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## Empirical Analysis of Bankruptcy Certiorari, An

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# An Empirical Analysis of Bankruptcy Certiorari

*Robert M. Lawless\**  
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## I. INTRODUCTION

Few scholars have explored the Supreme Court's role in creating private law, a surprising oversight given that private law often affects the lives of individuals as much as public law. This article focuses on one area of private law: federal bankruptcy law. The Court is the Bankruptcy Code's final arbiter. In addition to the social benefits and costs of the federal bankruptcy system, vast amounts of financial wealth depend on the Court's bankruptcy decisions.

In recent years, political scientists have paid increasing attention to the role of agendas in political processes. She who sets the agenda often controls the outcome of the political process. The Supreme Court sets its agenda through the certiorari process. Using the tools of statistical analysis, this article explores how the Court sets the agenda for its bankruptcy law decisions. The article presents a great deal of information about when and why the Court grants certiorari in a bankruptcy case. The results should be of interest to anyone concerned about the Court's role as an expositor of bankruptcy law.

This article analyzes data from every certiorari petition involving either a bankruptcy case or an issue of bankruptcy law since the Bankruptcy Code's 1978 enactment.<sup>1</sup> The article first provides an important analysis of the Court's institutional role as an expositor of bankruptcy law. At the same time, the accompanying analysis of over 600 certiorari petitions proves interesting reading for persons interested in the certiorari process generally. The article's approach differs in several important respects from other studies of certiorari. First, by including petitions from an extended period of time, this article avoids making only a static evaluation of the Court's certiorari decisions<sup>2</sup> in favor of an analysis accounting for the changing membership and philosophy of the Court over time.<sup>3</sup> An analysis of both certiorari grants and denials is

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1. This article evaluates data from post-1978 bankruptcy cases arising under the Bankruptcy Code, not considering post-1978 bankruptcy petitions to the Court arising under the old Bankruptcy Act. See *infra* notes 50-51 and accompanying text.

2. Many empirical studies of certiorari grants and denials have had a scope limited to a single Supreme Court term. See, e.g., Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 778 (1984) (analyzing 1,860 petitions and jurisdictional statements denied review during the 1982 Term); Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 870, 878 (1993) (evaluating 63 grants of certiorari from the 1988 Term).

3. See Book Note, *The Uncertainty of Cert*, 105 HARV. L. REV. 1795, 1798 (1992) (addressing the need for analytical longevity in studying the Court's case-selection

also unique among existing empirical studies and provides a comparative basis of study.<sup>4</sup> Using 1978 as a beginning point for evaluation of bankruptcy petitions also produces a large total number of certiorari petitions for empirical analysis.<sup>5</sup> Finally, this article has a unique and focused approach involving a detailed look at a particular area of the law, allowing a more specific appraisal of the importance of substantive subject matter to the Court's certiorari decisions.<sup>6</sup>

Part II of this article details the various arguments and hypotheses that have emerged from the scholarship about Supreme Court certiorari. Here, we look at both the scholarly arguments regarding the case-selection criteria the Court should evaluate as well as empirical findings regarding the criteria the Court does, in fact, evaluate. The purpose is not to provide another exhaustive review of certiorari theory and practice. Rather, we explain how previous academic literature motivates and justifies the variables we examine. Part III explains our method of data compilation as well as the method we used to define and categorize our database. We discuss the results of our statistical analysis in Part IV, first detailing the increasingly prevalent position of bankruptcy petitions in the federal court system and on the Court's

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process).

4. Most studies in the field have focused only on one side of the decision making equation. See, e.g., Estreicher & Sexton, *supra* note 2, at 778 (evaluating cert denials); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 705-06 (1995) (analyzing denials in two groups of cases from the 1988-90 terms); Tiberi, *supra* note 2, at 861, 870, 878 (evaluating only grants of certiorari).

5. Of the few previous studies specifically targeting bankruptcy cert petitions to the Court, none have evaluated a relatively large sample of petitions. See, e.g., Charles J. Tabb & Robert M. Lawless, *Of Commas, Gerunds & Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 888-90 (1991) (discussing the Court's decision to grant certiorari in less than 30 cases) [hereinafter Tabb & Lawless, *Rehnquist Court*]; Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 552-53 (1993) (analyzing the Court's decisions in 24 bankruptcy cases granted certiorari).

6. The large body of literature regarding the Court's case-selection process tends to focus on subject matter-neutral considerations of the Court, such as the presence of inter-circuit conflicts and whether the issue in a particular petition has sufficiently "percolated" among the lower courts. See, e.g., Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 618-20 (1984) (discussing the importance of these considerations to the Court). As well as primarily focusing on these considerations, the empirical studies in this area have tended to favor subject matter-neutral petition samples. See, e.g., Estreicher & Sexton, *supra* note 2, at 778-80 (analyzing the inter-circuit conflicts in all petitions denied certiorari in the 1982 Term).

certiorari docket. Part IV also explores the determinants of bankruptcy certiorari, using a regression analysis. Part V summarizes our conclusions.

## II. THE CERTIORARI DECISION

### A. Intercircuit Conflicts

Many commentators have focused their attention on the presence of a conflict between the decision underlying a certiorari petition and other lower court decisions.<sup>7</sup> Most discussion analyzes conflicts between decisions of the United States courts of appeals rather than other lower courts (such as state courts).<sup>8</sup> Perhaps one reason for this prevalent theme is the Court's own Rule 10 that emphasizes intercircuit conflicts as a consideration for whether certiorari will be granted.<sup>9</sup> Most important, however, is the Court itself simply taking more cases involving intercircuit conflicts, which tend to raise

7. See, e.g., Floyd Feeney, *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court*, in *Commission on Revision of Federal Court Appellate Jurisdiction*, 67 F.R.D. 195, 221 (1975) (analyzing "the extent to which the Supreme Court is denying review despite the existence of a conflict"); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 726 (1993) (proposing that a split of authority among federal circuit courts does not guarantee certworthiness); Daniel J. Meador, *A Comment on the Chief Justice's Proposals*, 69 A.B.A. J. 448, 449 (1983) (discussing the Court's failure to resolve as many lower-court conflicts as it would like due to case "overload"); see also WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987) ("One factor that plays a large part with every member of the Court is whether the case sought to be reviewed has been decided differently from a very similar case coming from another lower court . . .").

8. See, e.g., Thomas E. Baker & Douglas D. McFarland, *The Need For a New National Court*, 100 HARV. L. REV. 1400, 1407-08 (1987) (discussing different approaches to evaluating the importance of an intercircuit conflict); Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1014 (1985) (proposing that the most "firmly established" justification for a grant of certiorari is the presence of an intercircuit conflict); Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983) (criticizing the Court for not immediately resolving many intercircuit conflicts).

9. SUP. CT. R. 10(a) states that the Court, in exercising its certiorari discretion, will take into account that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." However, the presence of other types of lower court conflicts should also warrant the Court's consideration under Rule 10.

issues of uniformity in federal law, than conflicts involving state courts of last resort.<sup>10</sup>

Nearly all scholarly discussion of intercircuit conflicts rest on the concept of "percolation."<sup>11</sup> This concept entails the supposed desire of the Court to allow intercircuit conflicts to "percolate" among the federal circuit courts before the Court resolves them.<sup>12</sup> Thus, the argument goes, if the issue presented in a certiorari petition does not involve an intercircuit conflict, or if a conflict exists but only a few circuits have addressed the issue, then the Court will deny certiorari so that percolation can occur.<sup>13</sup> Scholarly treatments of percolation tend to reduce the Court's certiorari decision making process to a simple utilitarian analysis, under which the Court is said to weigh the benefits of percolation with the costs of the resulting nonuniformity in the law.<sup>14</sup> An intercircuit conflict is "intolerable" to the Court, when the costs of percolation outweigh its benefits.<sup>15</sup> The following sections address the

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10. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* § 4.4, at 168 (7th ed. 1993) ("One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on [matters of federal and general law] among the federal courts of appeals.").

11. See, e.g., Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 125, 1268 (1989) (noting the practice of the Court to let an issue percolate among the lower courts before resolving the issue); see also Hellman, *supra* note 4, at 700.

12. See Estreicher & Sexton, *supra* note 2, at 716 (defining "percolation" as "the independent evaluation of a legal issue by different courts").

13. See Michael S. Shenberg, Note, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law*, 59 N.Y.U. L. REV. 1007, 1027 (1984) (detailing the benefits of allowing percolation of an issue that only two federal circuit courts have addressed).

14. See, e.g., J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 930-31 (1983). Wallace actually devises a mathematical formula for the Court to employ in evaluating certiorari petitions:  $V = Q - (D + U)$ . The value of intercircuit conflict (V) equals the improvement in quality of the resulting rule (Q) less the sum of the cost of the delay in producing a definitive answer (D) and the cost of the resultant uncertainty." *Id.* at 930; see also Sanford Caust-Ellenbogen, Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1080-83 (1984) (using the costs-benefits formula as the method of analysis); Tiberi, *supra* note 2, at 864 (arguing that advocates of the percolation concept find the policies behind the benefits of percolation always outweigh the costs). *But see* Paul M. Bator, *What Is Wrong With the Supreme Court?*, 51 U. PITT. L. REV. 673, 691 (arguing the costs side of the equation will nearly always outweigh the benefits side).

15. See Estreicher & Sexton, *supra* note 2, at 699, 725 (describing this costs-benefits analysis as essentially a measure of the intolerability of an intercircuit conflict).

various costs and benefits that could, or should, play a role in the Court's evaluation of an intercircuit conflict.

