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Circuit Splits and Empiricism in the Supreme Court

Karen M. Gebbia¹

I. Introduction: A Brief Introduction to Empiricism and the Supreme Court

Fire sweeps through an old growth forest of sequoia, sugar pine and white fir trees. In the years following the conflagration, an observer notices significantly more seedlings growing in severely burned areas than in unburned areas. Why? Is there more space, more water, or more sun in the burned areas? Has the fire, itself, facilitated new growth? Could it be random chance? Might rigorous comparative studies yield an explanation?

This not entirely fictional tale² embodies the essence of empiricism. It begins with an observation, identifies hypotheses that might plausibly explain the observation, and sets about testing these hypotheses through rigorously controlled factual

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2. See, e.g., Bruce M. Kilgore, *Fire's Role in a Sequoia Forest*, NATIONAL PARKS SERVICE, http://www.nps.gov/seki/naturescience/fic_firerole.htm (last visited Dec. 16, 2015).

analysis, rather than settling for even the most sophisticated theoretical explanation.³

Empiricism, however, can explain far more than the natural world. In the past two decades, legal scholars have increasingly employed empirical methods to probe how the legal system's central actors and institutions function in practice, rather than merely in theory.⁴ Empiricism may add distinct value to traditional legal scholarship by testing the validity of theorized expectations and identifying trends, patterns and nuances in courts' and legislatures' decision making processes.

Consider, for example, Supreme Court review. The dynamics of the review process fundamentally shape the Court's role in fostering the legal system's essential values⁵; however,

3. See LAWLESS, *supra* note 1, at 7-20; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 1-3, 19-20 (2002).

4. See, for example, THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert M. Kritzer eds., Oxford Univ. Press 2010), for commentary recognizing the increasing amount of self-consciously empirical work in legal scholarship. See LAWLESS, *supra* note 1, at xix (noting increase in empirical legal scholarship); see also Theodore Eisenberg, *The Origins, Nature and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1713-19 (2011) [hereinafter Eisenberg, *Origins*] (tracing the development of empirical legal scholarship); Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741-42 (2004) [hereinafter Eisenberg, *Why*] (noting increase in empirical legal scholarship); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 527-29 (2000) (noting increase in empirical legal scholarship); Epstein & King, *supra* note 3, at 1-2 (same; also urging scholars to follow the rules of inference, defining empirical scholarship broadly to include much of what others might define as traditional scholarship); Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990-2009*, 2011 U. ILL. L. REV. 1739 *passim* (2011) (noting increase in empirical legal scholarship); Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195 *passim* (2013) (noting increase in empirical legal scholarship); see generally sources cited *infra* note 7.

5. Elsewhere, the author has identified eight essential values that underlie the legal system: that the law shall be predictable in individual cases, replicable in similar cases, horizontally coherent across related fields of law, vertically coherent across time, reflective of society's needs and values, responsive to changes in society's needs and values, influential in shaping social values or morals, and fair and just in individual cases. See Karen M. Gebbia, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233 (1997). See also sources cited *supra* note 4. Cf. Frank B. Cross & Dain C. Donelson, *Creating Quality Courts*, 7 J. EMPIRICAL LEGAL STUD. 490, 491 (2010) (articulating important qualities of judicial systems, including that: "The judiciary should be independent The

multiple factors influence each aspect of the process, including litigants' initial determination to request review, the framing of the issues presented, the Justices' decision whether to accept the case, and the Justices' individual votes on the merits. Consequently, the Court's (theoretical) power of final review is continually balanced against the (practical) reality that litigants' selection discretion significantly constrains Supreme Court review, and the Court's own limited docket prevents it from reviewing every case the lower courts decide.

Scholars have explored diverse and interrelated aspects of Supreme Court review, including: the rich variety of roles the Court plays (including correcting errors, resolving circuit splits, fostering uniformity, resolving constitutional questions, and signaling other actors); the dynamics of the certiorari process (including litigants' decisions to seek certiorari, the Court's decision to grant certiorari, work load considerations, and messages the Court's choices send lower courts);⁶ and the ways

judiciary should be accessible The judiciary should be reasonably efficient and effective. . . . All these features are part of establishing a 'rule of law.'"); Reid Hastie, *The Challenge to Produce Useful 'Legal Numbers'*, 8 J. EMPIRICAL LEGAL STUD. 6, 7 (2011) (articulating the "desired, normative properties of legal numbers" as reliability, equity, accuracy, predictability, and justice).

Commentators may disagree on how the values that define a legal system ought to be balanced, or allocated among the players in the legal system; nevertheless, empirical study enhances understanding of how legal institutions actually pursue these aspirations.

6. See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE US COURTS OF APPEALS* (Stanford Univ. Press 2007) (examining factors influencing appellate decision making); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (Harvard Univ. Press 1991) (examining decision making on certiorari); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (Cambridge Univ. Press 2002) (examining ideological impacts on Supreme Court decision making); Gregory Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J. L. ECON. & ORG. 549 (1999) (considering Supreme Court decision making in granting certiorari); Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 103 (2000) (considering factors affecting the Supreme Court's decision whether to grant certiorari); Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369 (2005) (examining why lower courts adhere to Supreme Court precedent); Paul H. Edelman et al., *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129 (2012) (examining whether ideology and the attitudinal model of decision making explain Supreme Court consensus); Paul H. Edelman et al., *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819 (2008)

in which broad models of judicial decision making illuminate the Court's and litigants' decisions (including the effects of attitudinal, institutional and legal factors, and of appellate

(examining factors that might explain Supreme Court Justices' deviations from voting behavior that would be expected if one applied the attitudinal model of judicial decision making); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (examining implications of ideological change on the Supreme Court); Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Access Supreme Court Justices, With Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891 (2007) (examining measures of Supreme Court Justices' ideology and the implications of ideological change); Tracey E. George & Michael E. Solamine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001) (considering whether the Supreme Court is any more or less likely to consider circuit court decisions heard en banc rather than by a panel); Bernard Grofman & Timothy Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of "Natural Courts" 1953-1991*, 112 PUB. CHOICE 55 (2002) (examining Supreme Court decision making); Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEGAL STUD. 407 (2008) (considering how case selection affects inferences regarding judicial politics, including regarding Supreme Court decision making and lower court compliance with Supreme Court signals); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007) (challenging the "principal-agent" theory of lower court compliance with Supreme Court policy making); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003) (examining whether lower courts comply with Supreme Court signals to avoid reversal); Maxwell Mak et al., *Is Certiorari Contingent on Litigant Behavior? Petitioners' Role in Strategic Auditing*, 10 J. EMPIRICAL LEGAL STUD. 54 (2013) (exploring inter-dependence between litigant selection discretion and Supreme Court selection discretion); Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the US Supreme Court*, 23 J.L. ECON. & ORG. 365 (2007) (examining implications of ideological change on the Supreme Court); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (exploring, in a classic work, the implications of litigants' decision making in selecting cases for litigation); Rorie Spill Solberg & Stephanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986-2000*, 2 J. EMPIRICAL LEGAL STUD. 237 (2006) (examining the impact of Supreme Court Justices' ideology on voting regarding constitutional challenges to legislation); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (examining circuit court response to Supreme Court signals and directives); Jeff Yates et al., *Judicial Ideology and the Selection of Disputes for US Supreme Court Adjudication*, 10 J. EMPIRICAL LEGAL STUD. 847 (2013) (examining the relationship between the attitudinal model of judicial decision making on the Supreme Court and the effects of selection discretion by litigants and the Court).

panel composition and Court composition).⁷

Traditional legal scholarship and empirical legal scholarship⁸ each contribute to our understanding of the

7. See sources cited *supra* note 6; see generally MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (Princeton Univ. Press 2011) (challenging the adequacy of the attitudinal model to explain judicial decision making); SEGAL & SPAETH, *supra* note 6 (exploring and comparing rival models of judicial decision making, including the attitudinal model and refinements to it); Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535 (2011) (noting how institutional models of decision making, including principal-agent models, improve upon simple attitudinal models, but challenging the ability of principal-agent models to account for legal norms); Michael A. Perino, *Law, Ideology, and Strategy in Judicial Decision Making: Evidence from Securities Fraud Actions*, 3 J. EMPIRICAL LEGAL STUD. 497, 497-98 (2006) (identifying the three predominant theories of judicial decision making as “legal,” “attitudinal,” and “strategic,” exploring how well these models describe decision making in securities litigation); Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective From Israel*, 8 J. EMPIRICAL LEGAL STUD. 556, 556-65 (2011) (comparing legal, attitudinal, rational choice, and neo-institutional models; applying these models to contrast the high courts’ decision making in the United States and Israel). Cf. Paresh Kumar Narayan & Russell Smyth, *What Explains Dissent on the High Court of Australia? An Empirical Assessment Using a Cointegration and Error Correction Approach*, 4 J. EMPIRICAL LEGAL STUD. 401 (2007) (examining how institutional, socio-economic and stylistic factors affect dissent on Australia’s high court). There is also a growing body of work examining the interaction between ideology and panel composition on the courts of appeal. See, e.g., Carlos Berdejo, *Is it the Journey or the Destination?: Judicial Preferences and Decision-Making in the Ninth Circuit*, 51 U. LOUISVILLE L. REV. 271 (2013) (examining the effects of ideology and panel composition in the Ninth Circuit); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (examining the effect of panel composition on ideological voting in the appellate courts).

8. In this Article, “empirical legal scholarship” is distinguished from “traditional legal scholarship” by the presence (in the former) of self-conscious factual investigation and experimentation using controlled and comprehensive data (rather than solely theory, anecdote and example), to test theoretical explanations of observed phenomena. It is not essential to this definition that statistical analysis is employed (although it often will be necessary to explain the relationships among variables or the significance of observed differences among datasets), or that inference be drawn (although it, too, will be necessary to any study that seeks to draw broader inferences from specific observed phenomena). Cf. LAWLESS, *supra* note 1, at 7 (“By the term *empirical methods* we mean, at the most general level, all techniques for systematically gathering, describing, and critically analyzing data (objective information about the world.)” (emphasis in original); Eisenberg, *Origins*, *supra* note 4, at 1719 (“ELS scholars use tools that have long been used in and out of law schools. ELS

complex interactions among these variables and the dynamic relationship between the Court and the circuit courts of appeal.⁹ Legal scholarship often seeks to go beyond illumination, however. It has the potential, indeed often forthright objective, of influencing policy-making and driving institutional reform.¹⁰ Empirical study, in particular, carries an aura of almost scientific veracity that policy makers may find harder to discount than even the most persuasive theory. It is particularly critical, therefore, that empirical studies proceed from rigorous, valid, and reliable foundations by applying accurate data to test

employs a methodology that is usually, but not always, the methodology of statistical analysis--parts of which are used by most scholars with a social scientific interest in legal issues.”); Epstein & King, *supra* note 3, at 1-2 (defining empirical scholarship broadly to include any research that involves learning about the world using quantitative data or qualitative information; noting that “[t]he word ‘empirical’ denotes evidence about the world based on observation or experience;” and arguing that legal scholars have been “conducting research that is empirical – that is, learning about the world using quantitative data or qualitative information – for almost as long as they have been conducting research”); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810 (1999) (limiting his discussion of “empirical legal scholarship” to work that applies statistical analysis to describe or draw inferences regarding larger samples); Craig Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and the Profession*, 30 WAKE FOREST L. REV. 347, 349 (1995) (describing empirical research as generally involving statistical analysis).

