they keep the ‘bad’ debtors or bad debts from partaking of the system’s benefits”).

72. See *supra* note 70 and accompanying text.

73. Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 797, 798 (repealed 1978). Also included were debts “for seduction of an unmarried female, or for criminal conversation.” *Id.*

74. § 523(a), 92 Stat. at 2590-91 (codified as amended at 11 U.S.C. § 523(a) (2006)).

ments to the Code—some the product of lobbying<sup>75</sup>—this number has burgeoned to nineteen types of nondischargeable debts.<sup>76</sup>

Congressional policy has thus evolved to restrain the reach of a debtor's fresh start by reference both to the identity of the creditor owed a debt—for example, tax and support creditors—and to the circumstances giving rise to the debt—for example, defalcation, fraud, or an intentional tort.<sup>77</sup> Normative judgments regarding the worthiness of a particular claimant and the worthiness of the debtor clearly underlie such policy.<sup>78</sup> Inherent in these judgments is the belief that the debtor's postbankruptcy earnings and assets will enable him to repay his nondischarged debts.<sup>79</sup> Nonetheless, the concern has arisen that the fresh-start policy may be compromised given the excessive proliferation of discharge exceptions. As forgiveness of debt becomes more limited, the debtor will exit bankruptcy with a greater amount of nondischarged debt, thereby

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75. GROSS, *supra* note 66, at 124; 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 180 (1997).

76. See 11 U.S.C. § 523(a) (2006). For individuals who complete their repayment plans, Chapter 13 provides a broader discharge than the discharge provided to individuals who file for relief under Chapters 7, 11, or 12. Although the full list of nineteen nondischargeable debts applies in the latter chapters, § 523(a), the full-compliance discharge of § 1328(a) excepts only some of those debts from discharge. See § 1328(a)(1)-(4).

77. Douglass G. Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 89 n.99 (1982); see also 1 NAT'L BANKR. REV. COMM'N, *supra* note 75, at 179 ("Debts excepted from the bankruptcy discharge obtain distinctive treatment for public policy reasons. Many nondischargeable debts involve 'moral turpitude' or intentional wrongdoing. Other debts are excepted from discharge because of the inherent nature of the obligation, without regard to any culpability of the debtor." (footnote omitted)).

78. See Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1050-58 (1987); see also, e.g., H.R. REP. NO. 109-31, pt. 1, at 142-43 (2005) ("Congress previously made the policy judgment that the equities of persons injured by drunk drivers outweigh the responsible debtor's interest in a fresh start, and here clarifies that the policy applies not only on land but also on the water and in the air. Viewed from a practical standpoint, this provision closes a loophole that gives intoxicated watercraft and aircraft operators preferred treatment over intoxicated motor vehicle drivers and denies victims of alcohol and drug related boat and plane accidents the same rights accorded to automobile accident victims under current law."), reprinted in 2005 U.S.C.A.N. 88, 201-02.

79. See GROSS, *supra* note 66, at 28 ("The limitations [to discharge] exist because individual debtors will generate future income through their labor, and this income can be used to repay the nondischarged debts."); Boshkoff, *supra* note 77, at 89 ("If we truly believed that the debtor had yielded up all her property and that there was no prospect of an improvement in her financial condition, there would be no exceptions to discharge. But there is always a lingering doubt, the hope that the debtor can do something for her creditors. This leads to the creation of such exceptions.").

increasing the likelihood that bankruptcy relief will fail to restore the debtor to economic productivity.<sup>80</sup>

In light of these considerations, how might ideological preferences regarding the fresh-start policy affect the decision-making process of judges in the context of debt-dischargeability determinations? To answer this question, one must realize that, for the overwhelming majority of such determinations, the judge's preferences will be constrained by statutory design. Because the question presented to the court focuses on whether a debt falls within a statutorily defined category, the judge cannot expressly base his or her determination on the debtor's financial circumstances and whether those circumstances warrant forgiveness of debt. Thus, the judge will have to rely on other mechanisms, such as principles of statutory interpretation or burdens of proof, to justify the direction of his or her vote. Regarding statutory interpretation,<sup>81</sup> some courts have been inclined to give the discharge exceptions a narrow construction,<sup>82</sup> whereas others have given them a broad construction.<sup>83</sup> As for burdens of proof, the Supreme Court has held that a creditor must prove the nondischargeability of a debt by a preponderance of the evidence and, in doing so, rejected the more exacting standard of clear and convincing evidence.<sup>84</sup> As another example,

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80. See REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 3-4 (1973) ("As for the debtor, while he might receive a discharge in bankruptcy, because of the large number of nondischargeable debts ... the question is raised as to how much relief the debtor actually gets."); GROSS, *supra* note 66, at 111 ("If, however, the exceptions become too numerous, they could overpower the rehabilitative principle, making the exception the rule and the rule the exception.").

81. Cf. Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 237 (2004) ("Appellate judges are likely to be more receptive than members of Congress or Congressional staffers to careful and well-grounded arguments by bankruptcy experts. Even under a so-called plain meaning analysis, some judges believe that context is critical to accurate statutory interpretation and construction.").

82. See, e.g., *In re Pelokowski*, 990 F.2d 737, 744 (3d Cir. 1993); *Snoke v. Riso* (*In re Riso*), 978 F.2d 1151, 1154 (9th Cir. 1992); *Schweig v. Hunter* (*In re Hunter*), 780 F.2d 1577, 1579 (11th Cir. 1986) (citing *Gleason v. Thaw*, 236 U.S. 558 (1915)), *abrogated on other grounds* by *Grogan v. Garner*, 498 U.S. 279 (1991).

83. See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 220-23 (1998).

84. See *Grogan*, 498 U.S. at 286-87. In reaching its decision, the Court expressly made reference to the fresh-start policy. See *id.* at 287 ("We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud. Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting

the Sixth Circuit has stated that an award designated by a state court as being in the nature of support and bearing certain indicia of a support obligation “should be conclusively presumed to be a support obligation by the bankruptcy court.”<sup>85</sup>

In some instances, however, the statutory framework does invite a judge to determine whether the debtor’s financial circumstances warrant forgiveness of debt. Since the enactment of the Bankruptcy Code in 1978, a debtor has been able to discharge his or her student loans in bankruptcy upon showing that repayment of the loans would impose an undue hardship.<sup>86</sup> Also, from 1994 through 2005, a debtor could discharge domestic relations nonsupport debt if the debtor either (1) proved an inability to pay the debt “from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor” or (2) demonstrated that the benefits of discharge to the debtor would outweigh the detrimental consequences to the debtor’s former spouse or child.<sup>87</sup> Unlike the other debts excepted from discharge, these debts represent conditionally dischargeable debts—that is, debts discharged upon the satisfaction of a certain condition.<sup>88</sup> Significantly, this approach deviates from our historical tradition of excluding conditional discharge rules from bankruptcy law<sup>89</sup> and creates a *sui generis* opportunity for a judge to exercise considerable discretion in deciding whether a debtor’s financial burden justifies a release from prebankruptcy debt.<sup>90</sup> Accordingly, for determinations involving these types of debt, one might expect

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interests.”).

85. *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 401 (6th Cir. 1998).

86. See 11 U.S.C. § 523(a)(8) (2006). For a detailed discussion of the legislative history of this provision, see Pardo & Lacey, *supra* note 56, at 419-28.

87. See 11 U.S.C. § 523(a)(15) (2000) (amended 2005). Congress enacted Bankruptcy Code § 523(a)(15) in 1994. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 303(e), 108 Stat. 4106, 4133.

88. See Boshkoff, *supra* note 77, at 73-74 (defining conditional discharge rules).

89. See *id.* at 73.

90. See Tabb, *supra* note 58, at 363 & n.315 (noting that the Bankruptcy Code section providing for discharge of student loans upon a finding of undue hardship stands as the “principal exception” to the bankruptcy court’s limited control over discharge); see also, *e.g.*, Pardo & Lacey, *supra* note 19, at 223-34 (finding judge-specific effects in debt-dischargeability determinations involving student loans).



judges' ideological preferences regarding the fresh-start policy to play a more prominent role.<sup>91</sup>

Finally, one should take into account the manner in which the litigation process itself may affect a judge's propensity to vote in conformity with his or her ideological preferences. Because debt-dischargeability determinations are generally adversary proceedings,<sup>92</sup> they proceed much as would any full-blown federal lawsuit.<sup>93</sup> The bankruptcy system thus necessitates litigation for relief from certain types of debts. The irony here is that debtors have generally sought bankruptcy relief as a result of financial distress. If a debtor must expend considerable resources to vindicate his or her fresh start, the litigation process itself could undermine the fresh start. One might imagine that those who are in the greatest need of relief will not have the financial wherewithal to hire an attorney.<sup>94</sup> They either will not pursue relief in the first instance, or they will do so on a pro se basis.<sup>95</sup> For those who can afford representation, their plight may be less sympathetic in light of their wealth relative to worse-off debtors—especially when one considers the amount of costs that the debtor will have incurred by the time the case reaches

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91. *Cf.* N.Y. State Higher Educ. Serv. Corp. v. White (*In re White*), 6 B.R. 26, 29 (Bankr. S.D.N.Y. 1980) (“It is regrettable that Congress shed so inadequate a spotlight on the exculpatory phrase ‘undue hardship’ .... It is also regrettable that so much is therefore left to the individual view of each judge who, after all, brings the sum of who and what he was, what he has become, and what he sees through his own eyes to this basically disagreeable task.”).

92. FED. R. BANKR. P. 7001(6).

93. *See supra* note 39 and accompanying text.

94. It seems reasonable to conclude that a contingent-fee arrangement in this context is highly improbable given that discharge does not result in a monetary award but rather in a release from personal liability. *See* 11 U.S.C. § 524(a)(2) (2006). Accordingly, this leaves hourly fees or lump-sum payment as potential arrangements for the debtor procuring representation. *Cf.* Robert J. Landry, III & Amy K. Yarbrough, *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 347 (2008) (“Fees in typical no-asset chapter 7 cases are usually a flat charge, typically paid in advance of filing. The fee covers most basic services associated with the routine consumer case. Services beyond routine services are subject to further agreement, likely at an hourly rate, between the debtor and the attorney.” (footnotes omitted)); Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 292 (2010) (reporting an empirical finding that “the primary factor that affects the date on which people actually file [for bankruptcy] is their ability to save up the money to pay their attorneys and filing fees”).

95. For evidence that pro se debtors who attempt to navigate the bankruptcy process fare worse than represented debtors, see Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 19-31 (2009).

the court of appeals. To make matters worse, debtors, who tend to be one-shot players, are likely to find themselves litigating against large institutional creditors—such as commercial banks and the IRS—that are well-funded, legally sophisticated repeat players in the bankruptcy system. Because of their resource advantage, and because of their likely ability to externalize the costs of such litigation, many of these creditors may be able to force the debtor to capitulate before trial. For those cases that do proceed to trial, the parties will find themselves trying their cases under an evidentiary standard—preponderance of the evidence—not likely to favor either side.<sup>96</sup> The debtor, however, will have the deck stacked against him or her insofar as the nature of the litigation will be focused on arguments over debts that Congress has singled out as warranting immunity from discharge.

On appeal, legal issues will be reviewed *de novo*, and pure factual issues will be reviewed for clear error.<sup>97</sup> These standards of appellate review are also likely to tilt in favor of creditors. First, consider the review of legal issues. One might think that, because the review standard is *de novo*, both the debtor and the creditor will have a clean slate from which to argue and thus be on equal footing when taking their proverbial “second bite at the apple.” But as a result of the above-mentioned resource asymmetry that advantages creditors, a creditor is more likely to hire an appellate specialist to pursue its appeal, whereas the debtor will continue to be represented by the attorney who served as trial counsel. On appeal, trial counsel may be anchored by the arguments that he or she made below and may also suffer from optimism bias, with the result that innovative argumentation will be chilled and the client’s position may be undermined.<sup>98</sup> As for the review of factual issues, winning

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96. In its decision holding that the preponderance of the evidence standard applies in debt-dischargeability determinations, the Supreme Court noted that the standard “results in a roughly equal allocation of the risk of error between litigants.” *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

97. *See, e.g., Peklar v. Ikerd (In re Peklar)*, 260 F.3d 1035, 1037 (9th Cir. 2001); *Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1086-87 (9th Cir. 2001).

