

ARE DEBTORS RATIONAL ACTORS? AN EXPERIMENT⁺

by
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This Article examines patterns in bankruptcy filing data to determine whether this data supports the simplistic Rational Actor model that is the basis for Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). The Article closely reviews the Rational Actor and Situationist models—the current debate about human behavior in bankruptcy context. Analysis of empirical data of pre-BAPCPA, post-BAPCPA, and current filings demonstrate that while BAPCPA reduced the number of filings nationally, unexplained variation in filing patterns exist. These findings suggest that the Rational Actor model provides a limited understanding of human behavior in the bankruptcy arena. As salient economic factors—poverty, unemployment, and foreclosure rates—fail to adequately explain the local variation patterns, this Article explores non-economic factors to develop a better understanding of debtor decision making. Wide local variation patterns in filing data demonstrate that a more nuanced model that takes into account both nationwide and local situational pressures is required for understanding debtor decision-making and developing effective policies.

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I. INTRODUCTION

The modern legal debate surrounding the effectiveness of statutes and regulations largely turns on competing explanations for human behavior. The two dominant models advanced by legal commentators are the Rational Actor model and the Situationist model. According to the former, individual decisions are freely chosen and based on individual preferences, and can best be maneuvered by altering the benefits and burdens associated with a given decision.¹ Under this model, situational aspects external to the chooser play a role in decision-making only when they are forceful and highly visible.² By contrast, according to the Situationist model, decisions are influenced by numerous and varied external forces, many of which the decision-maker may not even be aware.³ Under this view, rules that fail to account for the impact of this

¹ See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559 n.15 (1998); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (5th ed. 1998). Several scholars have noted the dominance of this model in modern legal thought. See, e.g., Adam Benforado & Jon Hanson, *Naive Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 509 (2008); Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV., Dec. 1985, at 53, 54; George Loewenstein, *The Fall and Rise of Psychological Explanations in the Economics of Intertemporal Choice*, in CHOICE OVER TIME 3 (George Loewenstein & Jon Elster eds., 1992); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1120 (1981); George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, AM. ECON. REV., Mar. 1977, at 76; ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16 (2d. ed. 1997).

² See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 116; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 6 (2004).

³ See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 108–26 (Peter Smith ed., Anchor Books 1970) (1930); K. N. LLEWELLYN, *THE BRAMBLE BUSH* 80 (1978); BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 17 (Erik J. Jensen & Thomas C. Heller eds., 2003); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 155 (2003); Hanson & Yosifon, *supra* note 2, at 6; Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV.

complex web of influence upon decision-making will be ineffective or even harmful. Bankruptcy scholars, for example, rigorously debate whether debtor filing decisions are the product of rational, strategic choice or whether they are attributable to situational pressures.⁴

Of course, many would argue that neither model can fully explain human behavior, and that both rational choice and situational pressures play a role in decision-making. However, our laws are sometimes still based on an assumption that rational choice alone determines an individual's behavior. One such law is the Bankruptcy Abuse Prevention and Consumer Protection Act.

In 2005, Congress—motivated by the assumption that debtors were acting rationally and strategically⁵—changed bankruptcy law to reduce

1729, 1745 (1998); Christine Jolls, Cass R. Sunstein & Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593, 1594 (1998). See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁴ See Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1486 (2006) (discussing the debate between economists and sociologists regarding debtor behavior). Scholars subscribing to the Rational Actor model have argued that bankruptcy filings are made by rational and often opportunistic debtors. Barry Adler, Ben Polak & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 609 (2000) (analyzing consumer bankruptcy choice within a principal-agent framework); Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 180 (advocating means-testing to curb "opportunistic" filings); Eric A. Posner, *Should Debtors Be Forced Into Chapter 13?*, 32 LOY. L.A. L. REV. 965, 976 (1999) (concluding means testing would "rationalize bankruptcy relief"); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 686, 710 (1998) (applying economic model to debtor choice to show increase in bankruptcy filing is due to strategic behavior); Philippe Aghion, Oliver Hart & John Moore, *Improving Bankruptcy Procedure*, 72 WASH. U. L.Q. 849, 852 (1994) (applying an economic perspective to bankruptcy procedure); Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 50–51 (1987) (arguing increased bankruptcy filings are due to rational debtor behavior). See also Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 VAND. L. REV. 1679, 1685 (1998). On the other hand, scholars subscribing to the Situationist model have argued that filing decisions are largely attributable to situational pressures such as adverse financial events. See Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1372 (2008) (describing the "adverse-events" model); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 243 (2000) (identifying job and income loss, sickness and injury, divorce, and homeownership as the most common causes of bankruptcy); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 81 (2003) (reporting data suggesting that job loss, family breakup, and medical problems prompted eighty-seven percent of consumer bankruptcy filings).

⁵ 151 CONG. REC. S1813–14 (daily ed. Mar. 1, 2005) (statement of Sen. Frist) (asserting that people plan their bankruptcies strategically); *Bankruptcy Reform Act of 1999 (Part III): Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 106th Cong. 9 (2000) (statement of Rep. Marge

individual discretion.⁶ The new law, the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), forced debtors through a cookie-cutter series of steps designed to reduce bankruptcy filings and to develop more national uniformity.⁷ Judicial discretion was sharply curtailed, and practicing lawyers were burdened with extensive, detailed obligations that drove up costs and pushed many out of bankruptcy practice altogether.⁸ In other words, the burdens and costs associated with bankruptcy were substantially increased in order to deter filings.

Bankruptcy provides a natural experiment to empirically test the strength of the Rational Actor model upon which the Bankruptcy Abuse Prevention and Consumer Protection Act was based. Over the past twenty-seven years, millions of American families have filed for personal bankruptcy, each going through a uniform federal process in their own local communities. A decade ago, empiricists discovered wide variations were reported among filing rates and chapter choices, and those variations remained stable over time. Interestingly, these variations could not be explained by any salient external factor, such as variations in income, unemployment, or exemption laws.⁹ Bankruptcy filing choices, in other words, were largely due to “unseen or overlooked influences,”¹⁰ suggesting that a simple Rational Actor model could not fully explain

Roukema, Chairwoman, H. Subcomm. on Financial Institutions) (arguing that bankruptcy was becoming a “first stop financial planning tool rather than a last resort”); 144 CONG. REC. S10787 (daily ed. Sept. 23, 1998) (statement of Sen. Grassley) (“The fact is that some people use bankruptcy as a convenient financial planning tool to skip out on debts they could repay.”); 144 CONG. REC. H10234 (daily ed. Oct. 9, 1998) (statement of Rep. Goodlatte) (“Under the current system, some irresponsible people filing for bankruptcy run up their credit card debt immediately prior to filing knowing that their debts will soon be wiped away.”); 144 CONG. REC. S10190 (daily ed. Sept. 10, 1998) (remarks of former Sen. Bentsen) (“With growing frequency, bankruptcy is being treated as a first choice rather than a last resort, a matter of convenience rather than necessity.”).

⁶ See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 101, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.); Lauren E. Tribble, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789 (2007).

⁷ Tribble, *supra* note 6, at 792.

⁸ *Id.*; Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 286 (2005).

⁹ Prior to passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), studies indicated that total filing rates and Chapter 13 filing rates varied substantially from district to district—and that this variation persisted over several decades. See Gordon Bermant, Ed Flynn & Karen Bakewell, *Bankruptcy by the Numbers: Thoughts on the “Local Legal Culture”*, AM. BANKR. INST. J., Feb. 2002, at 24 (finding correlation between district variation from 1999 to 2001); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 820 (1994) (describing variation in filing patterns among judicial districts from 1970 to 1990).

¹⁰ Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1090 (2008).

debtor behavior. In spite of these findings, Congress rooted its bankruptcy reform efforts in the assumption that debtors were acting strategically and rationally. The passage of BAPCPA was expected to radically alter bankruptcy filing patterns, and the question remained whether these filing patterns would be consistent with Congress's assumption that debtors were acting rationally and strategically. My data indicate that, while BAPCPA did reduce bankruptcy filings across the board, unexplained local variations in filing patterns remain, casting doubt upon the simplistic Rational Actor assumptions behind BAPCPA.

Two years after the passage of BAPCPA, a second factor emerged that would be expected to affect debtors' bankruptcy filing decisions: the subprime lending crisis and consequent economic downturn. Housing values have plummeted, and foreclosure rates and job loss rates have dramatically increased.¹¹ Because bankruptcy is designed to function as a safety net in times of economic crisis, one would expect bankruptcy filing rates to increase as a result. And indeed, the latest filing data indicate that bankruptcy filing rates have begun to ascend again.¹² However, bankruptcy filing rates are still lower than the filing rates prior to the passage of BAPCPA—even in districts particularly hard-hit by the subprime lending crisis—and wide variation across districts persists.

This Article examines the question of whether the bankruptcy filing data support the simplistic Rational Actor model upon which BAPCPA was based. The data described *infra*—including pre-BAPCPA, post-BAPCPA, and current filing rates—support a more nuanced model of debtor decision-making. For example, six years ago, residents of the Western District of Tennessee were about six times more likely to file for bankruptcy than residents of the District of Maine.¹³ The year after BAPCPA passed, residents of the Western District of Tennessee were about ten times more likely to file for bankruptcy than residents of the District of Maine.¹⁴ Today, residents of the Western District of Tennessee are close to eight times more likely to file for bankruptcy than residents

¹¹ Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Beyond Subprime Loans*, N.Y. TIMES, February 12, 2008, at A1; Steven R. Weisman, *Bernanke Nods at Possibility of Recession*, N.Y. TIMES, Apr. 2, 2008, at C1, available at <http://www.nytimes.com/2008/04/02/business/02cnd-bernanke.html>; Vikas Bajaj, *Housing Lenders Fear Bigger Waive of Loan Defaults*, N.Y. TIMES, August 4, 2008, at A1, available at <http://www.nytimes.com/2008/08/04/business/04lend.html>.

¹² See ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY STATISTICS (2008), available at <http://www.uscourts.gov/bnkrpctstats/bankruptcystats.htm>.

¹³ *Id.* DEC. 2001 QUARTERLY REPORT. The Western District of Tennessee had a rate of 10.93 per thousand household units in December 2001, while the District of Maine had a total filing rate of 1.7 per thousand household units.

¹⁴ *Id.* DEC. 2006 QUARTERLY REPORT. The District of Tennessee had a rate of 6.06 per thousand household units in December of 2006, while the District of Maine had a total filing rate of 0.58 per thousand household units in 2006.

of the District of Maine.¹⁵ Persistence over longer time periods is evident as well. In 1985, for example, residents of the Western District of Tennessee who filed for bankruptcy were more than fifteen times more likely to file a Chapter 13 plan than residents of the Northern District of Iowa.¹⁶ Bankruptcy filers in the Western District of Tennessee were still more than fifteen times more likely to file a Chapter 13 plan than filers in the Northern District of Iowa in 2001.¹⁷ In 2006, a year after the passage of BAPCPA, filers in the Western District of Tennessee were still close to ten times more likely to file a Chapter 13 plan than filers in the Northern District of Iowa.¹⁸ Today, filers in the Western District of Tennessee are again fifteen times more likely to file a Chapter 13 plan than filers in the Northern District of Iowa.¹⁹

Dramatic differences in filing patterns persist even in the face of a statute designed to reduce discretion and to influence the debtor's rational choice; and the patterns persist in the face of a nation-wide economic downturn. Importantly, these patterns do not correspond to factors that should be significant under a simplistic Rational Actor model.