### 1. Benefits of Percolation

The Court may perceive several general benefits of letting an issue percolate among the lower federal courts. First, the issue may resolve itself as more circuits address it, precluding the need for the Court to address the issue.<sup>16</sup> Second, even if the Court expects an issue to remain unresolved, percolation can provide the Court with a wealth of well-reasoned lower-court perspectives addressing the issue in the event the Court later tackles it.<sup>17</sup> Proponents of percolation argue that this process leads to better Supreme Court opinions.<sup>18</sup> Further, the circuits in the process act as "laboratories" for the conflicting rules, with the Court waiting at the end of the process to judge the experiment's results.<sup>19</sup>

Some commentators have questioned whether percolation actually provides any benefits to the Supreme Court. Regarding the notion of better-reasoned Supreme Court opinions, some have pointed to the lack of an empirical basis for this conclusion.<sup>20</sup> One empirical study, focusing on the Court's voting margins in percolated and nonpercolated cases granted

16. See STERN ET AL., *supra* note 10, § 4.4, at 169.

17. See *McCray v. New York*, 461 U.S. 961, 963 (1983) (stating the Court should deny certiorari when an issue needs more "study" in the courts below); *Baker & McFarland*, *supra* note 8, at 1408 (noting that one alleged justification for percolation is "allowing an issue to 'simmer' while several judges and different courts approximate different solutions [to] provide guidance to the Supreme Court when it ultimately decides to resolve the conflict"); *Estreicher & Sexton*, *supra* note 2, at 716.

18. See *Tiberi*, *supra* note 2, at 864. In explaining this argument, *Tiberi* states: "The more attorneys who have briefed and argued the issue, and the more judges who decided it, the better will be the decision from the Supreme Court . . . . [W]eaker arguments are weeded out." *Id.*

19. See, e.g., *Wallace*, *supra* note 14, at 929 (arguing the circuits "act as the 'laboratories' of new or refined legal principles, providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments."); see also *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (stating the Court denied certiorari in this case so that more state supreme courts and federal circuits could "[experiment] with substantive and procedural solutions to the problem"); *Addington v. Texas*, 441 U.S. 418, 431-32 (1979).

20. See, e.g., *Bator*, *supra* note 14, at 690 (pointing out the lack of evidence that the Court consistently relies upon the lower-court opinions underlying a conflict); *Shaefer*, *supra* note 8, at 454 ("[T]he notion of the Supreme Court's monitoring the results of experiments in more than 100 conflicting interpretations each year strains credulity.").

certiorari, concluded the Court reaches less-unanimous decisions when reviewing percolated issues.<sup>21</sup> Other commentators have questioned the appropriateness of viewing the federal circuits (as opposed to the state courts) as "laboratories" for the law.<sup>22</sup>

## 2. Presence of Potential Benefits in Particular Cases

Although the Court may perceive general benefits from percolation, there still remains the question of which cases would most benefit from further percolation. The first such characteristic that may justify further percolation is the number of circuit courts that have differed on the issue presented in a certiorari petition. Or, stated differently, how many lower courts does it take to "percolate" an issue? "Three" is a common answer. A third decision addressing the issue in conflict, assuming agreement with one of the two original decisions, would make the rule stated in that opinion a "majority" rule among the circuits. Other circuits may be more likely to follow the trend so established. As well, the third decision may develop a hybrid approach, combining the rules from both earlier decisions into one, more-persuasive rule that other circuits are more likely to adopt.<sup>23</sup>

Commentators have differed over the effect of another characteristic of intercircuit conflicts—timespan between the conflicting decisions. On one hand, if the decision underlying the certiorari petition conflicts with one or more older cases, the Court may perceive a need to let the circuit(s) that rendered the older decision reevaluate its holding, taking into consideration the

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21. Tiberi, *supra* note 2, at 879-80. For purposes of the study, Tiberi defined "percolated cases" as ones in which either the Court's opinion or the lower-court opinion recognized an intercircuit conflict. Tiberi, *supra* note 2, at 875. The study also recognized "degrees of percolation" based upon the number of circuits in conflict and the age of the first decision involved in the conflict. Tiberi, *supra* note 2, at 876-78.

22. See, e.g., Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1486 (1989). Baker argues that while states, through their right to exercise general police power, may be appropriate "laboratories of policy," the "circuits are not appropriate laboratories . . . . Theirs is a false sovereignty, an autonomy of happenstance and convenience." *Id.*

23. Shenberg, *supra* note 13, at 1027. The concept of circuits as "laboratories" may also be a basis for a two-court requirement. Shenberg argues that letting the issue underlying a two-court conflict percolate can give the Court an opportunity to "observe" the operation of the competing rules in their respective circuits. Shenberg notes one possible exception to a two-court requirement would be the event of the Court perceiving a low probability of a third court reaching the issue in the future. Shenberg, *supra* note 13, at 1027.



new "modern" rule.<sup>24</sup> Further, until the circuit cites the older case with approval, the Court may view the intervening years and resulting new case law as evidence that the percolation process is achieving results.<sup>25</sup> On the other hand, a long period of time between conflicting decisions could signal to the Court that the percolation process has run its course, particularly in light of any intervening decisions between the current and older ones.

A third characteristic of intercircuit conflicts that may bear on the Court's percolation assessment is the substantive subject matter underlying the conflict. Because the Court effectively has final review on constitutional matters, the need for the Court to have the aid of a large body of lower-court jurisprudence from a fully percolated issue may be the greatest with respect to constitutional issues.<sup>26</sup> On matters of administrative or procedural issues, the Court also may allow extensive percolation. A conflict regarding administrative rules may be difficult for the Court to resolve without first having evidence of how well the competing administrative rules worked in the lower courts.<sup>27</sup> Similarly, the Court may want the circuits to serve as laboratories for conflicting procedural rules, particularly where the intercircuit

24. Baker, *supra* note 6, at 618. Baker quantifies the necessary time frame as ten to fifteen years. Baker, *supra* note 6, at 618; *see also* STERN ET AL., *supra* note 10, § 4.4, at 172 (arguing a 30-40 year time lapse, "without any indication that [the older decision] has current vitality," will minimize the importance of an intercircuit conflict). *But see* Commissioner v. Stidger, 386 U.S. 287, 289 (1967) (involving an 18-year old conflicting opinion).

25. *See* Shenberg, *supra* note 13, at 1024-25 (discussing the need for a circuit court to reaffirm the older decision before a "standoff" sufficient to warrant Supreme Court attention exists); *see also* Hellman, *supra* note 4, at 734. An example occurred in the bankruptcy case of *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989). In *Sierra Summit*, the Ninth Circuit had ruled that a state could not impose a sales tax on a bankruptcy trustee's liquidation sale. The Ninth Circuit's ruling reaffirmed its own 31-year old precedent which stood in conflict with every other circuit that had considered the issue. The Court granted certiorari and reversed, bringing the Ninth Circuit into harmony with the rest of the federal courts. For background about *Sierra Summit*, see Tabb & Lawless, *Rehnquist Court*, *supra* note 5, at 846-47.

26. Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals*, 56 U. CHI. L. REV. 603, 633 (1989) ("The Supreme Court's decision on the meaning of a constitutional provision is difficult, if not virtually impossible, to change . . . . Thus, it is important that the Supreme Court have the benefit of as much thinking on the question as is feasible before it makes this final resolution."); *see also* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1425 (1987); Tiberi, *supra* note 2, at 870.

27. *See* Shenberg, Note, *supra* note 13, at 1031-32, cites as an example the drafting of the most understandable jury instructions regarding damage awards.

conflict involves a matter of trial procedure having no reach beyond the courtroom.<sup>28</sup> However, procedural conflicts can implicate a different Rule 10 concern, calling for the immediate attention of the Court in its role as the ultimate supervisor of federal judicial proceedings.<sup>29</sup>

### 3. The Costs of Percolation

Most empirical studies have focused on the importance of certain qualities that make a certiorari petition a bad candidate for percolation.<sup>30</sup> With the disadvantages of nonuniformity of federal law as the touchstone, the general proposition is that these "costs" of percolation can necessitate a grant of certiorari even in cases where the percolation of an intercircuit conflict otherwise would be advantageous.<sup>31</sup> Through this weighing process, commentators proffer, the Court identifies "intolerable" intercircuit conflicts in need of immediate resolution. Although scholars have set forth many factors that may contribute to the intolerability of an intercircuit conflict, the most scrutiny has focused upon the risks of economic harm to multicircuit actors and forum shopping if the Court does not immediately resolve a conflict.

Regarding the risk of economic harm, persons and entities operating in more than one circuit can suffer harm when they must plan their personal and

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28. See Estreicher & Sexton, *supra* note 2, at 727; Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 898-99 (1975); Nancy Haas, Note, *Criminal Law II*, 59 N.Y.U. L. REV. 1243, 1256-60 (1984).

29. In addition to consideration of the presence of intercircuit conflicts in evaluating certiorari petitions, Rule 10 provides the Court should place importance on the fact that a "United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10.

See STERN ET AL., *supra* note 10, § 4.15, at 191-92 ("On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary."). In such instances, the Court's role in the area of federal procedural error correction can override the experimental benefits of percolation. STERN ET AL., *supra* note 10, § 4.15, at 191-92; see also *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correction function in federal litigation.").

30. See, e.g., Hellman, *supra* note 4, at 697 ("[M]ost of the conflicts that the Supreme Court does hear either do not generate any of the consequences that might make them 'intolerable' or do so only for a short period of time.").