98. *See* SAMUEL R. MAIZEL & JESSICA D. GABEL, *BANKRUPTCY APPEALS MANUAL* 1-2 (2d ed. 2010) (“Many bankruptcy practitioners pursue the appeals from cases where they also served as trial counsel. Whether this serves the best interests of the client is questionable. Appellate practice is a specialized area of the law and requires a unique set of skills. Moreover, in many cases a ‘fresh set of eyes’ is beneficial; counsel involved in the trial may have lost perspective on the case. Emotions can cloud the very judgment needed to make

on appeal often is a function of winning at trial. A critical component of trial litigation is for counsel to be mindful of the looming shadow of an appeal and to establish a factual record that protects the client's position,<sup>99</sup> especially given that the appellate court will be limited to review of the trial record.<sup>100</sup> It seems reasonable to conclude that attorneys representing well-funded creditors are more likely to have this mindset at trial than attorneys representing cash-strapped debtors—if, for no other reason, due to the difference in the quality of lawyering.<sup>101</sup> Thus, if creditors are more likely to effectively protect their positions at trial as a result of informational and resource asymmetries, the clearly erroneous standard will, over time, favor them on appeal.

Finally, in a study focusing on outcomes at the circuit court level, one must be particularly attuned to the potential selection effect inherent in a decision to bring an appeal—particularly in the bankruptcy system with its two levels of intermediate appeal. It

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important decisions in an appellate case. Accordingly, many commentators and judges suggest that engaging an appellate specialist merits consideration.”); cf. David H. Tennant & Lauren M. Michals, *Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel*, 20 PROF. LAW. 1, 4 (2010) (“Appellate counsel is in a natural position to review the adequacy of the record made by trial counsel and to determine if meritorious arguments were not pressed at all, or were made and abandoned, and, perhaps, even to ask trial counsel, ‘Why?’”).

99. See, e.g., *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1331 (10th Cir. 1984) (“To preserve an evidentiary challenge for appeal, the opponent of the evidence must insure that the trial record reflects ‘a timely objection ... stating the specific ground of objection, if the specific ground is not apparent from the context.’” (omission in original) (quoting FED. R. EVID. 103(a)(1))); see also Tennant & Michals, *supra* note 98, at 5 (“In the context of an appeal, the competence of trial counsel will be front and center in terms of the trial record, especially in making evidentiary objections and otherwise preserving errors.”).

100. See FED. R. APP. P. 10(b)(2) (“If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.”); see also, e.g., *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992) (“Our appellate review is necessarily limited when, as here, an appellant challenges the sufficiency of the evidence and rulings of the district court but fails to ‘include in the record a transcript of all evidence relevant to such finding or conclusion.’” (quoting FED. R. APP. P. 10(b)(2))).

101. Cf. William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 406 (1994) (“Rather than making informed decisions reflecting their particular circumstances and personal goals, debtors are steered to particular choices by their attorneys. Too often, I believe, those choices reflect the best interests of the attorneys rather than the interests of debtors themselves.”).

could be that debtors, in desperate need of financial relief, systematically bring weaker appeals than do creditors. If mustering the resources to litigate the appeal is not too costly, the debtor may take the view that there is nothing to lose and everything to gain—most importantly, freedom from debt.<sup>102</sup> Or, “given the pressures of financial distress, ... debtors may suffer from a self-serving bias which leads them to believe that fairness demands relief from their debt burden and consequently to overestimate their probability of success.”<sup>103</sup> Yet another possibility could be that a debtor’s attorney’s economic incentives discourage the attorney from advising the debtor to abandon the appeal process. Because the attorney will likely have represented the debtor at the trial level,<sup>104</sup> and because the attorney will likely be paid on an hourly basis,<sup>105</sup> a potential principal-agent problem arises pursuant to which the attorney will work counter to his client’s interest in order to further his financial gain.<sup>106</sup> On the other hand, the added cost of

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102. See Pardo & Lacey, *supra* note 19, at 191 (“If the debtor does not litigate, he or she will be haunted by the specter of a crushing debt load and creditor collection efforts for years and years.”).

103. *Id.* at 211.

104. See *supra* note 98.

105. See *supra* note 94.

106. See, e.g., *In re San Miguel*, 40 B.R. 481, 485 (Bankr. D. Colo. 1984) (“[T]here is no demonstrated desire for repayment of creditors in any of these [Chapter 13] plans either.... In each of the cases now under consideration, the plan is careful to terminate immediately upon the final installment of attorney’s fees.... The real purpose of the 16 month, minimum repayment plans here is to avail debtors of the opportunity to defer attorney’s fees, since it appears difficult to obtain counsel in Chapter 7 without payment of fees in advance.”); cf. Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 172 (1996) (“[T]he framing model of litigation poses a powerful role for the attorney. The attorney can control the client’s frame, thereby influencing settlement decisions in either direction. The attorney may or may not use this ability to serve his clients’ best interests. An avaricious defense attorney who works on an hourly rate may portray all settlements as losses so as to encourage the risk-seeking proclivities of the client.”). For empirical evidence that the identity of debtor’s counsel can be statistically significantly associated with an increase in the resolution of a debt-dischargeability determination by trial as opposed to settlement and with a decrease in the amount of relief obtained by the debtor—that is, the extent of debt discharged—see Pardo & Lacey, *supra* note 19, at 220-21. The possibility also exists that, in addition to the financial-gain motive, an attorney may steer a debtor client toward certain choices based upon the attorney’s values. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 509 (1993) (“Lawyers’ financial interests and social attitudes are often mutually reinforcing. Their attitudes about proper social role-playing by their clients and themselves may have their origins at least in part in the lawyers’ financial interests. For example, a lawyer whose

prosecuting an appeal through an extra layer of appellate review may deter debtors from bringing frivolous appeals to the circuit court. Moreover, if a creditor views the appeals process as a battle that can be won by attrition, this vantage point may encourage creditors to pursue weaker appeals with the hope that the debtor will eventually capitulate once his or her resources have been exhausted.<sup>107</sup> The end result will be a settlement pursuant to which the parties agree that some, if not all, of the debt will be deemed nondischargeable.

Given these considerations, summarized below in Table 1, we expect that the outcomes of debt-dischargeability determinations will skew in favor of creditors. In other words, debtors will have a difficult time engendering sympathy from a judge. That said, we still believe that, if debtors do find a sympathetic ear, it is more likely to be a liberal judge rather than a conservative judge. Thus, although we expect to observe ideological voting by circuit court judges, that pattern of voting may not be as pronounced as in other areas of the law.

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practice prospers using chapter 13 frequently has every reason to hold the view that chapter 13 is better for clients' self-esteem and to develop professional pride in playing a socially useful role in facilitating repayment.”).

107. *Cf. Baker v. Sharpe (In re Sharpe)*, 351 B.R. 409, 424 n.13 (Bankr. N.D. Tex. 2006) (“Indeed, Ms. Baker—or at least her attorney—knew there was this very large flaw in her argument.... Plaintiff quoted section 523(a)(2)(A), but left out, with the convenient use of an ellipsis, the critical phrase ‘other than a statement respecting the debtor’s or an insider’s financial condition.’ Thankfully, the court has several copies of the Bankruptcy Code handy so it could consult the entire statutory provision in addressing this question.”).

**Table 1**  
**The Potential Skew of Outcomes**  
**in Debt-Dischargeability Determinations**

Litigation Feature	Litigant Advantaged
Procedure	Favors creditor
Burden of proof	Slightly favors debtor
Resource asymmetry	Favors creditor
Informational asymmetry	Favors creditor
Standards of appellate review	Favor creditor

### *B. Sample Selection*

Given the time demands involved in creating an original dataset, we faced a choice in constituting the dataset for our study. We could either focus on collecting and analyzing opinions arising in all of the federal circuits over a short period of time—for example, three one-year periods—or we could focus on opinions arising in select federal circuits over a longer period of time—for example, a ten-year period. We chose the latter approach so that, in our efforts to identify the causal effects of ideology on voting, we could take advantage of time variation in the random assignment of judges, judicial ideology, and appellate structure. The criteria for selecting the circuits were the ranking of the ideological composition of the circuit and the presence or absence of an operating BAP. We sought to identify circuits at the ideological extremes—the most liberal and most conservative circuits—as well as those whose ideological composition was toward the relative center of all circuits. We did so by reference to the median Judicial Common Space (JCS) score<sup>108</sup> among all active judges in each circuit, other than the D.C. Circuit,<sup>109</sup> for each year during the ten-year study period beginning on January 1, 1999, and

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108. See Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007). We gratefully acknowledge Epstein and her co-authors for generously making their JCS data available to other researchers. See Lee Epstein, *Research*, UNIV. S. CAL., <http://epstein.usc.edu/research/JCS.html> (last visited Nov. 9, 2011).

109. We excluded the D.C. Circuit because of the dearth of bankruptcy appeals on its docket. For example, during the twelve-month period ending on September 30, 2009, only three original bankruptcy appeals were commenced in the U.S. Court of Appeals for the D.C. Circuit. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR app. at 82 tbl.B-1 (2010).

ending on December 31, 2008. We calculated both the median and the mean for the median JCS scores of each circuit during this ten-year period.<sup>110</sup> Table A1 of the Appendix rank-orders the circuits according to these scores, from the most conservative to the most liberal circuit with the JCS scores reported in parentheses. The JCS scores range from -1.0, the most liberal score, to 1.0, the most conservative score.<sup>111</sup>

As set forth in Table A1 of the Appendix, the Fifth Circuit ranked as the most conservative circuit during this period, whether by reference to the median median-JCS score or mean median-JCS score of the circuits during the ten-year period. The Ninth Circuit, on the other hand, ranked as the most liberal circuit according to the median median-JCS score and as the second-most liberal circuit according to the mean median-JCS score. Given our interest in examining voting behavior in circuits at the ideological extremes, we selected the Fifth and Ninth Circuits for inclusion in our study. We selected the Ninth Circuit rather than the Second Circuit at the liberal extreme because of its continuously operating BAP since enactment of the Bankruptcy Code; the Second Circuit, on the other hand, had an operating BAP only from 1996 through 2000.<sup>112</sup> Among the four most conservative circuits, none has ever had an operating BAP.<sup>113</sup> Finally, we sought to identify two circuits whose ideological scores placed them toward the relative center of all the circuits, one with a BAP and the other without one. We selected the Eighth Circuit as an example of the former and the Seventh Circuit as an example of the latter.<sup>114</sup>

To constitute the sample dataset, a search query was formulated in Westlaw's FBKR-CS5, FBKR-CS7, FBKR-CS8, and FBKR-CS9 databases, which contain reported and unreported decisions and

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110. For example, the median JCS scores for the Fifth Circuit for each year during the ten-year period beginning on January 1, 1999, and ending on December 31, 2008, are .41125 (1999), .41225 (2000), .472 (2001), .472 (2002), .472 (2003), .44425 (2004), .44425 (2005), .44425 (2006), .4165 (2007), and .4165 (2008). The median of these scores is .44425—that is, the median median-JCS score—and the mean of these scores is .440425—that is, the mean median-JCS score.

111. See Epstein et al., *supra* note 108, at 309.

112. Nash & Pardo, *supra* note 21, at 1779 n.122.

113. See *id.*; *infra* Appendix Table A1.

114. Because the First, Eighth, and Tenth Circuits all have operating BAPs, we were restricted to selecting only one of these circuits as a result of our criteria of selecting both a BAP circuit and non-BAP circuit situated at the relative ideological center of all circuits.

orders relating to bankruptcy issued by various courts, including federal circuit courts of appeals in the Fifth, Seventh, Eighth, and Ninth Circuits.<sup>115</sup> The search query consisted of two terms: “11 U.S.C.,” the standard citation to title 11 of the United States Code—that is, the Bankruptcy Code; and “523,” which is the section number of the Bankruptcy Code provision entitled “Exceptions to discharge.”<sup>116</sup> The search terms were coupled with (1) a date restriction that limited query retrieval to opinions issued during the ten-year period beginning on January 1, 1999, and ending on December 31, 2008, and (2) a field restriction that limited query retrieval to opinions whose preliminary field contained the term “court of appeals.”<sup>117</sup> The search query produced a total of 346 documents: 91 from the Fifth Circuit, 50 from the Seventh Circuit, 34 from the Eighth Circuit, and 171 from the Ninth Circuit. Because most of these documents were opinions rather than orders, for ease of reference we will collectively refer to the documents as “opinions” for the remainder of the Article.