9. This Article focuses on the Court’s review of court of appeals decisions, which constitute the largest part of the Court’s docket, and give rise to the empirical concerns this Article addresses.

10. See, e.g., *UCLA-RAND Center For Law & Public Policy*, UCLA LAW (2015) <https://www.law.ucla.edu/centers/interdisciplinary-studies/ucla-rand-center-for-law-and-public-policy/about/> (“The UCLA-RAND Center for Law and Public Policy produces legal scholarship grounded in multidisciplinary empirical analysis to guide legal and public policymakers in the 21st century.”); Eisenberg, *Why*, *supra* note 4, at 1743-46 (noting public policy interest in empirical legal studies). As Epstein and King explain:

[L]egal scholarship – perhaps to a greater degree and more immediately than most other research – has the potential to influence public policy as it is promulgated by judges, legislators, and bureaucrats. It is especially so when that influence comes in studies assessing the likely consequences of particular changes in public policy, evaluating the impact of existing public programs, or affecting the real world in a timely manner.

Epstein & King, *supra* note 3, at 7 (footnotes omitted).

carefully constructed hypotheses.

This Article demonstrates, empirically rather than merely in theory, how a failure to do so leads to unreliable conclusions concerning the relationship between the Supreme Court and the circuit courts of appeal. Specifically, commentators routinely misapply facially accurate raw data regarding the rate at which the Court reverses circuit court decisions to support unreliable conclusions regarding the comparative degree of accord between the Court and individual circuits. Commentators and the popular press then employ these unreliable conclusions to draw unsupported inferences regarding the reasons for supposed discord between the Court and the circuits, and to urge fundamental institutional reforms ranging from dividing circuits to creating intermediate levels of judicial review.¹¹

Part II of this Article provides context for this Study by reviewing the principal ways in which empiricists employ raw data and inquiry-based analysis to study Supreme Court review practices. Part III examines how raw data and inquiry-based analysis apply to the question of Supreme Court / circuit court accord, explains how circuit splits and other factors affect apparent rates of accord, and distinguishes simple Supreme Court case disposition data (“affirm / reverse” rates, which do not account for circuit splits) from more comprehensive “approve / abrogate” rates (which do account for circuit splits). Part IV defines the two datasets this Article uses to compare affirm / reverse rates to approve / abrogate rates, and outlines the methods and parameters of the Study. Part V elaborates the Study’s findings regarding the differences between affirm / reverse rates and approve / abrogate rates, demonstrates that affirm / reverse rates do not reliably reflect the degree to which the Court agrees with the circuit courts of appeal, either in the aggregate, or on a circuit-by-circuit comparative basis, and considers what these data suggest about other variables, such as issue disparity, that may fundamentally impact Supreme Court / circuit court accord. Part VI summarizes these conclusions, makes recommendations regarding the interpretation and application of Supreme Court review data, and identifies areas for further study.

11. *See infra* nn. 69-74.

II. Empirical Perspectives on the Supreme Court

Empirical analysis of the Supreme Court follows two primary paths. The first reports comprehensive raw data; the second engages in inquiry-based analysis. Part II of this Article summarizes and considers the intersections between raw data reports (Part II.A) and inquiry-based analysis (Part II.B), in the context of empirical study of the Supreme Court.

A. Raw Data Reports

Raw data publishers strive to make accurate information regarding Supreme Court decision making available to scholars and the public. To do so, they first identify potentially interesting variables regarding Supreme Court cases (and perhaps regarding petitions filed with the Court). Variables might include, for example, the case's origin, nature of the issues, disposition of the case, voting coalitions, opinion author, etc. Raw data reporters then compile these data and publish them in summary reports or searchable databases.¹²

The complexity of the data-reporting enterprise depends on the nature of the variables reported, the degree of analysis and decision making required to assign values to the reported variables (i.e., to “code”¹³ them), and the reporting format (such as whether the compiler reports individual case data or aggregate Term data).

12. See, e.g., databases discussed *infra* Part II.A; see generally LAWLESS, *supra* note 1, at 7, 125-38 (discussing availability of and access to public and archival data); Epstein & King, *supra* note 3, at 22-24 (commenting on the practice by which large amounts of data are made publically available for general research rather than developed in response to a particular inquiry).

13. See generally LAWLESS, *supra* note 1, at 165-87 (noting the challenges of coding variables in empirical legal studies); see also Michael Evans et al., *Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research*, 4 J. EMPIRICAL LEGAL STUD. 1007, 1008-09 (2007) (noting the tension between large-scale inquiry of “thin,” reliably coded observations and small-scale inquiry of more nuanced variables that present greater coding challenges); Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60 (2013) (advocating mandatory party coding of case-related variables in all federal filings to enhance civil rulemaking).

Variables that may be reported based upon generally non-controversial coding decisions include numbers of petitions for certiorari filed and granted, numbers of cases resolved with and without opinion, numbers of merits cases decided, origin of cases,¹⁴ simple case disposition,¹⁵ opinion author, vote splits, voting alignments, and the like. *Harvard Law Review*¹⁶ and *SCOTUSBlog*¹⁷ produce the most well-recognized summaries of these types of Supreme Court decision making data.¹⁸ Each publishes an annual report that summarizes these data for the Court's most recently completed Term (the former since the 1948

14. *SCOTUSBlog* reports case origin in four categories: circuit courts of appeal, state supreme courts, three judge district courts, and original jurisdiction. See generally SCOTUSBLOG, <http://www.SCOTUSBlog.com> (last visited Dec. 16, 2015) [hereinafter *SCOTUSBlog*]; *Statistics*, SCOTUSBLOG <http://www.SCOTUSBlog.com/statistics/> [hereinafter *SCOTUSBlog Statistics*]. HARVARD LAW REVIEW reports sixteen categories of case origin: district courts, armed forces, state courts, and each of the thirteen circuit courts of appeal. See, e.g., *The Supreme Court, 2012 Term: The Statistics*, 127 HARV. L. REV. 408, 418 (2013) [hereinafter *2012 Term*].

15. Simple case disposition includes affirmed, reversed, vacated, remanded, and the like.

16. Each November since 1949, HARVARD LAW REVIEW has published statistics for the previous Supreme Court Term. See *The Supreme Court, 2004 Term: The Statistics*, 119 HARV. L. REV. 415, 415 n.1 (2005) (noting history of the statistics issue) [hereinafter *2004 Term*]. The most recent report is available at *2012 Term*, *supra* note 14.

17. *SCOTUSBlog Statistics*, *supra* note 14.

18. See also *Supreme Court Database*, *infra* note 40 and text accompanying notes 41–44, which reports these same variables, as well as extensive additional variables.

Other sources of various Supreme Court data include: LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* (5th ed. 2012); *Journal*, SUPREME COURT (Dec. 15, 2015), <http://www.supremecourt.gov/orders/journal.aspx> (“The Journal reflects the disposition of each case, names the court whose judgment is under review, lists the cases argued that day and the attorneys who presented oral argument . . .”); *Judicial Business 2013 Tables*, US COURTS (Sept. 30, 2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/statistical-tables-us-supreme-court.aspx> (setting forth cases on docket, disposed of, and remaining on docket at conclusion of October Terms for the most recent five-year period; also summarizing for each Term, the numbers of cases argued, disposed of by full opinion, disposed of by per curiam decisions, set for re-argument, granted review, reviewed and decided without oral argument, and available for argument at the outset of the following term); THE UNITED STATES CENSUS BUREAU, <https://www.census.gov/compendia/statab/2012/tables/12s0331.pdf> (setting forth, at Table 331, Supreme Court Cases filed and disposition, 1980 to 2010).

Term;¹⁹ the latter since the 1995 Term²⁰). Where it seems useful, each publishes data both in the aggregate and disaggregated by circuit.²¹

Although these resources refer to their reports as “statistics,” as a matter of common parlance, the reports actually comprise raw totals or percentages for specified variables, without comparative statistical analysis, which might account for factors such as sample size, weight, probability, significance and the like. The distinction may be important. For example, suppose that for a particular period, the Supreme Court agreed with the circuit courts of appeal, in the aggregate, on average, around 45% of the time, but agreed with the Tenth Circuit around 53% of the time during this same period. One might be tempted to ask why the Tenth Circuit has a better record. The first inquiry, however, must be whether the seeming difference is statistically meaningful given the numbers of cases considered. In this example, the difference has no greater significance than random chance.²²

Harvard Law Review and *SCOTUSBlog* also identify the types of cases the Court has decided on the merits, which is a somewhat more substantive variable than those mentioned above. The extent to which classification based upon the nature of a case presents coding challenges depends on the complexity of the issues and the specificity of the chosen taxonomy. *SCOTUSBlog* reports four categories of merits cases, namely: civil, criminal, habeas corpus, and original jurisdiction.²³ *Harvard Law Review* reports six subject matter categories for cases disposed of with full opinions, namely: civil cases from the federal courts, federal criminal cases, federal habeas corpus cases, civil cases from the state courts, state criminal cases, and

19. *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119 (1949); see 2004 Term, *supra* note 16, at 415 n.1 (noting history of the statistics issue).

20. *SCOTUSBlog Statistics*, *supra* note 14 (including reports for the 1995 through 2013 Terms).

21. See sources cited *supra* note 14.

22. See *infra* Table III, Figure 8, and accompanying text.

23. See *SCOTUSBlog Statistics*, *supra* note 14 (reporting “make up of the merits docket” beginning with the 2010 Term; reporting “questions presented and results” for the 2008 and 2009 Terms on a case-by-case but not summary basis; reporting a “case list” with “holdings” but not issues for the 2007 Term; and not reporting a nature of the case summary for earlier Terms).

cases within the Court's original jurisdiction.²⁴ Placing cases into the broad categories these reports employ does not typically require controversial coding decisions.