31. See, e.g., Estreicher & Sexton, *supra* note 2, at 699 ("[T]he mere existence of a conflict does not warrant Supreme Court intervention unless the costs created by the conflict outweigh the beneficial effects of further percolation.").

commercial activities under the differing rules of law in multiple circuits. An economic cost accrues to the multicircuit actor because to avoid liability and to maintain uniformity in its operations it must change its behavior and act in accordance with the rules of law in the most restrictive circuit.<sup>32</sup> The Court may view this problem as intolerable because "the most restrictive court is effectively binding the nation" with respect to nationwide actors, necessitating either Court approval or invalidation of that circuit's rule.<sup>33</sup> In such instances, percolation cannot effectively occur because only one rule, as opposed to multiple competing rules, is governing the behavior of actors in all circuits.

Closely related to effects on multicircuit behavior is the danger that excessive forum shopping will result from an intercircuit conflict. If future plaintiffs would have the ability to choose between courts in different circuits as possible fora for their suits,<sup>34</sup> the Court may view a conflict regarding the issue as intolerable because of the plaintiffs' ability to choose the most favorable rule.<sup>35</sup> Thus, the Court's evaluation would center on the applicable venue statute and choice-of-law rules. Another consideration might be the type of plaintiff likely to bring a claim invoking the issue. Corporations, for

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32. Hellman, *supra* note 4, at 748-49. As examples of the most common intercircuit actors, Hellman lists corporations, labor unions, and pension funds. Hellman, *supra* note 4, at 748; see also Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 7 (1989); Shenberg, *supra* note 13, at 1021 ("[Multicircuit actors] are forced to plan their behavior according to the law of the forum that has adopted the legal standard most detrimental to their interests."). An example of a multicircuit actor in bankruptcy court occurred in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). In that case, chapter 11 debtor Celotex Corp. was subject to different judicial orders in the Fourth and Fifth Circuits. The Supreme Court granted certiorari to resolve the conflict. For background on the *Celotex* case, see Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 77-81 (1996) [hereinafter Lawless, *Bankruptcy Legisprudence*].

33. Caust-Ellenbogen, *supra* note 14, at 1082, 1084 ("[T]he most restrictive rule effectively binds the nation and thereby cuts off percolation."); Estreicher & Sexton, *supra* note 2, at 725 (arguing that such a wide-reaching single-circuit rule will garner the Court's attention because it "upsets the balance among the lower courts").

34. See Hellman, *supra* note 4, at 754 (noting that while litigants in general often have a choice between fora, "many federal claims can be brought only in a single district"); see also Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 (analyzing the ability of bankrupt debtors to forum shop).

35. See Estreicher & Sexton, *supra* note 2, at 725 (arguing the Court will view "the cost to the legal system of compelling disregard of the holding of a court [as] too high to bear").

example, are likely to be in a better financial position to pursue a claim in a distant forum.<sup>36</sup>

Another factor that may weigh on the Court's assessment is the existence of a published lower-court opinion identifying the circuit conflict. If the decision creating the conflict is unpublished, multicircuit actors and their attorneys are less likely to be cognizant of the split in authority or to afford it a great deal of weight once they recognize its existence.<sup>37</sup> In compiling our database, we noted the presence or absence of a published circuit court opinion for each certiorari petition, allowing empirical evaluation of this factor.

### *B. The United States Government As a Party*

When the United States government is a party to a certiorari petition, conventional wisdom says the likelihood of a certiorari grant substantially increases. Our own data and the data from others support this proposition, as about one-third of the Court's certiorari grants each term involve cases in which the federal government either is a party or has filed an amicus brief.<sup>38</sup> In general, commentators have traced this preference to the inherent presence of a government interest in any petition to which the federal government is a party. Some argue the Court often grants certiorari in response to still another self-perceived role, this one as the ultimate decider of conflicts involving issues of federal government administration.<sup>39</sup> Beyond conflict resolution, others have asserted the Court tries to take an active role in furthering the government interests present in certiorari petitions.<sup>40</sup> However, other

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36. See Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 468-69 (1984) (discussing the ability of certain types of plaintiffs to choose the forum in which to locate based upon the applicable laws).

37. See Hellman, *supra* note 4, at 709 ("The more explicit the acknowledgement of conflict, the more likely it is that people will adjust their behavior to take it into account."); David O. Stewart, *The Uncertainty of Cert*, 82 A.B.A. J. 50, 51 (1996) (arguing that the lack of a written opinion from the court below is "fatal" to a petition's chances of receiving a grant of certiorari).

38. Bator, *supra* note 14, at 680-81.

39. See, e.g., William Alsup & Tracy L. Salisbury, *A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts*, 11 HASTINGS CONST. L.Q. 359, 368 (1984) ("[T]he Supreme Court is quick to grant certiorari in cases presenting conflicts that could affect the administration of the national government and the administration of the armed services. . .").

40. See, e.g., Rasmussen, *supra* note 5, at 562-63 (listing "sovereign immunity, federalism, and the need for access to the Court" as government interests important to the Court). In Rasmussen's sample of 24 bankruptcy cases granted certiorari, 19

commentators have pointed towards more specific explanations, largely dependent on the federal government's position as petitioner or respondent.

### 1. The United States as Petitioner

About three-fourths of the certiorari petitions the federal government files receive a certiorari grant,<sup>41</sup> compared with a success rate of only around six percent for other parties. This high success rate is attributable to the work of the Solicitor General.<sup>42</sup> Except in rare instances, the Solicitor General retains absolute discretion to decide which federal government cases are worthy of petition to the Supreme Court from amongst those cases that lost at the circuit court level.<sup>43</sup>

Commentators cite two reasons for the Solicitor General's significant success. First, the Solicitor General has a careful screening process for cases that the federal government has lost and exercises a large degree of restraint in choosing which cases to pursue further. Of the average six hundred cases the United States loses each year at the appellate level, the Office only chooses forty to fifty as necessitating a certiorari petition.<sup>44</sup> Because of this policy of restraint, the Solicitor General's petitioning decisions receive a large degree of deference from the Court.<sup>45</sup>

presented intercircuit conflicts, while the other three cases involved a government petitioner. Rasmussen, *supra* note 5, at 562. Rasmussen concluded: "[W]hile private parties must wait for a circuit split to have the Supreme Court review an issue involving the interpretation of bankruptcy law, the government has ready access to the Court when it feels aggrieved by an appellate court decision." Rasmussen, *supra* note 5, at 562-63.

41. Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1210-11 (1988); STERN ET AL., *supra* note 10, § 4.1, at 164 (stating about 70 percent of federal government petitions received grants from 1985 through 1991).

42. The Office files around forty petitions on behalf of the federal government each Supreme Court term, usually receiving more than thirty grants of certiorari. Schnapper, *supra* note 41, at 1212. In addition, the Office, often at the request of the Court, files between five and ten amicus briefs supporting other petitions each year. Schnapper, *supra* note 41, at 1212. The Court grants certiorari to a majority of these petitions. Schnapper, *supra* note 41, at 1212.

43. Baker, *supra* note 6, at 622-23; see also Roy W. McLeese, Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048, 1071 (1984); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1453-57 (1969).

44. Baker, *supra* note 6, at 623.

45. Schnapper, *supra* note 41, at 1215; see also Estreicher & Sexton, *supra* note

Second, in making its petitioning decisions, the Office attempts to apply the same criteria that the Court applies to its certiorari determinations. Unlike attorneys in private cases, the Solicitor General's exercise of discretion is not subject to the demands of private clients and has as a basis a high level of expertise in defining "certworthiness."<sup>46</sup> The resulting deference from the Court can lead to certiorari grants even in the absence of intercircuit conflict.<sup>47</sup>

## 2. The United States as Respondent

Many commentators also point out the greater likelihood of the Court granting certiorari when the federal government is a respondent as opposed to the instance of a petition involving only private parties.<sup>48</sup> One possible explanation for the disparity is the inherent presence of an issue of public importance in most cases in which in the federal government is a party. Such issues get the Court's attention. As well, in many of the cases in which the United States is the respondent, the federal government actually "acquiesces" to a certiorari grant due to the presence of an issue of public importance.<sup>49</sup>

To evaluate the significance of government parties in certiorari petitions, we noted the presence of all government parties, both state and federal, amongst the petitions in our bankruptcy database. In addition, our data distinguish petitions based upon whether the United States served as petitioner or respondent.

## III. DATABASE CONSTRUCTION

We set out to identify every certiorari petition that raised an issue under the Bankruptcy Code or related points of statutory or constitutional law. We chose the Supreme Court's 1978 Term as our starting point because that year coincided with enactment of the Bankruptcy Code.<sup>50</sup> Indeed, no Code cases

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2, at 775.

46. See Schnapper, *supra* note 41, at 1222.

47. Baker, *supra* note 6, at 623 ("[T]he office's standards are well-known to the Court. When the Solicitor General tells the Court a case is so important that certiorari should be granted even without a conflict, the Court listens.").

48. See, e.g., Bator, *supra* note 14, at 681.

49. Bator, *supra* note 14, at 681.

50. The current Bankruptcy Code, codified at Title 11 of the UNITED STATES CODE, was enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Since 1978, there have been numerous amendments to the Bankruptcy Code, most notably in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; the Bankruptcy Judges, United States

reached the Court until its 1979 Term.<sup>51</sup> As we encountered them, we systematically omitted cases that raised issues under the Bankruptcy Code's predecessor—the Bankruptcy Act of 1898.