The study’s dataset includes both published and unpublished opinions<sup>118</sup> that involve only the resolution of dispositions rendered by bankruptcy courts in core proceedings involving a determination regarding the dischargeability of a debt owed by an individual debtor.<sup>119</sup> We included opinions that disposed of the appeal on the merits as well as opinions that involved solely procedural dispositions, such as dismissal for lack of jurisdiction, dismissal for lack of standing, and dismissal on mootness grounds. If an opinion involved both a debt-dischargeability determination and other

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115. Reported case law documents are those released for publication in *West Federal Reporters*.

116. 11 U.S.C. § 523 (2006).

117. The preliminary field in Westlaw is found at the top of case law documents and generally contains the name of the court that issued the document. In its entirety, the search query was the following: “11 U.S.C.” & 523 & da(aft 12/31/1998 & bef 01/01/2009) & pr(“court of appeals”).

118. Empirical studies of judicial voting often examine only published opinions. *See, e.g.*, CROSS, *supra* note 4, at 4; SUNSTEIN ET AL., *supra* note 5, at 18. This practice has generated methodological criticism. *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1923 (2009) (“[A]ny assessment of the work of the courts of appeals that does not include unpublished opinions cannot be seen as complete.”).

119. Note that, as defined by the Judicial Code, core proceedings include “determinations as to the dischargeability of particular debts.” 28 U.S.C. § 157(b)(2)(I) (2006).



matters, only the portion of the opinion relating to the debt-dischargeability determination was coded.<sup>120</sup> Our definition of debt-dischargeability determination excludes a determination to award a party attorneys' fees with respect to the fees incurred in litigating the determination, whether pursuant to 11 U.S.C. § 523(d) or otherwise.<sup>121</sup> This situation, however, is distinct from a determination of whether an award for attorneys' fees assessed against the debtor prior to bankruptcy is dischargeable. Such opinions were included.<sup>122</sup> If the opinion involved multiple debt-dischargeability issues, but the court did not address all of them, only those matters addressed by the court of appeals were coded. Similarly, if a party waived a debt-dischargeability issue by failing to offer a legal or factual explanation of the lower court's error, the opinion or portion thereof was not coded. If the opinion involved certification by the court of appeals to a state court, the opinion was excluded. We also excluded en banc opinions. Finally, with respect to consolidated appeals decided by a single opinion, if all of the coded information produced duplicate observations with identical values across all variables, then we coded the consolidated appeals in the aggregate. If, however, the duplicate observations did not have identical values across all variables, then we disaggregated the consolidated appeals for coding purposes.

Pursuant to these selection procedures, our dataset consists of 666 judicial votes cast by 133 judges and derived from 222 opinions. Table A2 of the Appendix sets forth the number of judicial votes in

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120. See, e.g., *Spoerer Burke 1 LLC v. Feige (In re Feige)*, Nos. 06-35124, 06-35156, 2007 WL 3210945 (9th Cir. Oct. 30, 2007) (reviewing matters related to a debt-dischargeability determination pursuant to 11 U.S.C. § 523 and denial of discharge pursuant to 11 U.S.C. § 727).

121. See § 523(d) (providing for fee shifting in favor of the debtor if the creditor's complaint to determine dischargeability under § 523(a)(2) was not substantially justified).

122. Somewhat similarly, if one of the issues addressed by the court of appeals related to sanctions that were imposed in connection with the dischargeability determination, that portion of the opinion was not coded. On the other hand, if the issue involved the dischargeability of sanctions assessed against the debtor prior to bankruptcy, that portion of the opinion was coded. Also, if one of the issues addressed by the court of appeals related to the award of postjudgment interest by the bankruptcy court to the creditor in connection with a debt-dischargeability determination, that portion of the opinion was not coded. On the other hand, any issue regarding the dischargeability of accrued interest on a nondischargeable debt was coded.

the dataset by calendar year and circuit with column percentages reported in parentheses.

### *C. Descriptive Statistics and Bivariate Analyses*

In this Section, we provide descriptive statistics of our data as well as bivariate analyses exploring correlations between the direction of a judge's vote, whether conservative or liberal, and our explanatory variables of interest.

#### *1. Direction of Vote*

To explore the ideology of judging in the bankruptcy context, our dependent variable focuses on whether the circuit court judge cast his or her vote in a liberal or conservative direction.<sup>123</sup> As has been aptly noted:

Regardless of the measure of politics used, all researchers recognize that identifying possible political predilections in the judging context requires a prior definition of both "liberal" and "conservative" decisions. To give meaning to the two terms, scholars look to the identity of the winning party as well as the claim alleged.<sup>124</sup>

Conventional coding protocols follow the principle that a liberal vote favors the "underdogs" or "have-nots," whereas a conservative vote favors the "upperdogs" or "haves."<sup>125</sup> In the debtor-creditor context, a vote for a pro-creditor outcome is generally viewed to be a conservative vote.<sup>126</sup> There are concerns, however, that "the conventional approach to coding could lead to systematic errors in the identification of liberal and conservative decisions in the

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123. Although a focus on outcome overlooks opinion content, we choose to examine outcome in order to evaluate the claims of commentators who assert that bankruptcy cases would not yield ideological outcome-based votes, as do other areas of law.

124. Staudt et al., *supra* note 6, at 1801.

125. *See id.*; cf. Mark J. Roe, *Commentary on "On the Nature of Bankruptcy": Bankruptcy, Priority, and Economics*, 75 VA. L. REV. 219, 235 (1989) ("A persistent strain in American culture favors the underdog, hesitates to kick someone when he is down (even when he 'has it coming to him'), and worships the comeback.").

126. Staudt et al., *supra* note 6, at 1801.

economic context,” including bankruptcy cases, due to the diverse characteristics of litigants.<sup>127</sup> In their empirical study of U.S. Supreme Court tax cases, Nancy Staudt and her co-authors, using conventional coding protocols, found a statistically significant association between the political preferences of the Justices and the outcomes of corporate tax cases.<sup>128</sup> They did not, however, find such an association in individual tax cases or in the aggregate of all cases—that is, both individual and corporate.<sup>129</sup> The authors surmised that the absence of a correlation was likely attributable to the coarse coding protocols that could not account for the systematic diversity of litigants in individual tax cases, thus inevitably leading to misidentification of case outcomes.<sup>130</sup>

Given the legitimate and crucial concerns raised by Staudt and her co-authors, especially when considered in light of our description in Part II.A of the variety of litigants and disputes involved in bankruptcy cases, we have limited our analysis to debt-dischargeability determinations in order to render the definition of liberal and conservative outcomes more intuitive and consistent with prior research regarding the role of ideology in judicial voting. Although we cannot be fully confident that our approach eliminates the problem of controlling for litigant heterogeneity, we do believe that limiting our inquiry to debt-dischargeability determinations largely reduces the problem.

As a historical matter, liberal Members of Congress have tended to support pro-debtor legislation, and conservative Members have

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127. *Id.* at 1814.

128. *Id.* at 1817.

129. *Id.*

130. The authors noted as follows:

Although we can only speculate why the Justices do not appear to be politically motivated in individual taxpayer cases, we expect it relates to the diverse characteristics of this group and thus the categorization problems described earlier. In *Dalm*, the liberal Justices viewed Francis Dalm as a sympathetic taxpayer entitled to a refund, but many individuals that come to the Court are likely to be wealthy taxpayers challenging taxes such as those imposed on business activities, capital gains, and so forth—challenges that would most likely not get a sympathetic ear from the liberal Justices. We expect that grouping all individual taxpayers together and then labeling pro-taxpayer outcomes as “conservative” had disadvantages for empiricists interested in correlations between politics and outcomes. In some cases, the decisions are accurately categorized as conservative, but others should be coded as liberal.

*Id.* at 1820 (footnote omitted).

tended to support pro-creditor legislation.<sup>131</sup> This pattern of support was evident during the most recent round of bankruptcy reform, which culminated in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>132</sup> Much of the legislation focused on restricting the scope of relief available to consumer debtors and sought to accomplish this, in part, by attempting to strip bankruptcy judges of their gatekeeping discretion in allowing access to Chapter 7 relief.<sup>133</sup> As the Supreme Court noted in one of its first cases interpreting one of the 2005 amendments, “Congress enacted [BAPCPA] ... to correct perceived abuses of the bankruptcy system.”<sup>134</sup> Support for and opposition to BAPCPA occurred mostly along party lines, with all congressional Republicans voting for it and 62% of congressional Democrats voting against it.<sup>135</sup> Although the fresh-start policy may not be a perfectly partisan issue, it is clear that “the questions of who ought to be afforded [bankruptcy] relief and what the scope of that relief ought to be are questions that evoke visceral reactions fueled by particularized views on the ethic of personal responsibility”<sup>136</sup> and

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131. See SKEEL, *supra* note 70, at 16 (“Partisan politics have also figured prominently in bankruptcy history. Much of creditors’ influence has been in the Republican party, whereas most pro-debtor lawmakers have been Democrats. The political divide was especially pronounced in the nineteenth century, but the interaction of the three principal forces in U.S. bankruptcy law and the two political parties continues to be an important theme, even today.”).

132. Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

133. See Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 479-87 (2007).

134. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329 (2010).

135. See *Final Vote Results for Roll Call 108*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2005/roll108.xml> (last visited Nov. 7, 2011) (listing results for House of Representatives vote); *U.S. Senate Roll Call Votes 109th Congress—1st Session*, SENATE.GOV, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_109\\_1.htm](http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm) (follow “Vote 00044” hyperlink) (last visited Nov. 7, 2011) (listing results for Senate vote). For additional evidence that ideology played a role in congressional voting on a prior iteration of the bill that would eventually be enacted as BAPCPA, see Stephen Nunez & Howard Rosenthal, *Bankruptcy “Reform” in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527 (2004). For a comprehensive account of BAPCPA’s legislative history, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

136. Pardo, *supra* note 3, at 643; see also GROSS, *supra* note 66, at 4 (“[M]ost people are uninhibited about expressing their feelings, whether based on experience or perception, about the existing bankruptcy system. When nonlawyers speak about the bankruptcy system, their commentary frequently takes the form of questions that reveal an underlying

that those views are likely to correlate with ideological preferences—with liberals more likely to embrace the concept of forgiveness of debt and conservatives more likely to reject it.

We initially assigned one of three values to a judge's vote: (1) conservative, (2) hybrid, or (3) liberal. If the judge's vote entirely favored the creditor, we coded it as conservative. If the judge's vote partially favored the creditor and partially favored the debtor, we coded it as a hybrid vote. Finally, if the judge's vote entirely favored the debtor, we coded it as liberal. In order to explore the extent of conservative voting, we reduced our codes for the direction of the judge's votes to a simple binary value reflecting whether the judge's vote fully favored the creditor. This had the effect of subsuming the "split-the-difference decision making"<sup>137</sup> represented by the hybrid votes into the category of liberal votes and thus left the proportion of conservative votes unaltered but obviously increased the proportion of liberal votes. As a result of this recoding, approximately 56.2% of the votes were conservative and 43.8% were liberal.<sup>138</sup> Put another way, the odds of observing a conservative vote in our study are 1.28 to 1. Thus, conservative voting appears to be the norm in debt-dischargeability determinations but only slightly so.

## 2. *Judicial Ideology*

In terms of ideology, we were able to assign a JCS score to the voting judge for 664 of the 666 votes in the database.<sup>139</sup> The median

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sense that something about bankruptcy is just not right. 'Why should someone who runs up twenty-five thousand dollars of credit card charges be allowed to get out for ten cents on the dollar?' 'Why do banks and finance companies lend to those they knew, or should have known, could not repay their debts?')