The breadth of these categories may, however, be somewhat unsatisfactory to a researcher interested in exploring either a narrower subset of cases (e.g., all taxation or bankruptcy questions), or a broader group of cases that crosses categories (e.g., all constitutional questions). *Harvard Law Review* separates its six broad categories into subcategories based upon the statute, rule, constitutional provision, or legal doctrine presented.²⁵ Because the Court typically issues fewer than eighty decisions per Term, and typically does not review multiple cases presenting similar issues, this level of taxonomy often reports a single case observation in many of the subject matter subcategories.²⁶ For example, in the category of "federal criminal" cases, *Harvard Law Review* employs five subcategories, each with one case observation, to describe the 2005 Term cases,²⁷ and nine subcategories, each with one case observation, to describe the 2012 Term cases.²⁸ Separately, it identifies eight subcategories of "federal habeas corpus" cases for the 2005 Term (one with four case observations),²⁹ and seven for the 2012 Term (two with two case observations).³⁰ *SCOTUSBlog*

24. See, e.g., *2012 Term*, *supra* note 14, at 420-22.

25. For example, the October 2012 Term Report identifies six "state criminal cases" (comprising one double jeopardy, four search and seizure, and one self-incrimination case) and nine federal habeas corpus cases (comprising one case addressing each of five separate issues, rules, or laws, and two cases addressing each of two other issues, rules, or laws). *Id.* at 422.

26. For example, for the seventy-eight decisions reported for the October 2012 Term, HARVARD LAW REVIEW creates sixty-two subcategories, only thirteen of which have more than one case reported (eleven subcategories record two cases each, one subcategory records three cases, and one subcategory records four cases). *Id.* at 420-22.

27. *The Supreme Court, 2005 Term: The Statistics*, 120 HARV. L. REV. 372, 384 (2006) [hereinafter *2005 Term*] (categorizing cases as federal criminal procedure, right to counsel, search and seizure, speedy trial act, and statutory interpretation).

28. *2012 Term*, *supra* note 14, at 422 (categorizing cases as Armed Career Criminal Act, ex post facto, federal conspiracy law, federal rules of criminal procedure, Hobbs Act, plain error review, right to jury trial, search and seizure, and Sex Offender Registration and Notification Act).

29. *2005 Term*, *supra* note 27.

30. *2012 Term*, *supra* note 14, at 422.

does not subcategorize beyond the four broad categories noted; however, it does separately accord each merits decision its own case page.³¹

Any taxonomy that classifies cases into narrow categories offers users the flexibility of selecting, refining, and aggregating data suitable to their individual inquiries. Nevertheless, in even the most well-constructed taxonomy, increasing specificity simultaneously increases subjectivity at at least two levels. First, reasonable coders might create different taxonomies (in general or for different purposes). For example, one person might classify civil cases according to whether they present questions of federal or state law, while two others might apply doctrinal categories, but at different levels of specificity (e.g., commercial law, as compared to commercial transactions, consumer protection, real property, corporations, bankruptcy, etc.). Second, reasonable coders might make different coding decisions with respect to individual cases, particularly if those cases present multiple issues or the interaction of legal doctrines. For example, a case presenting an interaction between the Bankruptcy Code and state probate law might be classified as civil, probate, bankruptcy, supremacy clause, federalism, constitutional, all of the above, or perhaps something else.³²

The more subjective the coding decisions become, the greater care end users must exercise in selecting the cases or categories to be studied, precisely defining their selection criteria, and fully appreciating the coding decisions the reporters have made. Consider two more or less random illustrations of the types of errors that might otherwise arise.

First, a bankruptcy expert might consider three of the

31. See *SCOTUSBlog*, *supra* note 14.

32. See *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (presenting these tensions); *Marshall v. Marshall*, 547 U.S. 293 (2006) (presenting these tensions). See Christina L. Boyd et al., *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013) (exploring taxonomy generally in varied legal contexts and considering how lawsuits might be classified); Evans, *supra* note 13 (exploring the use of automated text classification to enhance consistency in coding the content of legal texts); Jonathan P. Kastellec, *The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees*, 7 J. EMPIRICAL LEGAL STUD. 202 (2010) (applying decision trees to categorize and illuminate legal reasoning).

Supreme Court's 2005 Term cases to be bankruptcy cases, namely: *Marshall v. Marshall*,³³ *Central Virginia Community College v. Katz*,³⁴ and *Howard Delivery Service, Inc. v. Zurich American Insurance Company*.³⁵ Each at least arguably implicates non-bankruptcy concerns as well. *Harvard Law Review*, in comparison, reports only two "bankruptcy" cases among fifty-one "civil cases from the federal courts" during the 2005 Term.³⁶ The report does not identify the cases by name, and reasonable people making an educated guess might disagree on which of these three cases is most logically classified as something other than a bankruptcy case. Consequently, a researcher using this report would need to inquire further and hope to locate a more detailed explanation of the coding decision.³⁷ Moreover, a researcher interested in engaging in statistical analysis of the Court's bankruptcy cases over some period of years might simply miss one of the three 2005 Term "bankruptcy" cases if the researcher had not: first, independently determined that there ought to be three bankruptcy cases in the 2005 Term; second, compared her own determination to the determination the compilers of the 2005 Term report made; and finally, made an affirmative choice

33. *Marshall v. Marshall*, 547 U.S. 293 (2006) (holding that the "probate exception" does not deprive the bankruptcy court of jurisdiction over debtor's tort suit against a third party).

34. *Cent. VA Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (holding that state agencies' sovereign immunity does not preclude bankruptcy trustee's preference action against the agencies).

35. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006) (holding that unpaid workers' compensation insurance premiums were not contributions to an employee benefit plan for purposes of priority under 11 U.S.C. § 507).

36. See 2005 Term, *supra* note 27, at 382.

37. In comparison, *SCOTUSBlog* presumably would classify each of these cases as "civil litigation" (rather than criminal, habeas corpus, or original jurisdiction) under its current classification scheme. See *infra* Table III, Figure 8, and accompanying text. In 2005, it did not summarize cases by "nature of the case." It did, however, provide a link to a summary report prepared by the Georgetown Supreme Court Institute. See GEO. U. L. CTR FINAL SUP. CT. INST., SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2005 OVERVIEW, http://www.SCOTUSBlog.com/movabletype/archives/GULCSupCtInstituteFinalReportOT2005_30June06.pdf (listing *Katz* and *Howard* as bankruptcy cases, and *Marshall* as a federal civil procedure case). See also Karl Blanke, *The Numbers*, SCOTUSBLOG (June 29, 2006, 4:09 PM), <http://www.SCOTUSBlog.com/2006/06/the-numbers/>.

whether to include two or three 2005 Term bankruptcy cases in her study.

Similarly, replicability challenges may arise if different reporting resources make different coding decisions. For example, *Harvard Law Review* reports nine federal habeas corpus cases in its table of federal criminal cases disposed of with full opinions during the October 2012 Term.³⁸ *SCOTUSBlog*, in comparison, reports six habeas corpus cases on the merits docket in the October 2012 Term.³⁹ Separately, *SCOTUSBlog* provides detailed case pages that might, or might not, allow a careful researcher to determine which cases it has included in the six.⁴⁰ If similar disparities existed over many years in these summary reports, a researcher amalgamating two decades worth of habeas corpus data (for example) could reach apparently different (non-replicable) conclusions depending on which source she employed and whether she undertook to reconcile apparent conflicts.

These examples illustrate why end users must review the reporter's coding decisions carefully, even with respect to apparently straightforward variables, such as the nature of the case. Other substantive coding decisions may present significantly greater nuance than subject matter taxonomy and, therefore, even greater need for care by both compilers and users. These data might include, for example, reasons the Court accepted the case, determinative legal provisions, qualitative characterization of the decision and its direction, and the like.⁴¹

38. See *2012 Term*, *supra* note 14, at 422.

39. See *Make-Up of the Merits Docket*, SCOTUSBLOG (June 27, 2013), http://SCOTUSBlog.com/wp-content/uploads/2013/06/makeup_OT12.pdf.

40. One might attempt to deduce the rationale underlying the coding taxonomy differences by comparing the issues reported on each of the seventy-odd individual *SCOTUSBlog* case pages for that Term to the seven sub-categories of issues HARVARD LAW REVIEW identifies as federal habeas corpus cases (namely, AEDPA, AEDPA deference, competency, confrontation clause, federal rules of appellate procedure, retroactivity, right to counsel).

Again in comparison, the *Supreme Court Database* identifies only three habeas corpus cases (one having two issues, and therefore being reported as two observations) under its "issue" variable for the 2012 Term. See discussion *infra* at text accompanying notes 41-42. It records two additional cases as presenting "ineffective counsel" issues. See THE SUPREME COURT DATABASE, <http://supremecourtDATABASE.org/> (last visited Dec. 16, 2015) [hereinafter *Supreme Court Database*].

41. HARVARD LAW REVIEW, for example, reports whether decisions were

The *Supreme Court Database*,⁴² which has served as an essential resource for many empirical studies, is the principal, authoritative resource for these more nuanced and comprehensive types of data.⁴³

The *Supreme Court Database* was conceived and developed by Harold Spaeth, who became a lawyer after many years as a political science professor and scholar.⁴⁴ Other leading empiricists subsequently expanded and enhanced the *Supreme Court Database*. This database codes and reports nearly 250 variables, include multiple variables concerning case identification, chronology, origin, jurisdictional basis, reasons the Court accepted the case, nature of the substantive issues, governing law, direction, outcome, voting, and the like, for each Supreme Court case decided during and since the 1946 Term.⁴⁵

The *Supreme Court Database* differs from the *Harvard Law Review* and *SCOTUSBlog* summary reports in several ways. Substantively, it records a significantly greater number of variables, many of which are more subjective than those

in favor of or against the government. See, e.g., 2012 Term, *supra* note 14, at 422.

42. See *Supreme Court Database*, *supra* note 40.

43. See *infra* note 44.

44. Harold Spaeth, PhD University of Cincinnati (political science), JD University of Michigan, serves as Research Professor of Law and Emeritus Professor of Political Science at Michigan State University. See *Harold J. Spaeth, Emeriti Faculty*, DEPT. OF POL. SCI., MICH. ST. U. (2005), <http://polisci.msu.edu/index.php/people/emeriti-faculty>.

45. See *Supreme Court Database*, *supra* note 40, at “About” section, noting that the database contains:

247 pieces of information for each case, roughly broken down into six categories: (1) identification variables (e.g., citations and docket numbers); (2) background variables (e.g., how the Court took jurisdiction, origin and source of the case, the reason the Court agreed to decide it); (3) chronological variables (e.g., the date of decision, term of Court, natural court); (4) substantive variables (e.g., legal provisions, issues, direction of decision); (5) outcome variables (e.g., disposition of the case, winning party, formal alteration of precedent, declaration of unconstitutionality); and (6) voting and opinion variables (e.g., how the individual justices voted, their opinions and interagreements).

Id.

reported by the other compilers. The database format is also dramatically different than the by-Term summary snapshots *Harvard Law Review* and *SCOTUSBlog* offer. Snapshot summaries allow users to compare or aggregate cases across Terms, but only within the categories reported. The *Supreme Court Database*, in contrast, does not summarize data by Term or otherwise. Rather, it presents its raw data in a traditional spreadsheet format. Researchers using the database are free to create their own data compilations by selecting the variables relevant to their own specific inquiries (such as particular years, issues, courts, justices, etc., or any combination thereof).