This Article examines total filing rates and Chapter 13 filing rates in all districts, finding that although the amendments triggered a substantial reduction in overall total filings and a substantial increase in Chapter 13 filing rates, and although the economic downturn triggered an increase in overall total filings, the trends in local filing patterns persist as strongly as before. Districts with the highest total filings continue to be the highest, and continue to have substantially higher filing rates than the districts with the lowest filing rates.²⁰ Districts with the highest rate of Chapter 13 filings as a percent of total filings continue to be the highest, and continue to have substantially higher filing rates than the districts with the lowest Chapter 13 rates.²¹

In fact, filing rates in some of the districts hardest hit by the subprime lending crisis remained well below their filing rates prior to

¹⁵ *Id.* MAR. 2008 QUARTERLY REPORT. The District of Tennessee had a rate of 6.46 in March of 2008, the most recent data available as of this study, while the District of Maine had a total filing rate of 0.86 per thousand household units.

¹⁶ *Id.* 1985 ANNUAL REPORT. The Western District of Tennessee had a Chapter 13 rate of 69% in 1985, while the Northern District of Iowa had a Chapter 13 rate of 2.5% in 1985.

¹⁷ *Id.* DEC. 2001 QUARTERLY REPORT. The Western District of Tennessee had a Chapter 13 rate of 74% in 2001, while the Northern District of Iowa had a Chapter 13 rate of 4.5% in 2001.

¹⁸ *Id.* DEC. 2006 QUARTERLY REPORT. The Western District of Tennessee had a Chapter 13 rate of 79% in 2006, while the Northern District of Iowa had a Chapter 13 rate of 8.7% in 2006.

¹⁹ *Id.* DEC. 2001 QUARTERLY REPORT. The Western District of Tennessee has a Chapter 13 rate of 72% in 2008, while the Northern District of Iowa had a Chapter 13 rate of 4.8% in 2001.

²⁰ See discussion *infra* Part IV.

²¹ See discussion *infra* Part IV.

BAPCPA—and still well below rates in districts with historically high filing rates. In Arizona, for example, filing rates were 2.85 per thousand in December of 2004, and shrank to 0.78 per thousand in 2006, but are still far below pre-BAPCPA levels at only 1.39 per thousand in March of 2008, with foreclosure rates skyrocketing. Even in times of economic crisis, districts in which many debtors may be in desperate need of bankruptcy protection may be deterred from filing due to the happenstance of their location.

These data demonstrate that, in spite of the nation-wide impact of BAPCPA and the economic downturn, wide local variation in filing patterns persist. Unexplained variation across districts persists in both debtors' decisions to file for bankruptcy and the chapter under which they choose to file. The likelihood that any given debtor will file for bankruptcy and, if so, in which chapter continues to depend heavily upon the district in which the debtor resides. National legal rules and major economic pressures have force—but they have no greater force than the local actors who must implement them. This finding has broad implications for the simplistic Rational Actor model and the policy decisions upon which it relies.

These data suggest that the simplistic Rational Actor model upon which BAPCPA was based is of limited scope in fully understanding behavior, and that laws based on this model may therefore be ineffective. Instead, these data support the idea that situational forces—not just nation-wide pressures, but overlooked local pressures as well—may be a powerful force in shaping bankruptcy-filing patterns, and bankruptcy policy would benefit from greater recognition of these forces.

This Article proceeds in six parts. Part II reviews the simplistic Rational Actor model and Situationist critiques of this model, discusses how this debate has played out in the bankruptcy context, and explores the recent events that could be expected to influence bankruptcy filing decisions. Part III explains the empirical methodology used to conduct the current study. Part IV reports the findings of the study: unexplained local variations persist in the face of tremendous external pressures. Part V explores possible causes of the local variations, and concludes that the simplistic Rational Actor model motivating BAPCPA cannot explain debtor behavior. Part VI is a conclusion.

II. HOW DECISIONS GET MADE: THE RATIONAL ACTOR OR THE SITUATION?

A. *The Debate About Behavior*

The basic Rational Actor model holds that human decisions are driven by rationality; that is, “a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to

have.”²² As Milton Friedman puts it, “every individual serves his own private interest The great Saints of history have served their ‘private interest’ just as the most money-grubbing miser has served his private interest. The *private interest* is whatever drives an individual.”²³ Under this view, humans are “preference-driven choosers.”²⁴

Jon Hanson and David Yosifon describe the basic assumptions of those who ascribe to a simplistic Rational Actor model (whom they call “dispositionists”) as follows:

- Actions are freely chosen.
- Choices imply a preference.
- Preferences are stable over time.
- Preferences implicate the identity of the self.
- Outcomes are mostly controllable.
- People are responsible for (and hence the self is implicated in) the choices they make and the resultant outcomes.
- Smart (good) people make good choices, whose outcome they are happy with.²⁵

In addition, dispositionists of this nature consider the chooser’s situation “only when it is palpable or when theorists are particularly motivated to do so. And even then, only the most salient or satisfying elements of the situation are considered. Otherwise, disposition is presumed to govern.”²⁶

Policymakers adopting a simplistic Rational Actor model assume that “variations in outcome result from one of two sources: one, variations in formal, legal rules; or two, variations in individual responses to these rules.”²⁷ Although legal realists and critical legal studies scholars challenged this assumption,²⁸ it continues to be the case that “most proposals for law reform rest on the premise that a change in formal rules will be sufficient to produce a change in actual practices, through coercion or through a system of incentives and disincentives.”²⁹

Situationists find it troubling that such a simplistic Rational Actor model underpins our laws to such a degree because the model fails to account for the varied and nuanced situational pressures that also

²² POSNER, *supra* note 1, at 17.

²³ Milton Friedman, *The Line We Dare Not Cross: The Fragility of Freedom at “60%,”* ENCOUNTER, Nov. 1976, at 8, 11.

²⁴ Hanson & Yosifon, *supra* note 2, at 8.

²⁵ *Id.* at 31 (citing Alan Page Fiske, et al., *The Cultural Matrix of Social Psychology*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 915, 939 (Daniel T. Gilbert, Susan T Fiske & Gardner Lindzey eds., 4th ed. 1998)).

²⁶ *Id.* at 6.

²⁷ Sullivan et.al., *supra* note 9, at 802; *see also* sources cited *supra* note 3.

²⁸ Sullivan et al., *supra* note 9, at 802; *see also* Block-Lieb & Janger, *supra* note 4; sources cited *supra* note 3.

²⁹ Sullivan et al., *supra* note 9, at 803; *see also* Hirsheifer, *supra* note 1; Loewenstein, *supra* note 1.

influence decisions.³⁰ Situationists present a growing body of evidence, drawn from social psychologists, that decisions are heavily influenced by unrecognized situational factors, and are often irrational.³¹ Such factors include heuristics such as availability, which people use “to evaluate the frequency or likelihood of an event on the basis of how quickly instances or associations come to mind.”³² The more an event or item is mentioned, the greater its influence; “individuals tend to focus on an obvious or convenient number or event”³³ Surveys show, for example, that people believe they are at greater risk for homicide than stomach cancer, although stomach cancer is seventeen times more likely.³⁴ This is coupled with what social psychologists call an “anchoring effect,” whereby “[i]nitial starting points, even totally irrelevant ones, seem to serve as anchors,”³⁵ and “random and irrelevant starting points can have a dramatic impact on judgment.”³⁶ Another important situational factor is framing effect; that is, “the way in which an issue is presented to us significantly influences how we perceive it.”³⁷ Social psychology studies have demonstrated that “perceptions and preferences shift depending on context.”³⁸ This is important because “different frames can lead to different choices.”³⁹ For instance, whether something is framed as a gain or a loss dramatically influences choice—in one experiment, members of a group asked how much they would pay to get a coffee mug were willing to pay much less than members of a group asked how much they would charge to give up the same mug.⁴⁰

³⁰ Hanson & Yosifon, *supra* note 3, at 157–79.

³¹ *Id.*; Jolls et al., *supra* note 3, at 1595.

³² SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 384 (2d ed. 1991) (citation omitted).

³³ Block-Lieb & Janger, *supra* note 4, at 1533.

³⁴ ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 91 (2000).

³⁵ *Id.* at 102.

³⁶ *Id.*

³⁷ Hanson & Yosifon, *supra* note 2, at 42. *See also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCI.* 453 (1981).

³⁸ Block-Lieb & Janger, *supra* note 4, at 1532 (citing Amos Tversky, *Rational Theory and Constructive Choice*, in *THE RATIONAL FOUNDATIONS OF ECONOMIC BEHAVIOUR* 185, 186 (Kenneth J. Arrow et al. eds., 1996)).

³⁹ Tversky & Kahneman, *supra* note 37, at 454.

⁴⁰ Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. POL. ECON.* 1325, 1326 (1990). *See also* Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 *Q.J. ECON.* 1039, 1041 (1991); Irwin P. Levin & Gary J. Gaeth, *How Consumers Are Affected by the Framing of Attribute Information Before and After Consuming the Product*, 15 *J. CONSUMER RES.* 374, 376 (1988); Gerald E. Smith, *Framing in Advertising and the Moderating Impact of Consumer Education*, 36 *J. ADVERT. RES.*, Sep.–Oct. 1996, at 49, 53.

Social psychologists, in study after study, demonstrated the irrationality of decision-making,⁴¹ persuading Situationists that a simplistic Rational Actor model is not an accurate view of human decision-making and should not underpin our laws.⁴²

B. The Debate About Debtor Behavior

The debate between scholars who assume a simplistic Rational Actor model and those who believe that situation plays a substantial role has been particularly prevalent in the bankruptcy context. Some scholars, like Congress, have viewed debtors as rational actors—whose incursion of debt is a rational choice and whose bankruptcy filing is a calculated, opportunistic move.⁴³ Critics of this assumption have conducted empirical studies demonstrating that most individuals who incur debt and ultimately file for bankruptcy are severely constrained by economic circumstances, including medical bills, divorce, and job loss.⁴⁴

One group of bankruptcy scholars who suspected that bankruptcy filings were not solely attributable to rational choice conducted a study of bankruptcy filing patterns over time.⁴⁵ Professors Sullivan, Warren, and Westbrook found tremendous variation across judicial districts and tremendous district-level consistency over time with respect to total bankruptcy filing rates⁴⁶ and chapter filing choice.⁴⁷ They found

⁴¹ See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 646–67 (1999) (summarizing several such studies); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1131 (1974); RICHARD NISBITT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* xii (1980); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 343 (1984); MASSIMO PIATTELLI-PALMARINI, *INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS* 71–72 (1994).

⁴² See Hanson & Yosifon, *supra* note 3, at 179; Hanson & Yosifon, *supra* note 2, at 37–71; Jolls et al., *supra* note 3, at 1595.