Fortunately, the *United States Law Week* provided an easy mechanism to accomplish our goal. That publication lists all certiorari petitions on the Supreme Court's paid docket, provides a subject matter summary for each of these petitions, and indexes the petitions by subject matter. Commencing with the 1978 Supreme Court term and *United States Law Week* volume 47, our inquiry in each volume began in the topical index. This index categorizes all petitions according to their underlying subject matter under alphabetized subject matter headings. The "bankruptcy" heading in each volume's index provided a list, complete with docket numbers, of all certiorari petitions from the corresponding term involving a bankruptcy case or presenting an issue of bankruptcy law. Using the docket numbers, we next located each petition in the "Case Status Report."<sup>52</sup> For each petition, the Case Status Report included the location of the subject matter summary<sup>53</sup> within the volume.<sup>54</sup>

The subject matter summaries provided many types of information

Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (1986); and the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

The Bankruptcy Code replaced the Bankruptcy Act of 1898. It is conventional to refer to the current statute as the "Code" and the predecessor statute as the "Act."

51. The first cert petition under the Bankruptcy Code we identified was *Williams v. New York State Higher Education Services Corporation*, 449 U.S. 843 (1980). That case involved the dischargeability of student loans in the interim between repeal of a previous statute barring their discharge in bankruptcy and enactment of the then-new Bankruptcy Code. See *New York St. Higher Educ. Serv. Corp. v. Adamo (In re Adamo)*, 619 F.2d 216 (2d. Cir.), cert. denied, 449 U.S. 843 (1980).

52. Numerically by docket number, the Case Status Report lists all certiorari petitions and appeals filed in the corresponding term as well as those petitions and appeals "carried over" from the previous term.

53. While the topical index provides brief subject matter "slugs" for each petition, such description is too superficial to lend meaningful guidance regarding the substantive issues underlying a petition. Reference to the subject matter summaries was necessary.

54. Using the information in the Case Status Report, we also excluded three appeals, eight petitions for a writ of mandamus, and fourteen voluntary dismissals of certiorari petitions. None of these cases involved a Supreme Court decision on whether to grant certiorari. We also omitted fourteen petitions in which the Court, without opinion, summarily reversed or vacated a lower court decision. A summary reversal or vacatur, without opinion, typically occurs when the Court has just issued a published opinion raising issues similar to those raised in the certiorari petition. These summary dispositions do not necessarily reflect the Court's decision that the petition independently presents particularly "certworthy" issues.

essential to our database. Most importantly, the summaries described the substantive question(s) presented by each petition, which we used to identify the subject-matter of the petition.<sup>55</sup> Each subject matter summary also provided a summary of the lower court's ruling and listed the case name, originating circuit, and citation for the lower-court opinion. We used the case name to identify the existence of a governmental party or petitioner as well as the existence of an institutional creditor party or petitioner. We categorized petitions by Supreme Court term based on when the Court granted or denied the petition rather than when the petition was filed.

There were advantages and disadvantages to our heavy reliance on *United States Law Week*. Most obviously, we were relying on someone else's characterization and indexing. Because a certiorari petition raising an issue of bankruptcy law is readily identified by the petition's reference to any statutory provision of the Bankruptcy Code, it is unlikely we would have arrived at a drastically different list of cases had we done the initial indexing ourselves. We are confident that the bankruptcy subject matter heading in *United States Law Week* provided a reliable list of bankruptcy certiorari petitions. Also, except for the certiorari petitions that were granted and led to a published opinion, we relied on *United States Law Week*'s short summary of the case's subject matter instead of reading the lower court's opinion. Despite these shortcomings, our methodology had important advantages: low cost and ready accessibility. We did not have the resources available to duplicate the extensive methodology of previous studies, but our methodology did allow for a longitudinal study of certiorari in a specific subject area.<sup>56</sup>

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55. We identified twelve different subject matter categories: (i) constitutional law, (ii) bankruptcy procedure, (iii) composition of the bankruptcy estate/exemptions, (iv) secured creditor issues, (v) avoiding powers, (vi) bankruptcy tax, (vii) executory contracts, (viii) bankruptcy discharge and dischargeability, (ix) automatic stay, (x) eligibility for bankruptcy filing, (xi) chapters 11, 12, and 13 plans, (xii) allowance, disallowance, and valuation of creditor claims. We also had a miscellaneous category for cases that did not fit one of the twelve descriptions. In the event the petition raised issues in more than one subject matter category, we used the issue listed first in the petition. Our statistical analysis aggregated several of these categories together, as discussed *infra* notes 65-89 and accompanying text.

56. For example, Professor Perry in 1991 published a major study of the certiorari process which had begun in the early 1980s. Professor Perry interviewed sixty-four former Supreme Court law clerks and five Supreme Court justices to provide an in-depth examination of the certiorari decisions from the 1976-1980 Terms. See H.W. PERRY, JR., *DECIDING TO DECIDE* 8-11 (1991). Similarly, Professors Estreicher and Sexton used twenty-two law review editors and 4 research assistants to review 2,061 cert petitions from the Court's 1982 Term. See Estreicher & Sexton, *supra* note 2, at 707-08. Their result is a study stunning in both its depth and breadth.



We did not select some certiorari petitions although they might be characterized as bankruptcy related in a broad sense. First, we omitted any certiorari petition from a state court decision. It is possible that federal bankruptcy issues can arise in a state court proceeding. For example, a debtor might plead a discharge in bankruptcy as a defense to a creditor's state-court collection suit. Since enactment of the Code, there have been 44 certiorari petitions from state court proceedings that raised an issue of federal bankruptcy law. Because the Court did not grant certiorari in any of these cases and because we were primarily interested in federal bankruptcy cases, we omitted all of these state-court certiorari petitions from our statistical analysis. Inclusion of these state-court cases would have skewed our statistical analysis by making it appear that the Court grants certiorari in federal bankruptcy cases less often than actually occurs.

Because *United States Law Week* does not identify petitions off the Court's *in forma pauperis* ("IFP") docket, our methodology also did not allow us to identify IFP bankruptcy cert petitions.<sup>57</sup> Criminal matters constitute most of the IFP docket, meaning few, if any, bankruptcy cases can be found there.<sup>58</sup> Moreover, enactment of the Code, the Court has never granted certiorari in a bankruptcy case off the IFP docket. Therefore, omission of the IFP docket should have had little effect on our study.

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57. All of the petitions in our sample were paid cases, filed pursuant to Supreme Court Rule 33. None of the petitions involved *in forma pauperis* or "IFP" cases, which have docket numbers greater than 5001. In an IFP case, the Court allows the parties to file a petition for cert without paying the docket fee and any other costs required by the Court. Regarding the distinction between these two types of cases, *see generally* STERN ET AL., *supra* note 10, § 8.1, at 407. Any comparisons in this article to overall certiorari trends refer only to the paid certiorari docket.

58. The leading treatise on Supreme Court practice describes the IFP docket thusly:

The vast majority of these *in forma pauperis* cases are filed by impoverished criminal defendants and prisoners, either *pro se* or by assigned counsel. While litigants in civil proceedings also may seek to proceed *in forma pauperis* before the Court, many on a *pro se* basis, their numbers are relatively small.

STERN ET AL., *supra* note 10, § 8.1, at 407.

Moreover, in *United States v. Kras*, 409 U.S. 434 (1973), the Supreme Court ruled that debtors did not have a constitutional right to file an *in forma pauperis* petition in federal bankruptcy court. The upshot of the ruling was that one could be too poor to file for bankruptcy. Just because no constitutional right to file an IFP petition exists in the lower-level courts does not mean it is inconceivable that a bankrupt debtor would file an IFP cert petition. The *Kras* case, however, certainly makes such a cert petition much less likely and further justifies the exclusion of IFP cases from our study.

Through our methodology, we identified 611 certiorari petitions involving issues of federal bankruptcy law. The Supreme Court considered and acted upon these petitions from its 1980 Term through its 1995 Term. The Supreme Court granted certiorari in 43 or 7.0% of these cases, a figure comparable to the overall rate of 6.0% for certiorari grants in all cases over the same time period. (Again, these figures only include cases from the Court's paid docket.)

Compiling data regarding the presence and extent of intercourt conflicts underlying these 611 certiorari petitions required reference beyond *United States Law Week*, to the court of appeals opinion from which each certiorari petition originated.<sup>59</sup> A majority of the petitions in our database, 417 (68.2%), were taken from opinions published in West's *Federal Reporter*. We also consulted 59 (9.7%) "unpublished" opinions for which a complete text appeared on Westlaw, a computerized legal research database. There were 135 (22.1%) lower-court opinions that were truly unpublished, appearing neither in the *Federal Reporter* nor on Westlaw.

We identified a petition as presenting an intercourt conflict when the originating circuit court expressly stated its disagreement with the holding of another circuit court regarding any of the "issues presented" in the petition.<sup>60</sup> This approach builds on others' observations that the Court, in its case-selection process, looks for the presence of direct conflicts between lower-court opinions. For cases that resulted in a published opinion by the Supreme Court, we used the Court's characterization to identify any possible circuit

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59. The *United States Law Week* case summaries did mention the presence of a possible intercourt conflict in some, but not most, of the instances in which a conflict actually existed. Thus, for some cases, we were able to verify our identification of an intercourt conflict with the claims asserted in the petition for certiorari. To identify intercourt conflicts, we did not rely solely on the *Law Week* case summaries out of concern that litigants would inflate claims of circuit conflict to improve their chances of successfully petitioning for certiorari.