The *Supreme Court Database* provides a variety of tools that enable researchers to retrieve data within the parameters of their inquiries. In the past, researchers using the *Supreme Court Database* typically manipulated and analyzed their chosen data using a traditional statistical analysis interface (such as STATA or SAS). More recently, the *Supreme Court Database* developed an interface that is more intuitive and user-friendly for scholars who are familiar with standard search engine technology (such as Google), but are not practiced in statistical analysis. For example, without engaging in “statistical analysis,” a user can easily generate and compare lists of, say, all habeas corpus cases and criminal non-habeas corpus cases decided on the merits during selected Supreme Court Terms.

Despite their different approaches, the *Supreme Court Database*, *Harvard Law Review* and *SCOTUSBlog* share a central conviction: publishing open access,⁴⁶ authoritative data regarding Supreme Court decision making, assiduously divorced from biases and presumptions, may facilitate understanding of the Court’s actual practices by enabling researchers to apply data to diverse inquiries without devoting extensive time to data development.⁴⁷

46. Each of these resources is publicly available via the internet. The HARVARD LAW REVIEW “statistics issue” is also available in print. *See, e.g., supra* note 16.

47. *See, e.g.,* sources cited *supra* note 12; Erin Miller, *New Supreme Court Database*, SCOTUSBLOG (Nov. 12, 2009, 1:24 PM), www.scotusblog.com/2009/11/new-supreme-court-database (discussing the *Supreme Court Database*).

As the simple examples offered above illustrate, however, end users must critically examine the structure and substance of the data reported.⁴⁸ Some tension among different compilers' respective taxonomy and coding choices is almost inevitable; and no source has attempted to devise a comprehensive evaluation of the degree of accord (or discord) among them. Far more essentially, even a researcher who fully appreciates the compilers' coding decisions and reconciles apparent inconsistencies may err if she fails to appreciate the limits of the data reported. Raw data reports, regardless of their format or rigor, are simply tools. The extent to which they provide accurate insight is wholly dependent on the questions a researcher asks the data to answer.

Two fundamental principles build the bridge between raw data and useful, reliable conclusions. First, data are relevant only in the context of inquiry-based analysis. Second, data cannot yield an accurate response to an inquiry if the data do not coherently and comprehensively capture the information necessary to test that inquiry.

Failure to apply these principles in the context of Supreme Court case disposition data (i.e., affirm / reverse rates) leads to unreliable conclusions regarding the relative degree of harmony between the Court and the various circuits. The unreliability of these conclusions arises not from a failure of the data reporting services but, rather, from the ends to which the data are applied. Routinely reported case disposition data simply do not capture the information necessary to draw valid conclusions regarding harmony between the Court and the circuits. To illuminate this seeming anomaly, Part B provides a brief overview of inquiry-based empirical analysis.

B. *Raw Data in the Context of Inquiry-Based Analysis*

Empirical study is self-consciously inquiry based. Researchers make an observation, develop hypotheses, formulate research protocols, and apply relevant data to test hypothesized relationships (qualitative, quantitative, or

48. See *supra* text accompanying notes 32–40.

descriptive) among variables.⁴⁹ Given this process, gathering data would generally appear to be an exercise that follows the development of a hypothesis. Today, however, vast amounts of data exist in the public domain. With regard to Supreme Court decision making in particular, the *Supreme Court Database*, *SCOTUSBlog* and *Harvard Law Review* offer a trove of publically accessible data. They do not, however, contain all of the data necessary to address every potential inquiry one might ponder regarding the Supreme Court's review practices. The nature of each specific inquiry dictates whether a researcher may rely upon these resources, must develop new data, or both. A few recent examples are illustrative.

First, many studies of the Court's practices rely heavily on the *Supreme Court Database*.⁵⁰ Others studies begin with this database, then add data or means of applying the data, as required by their hypotheses. For example, when Professors Clayton and Pickerill sought to determine whether the "New Right" had successfully altered the Court's criminal justice jurisprudence, they (i) selected all orally argued cases with opinions from the *Supreme Court Database* "criminal procedure" field,⁵¹ (ii) analyzed case dispositions and voting patterns from those cases,⁵² (iii) developed a method of using the political parties' national platforms to identify shifting positions with respect to criminal justice policy,⁵³ and (iv) compared trends in the Justices' decisions to changes in national party platforms.⁵⁴

49. See generally LAWLESS, *supra* note 1, at 7-20; Epstein & King, *supra* note 3, at 1-2, 19-20.

50. For a typical example, see Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (drawing two data subsets from the *Supreme Court Database* to test hypotheses regarding the Court's treatment of businesses).

51. Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1411 (2006) (concluding that the Supreme Court's criminal justice jurisprudence tracks electoral politics).

52. *Id.*

53. *Id.* at 1411-12.

54. *Id.* at 1412-15. See Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002) (selecting statutory decisions from the *Supreme Court Database*, applying established measures of judicial policy preferences, and gauging constraints under different models of the legislative process, to determine whether Justices engage in dynamic agenda setting in the context of the

Still other studies exploring the relationship between the Court and the circuit courts of appeal must develop their data with little, if any, support from publically reported data regarding Supreme Court practices. For example, Professors Songer, Segal and Cameron have considered whether circuit courts act as “agents” that follow Supreme Court policy preferences rather than their own policy preferences.⁵⁵ To test the principal / agent model, they devised a fact-pattern analysis that measures circuit courts’ congruence with and responsiveness to the Court.⁵⁶ They then drew a random sample of circuit court cases over a thirty-year period in one area of law (search and seizure), coded variables, and applied the data they had developed to their hypotheses.⁵⁷

Each of these studies begins by scrupulously determining what data are necessary to test its specific inquiry regarding the Court’s review practices. Whether they are able to produce valid studies based exclusively on publicly available raw data, or whether they must develop other or additional data, depends entirely on the extent to which publically reported data capture the information necessary to test their hypotheses.

In contrast to these studies, Part III differentiates the data that are publically available regarding Supreme Court case disposition from the data that would be necessary to test hypotheses regarding the Court’s relative degree of accord with the circuits. Part III then elaborates the methods this Study applies to determine whether the former can reliably be applied to the question of Supreme Court / circuit court accord.

III. Raw Data and Inquiry: Reversal Rates, Agreement and Circuit Splits

A. *Overview of Reversal Rates and the Question of Agreement*

A simple definition of “agreement” captures the essence of the discussion surrounding Supreme Court / circuit court accord.

decision to grant certiorari).

55. Songer, *supra* note 6, at 673.

56. *Id.* at 677.

57. *Id.* at 681.

Agreement means a “harmony of opinion, action or character.”⁵⁸ Some scholars attempt to measure harmony directly, by developing models of ideological accord.⁵⁹ Others seek objective manifestations of accord by comparing judicial decisions of the Court and the circuits.⁶⁰ One seeking an objective measure of

58. *Agreement*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/agreement?show=0&t=1419625780> (last visited Dec. 16, 2015).

59. Among the most well-recognized of such measures are Martin-Quinn Scores. A summary of Martin-Quinn scores, links to scholarship developing and applying these scores, and related materials are available at *Project Description*, MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu> (last visited Dec. 16, 2015). See, e.g., Songer, *supra* note 6 (analyzing circuit court responsiveness to the Supreme Court).

See generally CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (Brookings Inst. Press 2006) (referencing efforts to correlate or understand relationships between judicial performance and ideology); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009) (categorizing circuit court judges into “clusters” that display similar decision making characteristics, based primarily on Supreme Court review and reversal); Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC’Y REV. 163 (2006) (considering whether fear of reversal dampens circuit judges’ pursuit of ideological preferences); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (analyzing appellate judge decision making and ideology in fourteen areas of law; finding that panel composition affects decision making).

On efforts to forecast or predict Supreme Court voting behavior, based on ideology and other models, see generally Josh Blackman et al., *Fantasy SCOTUS Crowdsourcing a Prediction Market for the Supreme Court*, 10 NW. J. TECH. & INTELL. PROP. 125, 126 (2012) (analyzing the accuracy of *Fantasy SCOTUS* to “test the power of the wisdom of the crowd” by predicting Supreme Court behavior; comparing results to Supreme Court Forecasting Project results); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 J. EMPIRICAL LEGAL STUD. 485 (2009) (developing a measure of Supreme Court nominees’ ideology to predict voting behavior); Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (discussing a collaborative project that considers legal and political science models of predicting Supreme Court behavior); *Play FantasySCOTUS*, THE HARLAN INST. (2012), <http://harlaninstitute.org/sliders/fantasyscotus-org/> (offering a “Supreme Court Fantasy League” that allows participants to “Play Like the 10th Justice”).

60. “Objective,” here, refers to overtly expressed, and non-controversially quantifiable variables, such as disposition and reasoning, rather than subjective matters such as, perhaps, the degree to which the courts are ideologically aligned. For studies that compare the Court and the circuits

the comparative degree to which the Supreme Court agrees with the circuit courts would, first, identify the overt action each court has taken (i.e., the issuance of a decision) and, then, consider the degree of apparent harmony (in reasoning and conclusions) between the Court's decision and the circuit court's decision. Only after this groundwork question has been answered might one seek to extrapolate more ephemeral, characterological qualities of ideological and attitudinal harmony by asking why the Court and circuit agree or disagree.

On a case-by-case basis, determining objective "agreement" in cases the Supreme Court reviews seems relatively straightforward, although not entirely without complication. If the Supreme Court reverses a decision of a circuit court of appeals, the Court presumably disagrees⁶¹ with the circuit in that particular case on that particular issue.

The larger discussion, however, concerns whether the Court consistently agrees with particular circuits more often than with others. In other words, is there is any statistically significant positive correlation between the circuit that rendered a decision and the likelihood that the Supreme Court will agree or disagree with the decision. Assuming one can accurately determine "agreement" on a case-by-case basis, testing "agreement" in this larger sense requires a means of amassing and comparing significant numbers of Supreme Court and circuit court decisions. To do so, it is reasonable to begin by examining the Court's decisions (rather than the circuits' decisions) because one will find nothing to compare unless the Court has spoken on an issue. It might also seem reasonably convenient, then, to amass a population of cases for comparison by consulting publically available data regarding the disposition of those Supreme Court cases. The following discussion elaborates why those publically reported case disposition data cannot, in fact, accurately capture the relative degree of agreement between the Court and the individual circuits with respect to cases the Court

using objective measures, *see infra* notes 68-73.

61. The Court might have agreed with the circuit court's substantive analysis, but reversed for other reasons, such as standing or jurisdiction. The Court might have disagreed with every aspect of the circuit court's reasoning, but reached the same disposition for other reasons. The circuit court might have agreed with the position the Supreme Court ultimately embraced, but been bound to follow contrary precedent prior to the Court's ruling.

has reviewed.