⁴³ See *supra* note 4 and accompanying text.

⁴⁴ See SULLIVAN ET AL., *supra* note 4, at 243 (identifying job and income loss, sickness and injury, divorce, and homeownership as the most common causes of bankruptcy); WARREN & TYAGI, *supra* note 4, at 81 (reporting data suggesting that job loss, family breakup, and medical problems prompted 87% of consumer bankruptcy filings).

⁴⁵ See generally Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 513 (1993) (describing lawyers' influence on bankruptcy filing decisions); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1501 (1996) (arguing that legal communities form shared mental models of the law and process cases accordingly); Sullivan et al., *supra* note 9, at 803; Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483 (introducing empirical evidence that bankruptcy is a "self-organizing" legal system rather than one dependent upon appellate jurisprudence).

⁴⁶ Sullivan et al., *supra* note 9, at 818 tbl. 1; Braucher, *supra* note 45, at 581.

⁴⁷ Braucher, *supra* note 45, at 526; Sullivan et al., *supra* note 9, at 822–28.

“coherent and predictable inconsistencies or variations from one locality to another, that these variations persist over long period of time despite major shifts in formal law and economic conditions[.]”⁴⁸ Subsequent studies confirmed these patterns.⁴⁹ With respect to filing rates, Professors Sullivan, Warren, and Westbrook found variation of more than one hundred percent among districts.⁵⁰ They also found that the differences were persistent over time, with a Pearson correlation coefficient of .73 between 1970 and 1980,⁵¹ and a correlation of .80 between 1980 and 1990.⁵² With respect to chapter choice, the authors again found a variation greater than one hundred percent, and a correlation of .74 from 1970 to 1980, and a correlation of .81 from 1980 to 1990.⁵³ A more recent study found a “near-perfect” correlation of over .90 between Chapter 13 to Chapter 7 ratios for 1999 and 2001.⁵⁴ Although national trends emerged during this period—an overall increase in filings⁵⁵ and an increase in the rates of Chapter 13 filings⁵⁶—the wide variation across districts persisted.

Interestingly, in these studies, none of the salient external factors that may have been relevant under the Rational Actor model appear to have contributed to the variation in filing. For example, states that permitted debtors to exempt a greater amount of property did not have higher filing rates overall.⁵⁷ Instead, these authors posited that local pressures (something unaccounted for in a simplistic Rational Actor model)—apparently determined filing choice to a large extent.⁵⁸

Substantial variation in local filing patterns is an important phenomenon for both creditors and debtors given the vastly different consequences of filing decisions, whether it be the decision to file for bankruptcy in the first place or the decision to file in Chapter 7 or Chapter 13.⁵⁹ When a debtor decides to file for bankruptcy, all collection

⁴⁸ Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 Am. Bankr. Inst. L. Rev. 25, 27 (1998).

⁴⁹ See, e.g., Bermant et al., *supra* note 9, at 24 (finding correlation between district variation from 1999 to 2001).

⁵⁰ Sullivan et al., *supra* note 9, at 820.

⁵¹ *Id.* at 821–22. A Pearson correlation coefficient of 1 would mean a perfect correlation between the two points in time.

⁵² *Id.* at 822.

⁵³ *Id.* at 828–29.

⁵⁴ Bermant et al., *supra* note 9, at 24.

⁵⁵ Sullivan et al., *supra* note 9, at 820.

⁵⁶ *Id.* at 828.

⁵⁷ Braucher, *supra* note 45, at 529.

⁵⁸ Sullivan et al., *supra* note 9, at 820–22.

⁵⁹ Local variation in the bankruptcy system is also significant because Congress is charged with establishing “uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4 (emphasis added). Prior to the passage of the Constitution, the colonies had a divergent patchwork of laws relating to discharge of debt. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 365 (2006); see also PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR*

activities must cease,⁶⁰ the debtor may be able to keep more property than state law would permit,⁶¹ and the debtor may ultimately discharge unpaid debt.⁶² If a debtor does not file, she will continue to be subjected to calls from collection agents and repossession visits, and interest and fees will continue to accrue on unpaid debts. The difference between a decision to file a Chapter 7 and a decision to file a Chapter 13 is equally powerful. A Chapter 7 filing means the debtor will give up all property that exceeds the allotted exemptions,⁶³ and the trustee will distribute the proceeds after sale to the creditors on a pro rata basis.⁶⁴ The debtor's debt is discharged immediately upon confirmation of the plan.⁶⁵ If debtors wish to retain property in which they have no equity, they may choose to "reaffirm" their secured debts or may simply continue paying what is owed in an attempt to "ride through" bankruptcy proceedings without formal reaffirmation.⁶⁶ In a Chapter 13 filing, on the other hand, debtors keep their property (including their homes) but must pay all income above their court-approved budget to the trustee, who distributes the money to creditors on a pro rata basis.⁶⁷ Debtors may make up arrearages over time,⁶⁸ and may reduce their secured debts to collateral value.⁶⁹ Only after completion of the three to five year plan does the debtor obtain a discharge.⁷⁰ If the debtor fails to complete the plan—as is the case for at least a third of debtors⁷¹—they may attempt to file again in Chapter 7 or 13. If they cannot confirm a plan, however, they are required to repay their original debts, in addition to the interest and fees that have accrued while the debtor was attempting to complete the Chapter 13 plan.⁷²

The early bankruptcy studies demonstrate that these crucial filing decisions—whether a debtor files for bankruptcy and in which chapter a

DEBT, AND BANKRUPTCY, 1607–1900, 3 (1999). This resulted in disparate enforcement of debt discharges from state to state. *See James v. Allen*, 1 U.S. (1 Dall.) 188, 191 (1786). The Bankruptcy Clause was inserted into the constitution to remedy this lack of uniformity. *Katz*, 546 U.S. at 369 (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 571 (Ohio Univ. Press ed. 1966)). Accordingly, the very "purpose and effect" of the bankruptcy laws "are to ensure uniformity in treatment of state and private creditors." *Katz*, 546 U.S. at 376 n.13 (citing *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193–94 (1819)).

⁶⁰ 11 U.S.C. § 362 (2006).

⁶¹ 11 U.S.C. § 522(b) (2006).

⁶² 11 U.S.C. § 727(a) (b) (2006); 11 U.S.C. § 1328 (2006).

⁶³ 11 U.S.C. § 541 (2006).

⁶⁴ 11 U.S.C. § 726 (2006).

⁶⁵ 11 U.S.C. §§ 1327–28 (2006)

⁶⁶ 11 U.S.C. § 524(c) (2006).

⁶⁷ 11 U.S.C. § 1322(c)–(d) (2006).

⁶⁸ 11 U.S.C. § 1325(a) (5) (2006).

⁶⁹ *Id.*

⁷⁰ 11 U.S.C. § 1328.

⁷¹ Sullivan et al., *supra* note 9, at 862 n.158.

⁷² 11 U.S.C. § 1328.

debtor files—do not depend entirely on thoughtful individualized decisions in light of formal legal rules. At least as powerful a factor is the happenstance of the district in which the debtor is located. Prior to BAPCPA, Congress revised the Bankruptcy Code in 1978,⁷³ 1981,⁷⁴ 1982,⁷⁵ 1984,⁷⁶ 1986,⁷⁷ 1988,⁷⁸ 1990,⁷⁹ 1991,⁸⁰ and 1992.⁸¹ Changes in national legal rules governing bankruptcy did not markedly disrupt the persistence of variations between districts and consistency within districts in filing patterns over time.⁸² Even though overall filing rates and Chapter 13 filing rates increased over time, there continued to be substantial differences between districts with the lowest rates and districts with the highest rates.

C. Attempting to Shape Debtor “Choice”: BAPCPA

In spite of studies indicating that rational choice played little, if any, role in bankruptcy filing decisions, Congress based the 2005 BAPCPA bankruptcy amendments on the assumption that debtors were rationally choosing bankruptcy. The 2005 BAPCPA amendments were rooted in the assumption that debtors were unnecessarily and opportunistically filing for bankruptcy—by choice rather than circumstance. Congress assumed that debtors were rational and strategic—that bankruptcy was a “first choice rather than a last resort.”⁸³ Notably absent from the legislative history of BAPCPA is a recognition of the wide, unexplained variation in filing patterns and of the complex set of factors that may influence bankruptcy filing decisions.

⁷³ Bankruptcy Act Amendment of 1979, Pub. L. No. 96-56, 93 Stat. 387; Bankruptcy Act Amendment of 1980, Pub. L. No. 96-448, 94 Stat. 1931.

⁷⁴ Bankruptcy Act Amendment of 1981, Pub. L. No. 97-35, 95 Stat. 863.

⁷⁵ Bankruptcy Act Amendment of 1982, Pub. L. No. 97-222, 96 Stat. 241; Pub. L. No. 97-258, 96 Stat. 1062; Pub. L. No. 97-320, 96 Stat. 1539.

⁷⁶ Bankruptcy Act Amendment of 1984, Pub. L. No. 98-353, 98 Stat. 353.

⁷⁷ Bankruptcy Act Amendment of 1986, Pub. L. No. 99-509, 100 Stat. 1949 (1986); Pub. L. No. 99-554, 100 Stat. 3115.

⁷⁸ Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610; Intellectual Property Bankruptcy Protection Act of 1988, Pub. L. No. 100-506, 102 Stat. 2538; Bankruptcy Act Amendment of 1988, Pub. L. No. 100-597, 102 Stat. 3028.

⁷⁹ Bankruptcy Act Amendment of 1990, Pub. L. No. 101-311, 104 Stat. 267; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865; Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4865; Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5113.

⁸⁰ Act of Dec. 9, 1991, Pub. L. No. 102-198, 105 Stat. 1623.

⁸¹ Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, 106 Stat. 982; Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2782.

⁸² See generally Bermant et al., *supra* note 9, at 24; Sullivan et al., *supra* note 9, at 864. Large increases in Chapter 13 filings occurred after the adoption of the 1978 Bankruptcy Code, but this did not diminish the variation among districts. *Id.* at 828.

⁸³ See sources cited *supra* note 5.

The amendments had a singular design: to reduce individual discretion and force all debtors into a mechanized process. No longer would debtors evaluate their options in light of a flexible system—the system would dictate the debtors’ course of action in most cases. As one bankruptcy judge explained, Congress “created a law that is sometimes self-executing, inflexible, and unforgiving.”⁸⁴ Congress intended the new system to work formulaically: debtors would plug in their numbers (income, permitted expenditures, and debt) and the system would insert them in the proper slot (Chapter 13, Chapter 7, or out altogether).⁸⁵ In addition, the burdens to filing would be increased so as to prevent debtors from even seeking to file for bankruptcy.