For each petition, we limited our search for intercourt conflicts to the published opinion or unpublished disposition of the originating federal circuit court. We did not research the published opinions of the originating bankruptcy court or federal district court. However, in one instance we identified the presence of an intercourt conflict from a dissent from a denial of certiorari. See *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966 (1986) (Blackmun, J., dissenting).

60. See Feeny, *supra* note 15, at 305-06 (defining a direct conflict as a conflict "in which the decision below deals with the same explicit point as some other case and reaches a contradictory result"); see also STERN ET AL., *supra* note 10, § 6.31, at 355 (arguing the Court places importance upon conflicts that are direct, meaning "another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity").

conflict.<sup>61</sup> We did not attempt to distinguish "degrees" of conflict,<sup>62</sup> but we did disregard instances where a lower court expressed disagreement with a proposition characterized as the obiter dicta of another decision.<sup>63</sup> Once we recognized the existence of a conflict, we ascertained the number of circuit courts that had addressed the issue. Our method again relied upon the originating circuit court's published opinion or unpublished disposition, counting the number of circuits addressing the issue from the cases cited.

By using court opinions as a measure of circuit conflict, we deliberately avoided reliance on the brief accompanying a litigant's petition for certiorari. Because of the Supreme Court's stated standards for granting certiorari, litigants have an incentive to overstate the existence and depth of a circuit conflict.<sup>64</sup>

#### IV. STATISTICAL ANALYSIS

##### *A. The Bankruptcy Explosion at the Supreme Court*

Over the last several years, bankruptcy cases have been becoming an increasingly large portion of the overall federal docket. As Table One, Column E shows, bankruptcy cases have grown from approximately 55% of the federal court docket during the Supreme Court's 1983 Term to over 75%

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61. One of the authors (Lawless) has closely followed the Supreme Court's bankruptcy work. See Lawless, *Bankruptcy Legisprudence*, *supra* note 32, *passim*. Tabb & Lawless, *Rehnquist Court*, *supra* note 5, *passim*. In his experience, the Supreme Court usually notes the existence of any circuit conflict when deciding bankruptcy issues.

62. Although other commentators have drawn such distinctions, *see, e.g.*, Alsop & Salisbury, *supra* note 39, at 364 (noting a distinction between direct conflicts, strong partial conflicts, and weak partial conflicts); Shenberg, *supra* note 13, at 1013 (distinguishing between conflicts arising from the application of different legal standards as opposed to the same legal standard), trying to distinguish between "degrees" of conflict would have injected more subjectivity into our data and ultimately led to less reliable statistical results.

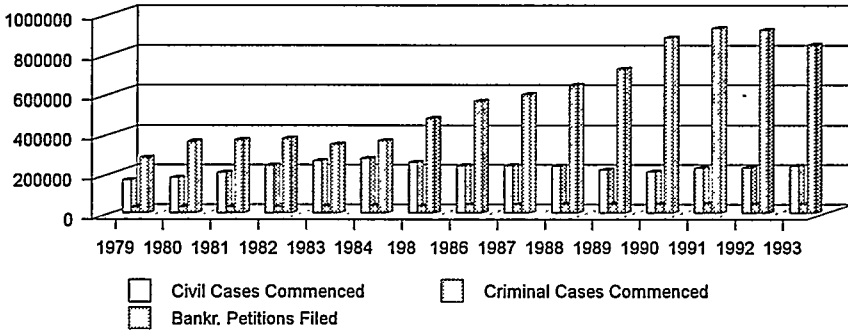
63. See STERN ET AL., *supra* note 10, § 4.3, at 167 (arguing the Court will not recognize a true conflict where the lower-court decision conflicts only with the dicta or reasoning of another decision). When a conflict arises only with reference to the dicta of a decision, the Supreme Court also may desire further percolation of the issue, considering the fact that the lower court may reevaluate its position when the issue is squarely before it. See Estreicher & Sexton, *supra* note 7, at 723.

64. As discussed *infra* notes 68-71 and accompanying text, Supreme Court Rule 10 expressly states that a circuit conflict is part of the criteria for deciding whether to grant cert.

by the Court's 1993 Term (the last year for which figures were available).<sup>65</sup> Figure One graphically demonstrates the sharp rise in bankruptcy petitions during the mid- and late-1980s. So far, the 1990s have proven to be a plateau, with bankruptcy petitions levelling off but showing no sign of decline. Currently, for every civil or criminal case commenced in the United States district courts, debtors file over three bankruptcy petitions. With bankruptcy petitions expected to top one million in 1996, these trends should continue.

Number of Cases Commenced in the U.S. Courts, by S. Ct. Term

Figure 1



65. We chose Supreme Court terms as the temporal unit of measurement for our study for the sake of consistency with most other statistical presentations of certiorari information. Each Supreme Court Term runs from approximately July 1 to June 30 of the following year. See STERN ET AL., *supra* note 10, § 1.2, at 3. We conformed all of our data to measurements based on Supreme Court terms. For example we used statistical information about the federal court docket based on a year ending of June 30.

For information about the general federal court docket, we found reliable information through the 1993 Term, which ended on June 30, 1994. Our analysis of bankruptcy certiorari petitions specifically runs through the 1995 Term.

### Number of Cases Commenced in the U.S. Courts, by S. Ct. Term

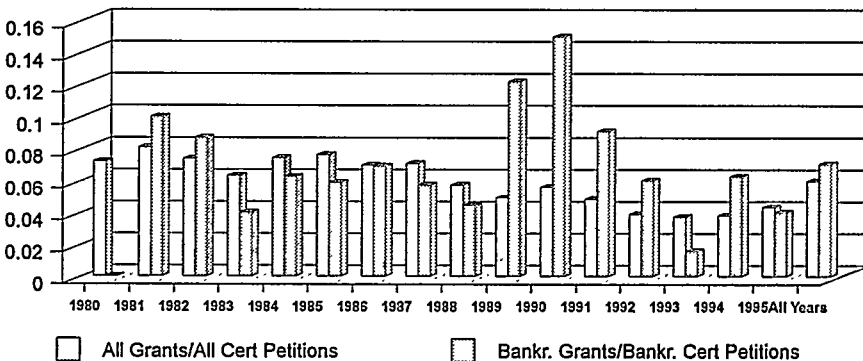
Table 1<sup>66</sup>

(A) S. Ct. Term	(B) Civil Cases Commenced	(C) Criminal Cases Commenced	(D) Bankr. Petitions Filed	(E) Bankr. Petitions as % of Total
1979	168,789	28,000	277,880	58.54%
1980	180,756	30,400	360,329	63.07%
1981	206,193	31,600	367,866	60.74%
1982	241,842	34,700	374,734	57.54%
1983	261,485	35,900	344,725	53.69%
1984	273,670	38,500	364,536	53.87%
1985	254,828	35,900	477,856	62.17%
1986	239,185	42,200	561,278	66.61%
1987	239,639	43,500	594,567	67.74%
1988	235,529	44,900	642,993	69.63%
1989	217,879	46,500	725,484	73.29%
1990	207,690	45,100	880,399	77.69%
1991	226,895	47,500	927,490	77.17%
1992	228,562	45,700	918,374	77.00%
1993	235,996	44,900	845,257	75.06%

As bankruptcy filings have grown, so has the portion of the Supreme Court's docket devoted to bankruptcy law. During the Bankruptcy Code's early days (1981-1986), the Supreme Court saw 20 to 30 bankruptcy cert petitions per year, which accounted for about only 1.0% of the Court's paid certiorari docket. Since the 1990 Term, however, the number of bankruptcy cert petitions has grown to between 50 and 60 per year, and they now comprise approximately 3% of the paid certiorari docket.

### % of Cert Petitions Acted Upon and Granted, by S. Ct. Term

Figure 2



66. The numbers in this table were compiled from various annual editions of the Department of Commerce's *Statistical Abstract of the United States*. The *Statistical Abstract* rounds off the number of new federal criminal prosecutions and civil actions each year to the nearest hundred.

Percentage of S. Ct. Docket Attributable to Bankruptcy  
Table 2<sup>67</sup>

(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
S. Ct. Term	# of Cert. Petitions	# of Grants	% Granted	# of Bankr. Petitions	# of Bankr. Grants	% Granted	Bankr. Petitions/ All Petitions	Bankr. Grants/ All Grants
1980	2,324	167	7.2%	8	0	0.0%	0.3%	0.0%
1981	2,513	203	8.1%	30	3	10.0%	1.2%	1.5%
1982	2,297	169	7.4%	23	2	8.7%	1.0%	1.2%
1983	2,220	140	6.3%	25	1	4.0%	1.1%	0.7%
1984	2,253	167	7.4%	32	2	6.3%	1.4%	1.2%
1985	2,185	166	7.6%	17	1	5.9%	0.8%	0.6%
1986	2,189	152	6.9%	29	2	6.9%	1.3%	1.3%
1987	2,224	157	7.1%	35	2	5.7%	1.6%	1.3%
1988	2,271	130	5.7%	45	2	4.4%	2.0%	1.5%
1989	2,096	103	4.9%	41	5	12.2%	2.0%	4.9%
1990	2,042	114	5.6%	60	9	15.0%	2.9%	7.9%
1991	2,125	103	4.9%	55	5	9.1%	2.6%	4.9%
1992	2,140	83	3.9%	50	3	6.0%	2.3%	3.6%
1993	2,099	78	3.7%	63	1	1.6%	3.0%	1.3%
1994	2,185	83	3.8%	48	3	6.3%	2.2%	3.6%
1995	2,130	92	4.3%	50	2	4.0%	2.4%	2.2%
All Years	35,293	2,107	6.0%	611	43	7.0%	1.7%	2.0%