Each of the data reporting resources noted earlier reports case disposition data. *SCOTUSBlog* and *Harvard Law Review* publish raw disposition rates by Term, in the aggregate and for each circuit court of appeals (as well as for the specialized federal courts and state supreme courts).⁶² For cases from the circuits, these reporters derive these data by identifying the merits cases the Court has decided, determining the circuit to which the Court granted certiorari (i.e., the “*circuit of origin*”), determining whether the Court “affirmed,” “reversed”⁶³ or “vacated”⁶⁴ the circuit of origin in each case, and reporting the total number of cases affirmed, reversed and vacated, both in the aggregate and disaggregated by circuit. *SCOTUSBlog* also generates and reports simple affirm / reverse / vacate percentages (i.e., cases affirmed, reversed or vacated divided by cases decided), both in the aggregate and by circuit.⁶⁵

The *Supreme Court Database* reports unconsolidated individual case disposition data using eleven values⁶⁶ that reflect the extent to which the Court agreed with the circuit of origin in that particular case on that particular issue. Seven of these values essentially coincide with the three disposition values *SCOTUS Blog* and *Harvard Law Review* report. These are: (i) affirmed (including modified), (ii) vacated, or vacated and

62. See sources cited *supra* notes 14, 16.

63. In the HARVARD LAW REVIEW, “reversed” includes cases reversed, reversed in part and affirmed in part, and reversed in part and vacated in part. *2012 Term*, *supra* note 14, at 418 n.n. On *SCOTUSBlog*, “reversed” includes vacated. *SCOTUSBlog Statistics*, *supra* note 14.

64. In HARVARD LAW REVIEW, “vacated” includes cases vacated and vacated in part and affirmed in part. *2012 Term*, *supra* note 14, at 418 n.o.

65. See, e.g., *Make-Up of the Merits Docket*, *supra* note 39. These data are “simple” in the sense that the tools of statistical analysis, which might account for significance given the numbers of cases presented, have not been applied. Cf. *supra* note 14 and accompanying text. In addition to reporting simple affirm / reverse percentages, both in the aggregate and disaggregated by circuit, *SCOTUSBlog* may provide “takeaway” commentary comparing individual circuits’ reversal rates.

66. These values are: petition or motion granted, affirmed (includes modified), reversed, reversed and remanded, vacated and remanded, affirmed and reversed (or vacated) in part, affirmed and reversed (or vacated) in part and remanded, vacated, petition denied or appeal dismissed, certification to a lower court, no disposition). *Disposition of Case*, THE SUP. CT. DATABASE, <http://supremecourttdatabase.org/documentation.php?var=caseDisposition> (last visited Dec. 16, 2015).

remanded, and (iii) four variables that other reporters generally code as reversed (reversed, reversed and remanded, affirmed and reversed (or vacated) in part, affirmed and reversed (or vacated) in part and remanded).⁶⁷ The remaining four *Supreme Court Database* values relate primarily to cases decided other than by a full opinion on the merits. Although the *Supreme Court Database* does not summarize case disposition data by circuit or otherwise, it does code the circuit of origin for each case.⁶⁸ Consequently, a researcher could readily generate comparative lists of case disposition data by circuit of origin data for selected time periods, issues or other variables.

Scholars⁶⁹ and other commentators⁷⁰ routinely apply

67. *Id.*

68. *Origin of Case*, THE SUP. CT. DATABASE, <http://supremecourtdatabase.org/documentation.php?var=caseOrigin> (last visited Dec. 16, 2015).

69. See, e.g., SEGAL & SPAETH, *supra* note 6, at 263 (considering Supreme Court circuit of origin only reversal rates); John F. Belcastor, *The D.C. Circuit's Use of the Chevron Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745 (1992) (exploring historical contentiousness between the District of Columbia Court of Appeals and the Supreme Court); Roy W. McLeese, III, *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, 1048, 1050-51 (1984) (assessing ideological relationship between the Supreme Court and District of Columbia Circuit Court of Appeals); Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 358 (2006) [hereinafter Wermiel, *Ninth Circuit*] (examining Ninth Circuit reversal rates, considering circuit of origin only data; noting public perception that the Ninth Circuit “is a bastion of liberalism run amok”); Stephen J. Wermiel, *Supreme Court Reversals: Exploring the Seventh Circuit*, 32 S. ILL. U. L.J. 641 (2008) [hereinafter Wermiel, *Seventh Circuit*] (examining reversal rates and reputation, comparing the Seventh Circuit to the Ninth Circuit, relying on circuit of origin only reversal rates; noting that “[r]eversals are a hot topic”); see also sources cited *infra* notes 71-72.

70. Jeff Bleich, *The Reversed Court: The Supreme Court Versus the Ninth Circuit*, 57 OR. ST. B. BULL. 17, 17 (1997) (discussing Ninth Circuit review and reversal rates, relying on circuit of origin only reversal rates); David A. DeGroot, *9th Circuit Gets More Than its Fair Share of Scrutiny*, DAILY J. (June 23, 2014) (arguing based on raw reversal rates that “the 9th Circuit is out-of-sync with the high court and the other circuits”); Brian T. Fitzpatrick, *Disorder in the Court*, L.A. TIMES, July 11, 2007, at A15 (criticizing the Ninth Circuit’s performance based on circuit of origin only reversal rates in the Court’s October 2006 Term); Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE 8, 8 (2010) (comparing circuit court success rates based on circuit of origin only reversal data over ten years); Adam Liptak, *Court That Ruled on Pledge Often Runs Afoul of Justices*, N.Y. TIMES,

publicly reported Supreme Court case disposition data to compare the circuits' relative levels of agreement with the Court; ubiquitously conclude that the Court consistently reverses some circuits with much greater frequency than others;⁷¹ and

June 30, 2002 (criticizing the Ninth Circuit's performance based upon sources that rely on circuit of origin only reversal rates); Sean SeLegue, *Perception Isn't Reality: The Ninth Circuit's Relationship With The U.S. Supreme Court*, THE BAR ASS'N OF S.F., Spring 2011, at 32-34 (relying on circuit of origin only reversal rates to compare the Ninth Circuit to other circuits); Jonathan H. Adler, *Is the Sixth Circuit the New Ninth (At Least in Habeas Cases)?*, THE VOLOKH CONSPIRACY (June 1, 2010, 10:44 AM), <http://volokh.com/2010/06/01/is-the-sixth-circuit-the-new-ninth-at-least-in-habeas-cases/> (commenting on Dan Horn, *U.S. 6th Circuit Court of Appeals on 0-15 Losing Streak*, CINCINNATI (Feb. 21, 2011, 11:34 AM), http://news.cincinnati.com/article/20110219/NEWS010702/102200325?nclink_check=1 (stating that the Sixth Circuit "keeps getting it wrong")); Judson Berger, *Take a Hint? Supreme Court Rejects 5 Rulings in a Row From West Coast Bench*, FOXNEWS (Feb. 2, 2011), <http://www.foxnews.com/politics/2011/02/02/hint-supreme-court-rejects-rulings-row-west-coast-bench/> (criticizing the Ninth Circuit based upon several then-recent circuit of origin only cases; suggesting that "[t]he Supreme Court may be sending a message to one of the country's most liberal appeals courts"); Pierre Bergeron, *U.S. Supreme Court Reversal Rates Continue to Attract Attention*, SIXTH CIR. APP. BLOG (July 22, 2011), <http://www.sixthcircuitappellateblog.com/supreme-court/us-supreme-court-reversal-rates-continue-to-attract-attention/> (commenting on Williams, *infra* note 70, discussing circuit of origin only reversal rates); Mark Walsh, *A Sixth Sense: 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, A.B.A. J. (Dec. 1, 2012, 9:30 AM), http://www.abajournal.com/magazine/article/a_sixth_sense_6th_circuit_has_surpassed_the_9th_as_the_most_reversed_appeal/ (stating that the Sixth Circuit has "a particularly dismal record before the high court," based primarily on circuit of origin only reversal rates for the Terms 2005 through 2011, but also referring to the *Hangley Study*, see discussion *infra* Part IV.B); Carol J. Williams, *US Supreme Court Again Rejects Most Decisions by the US 9th Circuit Court of Appeals*, L.A. TIMES (July 18, 2011), <http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718> (relying on circuit of origin only reversal rates to criticize the Ninth Circuit's success rates during the Court's 2010 Term); see also sources cited *infra* notes 71-72.

71. The Ninth Circuit is a singularly consistent, but by no means exclusive, target of criticism fueled by raw reversal rate statistics. See sources cited *supra* notes 69-70. See, e.g., Hon. Jerome Farris, *Judges on Judging: The Ninth Circuit—Most Maligned Circuit in the Country Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1471 (1997) (noting perception that "Ninth Circuit is reversed so often because it is the most liberal circuit in the country and because the Supreme Court is currently conservative"); Marybeth Herald, *Reversed, Vacated and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998) (considering possible reasons for the Ninth Circuit's apparently high circuit of origin only reversal rate); McLeese, *supra* note 69,

frequently infer that ideological incompatibility between the Court and particular circuits drives reversal patterns.⁷²

at 1048, 1050-51 (noting “inordinate rate at which the Supreme Court grants D.C. Circuit certiorari petitions and reverses or vacates D.C. Circuit opinions” and arguing that “the Supreme Court and the D.C. Circuit are ideologically incompatible”); Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Through October Term 2010*, 87 NOTRE DAME L. REV. 2165 (2012) (relying on circuit of origin only reversal rates; arguing that the Ninth Circuit’s record “has been strikingly poor”); Horn, *supra* note 70 (citing circuit of origin only reversal rates to conclude that the Sixth Circuit “keeps getting it wrong”); Steven Seidenberg, *A Comeback for the Federal Circuit: This Term, SCOTUS Is No Longer the ‘Court of Correction,’* A.B.A. J. (Sept. 1, 2011, 8:00 AM), http://www.abajournal.com/magazine/article/A_comeback_for_the_federal_circuit_this_term_supreme_court_is_no_longer (relying on circuit of origin only reversal rates to compare the Federal Circuit’s record before the Supreme Court during the October 2010 Term to prior Terms); Robyn Hagan Cain, *By the Numbers: Supreme Court Reversal and the Ninth Circuit*, THE FINDLAW 9TH CIR. NEWS & INFO. BLOG (Sept. 30, 2011, 3:30 PM), http://blogs.findlaw.com/ninth_circuit/2011/09/by-the-numbers-supreme-court-reversal-and-the-ninth-circuit.html (relying on circuit of origin only review and reversal rates to criticize the Ninth Circuit); Allen Pusey, *Taking the Fifth to Task*, DALLAS MORNING NEWS, Blogpost in PRISONTALK: CAPITAL PUNISHMENT IN THE NEWS (July 24, 2004, 10:58 AM), <http://prisonwalk.com/forums/archive/index.php/t-70279.html> (discussing the Fifth Circuit’s circuit of origin only reversal record during the Court’s 2003 Term).