Congress sought to exchange judicial discretion for formulas, with the stated intention of curbing “abuse.” To bring about these desired effects, Congress introduced several key changes to the Bankruptcy Code that could be expected to affect filing decisions. Some changes may affect whether debtors file for bankruptcy at all. For example, all debtors wishing to file for bankruptcy are now required to complete a credit-counseling course before filing.⁸⁶ This requirement is nominally designed to encourage debtors to work out repayment plans rather than filing. A greater barrier to filing, however, may be the onslaught of additional burdens placed on debtors’ attorneys. Under BAPCPA, attorneys are now required to certify that they performed a “reasonable investigation” into the circumstances that gave rise to each pleading or motion and that they determined that the pleading or motion is well grounded in fact.⁸⁷ Attorneys must take time to gather and scrutinize financial documents, and even second-guess the valuation of debtors’ property, in order to comply.⁸⁸ This requirement was expected to cost attorneys an additional \$150 to \$500 per case, and it was predicted that attorneys’ fees would rise as a consequence.⁸⁹ The amendments also subject attorneys to increased sanctions and civil liability,⁹⁰ which may deter many from continuing to represent debtors. Even if debtors are able to access counsel, they face not only rising attorneys fees, but an increase in bankruptcy filing fees as well.⁹¹

⁸⁴ *In re Ott*, 343 B.R. 264, 266 (Bankr. D. Colo. 2006).

⁸⁵ *See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 101, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.); *See generally* Tribble, *supra* note 6, at 792.

⁸⁶ 11 U.S.C. §§ 109(h), 521(b) (2006). This requirement does not apply if the debtor shows “exigent circumstances” and attempted to obtain counseling for five days before requesting the exemption. *Id.* § 109(h)(3)(A).

⁸⁷ 11 U.S.C. § 707(b)(4)(C) (2006).

⁸⁸ Vance & Cooper, *supra* note 8, at 313.

⁸⁹ S. REP. NO. 106-49, at 73–74 (1999) (citing Congressional Budget Office estimates).

⁹⁰ 11 U.S.C. §§ 526, 707(b) (2006).

⁹¹ *Id.* § 707.

Other changes may be expected to influence chapter choice. Debtors wishing to file a Chapter 7 must undergo a “means test,” and debtors whose income both exceeds the state median and exceeds their allowed expenses by a given amount presumptively may not file in Chapter 7.⁹² Attorneys are subject to civil liability if a debtor fails the means test and the court finds that the position of the attorney violated Rule 9011.⁹³ Further, debtors who receive a Chapter 7 discharge may not receive another discharge under Chapter 7 for eight years⁹⁴—an increase from the six-year waiting period in effect prior to BAPCPA.

In passing BAPCPA, Congress intended debtor choice to be tightly constrained in order to curb what it believed to be “abusive” filings. This study, the results of which are discussed in Part IV, suggests that bankruptcy filing decisions are the result of much more than a debtor’s rational, strategic choice.

D. A Salient Situational Force: Economic Crisis

After the passage of BAPCPA, with its design to limit and discourage bankruptcy filing, the subprime lending crisis unfolded and Americans faced foreclosures, job loss, and price increases.⁹⁵ Bankruptcy is a crucial safety net for those experiencing severe economic hardship. We might expect bankruptcy filing patterns to be affected by serious economic downturn, and we might also expect different areas of the country to respond differently. For example, we might expect to see areas hardest hit by foreclosure rates increase in Chapter 13 filings. The conventional wisdom is that those seeking to keep their homes will file for bankruptcy under Chapter 13, given that Chapter 13 can be used to put a halt to foreclosure proceedings, deaccelerate the mortgage, and give the debtor some time to negotiate with the lender.⁹⁶ The bankruptcy filing patterns that we see after the economic downturn also suggest that BAPCPA’s narrow conception of debtor behavior was misplaced, given that wide variation in local filing patterns persists.

III. METHODOLOGY

In order to test whether the wide local variation in bankruptcy filing patterns survived the bankruptcy amendments and economic downturn, this paper examines personal bankruptcy filing patterns across districts over time. The Office of the Administrative Court (AO) supplies

⁹² *Id.*

⁹³ *Id.* § 707(b)(4)(A). This provision appears to extend the scope of Rule 9011, which applied to documents submitted to the court, not positions of the party. Rule 9011 did not make attorneys responsible for the accuracy of debtors’ schedules, but § 707(b)(4)(A) purports to do so. *See* Vance & Cooper, *supra* note 8, at 286–87.

⁹⁴ 11 U.S.C. § 727(a)(8) (2006).

⁹⁵ *See* sources cited *supra* note 11.

⁹⁶ *See* 11 U.S.C. § 1322(b)(2), (5) (2006).

historical quarterly filing data by district.⁹⁷ This investigation focused on two patterns: the rate of total personal bankruptcy filings and the rate of Chapter 13 filings as a percent of total filings. To discern the pattern of total filings, I recorded the number of total filings in each district for each quarter from December 2001 through March 2008. I adjusted for population growth by calculating the incidence of filing per thousand housing units⁹⁸ for each quarter by district.⁹⁹ This enabled me to see the pattern of total filings over time across districts (Total Filings Data). To discern the pattern of Chapter 13 filings, I recorded the number of Chapter 13 filings by district for each quarter from December 2001 through 2008, and calculated Chapter 13 filings as a percent of total filings. I also recorded the number of Chapter 13 filings as percent of total filings for the fourth quarters of 1985, 1990, and 1995. This enabled me to see the pattern of Chapter 13 filings over time across districts (Chapter 13 Data).

In order to discern whether filing patterns were consistent across districts over time, I conducted two tests, which I will identify as the Rank-Correlation Test and the Distance-Consistency Test. Each test was conducted on both the Total Filings Data and the Chapter 13 Data. The Rank-Correlation Test was designed to unveil whether districts maintained their relative rank over time with respect to total filings per thousand and Chapter 13 filings as a percent of total filings. This test reveals whether districts that have the highest total filing rates or highest Chapter 13 rates are likely to continue to have the highest rates over time; and whether the districts that have the lowest filing rates or lowest Chapter 13 rates are likely to continue to have the lowest rates.

The Distance-Consistency Test, on the other hand, was designed to reveal whether the degree of difference between the highest filing districts and lowest filing districts, and highest Chapter 13-filing districts and lowest Chapter 13-filing districts, remained consistent over time. The Distance-Consistency Test is necessary because the Rank-Correlation Test indicates only whether districts are high or low filers relative to other districts. If the distance between the highest and lowest ranked districts is tiny, it does not matter much that there is variation from district to district. If the distance between the lowest and highest ranked districts is great, however, the happenstance of where a debtor is located can play a substantial role in the filing decision. In that case, the simplistic Rational Actor model upon which BAPCPA was based may be called into question.

⁹⁷ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

⁹⁸ The census did not make historical estimate data available by household, but only by housing unit. U.S. Census Bureau, Population Estimates: Housing Units, <http://www.census.gov/popest/housing>.

⁹⁹ Since the census housing unit data is compiled by county, I divided the districts into their respective counties and added the county-level data for each district to discern the total number of housing units per district.

IV. FINDINGS: DISTRICT-BY-DISTRICT PATTERNS OVER TIME

The Rank-Correlation Tests, depicted in Figures 1 through 4, and the Distance-Consistency Tests, depicted in Figures 5 and 6, support a key finding: Filing patterns across districts persist over time, even in the face of a systematic assault on local discretion, and even in the face of economic downturn. Although total filing rates and Chapter 13 filing rates have been affected, district-level filing trends persist. There continues to be tremendous variation in filing rates and Chapter 13 rates from district to district and considerable consistency within each district over time.

A. *Rank-Correlation Test*1. *Total Filings Data*

With respect to Total Filings Data, the Rank-Correlation Test was designed to uncover whether districts with a high number of filings per thousand¹⁰⁰ in 2003 (prior to BAPCPA) continued to have a high number of filings per thousand in 2006 (after BAPCPA) and 2008 (during economic downturn)—and whether districts with a low number of filings per thousand in 2003 continued to have a low number of filings per thousand in 2006 and 2008. To conduct this test, I ranked each district according to its number of filings per thousand housing units in 2003, and then re-ranked each district according to its number of filings per thousand housing units in 2006 and 2008. I then conducted two comparisons. First, I compared the rank of each district in 2003 to the rank of each district in 2006 by performing a correlation and significance test. Second, I compared the rank of each district in 2006 to the rank of each district in 2008. The district rankings for the 2003 and 2006 are positively correlated at .85,¹⁰¹ and the district rankings for 2006 and 2008 are positively correlated at .87. That is, districts that had the highest personal bankruptcy filing rates in 2003 are very likely to continue to have the highest personal bankruptcy filing rates in 2006; districts that had the lowest personal bankruptcy filing rates in 2003 are very likely to continue to have the lowest personal bankruptcy filing rates in 2006; and districts that ranked in the middle with respect to their personal bankruptcy filing rates in 2003 are likely to remain in the middle in 2006. The strength of this correlation is particularly meaningful because it occurs in spite of the introduction of BAPCPA in 2005. Likewise, the high filing districts in 2006 continue to be high-filing districts in 2008, and the low-filing districts continue to be low. This correlation is meaningful because it occurred in spite of the recent economic downturn, which,

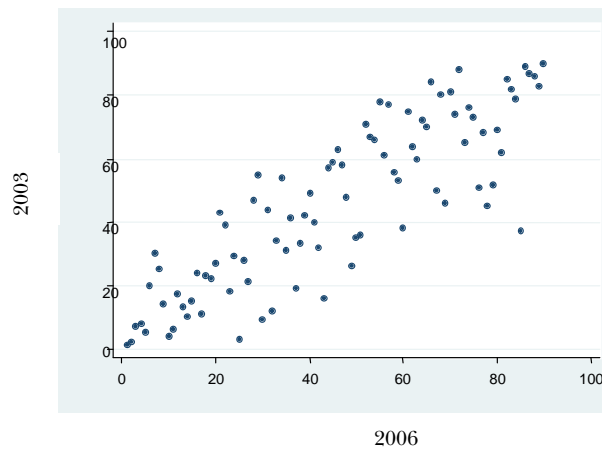
¹⁰⁰ Per thousand household unit, as supplied by the U.S. Census Bureau. For the data, see U.S. Census Bureau, *supra* note 98.

¹⁰¹ This finding was significant with a p value of less than .001.

while it affected debtors across the country, affected some districts more than others.

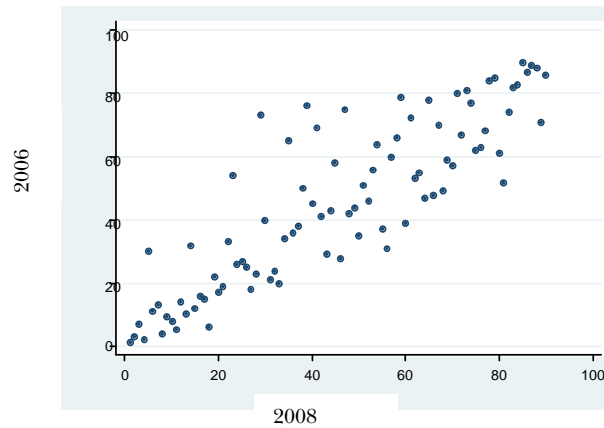
The Rank-Correlation Test for Total Filings Data comparing 2003 rankings to 2006 rankings appears as a scatter-plot in Figure 1, with the x-axis measuring the district's rank by total filings in 2003, and the y-axis measuring the district's rank by total filings in 2006, after BAPCPA. The correlation between district rankings by total filing in 2003 and rankings by total filing in 2006 is quite strong at .85. If the correlation were perfect—if every district kept the same rank—all points representing district rank would lie along a straight diagonal line going from the origin out to high x- and y-values (with a correlation of 1). This chart indicates that, although most districts experienced some change in rank between 2003 and 2006, most districts did not increase or decrease their rank substantially (with a correlation of .85). Figure 2 compares the 2006 rankings to the 2008 rankings, and indicates that districts did not increase or decrease their rank substantially (with a correlation of .87).¹⁰²

Figure 1. Rankings of Filing Rates Per Thousand Household Units; 2003 and 2006



¹⁰² Both findings were significant with a p value of less than .001.