137. We borrow this term from RICHARD A. POSNER, *HOW JUDGES THINK* 128 (2008).

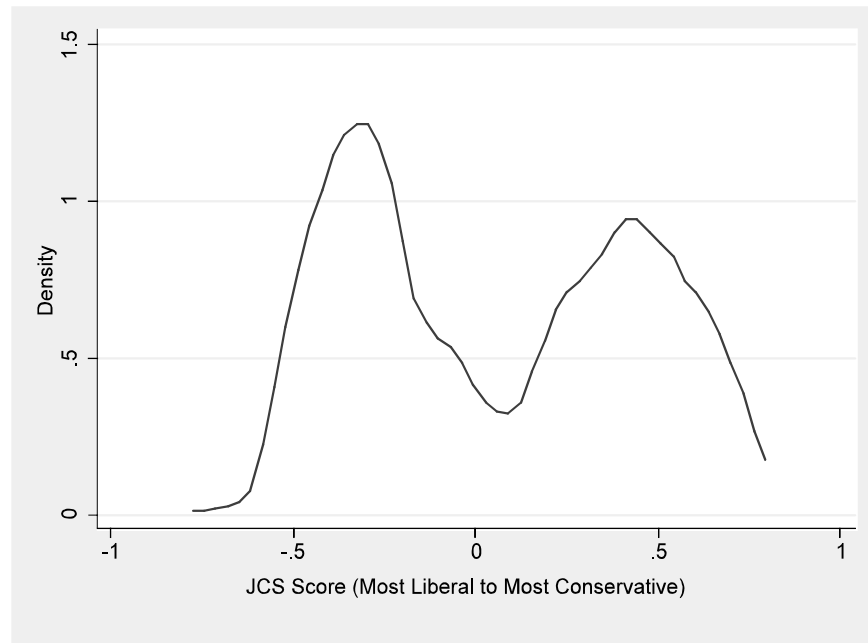
138. Without the recoding, approximately 38.9% of the votes were liberal and 5.0% were hybrid.

139. Two of the votes in the database were cast by Judge Glenn L. Archer, Jr. of the U.S. Court of Appeals for the Federal Circuit while sitting by designation on the Ninth Circuit. The currently available JCS scores for circuit court judges do not include scores for judges from the Federal Circuit. See Epstein et al., *supra* note 108, at 312 fig.4.

Approximately 4.1% of the votes in our dataset (27 of 666) were cast by federal district court judges sitting by designation. We assign these judges the JCS scores provided in *Federal District Court Judge Ideology Data*, CHRISTINA L. BOYD, <http://clboyd.net/ideology.html> (last visited Jan. 18, 2012). We gratefully acknowledge Boyd for generously making her JCS data available to other researchers.

and mean JCS scores in our database were, respectively, .0765 and .0606. The most liberal JCS score was -.681, and the most conservative JCS score was .702. Transforming the voting judge's JCS score into a dichotomous variable reveals that 51.4% of the votes in the database were cast by a conservative judge—that is, a judge with a JCS score greater than zero. As illustrated in Figure 2 below, a plot of the kernel density of JCS scores in our database reveals a bimodal distribution with a trough at a JCS score of approximately .09 and with peaks at JCS scores of approximately -.30 and .43. Given the positioning of the peaks of the curve, and given that the portion of the curve corresponding to the negative JCS scores is steeper and narrower than the portion corresponding to the positive JCS scores, the plot indicates that the conservative judges in our database are more conservative than the liberal judges are liberal—to wit, the median and mean JCS scores of the conservative judges are respectively .409 and .413 in contrast to median and mean JCS scores of -.350 and -.311 for the liberal judges.

**Figure 2**  
**Kernel Density Plot of JCS Scores**



We examine the correlation between a conservative vote and a judge's ideology using a simple logistic regression model with the direction of the judge's vote as the dependent variable<sup>140</sup> and the voting judge's JCS score as the independent variable. As set forth in Table A3 of the Appendix, there is no statistically significant association between the voting judge's JCS score and the direction of his or her vote.

To further illustrate the absence of a correlation, Figure 3 below compares the relationship between the ideology of the courts of appeals judges and their voting in debt-dischargeability determinations. Only judges with seven or more observations in the database—that is, judges whose votes constituted at least one percent of the total votes in the database—have been plotted.<sup>141</sup> The horizontal

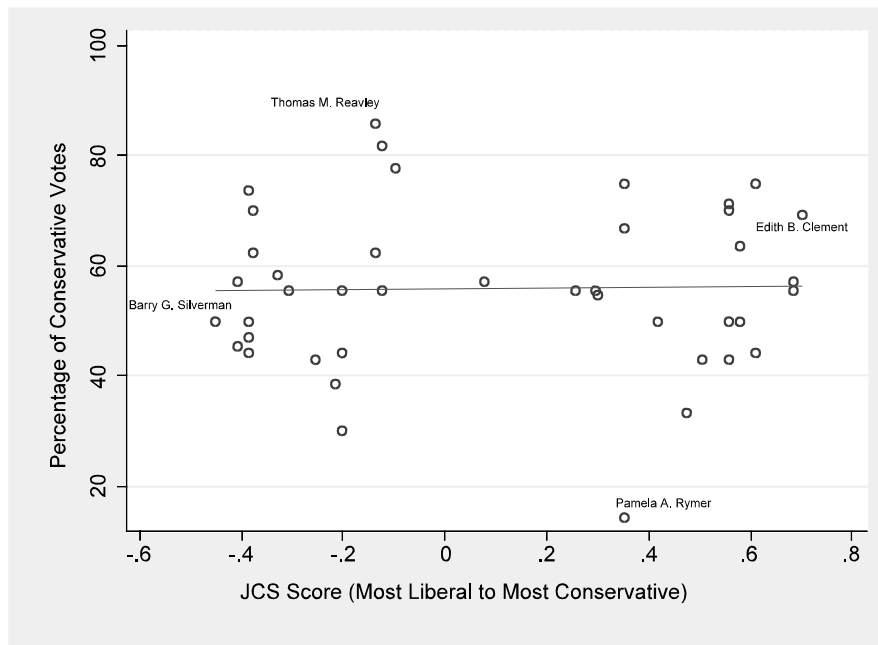
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140. Coded 1 for a conservative vote and coded 0 for a liberal vote.

141. Approximately 31.6% of the judges in the database (42 of 133) cast seven or more votes.

axis displays the judges' ideology as derived from the JCS scores. The vertical axis represents the percentage of votes that the judge cast fully in favor of the creditor—in other words, a conservative vote. The solid line represents the predicted value of the percentage of conservative votes based on a linear regression of (1) the observed percentage of conservative votes by the voting judge on (2) the JCS score of the voting judge.

**Figure 3**  
**Relationship Between Judicial Ideology and**  
**Votes in Debt-Dischargeability Determinations**



The near-zero slope of the plotted line indicates the absence of a statistically significant relationship between ideology and voting behavior in these types of cases. This becomes further apparent when one considers that many of the ideologically conservative judges voted conservatively less than 50% of the time and that many of the ideologically liberal judges voted conservatively more than 50% of the time. An extreme example of the former is Judge



Pamela A. Rymer from the Ninth Circuit who, despite being a moderately conservative judge, voted conservatively in only 14% of her cases. An extreme example of the latter is Judge Thomas M. Reavley from the Fifth Circuit who, despite being a slightly liberal judge, voted conservatively in 86% of his cases. Finally, a difference of only 20 percentage points in voting pattern separate the most conservative judge—Judge Edith B. Clement from the Fifth Circuit, who cast a conservative vote 70% of the time—and the most liberal judge—Judge Barry G. Silverman from the Ninth Circuit, who cast a conservative vote 50% of the time.

### 3. Panel Effects

In order to explore panel effects, we referred to the JCS scores of the two judges sitting with the voting judge on the three-judge panel. With these data, we were able to calculate the number of liberal and conservative colleagues who sat with the voting judge for 662 of the 666 observations in the database.<sup>142</sup> Approximately 24.3% of the votes in the database were cast by judges sitting with two liberal colleagues, 48.8% were cast by judges sitting with one liberal colleague and one conservative colleague, and 26.9% were cast by judges sitting with two conservative colleagues.

In the absence of a relationship between the number of conservative colleagues and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time—that is, the proportion of conservative votes in our database for the 662 observations in which panel composition could be coded. The data reveal that a voting judge cast a conservative vote approximately 55.3% of the time when sitting with two liberal colleagues (No Conservative Colleagues), 58.8% of the time when sitting with one liberal and one conservative colleague (One Conservative Colleague), and 52.3% of the time when sitting with two conservative colleagues (Two Conservative Colleagues). A chi-square test with two degrees of freedom indicates

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142. We were unable to code panel composition for four observations as a result of the missing JCS score for Judge Glenn L. Archer, Jr. of the Federal Circuit. *See supra* note 139.

that the difference between the observed and expected values is not statistically significant ( $p = .352$ ).<sup>143</sup>

#### 4. *Federal Regional Circuit*

We control for the circuit within which the appeal arose by creating four indicator variables for each of the circuits included in our study. Approximately 8.6% of the votes in our database were cast in appeals in the Eighth Circuit; 9.9% were cast in appeals in the Seventh Circuit; 25.7% were cast in appeals in the Fifth Circuit; and 55.9% were cast in appeals in the Ninth Circuit.<sup>144</sup>

In the absence of a relationship between the circuit within which the appeal arose and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. The data show that judges voted conservatively approximately 63.2% of the time in the Fifth Circuit, 57.6% of the time in the Seventh Circuit, 63.2% of the time in the Eighth Circuit, and 51.6% of the time in the Ninth Circuit. A chi-square test with three degrees of freedom indicates that the difference between the observed and expected values is statistically significant ( $p = .052$ ).

#### 5. *First-Tier Appellate Court*

In order to explore the effect of appellate structure on the voting behavior of the circuit court judges, we control for whether the first-tier appellate court was a district court or a BAP. Approximately 38.8% of the votes in our database were cast in appeals that were previously decided by a BAP, with the remainder having been decided by a district court. Once again, in the absence of a relationship between the first-tier appellate court to have heard the appeal and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. For appeals from district court determinations, however, circuit judges voted conservatively approximately 60.5% of the time; for appeals from BAP determinations, circuit judges voted conserva-

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143. We use the level of  $p \leq .10$  to assess statistical significance.

144. See *infra* Appendix Table A2.

tively approximately 49.2% of the time. The difference between the observed and expected values is statistically significant ( $p = .004$ ) according to a chi-square test with two degrees of freedom.

### 6. *Bankruptcy Court and First-Tier Appellate Court Outcomes*

Given that appellate review standards create an affirmance bias,<sup>145</sup> and given the potential of such bias to constrain judges from voting their ideological preferences,<sup>146</sup> we control for the direction of outcomes at both the trial level—that is, a bankruptcy court—and the first-tier appellate level—that is, the district court or the BAP. We coded the direction of outcome in the same fashion as we coded the direction of the judge's vote:<sup>147</sup> If the outcome fully favored the creditor, the outcome was coded as conservative. If the outcome partially or fully favored the debtor, the outcome was coded as liberal. Approximately 51.4% of the votes in our database were cast in appeals in which the bankruptcy court reached a conservative outcome, and approximately 51.8% of the votes were cast in appeals in which the first-tier appellate court reached a conservative outcome.

Approximately 41.4% of the votes in our database were cast in appeals in which both the bankruptcy court and the first-tier appellate court reached a conservative outcome (Conservative-Conservative); 7.2% were cast in appeals in which the bankruptcy court's determination was liberal and in which the first-tier appellate court's determination was conservative (Liberal-Conservative); 6.8% were cast in appeals in which the bankruptcy court's determination was conservative and in which the first-tier appellate court's determination was liberal (Conservative-Liberal); and 44.6% were cast in appeals in which both the bankruptcy court's determination and the first-tier appellate court's determination were liberal (Liberal-Liberal).

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145. See CROSS, *supra* note 4, at 48-49.

146. See *id.* at 55 (“Judges are more likely to affirm ideologically aligned decisions (by 6.2%), showing some effect of ideology. But judges affirm most of even those decisions that are not aligned with their ideology, demonstrating the considerable power of the legal deference effect.”).

147. See *supra* Part II.C.1.

In the absence of a relationship between the outcomes at the trial and first-tier appellate levels and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. Circuit judges voted conservatively approximately 83.5% of the time in appeals in the Conservative-Conservative category, 70.8% of the time in appeals in the Liberal-Conservative category, 17.8% of the time in appeals in the Conservative-Liberal category, and 30.4% of the time in appeals in the Liberal-Liberal category. The difference between the observed and expected values is statistically significant ( $p < .0001$ ) according to a chi-square test with three degrees of freedom.