72. See sources cited *supra* notes 69-71. Some commentators have attempted to articulate other explanations for seeming patterns of high reversal rates for particular circuits, or criticized the practice of comparing circuits based upon reversal rates. See, e.g., Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1 (2003) (considering circuit of origin reversal rates, numbers of cases reviewed, and anecdotal case examples); Farris, *supra* note 71 (attempting to rebut criticism of the Ninth Circuit’s origin only reversal rates); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553 (2010) (examining Supreme Court review and reversal rates for the Federal Circuit and District of Columbia Circuit); Herald, *supra* note 71 (examining Ninth Circuit decisions from a single Supreme Court term, including “indirect affirmances and reversals” in the case of circuit splits, but not considering circuit splits for other circuits); D.H. Kaye, *Reflections on a Mathematical Argument for Splitting the Ninth Circuit*, 48 JURIMETRICS J. 329 (2008) (considering the “mathematical” argument that the Ninth Circuit’s size underlies its high reversal rates); McLeese, *supra* note 69 (examining discord between the Supreme Court and the District of Columbia Circuit based on rates of review and reversal, relying on circuit of origin only reversal rates); Richard A. Posner, *Is The Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 713, 715 (2000) (arguing that the Ninth Circuit’s high reversal rate is not due exclusively to its size); Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 354

Commentators also combine raw data showing apparent patterns of differences in reversal rates with raw data showing apparent patterns of differences in the numbers of petitions granted to each circuit to draw further inferences regarding the relative degree of harmony between the Court and the circuits. Common inferences include that the Court grants disproportionately greater numbers of certiorari petitions to specific circuits,⁷³ grants certiorari primarily to reverse lower court decisions,⁷⁴ and grants certiorari at least in part to discipline particularly errant circuits.⁷⁵

(2006) (relying on circuit of origin only reversal data to examine Ninth Circuit reversal rates; considering ideology and circuit size); Eric Hansford, Note, *Measuring the Effects of Specialization With Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011) (examining circuit splits during four Supreme Court terms to determine whether patterns exist with respect to circuit court success rates and regional judicial specialization); Cullen Seltzer, *In Defense of the 9th Circuit: Why the Federal Appeals Court from the Left Coast Doesn't Deserve its Bad Rap*, SLATE (July 16, 2007, 4:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/07/in_defense_of_the_9th_circuit.html.

73. See, e.g., Bleich, *supra* note 70, at 17 (“For the fourth term in a row, the Ninth Circuit will have a disproportionate number of its decisions subject to discretionary review by the Supreme Court compared to other federal circuits.”); DeGroot, *supra* note 70 (arguing that the Ninth Circuit’s share of the Court’s docket is high compared to the Ninth Circuit’s share of the United States population); McLeese, *supra* note 69, at 1048 (noting apparently high rate of Supreme Court review of the D.C. Circuit); Fitzpatrick, *supra* note 70, at A15 (arguing that “[t]he justices spent much of their time reversing the U.S. 9th Circuit Court of Appeals” during the Court’s October 2006 Term); Williams, *supra* note 70 (stating that Ninth Circuit cases “dominated the high Court’s docket, as usual” during the Court’s October 2010 Term).

74. See, e.g., Hofer, *supra* note 70, at 8 (noting perception that “the Supreme Court only takes cases that it intends to reverse”); Kaye, *supra* note 72, at 331 (“Inasmuch as the Court tends to grant review to cases that it finds problematic, it is likely to reverse regardless of the circuit in which the case originated.”); Daniel Solove, *Some Thoughts on the Supreme Court’s Reversal Rate*, CONCURRING OPINIONS (July 25, 2007), http://concurringopinions.com/archives/2007/07/some_thoughts_o.html (concluding from SCOTUSBlog circuit of origin only reversal rates for the 2004 through 2006 Terms that “the Supreme Court primarily takes cases it wants to reverse, with only a few exceptions”).

75. See, e.g., Hofer, *supra* note 70, at 8 (noting perception that the Ninth Circuit is the “rogue circuit”); Posner, *supra* note 72, at 713, 715 (arguing that summary reversal “can fairly be described as a rebuke to the lower court”; attributing the District of Columbia Circuit’s high rate of non-summary reversals to its “dense menu of cases of national significance” and arguing that “the Ninth Circuit has no similar excuse for its high reversal rate”); Wermiel, *Ninth Circuit*, *supra* note 69, at 355 (noting that: “In its most persistent form,

The validity of all of these inferences, beginning with the basic presumption that a pattern of agreement between the Court and the circuits exists, hinges on whether simple Supreme Court case disposition data (i.e., affirm / reverse rates) reliably capture overtly expressed “agreement” between the Court and the circuits with respect to cases the Court has reviewed. Several fundamental hurdles, however, make Supreme Court case disposition data an unreliable measure of agreement between the Court and the circuits. Among the most significant hurdles are that: (i) the Court reviews only a small number of the total decisions from each circuit (and those chosen for review depend upon both litigant and Court selection discretion);⁷⁶ (ii) for every circuit of origin to which the Court grants certiorari in any particular case, there may be several other “*sleeper circuits*”⁷⁷ that overtly expressed their opinions on the issue by contributing to a circuit split (or by issuing a decision in accord with the circuit of origin);⁷⁸ (iii) the circuits might send significantly different types of issues to the Court for review;⁷⁹ (iv) the circuits’ marked differences in size and workload might affect the significance of presumed differences among the circuits;⁸⁰ (v) changes in the Court’s composition over time might affect Supreme Court / circuit court agreement; (vi) “affirm” might mean that only five justices, rather than nine, agree with the circuit of origin;⁸¹ and (vii) the Court (or particular Justices) might agree with a lower court’s outcome while completely

this perception holds that the Ninth Circuit is so out of control that the Supreme Court of the United States must devote considerable time and energy to reining in the judges and correcting their decisions”).

76. See sources cited *supra* note 6.

77. “Sleeper circuits” refers to the circuits that contributed to a circuit split, but were not chosen for certiorari. The term calls to mind a bowling ball toppling the visible pins, only to reveal the “sleepers” standing perfectly, mockingly, upright behind them. The *Hangley Study*, discussed *infra* Part IV.B, refers to these as “shadow” circuits.

78. See discussion *infra* Part III.B.

79. See discussion *infra* at notes 83-92, and accompanying text.

80. Although the implications of circuit size are beyond the scope of this Article, the application of statistical analysis tools can reveal the significance, if any, of raw differences in numbers and percentages. Refer to the application of *p* scores throughout this Article.

81. The implications of voting splits on the question of accord between the “Court” (as a presumed monolith) and the circuits are beyond the scope of this Article because they do not affect the hypotheses.

disagreeing with its reasoning.⁸²

This Article focuses on how sleeper circuits affect Supreme Court / circuit court accord assumptions because the sleeper circuit problem underlies, pervades and complicates each of the other hurdles that stand in the way of drawing inferences from simple case disposition data. For example, the data this Article presents concerning the problems created by circuit splits incidentally reveal important evidence regarding how issue disparity may affect Supreme Court / circuit court accord. That evidence and its implications are noted throughout as well.

Part III.B elaborates the foundational challenges that circuit splits and sleeper circuits pose in measuring the level of accord between the Court and the circuits.

B. Circuit Splits, Sleeper Circuits, and the Question of Agreement

The Supreme Court typically reviews federal circuit court of appeals' decisions on certiorari to resolve either a split among the lower federal courts,⁸³ an important question of federal law, or a constitutional or quasi-constitutional question.⁸⁴ When the circuits have split, some combination of serendipity (such as the order in which the circuits ruled before a split arose),⁸⁵

82. See, e.g., *infra* note 122 and accompanying text.

83. Although the majority of such splits are among the courts of appeal, the Court does review cases in which the lower federal (district or bankruptcy) courts have split. See, e.g., *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557 (1990) (resolving split among lower federal courts regarding the Bankruptcy Code's characterization of state law restitution obligations).

84. See 28 U.S.C. §§ 1251, 1254(1), 1331, 1334 (2006 & Supp. 2014); SUP. CT. R. 10 (identifying considerations in the granting of certiorari). Jurisdiction over bankruptcy matters is referred from the federal district courts to the federal bankruptcy courts under 28 U.S.C. § 157 (2006 & Supp. 2014). Bankruptcy matters typically begin in the federal bankruptcy courts, proceed by appeal to the federal district courts (or bankruptcy appellate panels, where constituted), and by appeal again to the federal courts of appeal.

85. For example, in *NLRB v. Bildisco & Bildisco*, the Supreme Court narrowly affirmed the Third Circuit's ruling, and thereby abrogated a prior Second Circuit ruling, on an important interaction between federal labor law and federal bankruptcy law. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984). The Court previously had denied certiorari to the Second Circuit on the issue, despite the importance of the question. See *Bhd. of Ry. Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423

circumstance (such as factual nuance),⁸⁶ the parties' decision whether to seek certiorari, and the Court's own selection discretion will determine the circuit of origin. Simple case disposition data (i.e., affirm / reverse rates) reflect, at best, the extent to which the Court agreed or disagreed with the circuit of origin on the issue presented. The Court's ruling, however, directly reflects the extent to which the Court agrees with both the circuit of origin and every sleeper circuit that has already ruled on the issue.

Consider the Supreme Court's recent bankruptcy law decision in *Ransom v. FIA Card Services*.⁸⁷ The Court granted certiorari to the Ninth Circuit⁸⁸ to resolve a circuit split over the interpretation of a Bankruptcy Code⁸⁹ provision governing how to calculate the minimum payments an individual debtor must make to creditors under a chapter 13 plan.⁹⁰ The Ninth Circuit had held that the debtor could deduct a car ownership allowance from his disposable income for purposes of this calculation only

U.S. 1017 (1975). Instead, the Court waited to grant certiorari until after the Third Circuit had ruled on the same issue and created a clear circuit split. See *NLRB v. Bildisco & Bildisco*, 459 U.S. 1145 (1983), *granting cert. to NLRB v. Bildisco & Bildisco*, 682 F.2d 72 (3d Cir. 1982); see also *Wermiel, Ninth Circuit*, *supra* note 69, at 361 ("The Supreme Court could just as easily have used the rulings of other circuits to reverse at another time, and it may be little more than a coincidence that a Ninth Circuit case was chosen.").

86. For example, in *NCP Mktg. Grp., Inc. v. BG Star Prods.*, the Court denied certiorari to the Ninth Circuit in a case that involved the standards under which chapter 11 debtors-in-possession may assume executory contracts. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145 (2009). In an unusual action, Justice Kennedy issued a statement with respect to the denial of certiorari, which Justice Breyer joined. *Id.* The two justices noted that "[t]he division in the courts over the meaning [of the provision] is an important one to resolve" but "[t]his petition for certiorari . . . is not the most suitable case for our resolution of the conflict" because the Court might be required to resolve antecedent questions of state law and trademark protection. *Id.* Consequently, Justices Kennedy and Breyer "reluctantly agree with the Court's decision to deny certiorari" but note that "[i]n a different case the Court should consider granting certiorari on this significant question." *Id.*

87. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011).