Figure 2. Rankings of Filing Rates Per Thousand Household Units; 2006 and 2008



2. Chapter 13 Data

With respect to Chapter 13 Data, the Rank-Correlation Test was designed to reveal whether districts with a high percentage of Chapter 13 filings in 1985 continued to have a high percentage of Chapter 13 filings in 2003, 2006, and 2008. For this test, I ranked each district according to its percentage of Chapter 13 filings in 1985, 2003, 2006, and 2008. I performed three correlation and significance tests—the first comparing the rank in 1985 to the rank in 2006, the second comparing the rank in 2003 to the rank in 2006, and the third comparing the rank in 2006 to the rank in 2008.

I found that districts demonstrated a strong correlation even over the twenty-one year span from 1985 to 2006. The district rankings in 1985 for Chapter 13 filings as percent of total filings were positively correlated with district rankings in 2006 for Chapter 13 filings at .66.¹⁰³ This is represented in Figure 3. As expected, the correlation across shorter periods of time is substantially stronger. The district rankings for 2003 and 2006 have a correlation of .93, which is important given BAPCPA's passage in 2005. The district rankings for 2006 and 2008 have a correlation of .98, even though the country is experiencing an economic downturn that is having a disproportionate affect on some districts when measured by job-loss and foreclosures. These findings are represented in Figures 4 and 5 respectively.¹⁰⁴

¹⁰³ This correlation is significant at less than .001.

¹⁰⁴ Both correlations are significant at less than .001.

Figure 3. Rankings of Chapter 13 Filing Rates as a Percent of Total Filings; 1985 and 2006

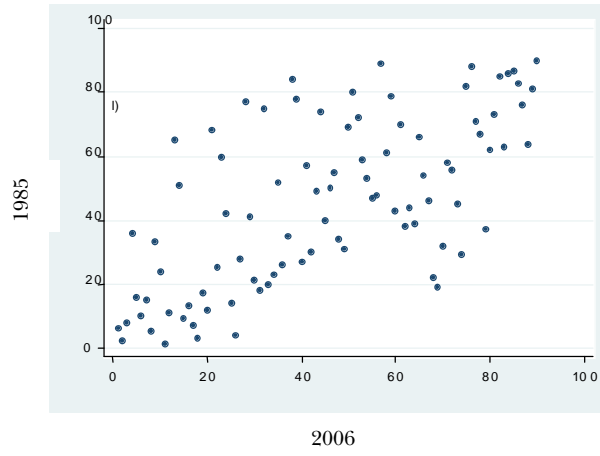


Figure 4. Rankings of Chapter 13 Filing Rates as a Percent of Total Filings; 2003 and 2006

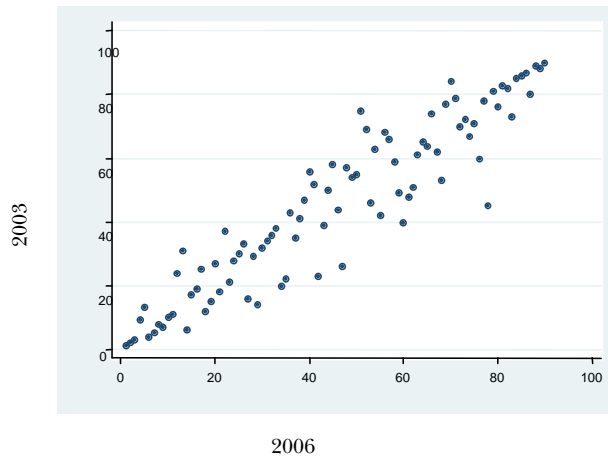
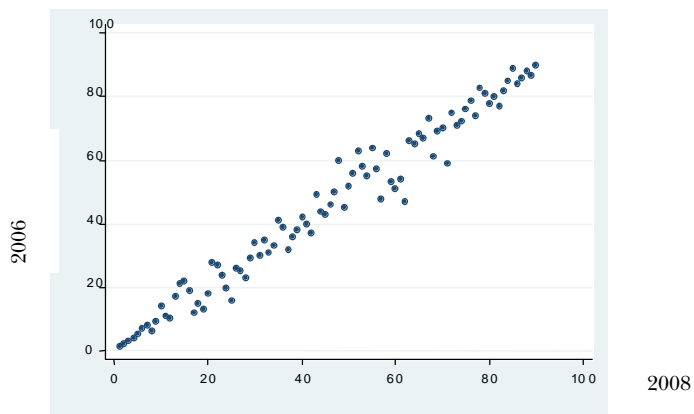


Figure 5. Rankings of Chapter 13 Filing Rates as a Percent of Total Filings; 2006 and 2008



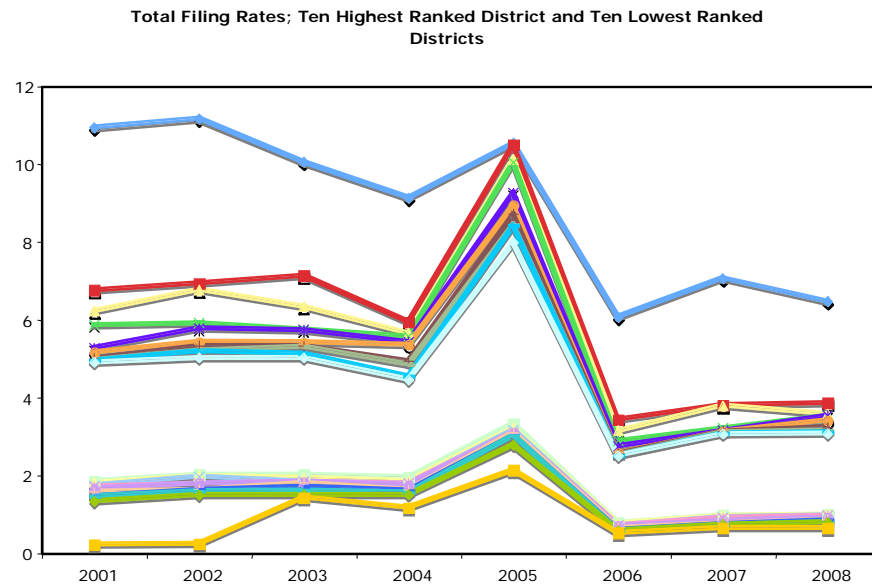
The Rank-Correlation Test provides powerful evidence that BAPCPA did not extinguish—or even diminish—the location variation in filing patterns. Districts that had high rankings for total filings per thousand prior to the passage of BAPCPA continue to have high rankings after BAPCPA, and districts that had low rankings prior to BAPCPA continue to have low rankings. The economic downturn did not disrupt the persistence of local patterns either. Districts that had high rankings for Chapter 13 filings as a percent of total filings continue to have high rankings, and districts that had low rankings for Chapter 13 filings continue to have low rankings. Most districts did not change markedly in rank relative to other districts with respect to total filings or percentage of Chapter 13 filings.

B. Distance-Consistency Test

1. Total Filings Data

With respect to Total Filings Data, the Distance-Consistency Test was designed to reveal whether the distance between the highest-filing districts and lowest-filing districts had increased, decreased, or remained the same over time. This test simply compared the filing rates per thousand among districts with the ten highest filing rates per thousand to the filing rates per thousand among districts with the ten lowest filing rates per thousand, in each year from 2001 to 2008. The trend is depicted in Figure 6.

Figure 6



As Figure 6 indicates, bankruptcy filings decreased substantially overall after BAPCPA, and increased again with the recent economic downturn. Interestingly, although total filing rates have recently increased, they have not yet surpassed the pre-BAPCPA levels.

The mean filing rate per thousand was 3.15 in both 2001 and 2004, and decreased to 1.46 in September of 2006. That is, by 2006 personal bankruptcy filings had decreased by more than half in the wake of the passage of BAPCPA. In March 2008, the mean total filing rate per thousand was 1.95 per thousand. As shown in Figure 6, the distance between the highest filing districts¹⁰⁵ and lowest filing districts¹⁰⁶ remains great. The mean filing rate per thousand among districts with the ten highest filing rates per thousand shifted from 5.99 in 2001, to 5.58 in 2004, to 3.08 in December of 2006, to 3.69 in March of 2008.¹⁰⁷ The

¹⁰⁵ In 2001, the ten districts with the highest total filing rates were the Western District of Tennessee, the southern district of Georgia, Utah, the middle district of Georgia, the Eastern District of Virginia, the Northern District of Alabama, the Eastern District of Arkansas, the southern district of Indiana, the Northern District of Georgia, and Nevada.

¹⁰⁶ In 2001, the ten districts with the lowest total filing rates were the Southern District of Alabama, Vermont, Massachusetts, Alaska, New Hampshire, North Dakota, Maine, the southern district of New York, the Northern District of Iowa, and Connecticut.

¹⁰⁷ In 2006, the ten districts with the highest total filing rates were the Western District of Tennessee, the Southern District of Georgia, the Northern District of Georgia, the Northern District of Alabama, the Middle District of Georgia, the southern district of Indiana, the Eastern District of Michigan, the Middle District of

mean filing rate per thousand for the districts with the ten lowest filing rates per thousand shifted from 1.47 in 2001, to 1.65 in 2004, to .65 in 2006, to .87 in 2008. Even districts with total filing rates well below the national average decreased by more than half after BAPCPA.

In spite of the overall decrease and subsequent increase in total filings, the distance between the mean for the ten highest-filing districts and the mean for the ten lowest filers actually increased. In 2001 the mean for the ten highest districts was 4 times greater than the mean for the ten lowest-filing districts; in 2004 the mean was 3.4 times greater than the mean for the ten lowest-filing districts, in 2006 it was 4.9 times greater than the mean for the ten lowest-filing districts, and in 2008 the mean for the ten highest-filing districts was 4.2 times greater than the mean for the ten lowest-filing districts. Of course, in absolute terms the distance between the districts with the highest filing rates and lowest filing rates has narrowed—from 4.52 in 2001 to 3.93 in 2004, to 2.53 in 2006 to 2.82 in 2008. Still, the persistence in distance between the highest and lowest filing districts demonstrates that districts are not only maintaining their rank, but also that there remains a great difference between the highest ranked districts and lowest ranked districts with respect to total filings.