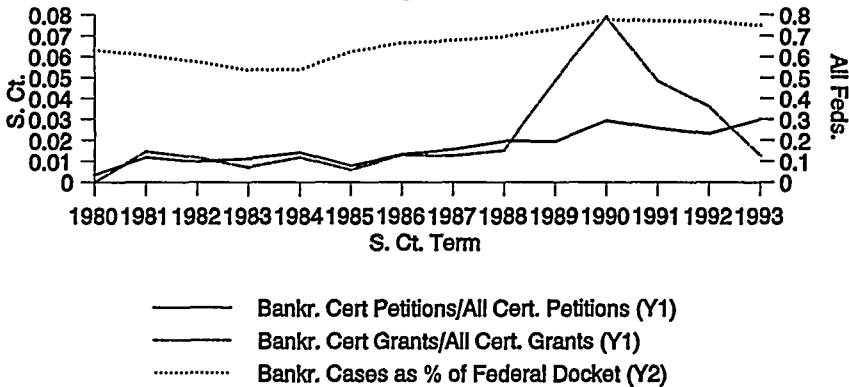
Even more striking has been the Court's increasing acceptance rate for bankruptcy cert petitions. Many commentators noted the Court's early 1990s explosion of interest in bankruptcy law. The 1990 Term was the high-water mark, where the Court granted cert in 9 or 15% of the bankruptcy cases presented to it. Bankruptcy accounted for 7.9% of all the Court's certiorari grants. The statistics for the 1989 and 1991 Terms, while not as dramatic, also show a dramatic increase in the Court's interest in federal bankruptcy law.

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67. As explained in the methodology, the total number of certiorari petitions was based on the paid docket only. See *supra* notes 57-58 and accompanying text. IFP cases were excluded. The overall certiorari figures were culled from various volumes of *United States Law Week* by reference to that publication's annual "Statistical Recap of Supreme Court's Workload During Last Three Term." This table typically appears in *United States Law Week* during August and reports statistics for the Supreme Court term that has just ended.

## % of Docket Attributable to Bankruptcy

Figure 3



It is plausible that the Court's "bankruptcy explosion" did nothing more than reflect bankruptcy's growing importance in the federal docket overall. Figure Three and the numbers from Tables One and Two suggest, however, that the Court was acting even beyond the statistical trend. Figure Three graphically overlays the trends in the general federal docket and the Supreme Court's docket. The top line, which is represented on the right-hand Y-axis, charts the increase in bankruptcy petitions in the total federal docket. The bottom two lines, which are represented on the left-hand Y-axis, track bankruptcy cert petitions as a percentage of the Court's certiorari docket and bankruptcy cert grants as a percentage of the Court's total number of grants. The Court's interest notably spiked in the late 1980s and early 1990s. Although the graphical representation smoothes out the top trend line, this spike is out of proportion to both the increase of bankruptcy cases in the total federal docket and the increase of bankruptcy cases in the certiorari docket.

Thus, it is fair to say that the Court did take an increased interest in bankruptcy cases during the late 1980s and early 1990s. The numbers, however, cannot provide the reason for the Court's increased interest. The answer to that question must be found through more sensitive analysis. It is likely that, as the Bankruptcy Code matured from its 1978 enactment to the late 1980s, many bankruptcy issues surfaced in the lower courts that eventually demanded the Court's attention. If this supposition is correct, it supports a percolation hypothesis.

### *B. Determinants of Bankruptcy Certiorari*

Even more than the Court's level of interest in bankruptcy law, statistical analysis identifies important trends in the bankruptcy cases the Court is

inclined to hear. These trends favor governmental parties and institutional creditors (e.g., banks, finance companies, insurance companies). These litigants are most likely to have their appeals heard by the Supreme Court. For sake of comparison with the material presented in this subpart, remember that the Court grants certiorari an average of 7.0% of the time in bankruptcy cases and an average of 6.0% in all cases.

Identifying the motives and factors behind the Supreme Court's certiorari decision making process is an inherently problematic endeavor. For certiorari petitioners looking for a bright-line rule of guidance, the Court provides only its own rule 10.<sup>68</sup> To appreciate the ambiguity underlying the Court's decision making process, one need look no further than rule 10's statement that "certiorari will be granted only when there are special and important reasons therefor."<sup>69</sup> Moreover, Rule 10 carefully qualifies its own list of certiorari criteria, which focus primarily on the existence of conflict among the lower courts.<sup>70</sup> The Court's own decisions also provide little guidance, adhering to a traditional practice of omitting the Court's reasons for granting or denying certiorari to a particular petition.<sup>71</sup>

68. SUP. CT. R. 10; see STERN ET AL., *supra* note 10, § 4.2, at 167 (discussing the bar's criticisms of the failure of Rule 10 to establish more precise guidelines of "certworthiness" for petitioners).

69. SUP. CT. R. 10.

70. Rule 10 provides a list "[indicating] the character of reasons that will be considered," which include: (1) United States court of appeals decisions in conflict with the decision of another court of appeals or state court supreme court, (2) state supreme court decisions deciding a federal question differently than another state supreme court or federal court of appeals, and (3) federal court of appeals decisions that conflict with Supreme Court precedent or present important questions of federal law.

Even this list is deemed noncontrolling. A disclaimer comes immediately prior to the list of criteria, stating the list is "neither controlling nor fully [a measure of] the Court's discretion." Rule 10 and its predecessor forms reflect the Court's own reluctance to reduce the certiorari decision making process to a set of neat guidelines, embodying the view that "[f]requently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." John M. Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C. BAR ASSN. 541, 548-49 (1959); see also William J. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 478-79 (1973); Earl Warren, *The National Court of Appeals*, 59 A.B.A. J. 721, 727-28 (1973).

71. See STERN ET AL., *supra* note 10, § 5.5, at 234. When the Court does state its reasons for granting certiorari, the explanation most often comes in superficial form. STERN ET AL., *supra* note 10, § 4.2, at 167.



**Characteristics of Bankruptcy Cert Petitions**  
Table 3

(A)	(B) Number of Bankr. Petitions w/ <u>Characteristic</u>	(C) As % of All Bankr. Cert <u>Petitions</u>	(D) Number of Bankr. Cert Grants w/ <u>Characteristic</u>	(E) Grants As % of <u>Column (B)</u>
Circuit Split	97	19.9%	26	27.4%
Unpub. Lower Ct. Opinion	194	31.7%	2	1.1%
No Gov't Party	447	73.2%	24	5.4%
Fed. Gov. Pet.	13	2.1%	11	84.6%
Fed. Gov. Res.	107	17.5%	2	1.9%
State Gov. Pet.	26	4.2%	5	19.2%
State Gov. Res.	18	2.9%	1	5.6%
No Instl. Party	505	82.3%	33	6.5%
Instl. Pet.	31	5.1%	6	19.4%
Instl. Res.	75	12.3%	2	0.5%

**Certiorari as a Function of Number of Circuits  
in Conflict with Lower Court Decision**  
Table 4<sup>72</sup>

(A) Number of Circuits in <u>Conflict</u>	(B) Number of Bankr. Cert <u>Petitions</u>	(C) As % of All Bankr. Cert <u>Petitions</u>	(D) Number of Bankr. Cert <u>Grants</u>	(E) Grants As % of <u>Column (B)</u>
Zero	391	80.1%	17	4.3%
One	33	6.8%	7	21.2%
Two	19	3.9%	4	21.1%
Three	21	4.3%	7	33.3%
Four	10	2.0%	2	20.0%
Five	8	1.6%	2	25.0%
Six or More	6	1.2%	4	66.7%

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72. Column A could benefit from clarification. Column A identifies the number of circuits in conflict with the circuit under review. For example, if the circuit opinion in question said it conflicted with the decision of two other circuit courts, then the value in Column A is "2."

Table Three presents a number of characteristics and explains their influence on the certiorari process. Not surprisingly, the Court granted certiorari in 27.4% of the cases where the lower court opinion was in conflict with at least one other circuit. Circuit conflicts are one of the Court's stated criteria for granting certiorari. Moreover, Table Four shows that, as the number of circuits in conflict goes up, the likelihood of a cert grant goes up as well, reaching a high of 66.7% for the six cases that conflicted with the rulings in six other circuits.

Also not a big surprise is the small number of cases where the Court grants certiorari from an unpublished opinion of the circuit court. The Court granted cert in only 1.1% of these cases, compared with a 7.0% grant rate overall. For an unpublished opinion, the lower court is supposed to have made a determination that the case was unimportant or unlikely to lead to a useful precedent of widespread application.<sup>73</sup> Because an important criteria for cert is whether the case has national importance,<sup>74</sup> an unpublished circuit court opinion may signal the Supreme Court that the case has little significance. Whether this signal is justified is another question, beyond the scope of this paper.<sup>75</sup>

Table Three's most important revelation is the Court's favored litigants. Governmental or institutional litigants are much more likely than other litigants to have their cases heard by the Supreme Court. Most astonishingly, the Court has agreed to hear 11 of 13 (84.6%) of the federal government's bankruptcy cert petitions. This figure is higher than the 70% success rate for the Solicitor General in all cases.<sup>76</sup> As discussed earlier, the Solicitor General (sometimes referred to as the "Tenth Justice") performs a screening function for the Court traditionally making it more likely federal appeals will be heard in the Supreme Court.<sup>77</sup>

The Court, however, also has looked favorably upon state governmental petitions<sup>78</sup> and the certiorari petitions of institutional creditors.<sup>79</sup> For these

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73. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 759 n.7, 789-90 (1995) (explaining why the courts of appeals issue unpublished decisions).