### *7. Subject Matter of Debt-Dischargeability Determinations*

In order to control for differences across debt-dischargeability determinations—for example, litigant types and legal issues—we coded the paragraph of Bankruptcy Code § 523(a) pursuant to which the court of appeals determined whether the bankruptcy court had made a proper determination. In some cases involving multiple debts, multiple paragraphs of § 523(a) were implicated. In some cases involving a single debt, multiple paragraphs of § 523(a) were implicated—that is, the creditor alleged that the debt was nondischargeable pursuant to various paragraphs of § 523(a). The votes in the database were cast in determinations involving the following mutually exclusive categories:<sup>148</sup>

- 24.0% in determinations involving only fraudulently incurred debt (general fraud debt);<sup>149</sup>
- 14.5% in determinations involving only debt arising from willful and malicious injury by the debtor (intentional tort debt);<sup>150</sup>
- 13.1% in determinations involving only student loan debt (student loan debt);<sup>151</sup>

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148. We were unable to ascertain the subject matter involved in one opinion in our study. Accordingly, the percentages reported are for 663 of the 666 observations in our database.

149. See 11 U.S.C. § 523(a)(2) (2006).

150. See § 523(a)(6).

151. See § 523(a)(8).

- 10.0% in determinations involving only debt incurred through embezzlement, larceny, or fiduciary fraud (fiduciary fraud debt);<sup>152</sup>
- 8.1% in determinations involving only certain tax debts (tax debt);<sup>153</sup>
- 3.6% in determinations involving only domestic relations debt for support (domestic relations support debt);<sup>154</sup>
- 2.7% in determinations involving only debts arising from nonpecuniary fines and penalties owed to a governmental unit (penalty debt);<sup>155</sup>
- 1.8% in determinations involving only domestic relations debt not in the nature of support (domestic relations nonsupport debt);<sup>156</sup>
- .9% in determinations involving only unscheduled debt (unscheduled debt);<sup>157</sup>
- 20.4% in determinations involving either multiple debts or a single debt alleged to be nondischargeable pursuant to various paragraphs of § 523(a),<sup>158</sup> and
- 1.4% in determinations not involving any of the aforementioned categories.

We find a statistically significant relationship between the subject matter of the appeal and the direction of the judge's vote for only two case types: (1) appeals that involved only general fraud debt and (2) appeals that involved only domestic relations support debt. In the absence of a relationship between the subject matter of the appeal and direction of the judge's vote, one would expect to see

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152. See § 523(a)(4).

153. See § 523(a)(1).

154. See § 523(a)(5); 11 U.S.C. § 523(a)(18) (2000) (repealed 2005). Prior to the 2005 amendments to the Bankruptcy Code, the list of nondischargeable debts included a provision regarding domestic relations debt in the nature of support that was owed to a state or municipality and that was enforceable under Title IV-D of the Social Security Act. See *id.* The subject matter of this former provision is now encompassed within the definition of "domestic support obligation." See 11 U.S.C. § 101(14A) (2006). Debts for such obligations are currently nondischargeable. See § 523(a)(5).

155. See § 523(a)(7) (2006).

156. See § 523(a)(15).

157. See § 523(a)(3).

158. Of the 135 observations falling within this class of discharge determination, approximately 73.3% involved general fraud debt, 71.1% involved intentional tort debt, 55.6% involved fiduciary fraud debt, 6.7% involved domestic relations support debt, 6.7% involved domestic relations nonsupport debt, and 2.2% involved penalty debt.

judges in our sample vote conservatively approximately 56.0% of the time.<sup>159</sup> For appeals involving only general fraud debt, however, circuit judges voted conservatively approximately 42.8% of the time as opposed to 60.1% for all other case types. The difference between the observed and expected values is statistically significant ( $p < .0001$ ) according to a chi-square test with one degree of freedom. And, for appeals involving only domestic relations support debt, circuit judges voted conservatively 100% of the time in contrast to 54.3% of the time for all other case types. Again, the difference between the observed and expected values is statistically significant ( $p < .0001$ ) according to a chi-square test with one degree of freedom.

We also control for whether the appeal involved an objection by the creditor to the debtor's discharge—that is, an objection that the debtor should be denied a discharge from all debts, including debts other than those owed to the creditor (Discharge Objection).<sup>160</sup> Here, we anticipate that the presence of such an objection could affect a judge's vote in either direction. On the one hand, one could expect that the presence of such an objection would increase the likelihood of a conservative vote. Because the grounds for denial of discharge are generally based on a debtor's fraud or misconduct in connection with his or her case,<sup>161</sup> such allegations might predispose a judge to view the debtor in a more negative light than had such allegations not been made. On the other hand, if a creditor has sought a debt-dischargeability determination with respect to the particular debt owed to it and has also lodged a discharge objection regarding all debts owed by the debtor, a judge may be inclined to look askance at the creditor's kitchen-sink approach to litigating against the debtor.

In the absence of a relationship between the presence of a discharge objection and the direction of a judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. We find, however, that a judge voted conservatively only 37.5% of the time when such an objection was

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159. This figure differs slightly from the expected value for conservative voting reported elsewhere in this Section, which was 56.2%, as a result of the three observations for which the subject matter of the appeal could not be coded. *See supra* note 148.

160. *See supra* notes 59-61 and accompanying text.

161. *See supra* note 59 and accompanying text.

made, in contrast to 57.6% of the time when there was no objection to the debtor's discharge. The difference between the observed and expected values is statistically significant ( $p = .007$ ) according to a chi-square test with one degree of freedom.

### 8. Appellant Identity

Any investigation of the effect of ideology on judicial voting behavior by courts of appeals judges should account for the party who brought the appeal. Other research shows that courts of appeals are more likely to reverse decisions favoring the party who bears the burden of proof and that the association is statistically significant.<sup>162</sup> As we previously discussed, the creditor bears the burden of proof to establish by a preponderance of the evidence that the debt owed to the creditor qualifies as a nondischargeable debt,<sup>163</sup> and that standard of proof is not likely to favor either party.<sup>164</sup> For conditionally dischargeable debts—that is, student loans and domestic relations nonsupport debt<sup>165</sup>—once the creditor has satisfied its burden of establishing that the debt qualifies as a conditionally dischargeable debt, the burden shifts to the debtor to establish by a preponderance of the evidence that the condition warranting discharge exists.<sup>166</sup> To control for appellant identity, we coded whether the debtor appealed the first-tier appellate court's decision to the court of appeals. Approximately 54.5% of the votes in our database were cast in appeals in which the debtor was the appellant.<sup>167</sup>

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162. See CROSS, *supra* note 4, at 52.

163. See *supra* text accompanying note 84.

164. See *supra* note 96 and accompanying text.

165. See *supra* notes 86-91 and accompanying text.

166. See, e.g., *Graves v. Myrvang (In re Myrvang)*, 232 F.3d 1116, 1121 (9th Cir. 2000) (discussing allocation of burden of proof in debt-dischargeability determinations involving domestic relations nonsupport debt); *Raymond v. Nw. Educ. Loan Ass'n (In re Raymond)*, 169 B.R. 67, 69-70 (Bankr. W.D. Wash. 1994) (discussing allocation of burden of proof in debt-dischargeability determinations involving student loan debt).

167. In the absence of a relationship between appellant identity and full affirmance by the court of appeals, one would expect the court of appeals to affirm approximately 73.9% of the time—that is, the proportion of circuit court opinions fully affirming the first-tier appellate court when the unit of observation is the decision of the panel rather than an individual judge's vote. For appeals in which the debtor was the appellant, the court affirmed approximately 78.5% of the time. For appeals in which the debtor was the appellee, the court

In the absence of a relationship between appellant identity and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. Circuit court judges voted conservatively, however, approximately 79.9% of the time for appeals in which the debtor was the appellant and voted conservatively only 27.7% of the time when the debtor was the appellee. A chi-square test with two degrees of freedom indicates that the difference between the observed and expected values is statistically significant ( $p < .0001$ ).

Further consider these figures from the perspective of liberal voting and whether the creditor was the appellant. In appeals in which the creditor was the appellant, the court voted *liberally*—that is, either partly or fully in favor of the debtor—approximately 72.3% of the time in contrast to 20.1% of the time for appeals in which the creditor was the appellee. Accordingly, we find that circuit court judges vote against debtor appellants only slightly more often—approximately 79.9% of the time—than they do against creditor appellants—72.3% of the time. We can compare the chance of a favorable vote for creditor appellants with that of debtor appellants by dividing the odds of such a vote for creditor appellants (.277/.723) by the odds of such a vote for debtor appellants (.201/.799). The odds ratio (.383/.252) indicates that a circuit court judge is 1.52 times more likely to vote in favor of a creditor appellant than a debtor appellant.

Overall, these figures provide additional evidence of the affirmative bias documented in our examination of the relationship between lower-court outcomes and the direction of the judge's vote.<sup>168</sup> But they also point to a slight creditor bias, which may be attributable to the manner in which the litigation features of a debt-dischargeability determination advantage creditors.<sup>169</sup> They do not, however, suggest to us that debtors in our study routinely brought losing appeals while creditors never or rarely brought such appeals—to wit, our data show that creditors prevailed at the trial level only 51.4% of the time and at the first-tier appellate level only 51.8% of the time. In other words, it does not appear that the

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affirmed 68.3% of the time. The difference between the observed and expected values is statistically significant ( $p = .086$ ) according to a chi-square test with two degrees of freedom.

168. See *supra* Part II.C.6.

169. See *supra* Table 1.



debtors in our study prosecuted appeals that were systematically weaker or less meritorious than those prosecuted by creditors.

### 9. *Time-Period Controls*

To control for potentially shifting attitudes over time toward the fresh-start policy, we controlled for whether the vote was cast in an appeal decided during a period of recession as identified by the Business Cycle Dating Committee of the National Bureau of Economic Research. During the ten-year period of our study, 1999 to 2008, there were two recessions: March 2001 to November 2001 and December 2007 to June 2009.<sup>170</sup> Studies suggest that economic conditions affect the voting behavior of judges.<sup>171</sup> In the context of bankruptcy, one might expect judges' ideological preferences regarding forgiveness of debt to become more charitable when the financial distress of debtors is more likely to be attributed to the exogenous shocks of macroeconomic forces rather than to overconsumption.<sup>172</sup> Approximately 18.9% of the votes in our database were cast when the country was in a state of recession.

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170. See *U.S. Business Cycles and Contractions*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/cycles/cyclesmain.html> (last visited Sept. 27, 2011).

171. See, e.g., Thomas Brennan, Lee Epstein & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191, 1219-26 (2009).

172. Cf. Mann, *supra* note 20, at 3 ("The redefinition of insolvency from moral failure to economic risk applied principally to debtors who were themselves entrepreneurs in the changing economy. The criticisms of debt that recurred in various public debates all reserved their strongest opprobrium for the purchasers rather than the purveyors of consumer goods, even though both acquired the items on credit. Thus, when Americans began to question the efficacy of imprisonment for debt and the utility of bankruptcy discharges, their animating concern was the people who trafficked in credit rather than those who merely purchased on it.").

To some extent, the idea of forgiveness of debt as a function of debtor culpability, or lack thereof, has been expressly incorporated into the Bankruptcy Code. If a Chapter 13 debtor fails to complete the payments scheduled in his or her repayment plan, the debtor may be granted a discharge only upon a showing that, among other things, the inability was "due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1) (2006). Commonly referred to as the "hardship discharge," H.R. REP. NO. 95-595, at 392 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6386, the Code clearly commands that the court deny such a discharge if the debtor bears responsibility for his or her financial distress. For an example of the considerations that may be relevant in making such a determination, see *Bandilli v. Boyajian (In re Bandilli)*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999).

We also controlled for whether the vote was cast in an appeal decided subsequent to the effective date of BAPCPA (October 17, 2005),<sup>173</sup> which resulted in a decidedly pro-creditor shift in the Bankruptcy Code.<sup>174</sup> BAPCPA amended half of the pre-BAPCPA discharge exceptions, with some of the amendments more substantial than others.<sup>175</sup> The substantial revisions generally had the effect of expanding the scope of the nondischargeability provision in question.<sup>176</sup> One might expect judges to interpret the Bankruptcy Code subsequent to BAPCPA's effective date with an eye toward

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173. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1501(a), 119 Stat. 23, 216.