2. Chapter 13 Data

After BAPCPA, Chapter 13 filings increased as a percent of total filings overall—over a 40% increase from pre-BAPCPA rates.¹⁰⁸ Nonetheless, there remains a great distance between the highest-ranked districts for Chapter 13 filings as a percent of total filings¹⁰⁹ and the

Tennessee, the Eastern District of Arkansas, and the Northern District of Missouri. The ten districts with the lowest filing rates were Hawaii, D.C., Maine, Vermont, Alaska, Wyoming, the Eastern District of Louisiana, North Dakota, the Southern District of New York, and Arizona. In 2008, the ten districts with the highest total filing rates were the Western District of Tennessee, the Northern District of Georgia, the Eastern District of Michigan, the Southern District of Georgia, Nevada, the Southern District of Indiana, the Eastern District of Tennessee, the Northern District of Alabama, the middle district of Tennessee, and the western district of Louisiana. The ten districts with the lowest total filing rates were Alaska, Wyoming, D.C., Hawaii, Maine, Vermont, South Dakota, North Dakota, South Carolina, and the Southern District of Texas.

¹⁰⁸ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹⁰⁹ The districts with the ten highest Chapter 13 filing rates in 1985 were the middle district of North Carolina, the western district of Tennessee, the eastern district of Arkansas, the western district of North Carolina, the northern district of Alabama, the southern district of Georgia, the northern district of Georgia, the middle district of Alabama, and the eastern district of North Carolina. In 1990 they were the middle district of North Carolina, the western district of Tennessee, the southern district of Georgia, the western district of North Carolina, the middle district of Alabama, the northern district of Alabama, the middle district of Tennessee, the northern district of Georgia, the eastern district of Arkansas, and the middle district of Georgia. In 1995 they were the southern district of Georgia, the western district of Tennessee, the middle district of North Carolina, the northern district of Alabama, the middle district of Georgia, the northern district of Georgia, the middle district of Alabama, the western district of North Carolina, the eastern

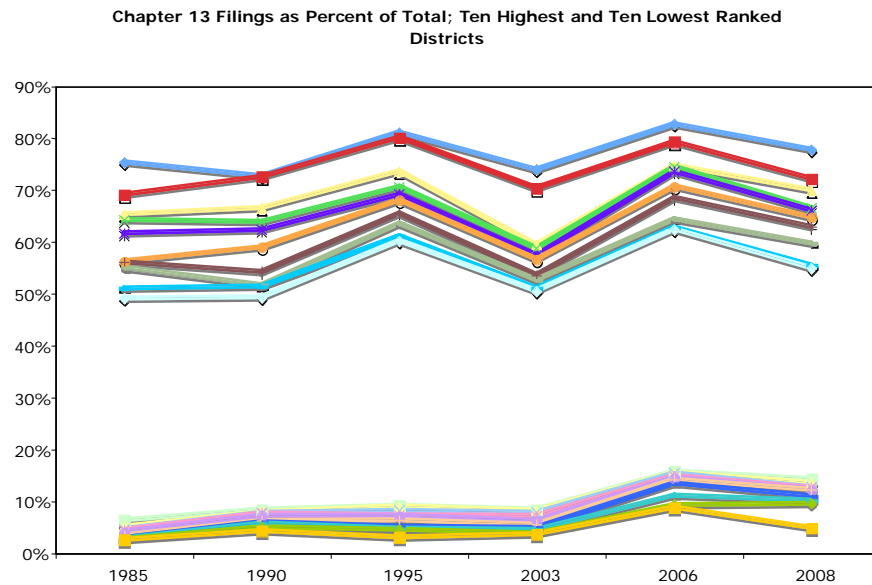
lowest-ranked districts.¹¹⁰ The mean Chapter 13 rate as a percent of total filings for the ten lowest-ranked districts was 6.08% in 1985, 9.23% in 1995, 6.0% in 2003, 13.2% in 2006, and 11.3% in 2008. The mean Chapter 13 rate as a percent of total filings for the ten highest-ranked districts was 60.3% in 1985, 60.3% in 1990, 69.2% in 1995, and 58.4% in 2003, 71.3% in 2006, and 65.0% in 2008. Not surprisingly, the increase among the highest-ranked districts was not nearly as great as the increase among the lowest-ranked districts. These districts experienced a marked increase nonetheless. But even this marked increase in the lowest-ranked districts does not substantially narrow the gap between low-13 districts and high-13 districts. The district in which individuals must file continues to influence heavily the likelihood of a Chapter 13 filing.

With respect to Chapter 13 Data, the distance between districts with the highest rate of Chapter 13 filings as a percent of total filings and districts with the lowest rate of Chapter 13 filings as a percent of total filings remained vast. The Distance-Consistency Test for Chapter 13 Data compared the districts with the ten highest Chapter 13 filing rates as a percent of total filings to the districts with the ten lowest Chapter 13 filing rates as a percent of total filings. This trend is depicted in Figure 7.

district of Arkansas, and the western district of Louisiana. In 2003 they were the southern district of Georgia, the western district of Tennessee, the southern district of Alabama, the middle district of Georgia, the district of South Carolina, the middle district of North Carolina, the northern district of Texas, the eastern district of North Carolina, the middle district of Alabama, and the northern district of Alabama. In 2006 they were the southern district of Georgia, the western district of Tennessee, the middle district of Alabama, the western district of Louisiana, the southern district of Alabama, South Carolina, the middle district of Georgia, the northern district of Alabama, the northern district of Texas, and the southern district of Texas. In 2008 they were the same districts as in 2006, except that the southern district of Mississippi replaced the northern district of Alabama.

¹¹⁰ The districts with the ten lowest Chapter 13 filing rates in 1985 were Vermont, the eastern district of Oklahoma, North Dakota, the northern district of West Virginia, the southern district of Indiana, the southern district of Iowa, Missouri, New Mexico, and the western district of Oklahoma. In 1990 they were the northern district of Iowa, North Dakota, the northern district of Florida, the northern district of Oklahoma, Rhode Island, South Dakota, the northern district of West Virginia, the southern district of Indiana, and the eastern district of Oklahoma. In 1995 they were North Dakota, the northern district of Iowa, South Dakota, Rhode Island, New Hampshire, Wyoming, Hawaii, the northern district of West Virginia, the northern district of Florida, and Vermont. In 2003 they were the northern district of Iowa, the southern district of West Virginia, North Dakota, the southern district of Iowa, South Dakota, the northern district of West Virginia, Rhode Island, Alaska, the northern district of Oklahoma, and the eastern district of Oklahoma. In 2006 they were the northern district of Iowa, New Mexico, Wyoming, the southern district of West Virginia, the southern district of Iowa, North Dakota, the northern district of Oklahoma, South Dakota, the northern district of West Virginia, and Alaska. In 2008 they were the northern district of Iowa, North Dakota, the northern district of Florida, the northern district of Oklahoma, Rhode Island, South Dakota, the northern district of West Virginia, the southern district of Indiana, the eastern district of Oklahoma, and the southern district of West Virginia.

Figure 7



V. EXPLORING WHY LOCATION MAKES A DIFFERENCE

A. *The Possible Role of Exemption Laws*

A simplistic Rational Actor model predicts that decisions will be influenced primarily by salient benefits and burdens.¹¹¹ Under this assumption, the states that provide the greatest benefits to bankruptcy filing might be expected to have higher bankruptcy filing rates. For example, the Bankruptcy Code permits states to determine the amount of property that debtors may exempt.¹¹² Some states allow debtors to choose between the state exemptions and the federal exemptions, but others do not allow debtors to opt out of the state exemption scheme. Some states, such as Texas, permit debtors to exempt virtually all personal and real property.¹¹³ Florida also has a very generous exemption statute.¹¹⁴ Other states, such as Delaware, do not permit real property exemptions and permit debtors to retain only personal property items worth less than \$75, in addition to clothing, a burial plot, and the family

¹¹¹ See generally, Stigler & Becker, *supra* note 1, at 76; COOTER & THOMAS, *supra* note 1. See also Posner, *Rational Choice*, *supra* note 1, at 1559; POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 17.

¹¹² 11 U.S.C. § 722 (2006).

¹¹³ TEX. PROP. CODE ANN. §§ 41.001–42.002 (Vernon 2006).

¹¹⁴ Debtors are permitted to keep their homes and personal property items worth up to \$1000. FLA. STAT §§ 222.01–222.03, 222.05 (West 2006).

Bible.¹¹⁵ Ohio allows debtors to retain only \$5,000 of home equity,¹¹⁶ and less than \$5,000 worth of personal property.

While these data do not include a comprehensive examination of exemption laws, and thus cannot answer the precise impact of exemption laws, a cursory review suggests that they are unlikely to explain the vast variation in filing patterns. For example, in 2008, the districts in Texas and Florida had mean filing rates of 1.3, while Delaware had a filing rate of 1.6.

A simplistic Rational Actor model might also expect states with low exemption levels to have a higher rate of Chapter 13 filings, given that the only way to retain property above the low exemption levels is to file under Chapter 13. However, there is no correlation between exemption levels and Chapter 13 filing rates. Braucher's 1991 study indicated that the Southern District of Ohio had a 27% Chapter 13 filing rate, whereas the Western District of Texas had a 45% Chapter 13 filing rate, an exact reversal of the prediction based exclusively on formal legal differences.¹¹⁷ This suggests that variation among local legal rules cannot account for the variation in filing patterns.

I compared the Chapter 13 rates in Texas, Florida, Delaware, and Ohio, and the results were consistent with these earlier studies. I found that the states with the lowest exemptions did not have the highest filing rates. Texas had the highest Chapter 13 filing rate, at 56% in 2006, while Delaware had a filing rate of 38% in 2006, and Ohio had a filing rate of 35%. Of those four states, Florida had the lowest rate of Chapter 13 filings, at 32% of total filings.

Further, filing rates often varied substantially within the same state—both for total filing rates and Chapter 13 filing rates. For example, the Western District of Tennessee had a Chapter 13 filing rate of over 72% of total filings in 2008, while the Middle and Eastern Districts had a Chapter 13 filing rate around 40% of total filings in 2008. Also, the total filing rate per thousand in the Western District of Tennessee was more than twice as high as the total filing rates in the Middle and Eastern Districts, despite the fact that formal law is the same in all three districts. The wide variation in local filing patterns seems unlikely to be attributable to variations in local exemption laws.

B. Some Salient Situations

Although Congress did not take local variations into account in drafting BAPCPA, it is worth exploring which local factors might play a role in creating this wide variation in filing patterns from district to district. The simplistic Rational Actor model upon which BAPCPA was based discounts situational pressures—even salient pressures such as

¹¹⁵ DEL. CODE ANN. tit.10, § 4902 (1999).

¹¹⁶ OHIO REV. CODE ANN. § 2329.66(A)(1)(b) (West 2008).