88. *In re Ransom*, 577 F.3d 1026, 1027 (9th Cir. 2009), *cert granted*, 562 U.S. 61, 68 (2011) ("We granted a writ of certiorari to resolve a split of authority over whether a debtor who does not make loan or lease payments on his car may claim the deduction for vehicle-ownership costs.").

89. 11 U.S.C. §§ 101-1532 (2006 & Supp. 2014) [hereinafter *Bankruptcy Code*].

90. See 11 U.S.C. § 707(a)(2)(A)(i-ii) (2006 & Supp. 2014).

if the debtor was actually making loan or lease payments.⁹¹ Three other circuits (the Fifth, Seventh and Eighth Circuits) disagreed.⁹²

The Court affirmed the Ninth Circuit in an eight-to-one decision.⁹³ The Ninth Circuit was correct (at least in the eyes of eight justices).⁹⁴ The three sleeper circuits, which the Court implicitly abrogated,⁹⁵ were incorrect (from that same perspective). This follows because *Ransom* presented a true split, in which the circuits disagreed over how to apply a single legal rule to indistinguishable facts. In such a case, the Court's ruling reveals its agreement or disagreement with the sleeper circuits just as surely as with the circuit of origin. Simple Supreme Court case disposition data, however, reveals only that the Court agreed with the Ninth Circuit in this case, not that the Court disagreed with the Fifth, Seventh and Eighth Circuits.

The sleeper circuit problem arises whenever more than one circuit has ruled on an issue. Although this most commonly involves a circuit split, sleeper circuits can exist even in the absence of a circuit split if more than one circuit has ruled on the issue before the Court grants certiorari (in such a case, the Court may have granted certiorari to review a constitutional or other important question rather than to resolve a circuit split).

A simple analogy demonstrates the inaccuracy of

91. *In re Ransom*, 577 F.3d 1026 (9th Cir. 2009).

92. See *eCast Settlement Corp. v. Washburn* (*In re Washburn*), 579 F.3d 934 (8th Cir. 2009) (permitting the allowance without regard to whether the debtor was making payments); *Tate v. Bolen*, 571 F.3d 423 (5th Cir. 2009) (permitting the allowance without regard to whether the debtor was making payments); *Ross-Tousey v. Neary* (*In re Ross-Tousey*), 549 F.3d 1148 (7th Cir. 2008) (permitting the allowance without regard to whether the debtor was making payments).

93. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011). Justice Scalia was the lone dissenter. *Id.* at 80 (Scalia, J., dissenting).

94. Split decisions highlight the crudeness of measuring "agreement" between the Court and a circuit court without considering the votes of individual Justices. As noted, the implications of non-unanimous decisions are beyond the scope of this Article because voting splits do not directly affect this Article's hypotheses. See *supra* note 81.

95. When the underlying facts and holdings clearly allow, the reporting services may expressly note that the Court's decision abrogates a sleeper circuit court of appeals decision. See, e.g., *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004).

considering only the circuit of origin when measuring Supreme Court/circuit court agreement. Assume that I purchase nine items of school clothing for my daughter. I have interpreted the dress code (the law) to permit each of these items. Moreover, rather than merely expressing my interpretation over tea at the local coffee shop, I have overtly acted upon and bound myself to this opinion by purchasing these items (as a circuit court overtly expresses its interpretation of the law by issuing a decision in a case). The school (the Supreme Court) can directly review my decisions for compliance with the dress code if my daughter chooses to wear any of these items to school.

Assume that, on the first day of school, my daughter actually wears three of the nine items to school—in effect, she has elected to seek direct review of my interpretive decisions. The school directly reviews my decisions, and decides that two items are in compliance with the dress code and one is not. My record before the school (the Supreme Court) is now 67% in accord on direct review.

Now, suppose that my other six overtly expressed purchase decisions are a sleeveless t-shirt, a pair of boots, patterned leggings, skinny jeans, short shorts, and wildly colored socks. Some other parents (other circuits) agree with me on some or all of these items (issues) and buy these items for their daughters. Others do not buy these items either because they interpret the dress code differently and affirmatively rule against buying these items (a “circuit split”), or because they have not considered how the dress code might apply to these items.⁹⁶ Because my daughter has not yet worn any of these items to school, the school has not directly ruled on my decisions with respect to these items. Suppose, however, that other girls choose to attend school wearing sleeveless t-shirts, patterned leggings and short shorts (thereby exercising their own selection

96. Parents of middle-school aged daughters will recognize this hypothetical as far from imaginary.

This may be a less than pristine analogy because the school arguably would be able to review only the decisions that parents made in favor of an item being permitted by the dress code, i.e., items actually worn to school. We may eliminate the imperfection by imagining a process under which a parent who determined that a particular item does not comply with the dress code may seek a ruling from the school even if no student has yet worn that item to school.

discretion and seeking direct review of their parents' [circuits'] interpretive decisions). If the school rules that each of these items violates the dress code, the school has overtly (although indirectly) abrogated my interpretive decisions regarding sleeveless t-shirts, patterned leggings, and short shorts. Is my record of objectively measurable accord with the school still 67% (i.e., two out of three on direct review as "circuit of origin") or is it 33% (i.e., two out of six, comprising two out of three on direct review plus zero out of three on indirect review as a "sleeper circuit")?

In this illustration, there is no objective way to measure whether the school and I agree on how the dress code applies to skinny jeans, boots or wildly colored socks because, although I have expressed my interpretation, the school has not. With respect to the other six items, on which both the school and I have overtly expressed our interpretation, however, one can readily measure accord by considering both the items my daughter tested and the items other girls tested. Only the serendipity of the girls' selections determined which parents' identical interpretations of the dress code were subject to direct rather than indirect review.

Simple Supreme Court case disposition data (affirm / reverse rates) do not reflect whether the Court agrees or disagrees with the sleeper circuits.⁹⁷ Moreover, little weight can be attributed to the Court's "choice" of circuit of origin because both litigant selection and the order in which the circuits have ruled profoundly limit the Court's control over the circuit of origin when resolving a circuit split.⁹⁸ If the Court functioned as a roving investigator, seeking out circuit splits, choosing which circuit's decision to review, and consistently choosing the circuit that had erred (in the Court's view), one might attribute an error-correcting function to the Court's grant of certiorari and consequent designation of the circuit of origin. Instead,

97. *Supreme Court Database*, *supra* note 40 (recording whether the Court expressly accepted a case to resolve a circuit split, and identifying the circuit of origin, but not reporting any data regarding the circuits that contributed to the split).

98. *See supra* note 77 and accompanying text. Even when the circuits have split, the Court may decline to grant certiorari if the circumstances in which the proffered case presents the issue are not felicitous. *See supra* note 78.

although the Court has some control over whether and when it reviews a circuit split, it can only choose from among the cases presented to it. If *Circuit P* and *Circuit Q* split on an important question of federal law, but only the litigants in *Circuit P* choose to seek certiorari, *Circuit Q* has no chance of becoming the circuit of origin or of being counted as “affirmed” or “reversed.” Similarly, even if a litigant petitions for review, the Court may decline to grant certiorari until a circuit split arises. Thus, if *Circuit R* decides an issue in 2005 and the Court denies review, *Circuit S* decides the same issue in conflict with *Circuit R* in 2006 but the litigants do not seek Court review, and *Circuit T* decides the same issue in 2010, the circuit of origin when the Court finally reviews the issue may serendipitously be *Circuit T*. Litigant discretion also operates at the lower court levels. For example, if lower courts in *Circuit U* are split on an issue but litigants in those cases do not seek circuit court review, *Circuit U* has no chance to decide the issue or to become a circuit of origin in Supreme Court review.

Consequently, in order to use simple affirm / reverse rates to test hypotheses concerning the relative degree of overtly expressed accord between the Court and the circuits, a researcher must assume (or, prove) that affirm / reverse rates are an accurate stand-in (analogous to a random sample) for how frequently the Supreme Court overtly agrees with the circuit courts. In other words, one must demonstrate that there is no statistically significant difference between the rate at which each circuit is affirmed or reversed when its decisions come before the Supreme Court directly as the circuit of origin (i.e., the affirm / reverse rate) and the rate at which each circuit is approved or abrogated when its decisions come before the Supreme Court overall, directly as a circuit of origin plus indirectly as sleeper circuit, combined (i.e., the approve / abrogate rate).⁹⁹ To do this, one must (i) marshal circuit of origin affirm / reverse data and circuit of origin plus sleeper circuit approve / abrogate data, (ii) compare affirm / reverse data to approve / abrogate data, and (iii) interpret the implications of

99. In the language of statistical analysis, the circuit of origin cases would need to constitute a random sample of the entire population of cases in which the circuit ruled on any issue that the Court ultimately addressed by certiorari either to that circuit or another circuit.

any differences, including by determining whether they are statistically significant. Only if affirm / reverse rates mirror approve / abrogate rates (across time, issues, and perhaps other variables) can one use affirm / reverse rates to test the underlying hypothesis, i.e., whether there is a positive correlation between the circuit that rendered a decision and the likelihood that the Supreme Court will agree or disagree with the decision.¹⁰⁰

Commentators, however, typically draw inferences about Supreme Court / circuit court accord (or, more typically, discord) solely from Supreme Court case disposition data (generally, simple reversal rates), without acknowledging the challenges presented by the sleeper circuits.¹⁰¹ Several commentators have attempted to explain flawed or superficial analyses of reversal rate patterns by identifying factors that might explain these apparent patterns, such as circuit size or nature of the issues presented.¹⁰² These critiques are frequently inadequate, however, because they generally fail to account for the sleeper circuit problem, typically attempt to explain away apparent patterns rather than to demonstrate that apparent patterns might evaporate if sleeper circuits were considered, and tend to rely upon anecdotal evidence with scant supporting data, at best.¹⁰³

100. Null Hypothesis H_0 : the circuit that rendered a decision has no effect on whether the Supreme Court will agree or disagree with the decision. Alternative Hypothesis H_a : the circuit that rendered a decision does affect whether the Supreme Court will agree or disagree with the decision.

101. See sources cited *supra* notes 63-67.

102. See sources cited *supra* notes 69, 98.

103. See, e.g., Chemerinsky, *supra* note 72 (considering circuit of origin reversal rates, numbers of cases reviewed, and anecdotal case examples); Farris, *supra* note 71 (acknowledging the Ninth Circuit's high reversal rate based on circuit of origin only data, but arguing that the circuit's reversal rate is low as a function of the number of cases the Ninth Circuit decides and is not surprising given the importance of the issues the circuit decides); Seidenberg, *supra* note 71 (relying on circuit of origin only reversal rates to compare the Federal Circuit's record before the Supreme Court during the October 2010 Term to prior Terms); SeLegue, *supra* note 70, at 32-34 (relying on circuit of origin only reversal rates to compare the Ninth Circuit to other circuits); Wermiel, *Ninth Circuit*, *supra* note 69, at 358 (acknowledging that "anecdotal evidence is all that this Essay has to offer," and arguing that "quantitative questions are only a starting point and must be combined with qualitative analysis to shed any real light on" the Ninth Circuit's "liberals run amok" reputation).