174. See *supra* notes 131-35 and accompanying text. BAPCPA represented the culmination of a decades-long effort by creditor groups to scale back a Bankruptcy Code that, at its inception, had been decidedly pro-debtor. See Pardo, *supra* note 133, at 476 ("Bankruptcy law reached its zenith as a robust prodebtor law with enactment of the Bankruptcy Code in 1978. Immediately thereafter, the consumer credit lobby sought to gain back the concessions it had made." (footnote omitted)).

175. See William Houston Brown, *Taking Exception to a Debtor's Discharge: The 2005 Bankruptcy Amendments Make It Easier*, 79 AM. BANKR. L.J. 419, 420, 421 tbl.1 (2005) (summarizing revisions to § 523(a)). It has been hypothesized that "BAPCPA's restriction on the types of debts that can be discharged is also likely to have a larger, negative effect on minority debtors." A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 956 (2006).

176. Brown, *supra* note 175, at 420, 421 tbl.1; Dickerson, *supra* note 175, at 947-48.

favoring creditors.<sup>177</sup> Approximately 25.4% of the votes in our database were cast on or after this date.

In the absence of a relationship between voting during either of the above-referenced time periods and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. Circuit court judges voted conservatively approximately 51.6% of the time for appeals decided during a recessionary period and 57.2% of the time during a nonrecessionary period. A chi-square test with one degree of freedom indicates that the difference between the observed and expected values is not statistically significant ( $p = .251$ ). For pre-BAPCPA appeals, judges voted conservatively approximately 58.4% of the time in contrast to 49.7% of the time for post-BAPCPA appeals. The difference between the observed and expected values

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177. *E.g.*, *Baud v. Carroll*, 634 F.3d 327, 356 (6th Cir. 2011) (“We believe it is now clear that, where each competing interpretation of a Code provision amended by BAPCPA is consistent with the plain language of the statute, we must, as the Supreme Court did in *Lanning* and *Ransom*, apply the interpretation that has the best chance of fulfilling BAPCPA’s purpose of maximizing creditor recoveries.”). *But see, e.g.*, *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 875 (9th Cir. 2008) (“[W]e will not de-couple ‘disposable income’ from the ‘projected disposable income’ calculation simply to arrive at a more favorable result for unsecured creditors, especially when the plain text and precedent dictate the linkage between the two terms.... If the changes imposed by BAPCPA arose from poor policy choices that produced undesirable results, it is up to Congress, not the courts, to amend the statute.”), *abrogated by* *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010); *Jacoby, supra* note 81, at 225 (noting that, with respect to omnibus legislation that would eventually be enacted as BAPCPA, “Congress did not take heed even of organizations that generally represented creditor interests, such as the Commercial Law League, of claims that the legislation would have *the opposite effect* of that it supposedly intended” (emphasis added) (footnote omitted)); Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 228 (2007) (“Numerous decisions have indicated that the enacted text in BAPCPA frequently appears to be *inconsistent* with the purposes of the passage of BAPCPA and often demonstrates inattentive drafting. Additionally, decisions interpreting the enacted text of BAPCPA have often reached directly contradictory conclusions, with each decision claiming to rest on the application of accepted principles of statutory interpretation.” (emphasis added) (footnote omitted)); *cf.* Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 182 (2005) (“Even as bankruptcy professionals and judges work to implement the statutory changes faithfully and literally, the nature of legal systems and the details of these particular statutory changes practically dictate variable and divergent application. Whether the omnibus bankruptcy bill results in a ripple or a revolution for the personal bankruptcy system will depend on how the Bankruptcy Code revisions are filtered through the influences of the day-to-day actors trying to make the system work.”).

is statistically significant ( $p = .050$ ) according to a chi-square test with one degree of freedom.

### 10. Judge Characteristics

Consistent with prior research that has explored whether the gender, age, and race of circuit court judges are associated with their voting behavior,<sup>178</sup> we control for these background characteristics.<sup>179</sup> Approximately 76.7% of the votes in our database were cast by a male judge. The median and mean judges were, respectively, 63.0 and 63.9 years old at the time they voted.<sup>180</sup> Approximately 7.1% of the votes were cast by judges in their 40s, 30.0% by judges in their 50s, 33.8% by judges in their 60s, and 29.1% by judges who were 70 and older. As for the race of the judges, approximately 81.4% were white, 10.7% were Hispanic, 5.3% were African American, and 2.7% were Asian American.

In the absence of a relationship between any of the above-referenced personal characteristics and the direction of the voting judge's vote, one would expect to see judges in our sample vote conservatively approximately 56.2% of the time. Female judges voted conservatively approximately 58.7% of the time, and male judges voted conservatively approximately 55.4% of the time. The difference between the observed and expected values is not

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178. *E.g.*, CROSS, *supra* note 4, at 74-83 (finding for certain case types a statistically significant increase in the likelihood of liberal voting by female judges, older judges, and African American and Hispanic judges when grouped together); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1141, 1143 (2009) (finding a statistically significant increase in the likelihood of African American judges voting in favor of plaintiffs in workplace racial harassment cases, but failing to find a gender effect); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 43 (2008) (finding that minority judges are more likely to find a violation of section 2 of the Voting Rights Act, but failing to find a gender effect); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1774, 1776-77 (2005) (finding a statistically significant increase in the likelihood of female judges voting in favor of plaintiffs in sexual harassment and sex discrimination cases, but failing to find a race effect).

179. We obtained the gender, age, and race data from the Federal Judicial Center. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct. 13, 2011).

180. We calculated the age of the voting judge as of the date that the opinion was issued by subtracting the year of the judge's birth from the year that the opinion was issued.

statistically significant ( $p = .465$ ) according to a chi-square test with one degree of freedom. Likewise, age is not statistically significantly associated with voting behavior. We created an indicator variable for whether the voting judge was older or younger than 60 at the time he or she voted. Judges who were older than 60 voted conservatively approximately 55.4% of the time, and those younger than 60 voted conservatively approximately 57.5% of the time. The difference between the observed and expected values is not statistically significant ( $p = .594$ ) according to a chi-square test with one degree of freedom.

On the other hand, we do find a statistically significant association between the race of the judge and the likelihood of a conservative vote. We create an indicator variable for whether the voting judge was African American or Hispanic.<sup>181</sup> Judges who were African American or Hispanic voted conservatively approximately 66.0% of the time in contrast to 54.3% of the time for judges who were white or Asian American. The difference between the observed and expected values is statistically significant ( $p = .025$ ) according to a chi-square test with one degree of freedom.

#### *D. Findings from Multivariate Regression Models*

Here, we seek to provide an analysis of the determinants of judicial voting in circuit court bankruptcy cases by fitting an ordinary least squares (OLS) regression model and a logistic regression model.<sup>182</sup> For all variables in the model, negative responses

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181. This is similar to the approach used by Cross. See CROSS, *supra* note 4, at 75.

182. We have chosen to fit an OLS model to ease the interpretation of our regression results. We recognize that, when predicting the value of a dichotomous dependent variable, as we do here, an OLS model will inevitably fit values outside the range of the dependent variable—that is, it will produce fitted values that are greater than 1 and less than 0. Moreover, the homoskedasticity assumption of the OLS model—that is, that the variance of the error terms be constant for all  $x$ -values—will be violated, with the result that the standard errors of the coefficients will be incorrect. This, in turn, will result in inefficient statistical inference—specifically, an increased likelihood that a coefficient, although unbiased, will deviate from the true value for the population. See JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT AND PROBIT MODELS 13-14 (1984). The advantage of an OLS regression, however, is that the model coefficients can be interpreted as the effect that a change of a given value of the independent variable in question has on the predicted probability of the outcome, adjusted for the effect of all other independent variables in the model. This interpretation is referred to as the linear probability model. See

are coded as 0 and positive responses are coded as 1. The dependent variable is whether the judge voted conservatively (Conservative Vote). Having failed to find evidence of ideological voting or panel effects,<sup>183</sup> we do not include such controls in our models. We control for whether the voting judge was either African American or Hispanic (African American or Hispanic Judge) and whether the judge was 60 or older (60-Year-Old (or Older) Judge). We control for the circuit within which the appeal arose using four indicator variables and omit the variable for the Ninth Circuit as the reference category. We control for whether the first-tier appellate court was a bankruptcy appellate panel (BAP). We control for the direction of outcomes at both the trial level (the bankruptcy court) and the first-tier appellate level (the district court or the BAP) using the indicator variables Conservative-Conservative, Conservative-Liberal, Liberal-Conservative, and Liberal-Liberal,<sup>184</sup> omitting the latter as the reference category. We control for the subject matter of the debt-dischargeability determinations using the indicator variables General-Fraud Debt and Discharge Objection.<sup>185</sup> We control for whether the debtor was the appellant (Debtor

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*id.* at 13.

A logistic regression model, on the other hand, overcomes the above-referenced problems by producing predicted probabilities between 0 and 1 and by relying on assumptions that are maintained by the model. But interpreting the model coefficients presents some difficulty given the nonlinear nature of the model. Because of the nonlinearity, the effect of a change in one independent variable depends on the values of all other variables in the model. J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 116 (2d ed. 2006). This hurdle can partially be overcome by using the model coefficients to compute odds ratios. One can then interpret the odds ratios associated with an independent variable as the effect that a change of a given value of the independent variable in question has on the odds of observing the outcome while holding other variables constant, regardless of their specific values. *See id.* at 179. The limitation of using odds ratios for interpretation is that “a constant factor change in the odds does not correspond to a constant change or constant factor change in the probability” of the outcome—that is, the predicted probability of the outcome depends on the levels of all variables in the model. *Id.* at 179-80.

For these reasons, we fit both an OLS regression model and a logistic regression model. The models, as reported in Tables A4 and A5 of the Appendix, yield qualitatively and quantitatively similar results. Accordingly, we suggest that the reader focus on the estimates from the logistic regression as the more accurate ones, while at the same time considering the estimates from the OLS regression as approximate indicators of the effect of our control variables on the predicted probability of a conservative vote by a judge.

183. *See supra* Parts II.C.2, II.C.3.

184. *See supra* Part II.C.6.

185. *See supra* Part II.C.7. Because we were unable to ascertain the subject matter of the

Appellant). Finally, we control for whether the appeal was decided during a recessionary period (Recession) and whether it was decided subsequent to BAPCPA's effective date (BAPCPA). We find that our controls for (1) the Fifth and Seventh Circuits, (2) all lower-court outcomes, (3) the subject matter of the appeal, and (4) the time period of the appeal are all statistically significant predictors of the direction of a judge's vote. Tables A4 and A5 of the Appendix set forth the results from our regression models.<sup>186</sup>

Overall, the models are statistically significant as compared to a model without independent variables. To assess model fit, we compare the observed and predicted values for a conservative vote. Using the model equations, we calculate the predicted probability of a conservative vote for each observation in the models given the actual values of the independent variables for that observation. For any predicted probability less than or equal to .5, we classify the predicted vote as a liberal vote; and for any predicted probability greater than .5, we classify the predicted vote as a conservative vote. The OLS model correctly predicts the direction of the judge's vote in 77.2% of the observations,<sup>187</sup> and the logistic model correctly predicts the direction of the judge's vote in 77.5% of the observations.<sup>188</sup>

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discharge determination for three observations, the regression models include only 663 of the 666 observations in the database.

186. Our findings remain qualitatively unchanged with different specifications of our models. These regressions included additional independent variables, such as the gender and JCS score of the judge, as well as controls for panel composition. Some regressions also excluded those observations involving a vote cast by a federal district judge sitting by designation. *See supra* note 139. For each of the specifications, the model coefficients remained correlated in the same direction as those we report here. Likewise, the statistically significant coefficients from the other specifications were the same significant coefficients that are reported here.

187. As expected, the OLS model produced some values for the predicted probability of a conservative vote that were greater than 1 and less than 0. *See supra* note 182. Specifically, there were 7 observations for which the predicted probability was greater than 1, with a maximum value of 1.046; and there were 7 observations for which the predicted probability was less than 0, with a minimum value of -.070. These 14 observations constituted approximately 2.1%—that is, 14 of 663—of the observations included in the model.