¹¹⁷ Braucher, *supra* note 45, at 528.

local economic conditions—assuming instead that opportunism is the driving factor in bankruptcy filings. If salient economic factors such as poverty, income, and unemployment rates cannot explain the variation in filing patterns, this would indicate that subtle and overlooked pressures might be playing a role in shaping filing decisions. Indeed, the previous study of bankruptcy filing patterns from 1980 to 1990 ruled out several salient local situational factors by demonstrating that the financial profile of debtors (measured by asset, income, and debt levels) was statistically indistinguishable from state to state.¹¹⁸

Other possible explanations of the filing patterns, among many, include poverty, unemployment, and foreclosure rates. Although these data do not measure the precise impact of these factors, I examined poverty, unemployment, and foreclosure rates to see whether these local economic factors clearly jumped out as being the cause of the local variation. If these salient economic factors are, in subsequent studies, proven unable to explain the wide variation in filing patterns across districts, this would suggest that debtor decision-making is a result of numerous factors rather than simply rational, opportunistic choice.

1. Poverty and Unemployment

Where poverty and unemployment is high, total bankruptcy rates might be expected to be higher. Poverty rates have some impact on total filing rates: in 2003, the median total filing rate for the states with higher poverty rates was 3.5 per thousand, while the median total filing rate for states with lower poverty rates was 2.7 per thousand.¹¹⁹

In addition, unemployment rates might be expected to be correlated with a lower rate of Chapter 13 filings as a percentage of total filings: if more debtors have no income, they cannot have a repayment plan. However, while there is indeed a correlation between Chapter 13 filing rates as a percentage of total filings, the correlation is a surprising and counterintuitive one: states with higher unemployment rates have a median Chapter 13 filing rate of 27% of total filings, while states with lower unemployment rates have a median Chapter 13 filing rate of 19% of total filings. It may be that another factor strongly correlated with unemployment rates is influencing bankruptcy filing patterns.

Interestingly, the eight states with the highest rates of Chapter 13 were also states with higher unemployment rates—and were also southern states. I conducted a test comparing Chapter 13 filing rates with whether the state was classified as a southern state or non-southern state. For non-southern states, the median rate of Chapter 13 filings as a percent of total filings was 18%. For southern states, the median rate of

¹¹⁸ Sullivan et al., *supra* note 9, at 836.

¹¹⁹ Significant at .014.

Chapter 13 filings was 36.8.¹²⁰ Academics have noted this correlation between Chapter 13 rates and southern states, and have debated the reason for it.¹²¹ Regardless of the cause, it was a trend unaccounted for in the simplistic Rational Actor model that Congress espoused in the legislative history of BAPCPA.¹²²

2. Foreclosure Rates

Currently, an important salient situational factor is the current housing crisis and recent economic downturn. This economic downturn corresponds with an overall increase in bankruptcy filings,¹²³ and, because regions were differentially affected, might also be expected to correspond with some local increases in bankruptcy filings. The ten states with the highest foreclosure rates are Arizona, California, Nevada, Colorado, Michigan, Ohio, and Georgia. There is some indication that several of these states have experienced a greater increase in total filings than other states—Nevada, for example, which has the highest foreclosure rate (33.8 per thousand)¹²⁴ was ranked thirtieth in 2006 when housing prices were high, but ranked fifth in 2008.¹²⁵ The southern district of California, with a foreclosure rate of 19.2 per thousand,¹²⁶

¹²⁰ Southern states were also positively correlated with total bankruptcy filing rates—southern states had a median filing rate of 3.7 per thousand, whereas non-southern states had a median filing rate of 2.8 per thousand.

¹²¹ Adam Levitin, *Debt Slavery? Correlation of Slavery with Chapter 13 Filing Patterns*, CREDIT SLIPS, Jan. 2, 2008, <http://www.creditslips.org/creditslips/2008/01/debt-slavery-co.html#more>. In response to Professor Levitin's observation that Chapter 13 filings were correlated with southern states, academic respondents offered differing explanations for the occurrence, including higher rates of mobile home ownership, religion, and the southern origins of Chapter 13.

¹²² Also interesting is that districts with similar characteristics can have vastly different filing patterns, and districts with widely different characteristics can have similar snapshots. This is evident in comparing rural districts (Montana, Wyoming, and North Dakota) and urban districts (Chicago, Manhattan, and Los Angeles). With respect to total filings, the district in which Manhattan is located (the Southern District of New York) was ranked seventh of ninety-eight in 2006, the district in which Chicago is located (the Northern District of Illinois) was ranked fifty-eighth, and the district in which Los Angeles is located (the Central District of California) was ranked sixteenth. North Dakota was ranked ninth, Montana was ranked thirtieth, and Wyoming was ranked twentieth. With respect to Chapter 13 filing rates as a percent of total, the district in which Manhattan is located was ranked sixty-fourth, the district in which Chicago is located was ranked twenty-sixth, and the district in which Los Angeles was located was ranked fifty-second. North Dakota was ranked sixty-eighth, Montana was ranked forty-ninth, and Wyoming was ranked forty-fourth. Manhattan and North Dakota had more in common with respect to filing patterns than did Manhattan and Chicago or North Dakota and Montana.

¹²³ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹²⁴ CBS Interactive, 2007 Foreclosure Rates, cbsnews.com/elements/2008/02/12/business/map3823166.shtml.

¹²⁵ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹²⁶ See CBS Interactive, *supra* note 124.

shifted from fifty-fourth to twenty-third.¹²⁷ The district of Arizona, with a foreclosure rate of 15.2 per thousand,¹²⁸ shifted somewhat, from seventy-eighth to sixty-fifth.¹²⁹ The southern district of Florida, with a foreclosure rate of 20 per thousand,¹³⁰ moved from seventy-ninth to fifty-ninth.¹³¹ However, in each of the ten states with the highest foreclosure rates in the nation, the total bankruptcy filing rate is still currently *lower* than the filing rate prior to the passage of BAPCPA.¹³² Districts with historically low filing rates—even states affected by the housing crisis, such as Arizona—continue to have low filing rates. Arizona’s filing rate, for example, was 3.5 per thousand household units in 2003, and only 1.39 per thousand household unit in 2008—among the lowest ten districts.¹³³ The Eastern District of Michigan—which encompasses Detroit—has a slightly lower bankruptcy filing rate today (3.57 per thousand) as in 2003 (3.93 per thousand). Districts with historically low bankruptcy filing rates—even those affected by the housing crisis—continue to have low bankruptcy filing rates.¹³⁴

C. *Where Are the Rational Homeowners?*

The salient situation of the housing crisis might be expected to influence filing patterns in another way. Because Chapter 13 provides breathing room for homeowners seeking to ward off foreclosure,¹³⁵ Chapter 13 rates might be expected to increase in the states with the highest foreclosure rates. However, the district rankings for Chapter 13

¹²⁷ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹²⁸ See CBS Interactive, *supra* note 124.

¹²⁹ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹³⁰ See CBS Interactive, *supra* note 124.

¹³¹ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹³² *Id.* The total filing rates per thousand household unit in 2003 and 2008 are as follows: Arizona: 3.505 in 2003, 1.39 in 2008; Southern District of California: 2.378 in 2003, 2.372 in 2008; Central District of California: 2.78 in 2003, 1.94 in 2008; Eastern District of California: 2.476 in 2003, 2.17 in 2008; Northern District of California: 2.2 in 2003, 1.67 in 2008; Nevada: 5.12 in 2003, 3.53 in 2008; Colorado: 3.2 in 2003, 2.07 in 2008; Western District of Michigan: 2.63 in 2003, 1.93 in 2008; Eastern District of Michigan: 3.93 in 2003, 3.57 in 2008; Southern District of Ohio: 4.16 in 2003, 2.57 in 2008; Northern District of Ohio: 4.749 in 2003 and 2.65 in 2008; Southern District of Georgia: 7.12 in 2003, 3.53 in 2008; Middle District of Georgia: 5.729 in 2003, 3.05 in 2008; Northern District of Georgia: 5.312 in 2003, 3.85 in 2008.

¹³³ *Id.*

¹³⁴ Of course, this analysis is necessarily limited because only district-level data is available, and in the case of poverty and unemployment data, only state-level data is available for comparison with bankruptcy filing rates. County-by-county comparison may reveal more similarities in towns with similar characteristics with respect to density, income level, cost of living, or other characteristics. Still, while salient situational factors such as economic differences may account for some of the difference in filing rates, such factors alone cannot explain the persistent variation in filing patterns across districts.

¹³⁵ See 11 U.S.C. § 1322(b)(2), (5) (2006).

rates in those states went almost unchanged between 2006 and 2008. Nevada, with the foreclosure rates of 33.8 per thousand, actually went down in rank—from 36 to 38. Arizona moved up a couple of slots, from 68 to 65, but Chapter 13 rates actually decreased somewhat as a percent of total filings, from 23.6% to 21.9%. In fact, the only district of those states to increase was the Central District of California, from 20.7% to 23.7%. The remaining districts actually decreased in Chapter 13 filings as a percent of total filings, and decreased in rank. The simplistic Rational Actor model might predict that homeowners experiencing foreclosure would take advantage of the powerful incentive provided in Chapter 13, but this incentive appears not to play a significant role in debtor decision-making. It could be that debtors experiencing foreclosure in these states are so financially distressed that liquidation is the only option for many of them. In either case, it does not appear likely from this cursory review that foreclosure rates are the primary cause of the wide variation in bankruptcy filing rates. Regression analysis could show that some of these factors play a role in filing patterns, but the persistent variation suggests that filing choice cannot be explained by debtor opportunism.

D. Exploring Non-Economic Factors

The Law and Society movement was the first to discover that “there are coherent and predictable inconsistencies or variations from one locality to another, that these variations persist over long periods of time despite major shifts in formal law and economic conditions.”¹³⁶ This group proposed a situationist explanation for the variation, suggesting that individual decision-making is influenced not only by formal legal rules, but also by an important but overlooked situation—the local legal culture in which a person operates.¹³⁷ Professors Sullivan, Warren, and Westbrook first defined local legal cultures as

systematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and different in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime.¹³⁸

This explanation suggests that “a local legal culture transcends the influence of individual participants,” which means that “variation produced by a local legal culture persists over a long period of time,

¹³⁶ Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 27 (1998).

¹³⁷ See FRANK, *supra* note 3, at 120; LLEWELLYN, *supra* note 3, at 81–82; Kennedy, *supra* note 3.

¹³⁸ Sullivan et al., *supra* note 9, at 804.

instead of changing as individual judges and lawyers assume and abdicate positions of power in a particular locality.”¹³⁹

There is evidence that a variety of local legal players influence filing patterns in several ways, some subtle and some overt.¹⁴⁰ The individual debtor makes bankruptcy filing decisions in the context of this network of actors, including judges, attorneys, trustees, and credit counseling agencies.