74. See PERRY, *supra* note 56, at 253-60.

75. See Dragich, *supra* note 73, *passim* (criticizing the trend of the courts of appeals to issue fewer published decisions).

76. See *supra* note 41 (citing to empirical studies of Solicitor General cert petitions).

77. See *supra* Part II.B.1.

78. In this paper, "state governments" include local subunits of a state government such as a municipality.

79. For purposes of this paper, we defined "institutional creditors" as banks, insurance companies, finance companies, and similar institutions that regularly extend

petitions, the Court has granted certiorari, respectively, 19.2% and 19.4% of the time. Regardless of the respondent's identity, nongovernmental and noninstitutional petitioners have had average to below average success in having the Court hear their bankruptcy appeals. Although the mediating influence of the Solicitor General perhaps can explain the favorable reception of federal cert petitions, it is difficult, if not impossible, to advance a similarly neutral explanation for why the Court has so favorably received the petitions of state governments and financial institutions.<sup>80</sup>

Moreover, once the Court has granted certiorari, it has favored governmental and institutional litigants at the expense of unsecured creditors and debtors.<sup>81</sup> By definition, a cert petition means the litigant lost at the circuit court level. Governmental and institutional litigants have had an easier time getting the Supreme Court to reverse adverse lower court decisions. The trend is perverse. These litigants are most likely to have the resources and organizational strength to lobby Congress for changes in the federal bankruptcy statute. The Supreme Court now has opened its doors to their claims as well. At the highest levels of the federal government, no one appears to be protecting the interests of the unsecured creditor or the debtor.<sup>82</sup>

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credit as part of their business. These institutions usually are repeat players in bankruptcy litigation throughout the country. A winning appeal financially benefits an institutional creditor not only by the rendering a favorable judgment in the case actually on appeal but also by establishing a judicial precedent the institutional creditor can use in other cases.

80. Perhaps one could argue that cert petitions from nongovernmental or noninstitutional litigants are less meritorious. Absent an explanation of why this should be so on a systematic basis, this argument does not advance a neutral position.

81. See Lawless, *Bankruptcy Legisprudence*, *supra* note 32, at 114-16.

82. An argument could be made that the observations in the text explain why bankruptcy courts are often perceived as "pro-debtor." If the upper levels of the bankruptcy system are skewed against debtor interests, then a fair-minded bankruptcy judge might compensate by protecting debtor interests at the lower-court level.

**Certiorari as a Function of Originating Circuit**  
Table 5<sup>83</sup>

(A)	(B)	(C)	(D)	(E)
Originating Circuit	Number of Bankr. Cert Petitions from Circuit	As % of All Bankr. Cert Petitions	Number of Bankr. Cert Grants from Circuit	Grants As % of Column (B)
First Circuit	15	2.5%	2	13.3%
Second Circuit	50	8.2%	5	10.0%
Third Circuit	57	9.3%	5	8.8%
Fourth Circuit	51	8.3%	2	3.9%
Fifth Circuit	96	15.7%	4	4.2%
Sixth Circuit	53	8.7%	6	11.3%
Seventh Circuit	43	7.1%	2	4.7%
Eighth Circuit	39	6.4%	4	10.3%
Ninth Circuit	101	16.5%	3	3.0%
Tenth Circuit	44	7.2%	7	15.9%
Eleventh Circuit	50	8.2%	3	6.0%
D.C. Circuit	10	1.6%	0	0.0%
Federal Circuit	2	0.0%	0	0.0%

Another possibility explanation of certiorari is the originating circuit. Perhaps some circuits have a reputation for making "bad" bankruptcy law, and the Court is more likely to hear appeals from these circuits.<sup>84</sup> Table Five explores this possibility. First, Table Five reveals that some circuits contribute a relatively large percentage of Supreme Court cert petitions. Because of their size, both the Fifth and Ninth Circuit generate approximately more than twice the number of cert petitions than most of the other circuits. Some circuits, such as the Sixth, Eighth, and Tenth Circuits do have a larger number of

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83. Although the Federal Circuit does not have any direct appellate jurisdiction over matters that might arise in a federal bankruptcy court, we did identify two cases from the Federal Circuit that raised bankruptcy issues. These cases both involved the relationship between the federal laws protecting intellectual property and the federal Bankruptcy Code.

84. Theoretically, the Supreme Court's role in the cert process is to identify cases of national importance. The correctness of the lower court decision generally should not be an issue. Nevertheless, PERRY, *supra* note 56, at 265-68, found that, in the certiorari process, individual justices often place great weight on whether they perceive that the circuit court "got it right." Professor Perry couches the inquiry as the justices' sense of how "egregious" the lower court decision was. PERRY, *supra* note 56, at 265-68.

certiorari grants than other circuits. These differences were not found to be statistically significant when subjected to the regression analyses discussed below.

**Certiorari as a Function of Subject Matter**  
Table 6

(A)	(B)	(C)	(D)	(E)
<u>Subject Matter</u>	Number of Bankr. Cert Petitions w/ <u>Subject Matter</u>	As % of All Bankr. Cert <u>Petitions</u>	Number of Bankr. Cert Grants w/ <u>Subject Matter</u>	Grants As % of <u>Column (B)</u>
Constitutional Law	31	5.1%	5	16.1%
Bankruptcy Procedure	158	25.9%	6	3.8%
Property of the Estate	63	10.3%	6	9.5%
Secured Creditor Issues	49	8.0%	6	12.2%
Avoiding Powers	46	7.5%	4	8.6%
Tax Issues	21	3.4%	4	19.0%
Executory Contracts	21	3.4%	1	4.8%
Discharge/Dischargeability	54	8.8%	4	7.4%
Automatic Stay	37	6.1%	2	5.4%
Eligibility for Filing	14	2.3%	2	14.2%
Reorganization Plans	31	5.1%	1	3.2%
Claim/Valuation	24	3.9%	2	8.3%
Miscellaneous	62	10.1%	0	0.0%

Another possible determinant of bankruptcy certiorari is the subject matter of the cert petition. It could be that the Court deems certain bankruptcy issues of more importance and therefore more "certworthy." We identified twelve different subject matters along with a residual miscellaneous category. We then categorized each cert petition based on the subject matter description in *United States Law Week*. Our primary goal in categorizing the cases was consistency, so that the same issue received the same category assignment whether it was presented in the first or the last case examined.

Bankruptcy procedure far and away presented the largest number of cases. These cases tended to be appeals from obstreperous or desperate litigants. Examples included petitions to have a lower-court judge recused because of conflict of interest or an argument that the lower court had deprived the litigant of due process of law. These cases had a low (3.8%) acceptance rate.

Several subject matters exhibited high acceptance rates. Constitutional law issues (16.1%), secured creditor issues (12.2%), and tax issues (19.0%) all had acceptance rates above ten percent.<sup>85</sup> These issues also tend to be raised by governmental and institutional litigants, and the Court's proclivity to accept cert petitions from these groups might explain the higher acceptance rate. Issues relating to the eligibility to file bankruptcy had a 14.2% acceptance rate. Only 14 of the 611 (2.3%) petitions presented eligibility issues, meaning that the relative acceptance rate for these cases was extremely sensitive to small changes in the absolute number of certiorari grants (*i.e.*, one less cert grant would have cut the acceptance rate in half, to 7.2%). When subjected to regression analysis, only constitutional law cases were found to have a statistically significant effect on the Court's decision to grant certiorari.

Table Seven presents the results of a logistic regression analysis on our data.<sup>86</sup> A logistic regression measures the effects of independent variables on the logarithm of the odds on a positive response. Thus, one cannot interpret the results in a logistic regression as estimating the statistical likelihood of a particular event. To do so requires a mathematical calculation.<sup>87</sup> Although the logarithmic transformation may seem arcane and unnecessarily complex, it is used quite often and has several useful qualities.<sup>88</sup>

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85. One might argue that the Supreme Court accepts more cert petitions from governmental and institutional litigants because their cert petitions present more important issues. The existence of important issues, however, should be equally as likely whether a governmental or institutional litigant is the petitioner or the respondent. Our statistical analysis showed that the Court accepts more cert petitions only when the government or institutional litigant is the petitioner.

86. We also performed two other logistic regression analyses, not discussed in the text. We did a regression analysis based on the originating circuit for the cert petition and found no statistically significant relationships. We also performed a regression analysis based on the subject matter of the cert petition and found a statistically significant relationship only for constitutional law issues. Rather than burden a legal journal with tables of numbers that have no story to tell, we have omitted these regressions from our discussion.

87. To elaborate on the points in the text, assume that  $p$  represents the probability of a positive response on an underlying event. In our case, the underlying event is the decision whether to grant certiorari. Logistic regression produces a "log-odds," which is the logarithm of the ratio of the probability of a positive response to the probability of a negative response. Mathematically, a logistic regression estimates  $L = \log[p/1-p]$ . To transform  $L$  into the probability of a positive response ( $p$ ), perform the following calculation:  $p = 1/(1 + e^{-L})$ . For further discussion, see MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* § 12.34 (1990).