188. The proportion of correct predictions is referred to as the *count R*<sup>2</sup>. J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 107 (1997). The OLS and logistic models predict the direction of the judge's vote differently for only four observations in the model. For three of those observations, the logistic model predicts a conservative vote, and the OLS model predicts a liberal vote. The logistic model correctly predicts two of the three observations. For the fourth observation, the logistic model correctly

Of course, without referring to any of the independent variables in the models, one could correctly classify the outcome in some of the observations by assigning the most frequent category of outcome—that is, the marginal distribution of the dependent variable—to all of the observations. In this case, one could correctly classify the outcome in 56.0% of the observations by guessing a conservative vote for all observations.<sup>189</sup> Thus, when predicting with the models that include the independent variables, the error rate drops by 48.3% with the OLS model and by 49.0% with the logistic model compared to a prediction based solely on the marginal distribution of the dependent variable.<sup>190</sup>

We find several statistically significant predictors of the direction of a judge's vote. All of the following estimates of the effect of an independent variable on the likelihood of a conservative vote are based on the coefficients from the OLS regression model and the odds ratios from the logistic regression models, holding all other variables constant, regardless of their values. First, we find that a judge who is either African American or Hispanic is predicted to have a .104 [.028, .180] higher probability of casting a conservative vote than a judge who is either white or Asian American.<sup>191</sup> The odds of a conservative vote are predicted to be 1.870 [1.162, 3.011] times greater for a judge who is either African American or Hispanic than for a judge who is white or Asian American.

Second, we find that, for appeals arising in the Fifth and Seventh Circuits, the likelihood of the judge casting a conservative vote is statistically significantly higher than for a judge voting in a Ninth Circuit appeal. A judge voting in a Fifth Circuit appeal is predicted to have a .106 [.028, .184] higher probability of casting a conservative vote than a judge voting in a Ninth Circuit appeal; and a judge voting in a Seventh Circuit appeal is predicted to have a .113 [.011,

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predicts a liberal vote.

189. For the 663 observations included in the models, 371 of the votes were conservative.

190. The proportion of correct predictions beyond the number that would be correctly predicted with the marginal distribution of the dependent variable is referred to as the *adjusted count R<sup>2</sup>*. LONG, *supra* note 188, at 108.

191. We implement the recommended practice of conveying levels of uncertainty by using the notation [#, #] to indicate the lower and upper bounds of the 90% confidence interval around our estimates. See Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1836-37 (2006).



.215] higher probability of casting a conservative vote than a judge voting in a Ninth Circuit appeal. The odds of a conservative vote are predicted to be 1.945 [1.199, 3.155] and 1.962 [1.067, 3.609] times greater for a judge voting in, respectively, a Fifth Circuit appeal and Seventh Circuit appeal than for a judge voting in a Ninth Circuit appeal.

Third, we find that, for appeals in which both the bankruptcy court's and the first-tier appellate court's determinations fully favored the creditor (a conservative-conservative appeal) as well as for appeals in which only the first-tier appellate court's determination fully favored the creditor (a liberal-conservative appeal), the likelihood of the judge casting a conservative vote is statistically significantly higher than for a judge voting in an appeal in which in which the determinations by the two lower courts did not fully favor the creditor (a liberal-liberal appeal). A judge voting in a conservative-conservative appeal is predicted to have a .378 [.205, .551] higher probability of casting a conservative vote than a judge voting in a liberal-liberal appeal.<sup>192</sup> And a judge voting in a liberal-conservative appeal is predicted to have a .236 [.039, .432] higher probability of casting a conservative vote than a judge voting in a liberal appeal. The odds of a conservative vote are predicted to be 7.483 [2.927, 19.132] and 3.076 [1.063, 8.899] times greater for a judge voting in, respectively, a conservative-conservative appeal and liberal-conservative appeal than for a judge voting in a liberal-liberal appeal.

Fourth, we find that, for appeals in which only the bankruptcy court's determination fully favored the creditor (conservative-liberal appeal), the likelihood of a judge casting a conservative vote is statistically significantly lower than for a judge voting in a liberal-liberal appeal. A judge voting in a conservative-liberal appeal is predicted to have a .145 [.033, .257] lower probability of casting a conservative vote than a judge voting in a liberal-liberal appeal. The odds of a conservative vote are predicted to be .449 [.218, .927] times smaller for a judge voting in a conservative-liberal appeal than for a judge voting in a liberal-liberal appeal. Put another way,

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192. This finding also means that a judge voting in a liberal-liberal appeal is predicted to have a .378 higher probability of casting a *liberal* vote than a judge voting in a conservative-conservative appeal.

a judge is more likely to vote partially or fully in favor of the debtor in conservative-liberal appeals than in liberal-liberal appeals.

Fifth, we find that, for an appeal of a debt-dischargeability determination solely involving general fraud debt, the likelihood of the judge casting a conservative vote is statistically significantly lower than for a judge voting in an appeal falling in any of the other categories of case types described in Part II.C.7. A judge voting in an appeal solely involving general fraud debt is predicted to have a .142 [.080, .205] lower probability of casting a conservative vote than in any of the other subject matter categories for case type. The odds of a conservative vote are predicted to be .411 [.277, .610] times smaller in an appeal involving general fraud debt than in other types of appeals.

Finally, we find that, for an appeal arising during a recessionary period or for appeals arising subsequent to BAPCPA's effective date, the likelihood of the judge casting a conservative vote is statistically significantly lower than in nonrecessionary or pre-BAPCPA appeals. A judge voting in a recessionary appeal is predicted to have a .136 [.065, .208] lower probability of casting a conservative vote than a judge voting in a nonrecessionary appeal; and a judge voting in a post-BAPCPA appeal is predicted to have a .078 [.013, .142] lower probability of casting a conservative vote than in a post-BAPCPA appeal. The odds of a conservative vote are predicted to be .420 [.267, .660] and .616 [.413, .920] times smaller for a judge voting in, respectively, a recessionary appeal and a post-BAPCPA appeal than for a judge voting in, respectively, a nonrecessionary appeal and a pre-BAPCPA appeal.

### *E. Interpretation of Results*

Our inquiry focused on the role of ideology in the voting behavior of circuit court judges in appeals involving debt-dischargeability determinations. Our bivariate analyses demonstrated that there was no statistically significant correlation between a judge's ideology and the direction of the judge's vote.<sup>193</sup> Likewise, we found

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193. See *supra* Part II.C.2. Perhaps this result can be explained by the fact that the JCS scores may be better suited for operationalizing a judge's ideology in areas of the law other than bankruptcy. Cf. CROSS, *supra* note 4, at 20 ("The available methods for measuring the ideology of judges and decisions are rough and imperfect. Translating something so

no statistically significant correlation between panel composition and the direction of a judge's vote.<sup>194</sup> Accordingly, we failed to find empirical evidence supporting our ideology and panel-effects hypotheses. Without any evidence of ideological voting, our hypothesis regarding the muting effect of BAPs was rendered moot. Moreover, although our bivariate analyses demonstrated a statistically significant decrease in the likelihood of a judge voting conservatively in an appeal that was initially heard by the BAP, that association disappeared when controlling for other variables.<sup>195</sup>

Our bivariate and regression analyses, however, revealed various statistically significant relationships of interest. Although we did not have any formal hypotheses regarding these associations, we discuss them here as a vehicle for informing future studies of the voting behavior of circuit court judges in consumer bankruptcy cases, whether involving debt-dischargeability determinations or some other type of determination. Our goal is to hypothesize why we observed these relationships and whether they have substantive significance, with the hope that these hypotheses will serve as a basis for new lines of inquiry that confirm or reject the observed patterns. Table 2 below summarizes the statistically significant relationships identified in our regression analyses.

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amorphous as ideology into a numerical measure for quantitative analysis will inevitably be imperfect. Moreover, rarely does one have the same ideological perspective on all subjects. It is relatively common for an individual to be liberal on social issues and conservative on economic issues, for example. In such a case, a simple single-point measure will miss much of the individual's ideological preference pattern." It should be noted that our result is consistent with the finding that Supreme Court Justices have not voted ideologically in bankruptcy cases involving debt-dischargeability determinations. *See* KENNETH N. KLEE, *BANKRUPTCY AND THE SUPREME COURT* 40-44, 53-56 (2008).

194. *See supra* Part II.C.3.

195. *See infra* Appendix Tables A4, A5.

**Table 2**  
**Findings from OLS Regression and Logistic**  
**Regression Models: Statistically Significant Variables**  
**Correlated with the Probability of a Conservative Vote**

Variable	Direction of Correlation
African American or Hispanic Judge	Increased likelihood
Fifth Circuit Appeal	Increased likelihood
Seventh Circuit Appeal	Increased likelihood
Conservative-Conservative Appeal	Increased likelihood
Liberal-Conservative Appeal	Increased likelihood
Conservative-Liberal Appeal	Decreased likelihood
General Fraud Debt	Decreased likelihood
Recession	Decreased likelihood
BAPCPA	Decreased likelihood

The finding that an African American or Hispanic judge is more likely to vote conservatively than a white or Asian American judge raises interesting questions regarding the role of race in bankruptcy. A. Mechele Dickerson has argued that, prior to the reform of the Bankruptcy Code in 2005, white debtors likely received greater benefits than minority debtors due to the manner, whether conscious or unconscious, in which the Code had been drafted by Congress and interpreted by courts.<sup>196</sup> She has further argued that, subsequent to the 2005 amendments, the expansion of the categories of nondischargeable debt is likely to further exacerbate the negative effect of the Code on minority debtors.<sup>197</sup> Finally, Sumit Agarwal and his co-authors have empirically documented that white bankruptcy judges are statistically significantly more likely to dismiss a Chapter 13 case filed by an African American debtor than one filed by a white debtor.<sup>198</sup> At first blush, our finding that African American and Hispanic judges were more likely to vote conservatively seems counterintuitive to the finding by Agarwal.

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196. See A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1726, 1771-72 (2004).

197. See Dickerson, *supra* note 175, at 956.

198. See Sumit Agarwal et al., *Dismissal with Prejudice? Race and Politics in Personal Bankruptcy 1* (June 16, 2010) (unpublished manuscript) (on file with authors), available at <http://ssrn.com/abstract=1633083>.

Because we do not have information on the race of the debtors in our study, however, it could be that such information would provide a plausible explanation for the voting behavior of the African American and Hispanic judges in our study—especially when one considers Dickerson’s theory regarding the manner in which the debt-dischargeability provisions of the Code disfavor minority groups. All of this points to the need in future studies for a continued and more comprehensive focus on the role of race in bankruptcy.

The finding that the circuit within which the appeal arose is associated with the direction of a judge’s vote may signify that the law interpreting the Bankruptcy Code in the Ninth Circuit has generally developed in a more liberal direction than in the Fifth and Seventh Circuits, thus allowing judges in the Ninth Circuit to vote more liberally than judges in the Fifth and Seventh Circuits.<sup>199</sup>

The lower-court-outcome findings indicate that courts of appeals judges are likely to cast votes in the same direction as the first-tier appellate court. This finding is consistent with commentators’ findings that courts of appeals tend overall to affirm the court below.<sup>200</sup>

On the other hand, the posture of the court of appeals differs from its posture in the typical case in an important way. In bankruptcy cases, the court of appeals functions not as the initial appellate court but rather as the second-tier appellate court.<sup>201</sup> With limited exceptions, courts of appeals hear bankruptcy cases only after they have been heard by a trial court and a first-tier appellate court.<sup>202</sup> In this sense, the tendency of the court of appeals to affirm the court below differs from what one sees from the Supreme Court, which, in nonbankruptcy federal cases, generally also hears cases after a trial court and appellate court have opined on them. Unlike the courts of appeals in bankruptcy, the Supreme Court usually

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199. See, e.g., Edith H. Jones, *Bankruptcy Appeals*, 16 T. MARSHALL L. REV. 245, 255 (1991) (discussing the appeal of orders entered in “[d]isputes arising from a bankruptcy court’s administrative functions” and noting that, “[w]hile a particular bankruptcy court decision may be held unreviewable in the Fourth, Fifth, Tenth, and Eleventh Circuits, such a result would not always follow in the Third, Sixth, Eighth, or Ninth Circuits” and that “[t]he First and Seventh Circuits seem to fall in the middle of the scale of liberality”).