Judges are powerful players in the bankruptcy system. Previous studies found that variations in courthouse procedures could influence the attorney’s recommendation. In some jurisdictions, judges hear Chapter 7 cases before Chapter 13 cases, resulting in less delay for attorneys whose clients filed in Chapter 7.¹⁴¹ Further, some jurisdictions displayed varying levels of facility in Chapter 13 filings—differences in the level of assistance provided by clerks or the detail required on forms influenced attorney recommendations in some jurisdictions.¹⁴² Judges can also influence attorneys’ recommendations by changing the level of attorneys’ fees for each chapter.¹⁴³ One judge explained, “If I don’t see enough Chapter 13s, I can just raise the allowable fees in 13, while I hold Chapter 7 fees steady. The Chapter 13 filings will go up.”¹⁴⁴ Sometimes judges explicitly expressed a preference for one chapter over the other, using techniques such as questioning attorneys and debtors who plan to file in Chapter 7, or encouraging practitioners with high Chapter 13 practices to expand their practice to their jurisdictions.¹⁴⁵ Even judges who expressed neutrality exerted powerful influence in some cases—including one judge who scrutinized Chapter 13 plans “line by line” to ensure that the plan could succeed. Not surprisingly, that district had one of the lowest filing rates in the country, although the judge considered himself “scrupulously neutral.”¹⁴⁶

Attorneys are another powerful component of local legal culture. This is particularly true in the absence of strong judicial influence.¹⁴⁷ Jean Braucher conducted a qualitative study of debtors’ attorneys in the Western District of Texas and the Southern District of Ohio in 1993.¹⁴⁸ She found substantial differences in the filing patterns of these two

¹³⁹ *Id.*

¹⁴⁰ Sullivan, Warren, and Westbrook conducted interviews of bankruptcy judges, court clerks, and trustees in five districts when collecting data for the Consumer Bankruptcy Project. *Id.* at 842–57. The Consumer Bankruptcy Project is an ongoing empirical study of debtors in bankruptcy conducted by Professors Sullivan, Warren, and Westbrook.

¹⁴¹ *Id.* at 843.

¹⁴² *Id.*

¹⁴³ *Id.* at 844.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 845.

¹⁴⁶ *Id.* at 845–46.

¹⁴⁷ *Id.* at 848.

¹⁴⁸ See Braucher, *supra* note 45, at 514–16.

districts, and concluded that the differences were at least partially attributable to difference in lawyers' advice to their clients.¹⁴⁹ As Professor Robert Lawless explained, lawyers are usually the ones helping debtors navigate the bankruptcy system. He explains, "I think it's a professional culture, for the amount of times Chapter 13 is used, especially in Alabama and Tennessee."¹⁵⁰ Local lawyers confirmed that "coaching clients to file for [Chapter 13] bankruptcy has been ingrained in the [local] legal culture for decades."¹⁵¹ Professor Gene Marsh, from the University of Alabama, explained that Chapter 13 has been "seen as a custom" in Alabama since the 1930s.¹⁵²

Sullivan, Warren, and Westbrook also found that attorney advertising played a powerful role in facilitating high volume practice, which interviewees called "bankruptcy mills."¹⁵³ These "mills" offer consumers pre-packaged, routine services. Some focused on routinized Chapter 7 filings and others focused on routinized Chapter 13 filings, contributing to the variation of filing rates across districts.¹⁵⁴ Difference in the "professional convictions" of the lawyers regarding chapter preference also influenced filing rates, since clients often follow lawyers' advice regarding chapter choice.¹⁵⁵ CLE programs also varied from district to district depending on the beliefs of attorneys, thus educating new lawyers into the local legal culture.¹⁵⁶

Trustees may also influence legal culture, given that they must recommend confirmation or rejection of debtors' plans.¹⁵⁷ If trustees routinely reject plans, attorneys may be less likely to advise clients to file under Chapter 13. A successful Chapter 13 trustee will be one who makes the system work smoothly for debtors' counsel.

Another component of local legal culture is consumer credit counseling agencies.¹⁵⁸ If the local credit counseling agency is active and effective in helping debtors work out alternative repayment plans, the Chapter 13 filing rate may be lower.¹⁵⁹

Although there is no way to quantify and test the precise impact of local legal culture, it is plausible that some of the variation is due to differences in local legal culture. If local legal culture plays a role in filing patterns, one would expect to see a correlation even over a twenty-one

¹⁴⁹ *Id.* at 581.

¹⁵⁰ *Consumer Bankruptcy Rate Up in 3 States*, USA TODAY, July 20, 2007, http://www.usatoday.com/money/economy/2007-07-20-487927626_x.htm.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Sullivan et al., *supra* note 9, at 850.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 852.

¹⁵⁶ *Id.* at 853.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 854–55.

¹⁵⁹ *Id.* at 855.

year span, as legal culture is embedded in a community and transcends the local legal players that come and go. One would expect the correlation to be stronger over a shorter period, during which the local legal players likely remained substantially unchanged. One reason for these variations may well be “a culture governing the behavior of actors in the bankruptcy system in each locality;”¹⁶⁰ a culture implemented and enforced by local legal actors, including judges, attorneys, trustees, and credit counseling agencies.

The proposition that local legal actors may influence filing decisions is supported by some of the social psychology studies influential to the Situationist model. Given that most debtors likely come to the filing decision without much knowledge about the consequences of filing versus not filing or Chapter 13 versus Chapter 7, it seems particularly likely that they would follow the advice of their attorney, who will be conscious of the preferences of judges and trustees. The attorney may well present all of the choices to the debtors, but the debtor’s decision is likely to depend upon how the choices are “framed.”¹⁶¹ The attorneys may frame the choice “in terms that appear to minimize the risk of an event,”¹⁶² such as the risk that a debtor who files under Chapter 13 will not be able to complete the plan and will therefore be ineligible for discharge.¹⁶³ The local legal culture may also serve as an availability heuristic¹⁶⁴—if the community is quick to connect bankruptcy to irresponsibility, debtors may be deterred from filing. Once a pattern is established in a district, even if it is an irrational one—it may serve as an anchor or starting point¹⁶⁵ and continue to influence filing decisions. Taken together, the data support the proposition that debtors’ filing decisions are at least as much a product of unseen situational pressures as rational choice.

E. Limits of BAPCPA’s Rational Actor Model

A nuanced model of debtor decision-making does not posit that the individual debtor is powerless in the face of situational pressures. Rather, an individual exercises her agency within the predetermined terrain of its situation, including the local legal culture. The Situationist model conceptualizes the individual as nested within a network of actors, working in concert to make legal choices.¹⁶⁶ The wide variation in filing

¹⁶⁰ Westbrook, *supra* note 136, at 27.

¹⁶¹ Tversky & Kahneman, *supra* note 37, at 453; Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S257 (1986).

¹⁶² Block-Lieb & Janger, *supra* note 4, at 1532.

¹⁶³ *Id.*; 11 U.S.C. §1328.

¹⁶⁴ See *supra* notes 32–33 and accompanying text.

¹⁶⁵ See *supra* notes 34–36 and accompanying text.

¹⁶⁶ As Professors Sullivan, Warren, and Westbrook observed, “repeat players—the judges, lawyers, and other specialists—are likely to have enormous influence over their choices. While the debtor remains the nominal decisionmaker, we believe that

patterns across districts complicates a simplistic Rational Actor hypothesis; it casts doubt on the assumption that debtors make self-interested choices, carefully weighing the benefits and burdens.

These data suggest that the simplistic Rational Actor model that Congress assumed in crafting BAPCPA is not a plausible explanation for bankruptcy filing decisions. Failure to consider nuanced local situational pressures may “cause[] policy debates as well as legal reforms to fall wide of their marks.”¹⁶⁷

BAPCPA is a prime example of a legal reform that fell wide of its self-proclaimed mark. Congress framed the debate around the assumption that debtors were making opportunistic decisions about bankruptcy filing and that BAPCPA would change this behavior.¹⁶⁸ If we take the proponents at their word, this framing provokes the conclusion that Congress believed that a simplistic Rational Actor model fully explained individual debtors’ legal choices. Congress passed BAPCPA in spite of decades of evidence that debtors’ filing decisions are not strategic. These data suggest that Congress may have made a fundamental change to the Bankruptcy Code based on an erroneous perception of the reality in which these formal laws operate.

If Congress were correct that debtors were rationally and opportunistically filing for bankruptcy, we would expect filing patterns to change markedly after the passage of BAPCPA—and we would expect to see change in varying degrees depending on the individual characteristics of debtors in various locales. Instead, BAPCPA provoked a wholesale reduction in filing rates, even in districts whose initial filing rates were already far below the national average. Likewise, BAPCPA resulted in a wholesale increase in Chapter 13 filing rates—even in districts whose initial filing rates were far above the national average.¹⁶⁹ BAPCPA did not significantly alter district rank with respect to filing rate or Chapter 13 rate, nor did it decrease the distance between the filing rates of the highest and lowest ranked districts.

Now that the economy has taken a hit, more debtors may need to turn to bankruptcy protection. Because BAPCPA increased the burdens to bankruptcy filing across the board, without regard for local situational pressures, debtors in districts with historically low filing rates may not

most debtors do what the local system tells them to do.” Sullivan, et al., *supra* note 9, at 864.

¹⁶⁷ *Id.* at 865.

¹⁶⁸ H.R. Rep. No. 109-031, at 5 (2005) (explaining that one “motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse”). Studies have proven that the opportunistic debtors that BAPCPA was intended to target do not exist in large numbers. *See, e.g.*, Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. L. REV. 27 (1999).

¹⁶⁹ *See* discussion *supra* Part V.

have a realistic chance of making the “choice” to file for bankruptcy—even if they desperately need relief.

VI. CONCLUSION

An accurate understanding of individual decision-making is necessary for Congress to achieve effective legal rules. In the case of bankruptcy, filing decisions are the product of a complex network of legal actors—not solely individual, self-interested reactions to formal rules.

Even in the face of a national law intended to dictate bankruptcy filing outcomes and to reduce local discretion and variation, wide local variations in filing patterns persist. The variations persist in the face of serious economic downturn. The difference between districts with high Chapter 13 filing rates and districts with low Chapter 13 filing rates has not diminished, and the difference between districts with high total filings rates and low total filing rates is greater than ever. BAPCPA may have shocked the bankruptcy system, but only in the form of a blanket decrease in total filings; economic downturn may have triggered an overall increase in total filings, but large variations among districts continue. The housing crisis may have triggered an increase in total filings, but the districts with the highest filing rates are not those hardest hit by the economic downturn, but rather those districts that have simply always had a high rate of bankruptcy filings. Because BAPCPA failed to account for local situational pressures, it is unlikely to meet its purported goals of preventing abuse and protecting consumers.

Filings are down in high-filing districts such as the Western District of Tennessee—but they are also down in districts like Maine, where very few residents used the bankruptcy system before the changes. After BAPCPA, the filing rate in the Western District of Tennessee is 6.45 per thousand, while the filing rate in the District of Columbia is only .78 filings per thousand.¹⁷⁰ Although Chapter 13 filings have increased somewhat in districts with low rates of Chapter 13 filings, Chapter 13 filings have risen even in districts like the Western District of Tennessee where over half of bankruptcy filings already took place under Chapter 13 prior to BAPCPA. Even after BAPCPA, only 12.2% of bankruptcy filers in the Northern District of West Virginia will file a Chapter 13—whereas 72% of bankruptcy filers in the Western District of Tennessee will file a Chapter 13.¹⁷¹

With this latest round of amendments, Congress has attempted to sever the bankruptcy system from reality. In the face of the data presented here, it becomes more difficult to sustain the myth that bankruptcy filing is solely a matter of individual choice. Amendments

¹⁷⁰ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 12.

¹⁷¹ *Id.*

such as BAPCPA, which are based on this myth, are unlikely to fulfill their stated goals.