88. Specifically, a logarithmic transformation allows measurement of nonlinear effects on the event to be measured. Normal linear models of regression are not appropriate to measure a predicted outcome, such as the decision to grant cert, because these linear models allow the predicted outcome probability to fall outside the range

Those without a strong mathematical background need not be intimidated by the regression analysis. The regression does nothing more than measure the quality and strength of the relationship between various case characteristics and the probability the Court will grant certiorari. (In an attempt at simplicity, Table 8 presents these relationships using the more readily understood concept of probability.) If a characteristic is found to have statistical significance, we can say with a high level of confidence that the characteristic is related to the likelihood the Court will grant certiorari. On the other hand, the lack of statistical significance does not necessarily mean the characteristic has no effect on the Court's decision to grant certiorari. Statistical significance may be lacking due to any number of reasons, including misspecification of the regression model or data collection errors.

In the table, INTERCEPT is the intercept estimate for the equation, *i.e.*, the value of the equation when all independent variables equal zero. SPLITNUM is the number of circuits in conflict with the decision under review, and UNPUB indicates an unpublished circuit decision. INSPET, FEDPET, and STPET indicate the presence of an institutional, federal, or state petitioner respectively. In addition to these variables, we tested for the presence of constitutional law issues because these cases with a constitutional law issue are widely believed to be more "certworthy." In the table, CONLAW indicates the case involved an issue of constitutional law. Statistical significance is indicated by \*\*\* for significance at the 99% level, by \*\* for significance at the 95% level, and by \* for significance at the 90% level.

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from 0 to 1. See FINKELSTEIN & LEVIN, *supra* note 87, § 12.34. A logistic regression forces the range of predicted outcomes to fall between 0 and 1. Also, a logistic regression accounts for skewness in the distribution of the data. FINKELSTEIN & LEVIN, *supra* note 87, § 12.34.

**Logistic Regression Analysis**

Table 7

sample size (N) = 488 (123 observations were omitted due to missing values)  
 model overall Chi-square score = 151.056\*\*\*; -2 Log likelihood score = 93.420\*\*\*  
 at 50% probability level, false positives = 36.4% & false negatives = 6.2%  
 concordance = 85.3%

	Parameter Estimate	Wald Chi-Square	Standard Error
INTERCEPT	-3.0541***	135.6721	0.3008
SPLITNUM	0.5569***	33.8333	0.0957
UNPUB	-1.1442	1.8183	0.8486
INSPET	1.5482***	8.1345	0.5428
FEDPET	4.5489***	29.9893	0.8307
STPET	1.4406**	5.8631	0.5950
CONLAW	1.2209*	3.3696	0.6651

**Probability of Cert Grant for Bankruptcy Cases**

Table 8

	Factors Present									
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
SPLITNUM		1	1					1	1	1
INSPET					x				x	
FEDPET						x		x		x
STPET							x			
CONLAW		x		x						x
Probability of Cert Grant	2.9%	15.1%	5.0%	9.3%	12.4%	74.0%	11.3%	83.2%	19.8%	94.4%

Overall, the model explains a large portion of the reasons the Court grants cert in a bankruptcy case. The test scores for the overall model demonstrate statistical significance for the entire model. Moreover, the independent variables show high levels of statistical significance. Only the presence of an unpublished lower court opinion was found not to be statistically significant.



Thus, the results indicate a statistically significant relationship between the identity of the petitioner and certiorari acceptance rate. Specifically, governmental and institutional litigants have statistically significant higher acceptance rates than other litigants. Also, the regression shows that an increase in the number of circuits split on the issue increased the likelihood that the Court would accept the case. This last finding is consistent with the hypothesis that the Court will allow some issues to percolate in the lower courts before accepting a case and issuing a decision of binding national effect.

Table 8 puts the regression analysis in more understandable terms by performing a mathematical transformation of the regression results to produce probabilities.<sup>89</sup> We performed the calculation for selected combinations of case characteristics. Thus, as Column (1) shows, a case without any of the characteristics in Table 8 has only a 2.9% chance of being granted certiorari. In contrast, Column (10) calculates a 94.4% probability of a cert grant for a circuit court opinion involving constitutional law with at least one circuit in conflict and brought to the Supreme Court by the federal government. The federal government's status as petitioner alone raises the probability of a cert grant to 74.0% (Column 5). If an institutional creditor presents a cert petition, the chance of a cert grant is 12.4% (Column 4), while the same petition presented by a state government stands a 11.3% (Column 6) chance of being granted cert. The presence of a circuit split raises the probability of certiorari only 5.0% (Column 3).

## V. CONCLUSIONS

We have admittedly presented a great deal of information and figures in a short space. The analysis has a number of important implications for those interested in bankruptcy or the Supreme Court generally. To summarize our major findings:

- Currently, the Supreme Court receives approximately 50 to 60 bankruptcy certiorari petitions per year, granting cert in an average of 7.0% of these cases and hearing an average of 3 or 4 bankruptcy cases per year. These figures are comparable to the certiorari grant rate for all cases of 6.0%.
- In bankruptcy cases, the certiorari process has favored governmental and institutional litigants. The statistical result is extremely robust and significant when subjected to regression analysis. For state governments and institutional litigants, no satisfactory, neutral explanation can be

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89. The mathematical transformation is the calculation on the log-odds ratio that produces a probability for the event in question, as discussed *supra* note 87.

offered for this apparent bias. These results were consistent with other scholarship that demonstrated the increased likelihood of a governmental petitioner being granted cert. The finding for institutional litigants is new. We were not able to duplicate results showing that the presence of a governmental *respondent* made certiorari more likely.

- The existence and depth of a circuit conflict is important when the Court decides whether to grant cert in a bankruptcy case. This finding is consistent with classic legal explanations of the certiorari process. Moreover, because the Court is more likely to hear a bankruptcy case the greater the number of circuits involved in the split, our findings are consistent with the theory that the Court will allow some issues to “percolate” in the lower courts before agreeing to decide them.

- Several subject matters--constitutional law, secured creditor issues, and tax issues--exhibited cert acceptance rates far above the 7.0% average. Our regression analysis showed only constitutional law to have a statistically significant effect.

- In the late 1980s and early 1990s, the Supreme Court did agree to hear a large number of bankruptcy cases, out of proportion to bankruptcy’s share of the overall federal docket. Our statistics were incapable of capturing the reasons for this increased interest, which probably is best explained by more subjective analysis. Perhaps a number of the justices simply had a personal interest in the bankruptcy issues presented to the Court.<sup>90</sup> Given the background of the current justices, it is somewhat unlikely that any of them have a personal interest in bankruptcy law. A more plausible analysis rests in the Bankruptcy Code’s development. After the Bankruptcy Code was enacted, the Supreme Court was called upon to hear a small number of important structural issues (*e.g.*, the Code’s retroactivity, the constitutionality of the bankruptcy court system). After these few important structural cases were decided, it took a few years for the Code to mature and for important statutory issues to percolate through the lower courts (*e.g.*, the scope of the chapter 13 cramdown, the relationship between fraudulent transfers and real-estate foreclosures). By the late 1980s, these statutory issues had reached a point where the Court had to decide them. Thus, the explosion of bankruptcy cases during the late 1980s and early 1990s can be interpreted as consistent with the view that the Court allows issues to percolate in the lower federal courts before hearing them on certiorari.

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90. It has been noted that justices often vote to grant cert in areas of law in which they have a personal interest. See PERRY, *supra* note 56, at 260-65 (noting how a justice from the western United States might be interested in water rights cases or a justice with a prior corporate practice might be interested in securities law).

•Bankruptcy cases are similar to the Court's public-law agenda. The Court uses extra-legal factors in deciding whether to grant certiorari in bankrupt just as other scholars have identified for public-law cert petitions. Supreme Court scholars who neglect the Court's agenda in areas of private law, like bankruptcy, are missing a major piece of the picture.

The results present a picture of bankruptcy certiorari that differs little from the picture painted about the certiorari process generally. This suggests the Court approaches bankruptcy cases in more or less the manner as it approaches any federal law issue. Our study shows that circuit splits and percolation are important for bankruptcy law, as they for any other federal law.

The apparent favoritism for governmental units and financial institutions is troubling. Many bankruptcy scholars and practitioners forget that the Court can have as great a role in shaping the bankruptcy statute as Congress. *Ron Pair*, *Nobelman*, and *BFP* are all examples of Supreme Court decisions addressing important issues of bankruptcy law that Congress has left untouched.<sup>91</sup> Although most people envision the legislative process as inherently political and non-neutral, the paradigm for the judiciary is exactly the opposite. Courts are supposed to act in a neutral fashion, without the bias that our analysis indicates may be present.

Our results are significant for anyone pondering the future of federal bankruptcy law. There is no reason the bankruptcy system has to remain static. Perhaps a mediating agency, much like the SEC's relationship with federal securities law, would be appropriate for bankruptcy law. Perhaps a specialized national bankruptcy court of appeals would produce better results. We do not mean to be heard arguing for such radical reforms, at least not yet. These reforms carry costs of their own, and frankly, we are not sure whether they would be an improvement over the existing structure. The debate needs to occur, however, and the data in this article provide a place to start.

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91. These three cases should be familiar to anyone with a background in bankruptcy law. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), held that an oversecured, nonconsensual lien holder (e.g., a tax lien holder) was entitled to postpetition interest on its claim. In *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), the Supreme Court ruled that a chapter 13 consumer debtor had to pay her mortgage holder the full value of the holder's claim regardless of the value of the underlying collateral. In *BFP v. Resolution Trust Corporation*, 114 S. Ct. 1757 (1994), the Court ruled that a state real estate foreclosure sale was protected from fraudulent transfer attack under the Bankruptcy Code.