200. See, e.g., CROSS, *supra* note 4, at 48-49, 53.

201. See *supra* Figure 1.

202. See *supra* text accompanying notes 27-32.

reverses the cases it hears.<sup>203</sup> On reflection, however, this distinction is not surprising. The Supreme Court has a discretionary docket; in contrast, litigants may appeal cases—even bankruptcy cases—as of right to the courts of appeals.<sup>204</sup> In some sense, the first-tier appellate court serves the role of traditional error-corrector. Provided that court is doing its job, the court of appeals ought to affirm in most cases, which we find.<sup>205</sup>

Our findings further suggest, in particular, a tendency by courts of appeals judges to vote liberally or conservatively when both courts below—and therefore a majority of judges below, the bankruptcy judge and either the district judge or a majority of BAP judges—have voted, respectively, liberally or conservatively. This conclusion is in line with the prediction of the Condorcet Jury Theorem.<sup>206</sup> The Theorem predicts that, when each voter is more likely than not to vote for the “correct” answer, the result for which a majority of all the voters cast votes is even more likely to be the “correct” answer, with the “correct” answer being more likely to

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203. See, e.g., Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1180 n.82 (2004).

204. Note, moreover, that the marginal cost of appealing to the court of appeals after appealing once to either the district court or BAP is probably not that high. Litigants can probably rely on the briefs that they filed during the initial appeal.

205. Charles Cameron and Lewis Kornhauser explain that, when judges in a judicial hierarchy work as a “team” toward the goal of deciding cases correctly and both litigants know after trial whether the defendant is liable, a three-tier judicial hierarchy is optimal. See Charles M. Cameron & Lewis A. Kornhauser, *Appeals Mechanisms, Litigant Selection, and the Structure of Judicial Hierarchies*, in INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 173, 190-91 (James R. Rogers et al. eds., 2006). Under idealized conditions of litigant selection, litigants will sort themselves out of appealing to the Supreme Court except under the rare circumstance in which the intermediate appellate court reached the wrong result. Accordingly, Cameron and Kornhauser conclude that the Supreme Court will hear few cases but will tend to reverse in those that it does hear. See *id.* at 188-93.

Though one might question whether litigants know after a bankruptcy court trial whether the defendant is “correct” or not, the “team model” of judging seems applicable given our finding, at least at the court of appeals level, of an absence of ideological voting. Still, Kornhauser and Cameron’s finding seems inapplicable to courts of appeals hearing bankruptcy cases insofar as the marginal cost to litigants for an additional appeal to the court of appeals is likely to be small. In the end, the second tier of intermediate appellate review in bankruptcy may be superfluous unless one is not very sanguine about the ability of district courts and BAPs to serve the error-correcting function.

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

emerge as the size of the panel grows.<sup>207</sup> To the extent that the Theorem applies to votes by judges on legal issues,<sup>208</sup> it stands to reason that a majority of the judges below are more likely than not to have reached the correct conclusion.<sup>209</sup> Accordingly, the finding that court of appeals judges' votes tend to align with that majority is not surprising.

The finding that a judge is more likely to cast a liberal vote in appeals of debt-dischargeability determinations involving general fraud debt perhaps can be attributed to creditors systematically bringing weaker appeals in such cases. While most debt-dischargeability determinations can be commenced at any time,<sup>210</sup> a complaint to determine the dischargeability of general fraud debt must be filed no later than sixty days after the first date set for the meeting of creditors.<sup>211</sup> Perhaps this accelerated timeline compels creditors to file complaints hastily without giving careful consideration to the merits of their position. This problem may be exacerbated further by the fact that the Code creates a presumption of nondischargeability for determinations involving a certain subset of general fraud debt—specifically, debt arising from “false pretenses, a false representation, or actual fraud.”<sup>212</sup> Armed with this presumption, a creditor may be encouraged to barrel ahead with the hope that the presumption will provide sufficient leverage to extract a settlement from the debtor. Although this incentive may be somewhat muted by the fact that the Code provides for fee shifting in favor of the debtor if the creditor's complaint was not substantially justified,<sup>213</sup> it seems reasonable to conclude that debtors may

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207. *Id.*

208. One can argue that at least some legal issues lack an objectively “correct” answer and thus are not susceptible to the strictures of the Jury Theorem. *See id.* at 1023. One also can argue that the Jury Theorem does not apply, at least cleanly, to the extent that judges deliberate together over how to vote. *See* Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 113 n.132 (2003).

209. *Cf.* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 710-12 (2007) (noting that proper application of the Jury Theorem in administrative law cases should extend beyond judges to “votes” cast by administrative agencies).

210. FED. R. BANKR. P. 4007(b).

211. FED. R. BANKR. P. 4007(c); *see also* 11 U.S.C. § 523(c)(1) (2006) (providing that debt-dischargeability determination pursuant to § 523(a)(2) must be resolved in the course of the bankruptcy case in order for such debt to be excluded from discharge).

212. § 523(a)(2)(A), (C).

213. § 523(d).

not seek to vindicate their entitlement to such fees. It would be quite daunting and risky to engage in a second round of litigation with the creditor, only to fail to establish that “the position of the creditor was not substantially justified.”<sup>214</sup> And, even if the debtor made such a showing, the creditor could still avoid liability “if special circumstances would make the award unjust.”<sup>215</sup> Accordingly, our finding with respect to general fraud debt suggests that procedure may result in creditors bringing weaker appeals in a subset of cases, with a resulting increase in the likelihood of a liberal vote by a circuit court judge.<sup>216</sup>

Finally, our findings with respect to the time controls seem consistent with the reasons we set forth above for including such controls in our models.<sup>217</sup> The increased likelihood of liberal voting in recessionary appeals suggests that judges may be willing to be more forgiving of debt during times of national economic crisis.<sup>218</sup> And the fact that we witness an increased likelihood in liberal voting for post-BAPCPA appeals, notwithstanding BAPCPA’s pro-creditor tilt, provides some evidence for the view by some commentators that poor drafting would ultimately lead to unintended consequences.<sup>219</sup>

## CONCLUSION

The findings from our study have failed to unearth evidence that ideological preferences affect judicial voting behavior in a subset of bankruptcy cases. However, our results do identify several factors that appear to influence judicial voting. Because our study confined itself to examining appeals of debt-dischargeability determinations that arose in four circuits over a ten-year period, it could very well

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214. *Id.*

215. *Id.*

216. *Cf.* CROSS, *supra* note 4, at 26 (“Some topical case types might conduce to particularly liberal or conservative results, for a variety of possible reasons entirely independent of the judicial ideology.”).

217. *See supra* Part II.C.9.

218. *See supra* notes 172-73 and accompanying text.

219. *See supra* note 177; *see also* Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 917 (2000) (“[T]he Bankruptcy Code is complicated and amendments often have unintended consequences, or fail in part, or, sometimes, fail completely.”).



be that our findings are not representative of such appeals in the same circuits during different time periods or of similar appeals in other circuits during the same or different time periods. It is also conceivable that other areas of bankruptcy law may draw out ideological voting. We chose to focus on debt-dischargeability determinations primarily because of our reasoned assumption that such determinations are most likely to prompt ideological voting—if such voting exists in bankruptcy. Ultimately, we hope that the past patterns revealed through our empirical analyses will encourage others to test and reconsider their assumptions and understanding of judicial voting behavior in economic cases.

## APPENDIX

**Table A1**  
**Rank Ordering of Circuits by Ideology from**  
**Most Conservative to Most Liberal, 1999-2008**

Median Median-JCS Score	Mean Median-JCS Score
Fifth Circuit (.4443)	Fifth Circuit (.4404)
Eleventh Circuit (.3775)	Eleventh Circuit (.3788)
Fourth Circuit (.3284)	Fourth Circuit (.3173)
Seventh Circuit (.3078)	Seventh Circuit (.3161)
Eighth Circuit (.3003)	First Circuit (.2788)
First Circuit (.2908)	Eighth Circuit (.2765)
Tenth Circuit (.2623)	Tenth Circuit (.2623)
Third Circuit (.0625)	Third Circuit (.0499)
Sixth Circuit (.0190)	Sixth Circuit (.0260)
Ninth Circuit (-.2580)	Second Circuit (-.2609)
Second Circuit (-.2905)	Ninth Circuit (-.2647)

**Table A2**  
**Judicial Votes by Calendar Year and Circuit**

Year	Circuit				Total
	Fifth	Seventh	Eighth	Ninth	
1999	9 (5.26)	3 (4.55)	9 (15.79)	51 (13.71)	72 (10.81)
2000	21 (12.28)	12 (18.18)	3 (5.26)	63 (16.94)	99 (14.86)
2001	12 (7.02)	3 (4.55)	9 (15.79)	75 (20.16)	99 (14.86)
2002	12 (7.02)	9 (13.64)	6 (10.53)	48 (12.90)	75 (11.26)
2003	27 (15.79)	18 (27.27)	3 (5.26)	18 (4.84)	66 (9.91)
2004	12 (7.02)	9 (13.64)	9 (15.79)	21 (5.65)	51 (7.66)
2005	12 (7.02)	9 (13.64)	3 (5.26)	21 (5.65)	45(6.76)
2006	30 (17.54)	0 (0.00)	9 (15.79)	18 (4.84)	57 (8.56)
2007	12 (7.02)	3 (4.55)	0 (0.00)	27 (7.26)	42 (6.31)
2008	24 (14.04)	0 (0.00)	6 (10.53)	30 (8.06)	60 (9.01)
Total	171 (100.00)	66 (100.00)	57 (100.00)	372 (100.00)	666 (100.00)

Note: Column percentages reported in parentheses.

**Table A3**  
**Logistic Regression Model for Direction of Judicial Vote**

Variable	Conservative Vote
JCS Score	.967 (.697, 1.341)
N	664
Log likelihood	-455.16
Adjusted Count R <sup>2</sup>	0
Note: Odds ratios presented with 90% confidence intervals in parentheses.	

**Table A4**  
**Logistic Regression Model for Direction of Judicial Vote**

Variable	Conservative Vote
African American or Hispanic Judge	1.870** (1.162, 3.011)
60-Year-Old (or Older) Judge	1.287 (.901, 1.839)
Fifth Circuit	1.945** (1.199, 3.155)
Seventh Circuit	1.962* (1.067, 3.609)
Eighth Circuit	1.320 (.722, 2.414)
BAP	.931 (.607, 1.426)
Conservative-Conservative	7.483*** (2.927, 19.132)
Conservative-Liberal	.449* (.218, .927)
Liberal-Conservative	3.076* (1.063, 8.899)
General Fraud Debt	.411*** (.277, .610)
Discharge Objection	.765 (.405, 1.443)
Debtor Appellant	2.079 (.842, 5.133)
Recession	.420** (.267, .660)
BAPCPA	.616** (.413, .920)
N	663
Adjusted Count R <sup>2</sup>	.490
Note: *** $p \leq .01$ , ** $p \leq .05$ , * $p \leq .10$ . Odds ratios presented with 90% confidence intervals in parentheses.	

**Table A5**  
**OLS Regression Model for Direction of Judicial Vote**

Variable	Conservative Vote	
African American or Hispanic Judge	.104**	(.028, .180)
60-Year-Old (or Older) Judge	.046	(-.012, .103)
Fifth Circuit	.106**	(.028, .184)
Seventh Circuit	.113*	(.011, .215)
Eighth Circuit	.048	(-.054, .149)
BAP	-.010	(-.080, .060)
Conservative-Conservative	.378***	(.205, .551)
Conservative-Liberal	-.145**	(-.257, -.033)
Liberal-Conservative	.236**	(.039, .432)
General Fraud Debt	-.142***	(-.205, -.080)
Discharge Objection	-.051	(-.155, .052)
Debtor Appellant	.163	(-.008, .333)
Recession	-.136**	(-.208, -.065)
BAPCPA	-.078**	(-.142, -.013)
Constant	.296***	(.212, .380)
N	663	
Adjusted Count R <sup>2</sup>	.483	
Note: *** $p \leq .01$ , ** $p \leq .05$ , * $p \leq .10$ . Odds ratios presented with 90% confidence intervals in parentheses.		