Recently, a few commentators have attempted to articulate problems inherent in drawing inferences from Supreme Court disposition rates without considering the implications of circuit splits and sleeper circuits. This recognition is an extremely important first step. In general, however, even these discussions fail to mount an empirical response to the problem raised by circuit splits because they tend to rely upon anecdote and theoretical argument rather than data.¹⁰⁴ One recent study, explored and applied *infra* in Parts IV and V, does bring data to the question; however, it reports variations between affirm / reverse data and approve / abrogate data only in raw percentages without the tools necessary to determine the significance of any differences it reveals.

This Article presents the first Study that directly compares affirm / reverse rates and approve / abrogate rates and demonstrates the statistical significance of differences between these data. It does so using two separate datasets that directly test the basic inquiry: i.e., whether there is any significant difference between the circuit courts' affirm / reverse rates (as circuit of origin) and approve / abrogate rates (as circuit of origin plus sleeper circuit).¹⁰⁵ Part IV describes the datasets and the methods the Study applies to this inquiry.

104. See Hansford, *supra* note 72 (considering circuit splits in the context of specialized judicial decision making); Herald, *supra* note 71, at 414-17 (including "indirect affirmances and reversals" arising from circuit splits to bolster the Ninth Circuit's apparent approval rates for the Court's 1996 Term); Stephen L. Wasby, *How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 SETON HALL CIR. REV. 119 (2005) (considering circuit splits involving the Ninth Circuit); Wermiel, *Ninth Circuit*, *supra* note 69 (acknowledging the unfairness of counting only the circuit of origin but nevertheless considering only circuit of origin reversal rates); John Summers et al., *Supreme Court Project*, HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER, http://www.hangley.com/Supreme_Court_Project/ (last visited Dec. 17, 2015) [hereinafter *Hangley Study*] (including circuit split data for seven years of Roberts Court decisions); see also Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173 (2000) (considering circuits of origin and sleeper circuits in a different context).

105. Null Hypothesis H₀: there is no significant difference between any circuit court's *reversal rate* (as circuit of origin) and its *abrogation rate* (as circuit of origin plus sleeper circuit). Alternative Hypothesis H_a: there is a significant difference between at least some circuit courts' *reversal rates* (as circuit of origin) and *abrogation rates* (as circuit of origin plus sleeper circuit).

IV. The Data and The Study

A. *Parameters, Data, Methods and Objectives*

This Article does not purport to draw conclusions regarding, nor to explain the bases for any differences in, the “true” level of agreement between the Court and the respective courts of appeal.¹⁰⁶ Definitive answers to that question require deeper analysis of the factors identified in Part III. Rather, this Article begins the exploration by analyzing the most fundamental aspect of this relationship that is absent from much popular discussion, i.e.: (i) whether taking sleeper circuits into account reveals differences between reversal rates and abrogation rates; (ii) if so, whether those differences are significant; and (iii) if so, how those differences affect the validity of assessing accord between the circuits and the Supreme Court based solely upon Supreme Court case disposition data. In the course of this analysis, this Article also highlights important questions that the data incidentally reveal regarding how issue disparity may affect presumed rates of accord. Evidence concerning the potential implications of issue disparity arises specifically in the context of comparing overall data to single-subject habeas corpus data and single-subject bankruptcy data.

This Article examines these questions using two distinct datasets. The first compares affirm / reverse rates and approve / abrogate rates for all issues over a seven-year period of the Roberts Court (as described in Part IV.B). The second compares affirm / reverse and approve / abrogate rates during the entirety of the Court’s jurisprudence in one subject area, namely thirty-two years of Bankruptcy Code decisions (as described in Part IV.C). Applying two distinctive datasets counter-balances the benefits and limits of shorter-term overall data and longer-term single-subject data, and introduces the implications of issue disparity. The Study examines each dataset independently, and

106. See sources cited *supra* notes 69-74 and accompanying text (discerning accord between the Court and the circuits would require, at a minimum, accounting for the effects of critical variables such as circuit size, issue disparity, individual Justices’ votes, and changes in composition of the Court, as well as circuit splits). The question of issue disparity is explored *infra* at text accompanying Figures 5, 6, 8, 13 and 14.

where appropriate, trims data to create comparable parallels. Where useful, the Study highlights the potential impact of issue disparity by comparing single-subject bankruptcy data to single-subject habeas corpus data drawn from these datasets.

B. *Dataset I: All Issues, Roberts Court, Seven Terms*

1. Scope of the Data

A recent study reports summary reversal rates and abrogation rates for the Roberts Court's 2005 through 2011 Terms ("*Hangley Study*").¹⁰⁷ The *Hangley Study's* most important contribution lies in the fact that it endeavors to include the sleeper circuit (therein referred to as "shadow circuit") decisions underlying each of the Court's decisions and to compare circuit-by-circuit success rates based upon abrogation data (therein referred to as "full reversal rates") as well as reversal data.

2. Methods, Coding and Selection Determinations

The *Hangley Study* identifies sleeper circuits at a primary level of depth by counting a sleeper circuit decision only if the Court's majority opinion states that it is resolving a circuit split.¹⁰⁸

The *Hangley Study* reports its comparisons of reversal rates and abrogation rates using only raw totals and percentages, without statistical analysis that might determine whether any perceived differences are significant or the result of random chance. To analyze these data, the Study this Article reports, translates the *Hangley Study* data into a format that makes determinations of probability and significance feasible. It does not independently reevaluate the validity of the *Hangley Study*

107. *Hangley Study*, *supra* note 104.

108. *Id.*; accord Hansford, *supra* note 72, at 1161-62 (limiting inquiry to cases in which the Court expressly states that it is resolving a circuit split); cf. *infra* note 114 and accompanying text (describing the method used to identify sleeper circuits in the *Bankruptcy Code Supreme Court Database*, *infra* note 116).

data.¹⁰⁹ For example, if the *Hangley Study* raw data identifies a category comprising twenty cases, of which nine were reversed and eleven were affirmed, this Study establishes a data file (STATA or Excel) showing twenty separate observations and assigning a value of “affirm” to eleven and “reverse” to nine. This enables statistical analysis of the data to determine whether any apparent differences among datasets are significant or the result of random chance. This Article refers to these translated data files as the *Roberts Court Dataset*.¹¹⁰

3. The Habeas Corpus Data

Where useful to highlight potential complications arising from the disparity of issues the Court has reviewed from individual circuit courts, this Article considers habeas corpus data drawn from the *Hangley Study*. The *Hangley Study* derives habeas corpus data on the same basis as overall data, and the Study this Article reports translates the *Hangley Study* habeas corpus data into the *Roberts Court Dataset* format on the same basis as other *Hangley Study* data (Part IV.B.1-2).

C. Dataset II: Single Subject, Bankruptcy Code, Thirty-Two Terms

1. Scope of the Data

Congress enacted the modern Bankruptcy Code¹¹¹ in 1978.¹¹² The first cases testing the law came before the Court in

109. Specifically, this Article does not reevaluate whether the *Hangley Study* accurately and fully captures every sleeper (or shadow) circuit, or accurately codes case disposition values (affirm, reverse, etc).

110. The *Roberts Court Dataset* is available upon request from the author. Unless otherwise noted, ratios, deviations and measures of statistical significance and correlation reported throughout this Study have been calculated to at least the sixth decimal place before being rounded.

111. *Bankruptcy Code*, *supra* note 89.

112. The Bankruptcy Code was enacted in 1978 and became effective on October 1, 1979. See Bankruptcy Reform Act of 1978, H.R. 8200, 95th Cong. (2nd Sess. 1978). It has been amended from time to time, most significantly by the Bankruptcy Amendments and Federal Judgeship Act of 1984, H.R. 5174, 98th Cong. (1984); Bankruptcy Judges, United States Trustees, and

the 1981 Term.¹¹³ In the ensuing thirty-two Terms, the Supreme Court has considered seventy-four Bankruptcy Code cases. Underlying these cases are 248 circuit of origin and sleeper circuit decisions.¹¹⁴ The *Bankruptcy Code Supreme Court Database*¹¹⁵ compiles data regarding each bankruptcy decision the Supreme Court has rendered since the enactment of the Bankruptcy Code, and each underlying court of appeals decision, including both circuit of origin and sleeper circuit decisions.¹¹⁶

Family Farmer Bankruptcy Act of 1986, H.R. 5316, 99th Cong. (1986); Bankruptcy Reform Act of 1994, H.R. 5116, 103rd Cong. (2nd Sess. 1994); and Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. (2005). The Bankruptcy Code superseded the former Bankruptcy Act. See Bankruptcy Act of 1898, 55th Cong. (2nd Sess. 1898), *as amended by* Chandler Act of 1938 H.R. 8046, 75th Cong. (1st Sess. 1937) (repealed 1979) [hereinafter *Bankruptcy Act*].

113. See *Cent. Tr. Co. v. Official Creditors' Comm.*, 454 U.S. 354 (1982); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

After the Bankruptcy Code was enacted, the Court issued opinions in three cases decided under the former Bankruptcy Act. See *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457 (1982); *Butner v. United States*, 440 U.S. 48 (1979); *United States v. Sotelo*, 436 U.S. 268 (1978). This Article, and the *Bankruptcy Code Supreme Court Database*, *infra* note 116, exclude the Bankruptcy Act cases.

114. See *infra* note 116.

Many of the tables and calculations throughout this Article refer to seventy-six Supreme Court bankruptcy case observations, rather than seventy-three. This discrepancy arises from two sources. First, because most aspects of this Article compare the circuits' relative performance, these analyses include only the seventy-three cases that came to the Supreme Court from the circuits. The seventy-fourth case was certified to the Supreme Court directly from a district court because it raised important constitutional questions. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (affirming the federal district court holding that grant of bankruptcy jurisdiction to the bankruptcy courts was unconstitutional). Second, of the seventy-three remaining cases, three presented two distinct issues on which either the Supreme Court issued distinctly different holdings, or different sleeper circuits had rendered underlying decisions. Each of these cases is treated as two observations, rather than one, which increases the number of distinct observations from seventy-three to seventy-six. See *infra* note 121 (identifying the three cases that merit this treatment). This treatment increases the number of underlying circuit court decisions from 248 to 251.

115. All datasets and database access are available upon request from the author. See *supra* note 110.

116. Bankruptcy case observations specific to this Article are reported in discrete text files within the *Bankruptcy Code Supreme Court Database*, as follows: Appendix I: *Supreme Court Bankruptcy Code Decisions, By Term, 1981-2012*, lists each Supreme Court bankruptcy case, by Term; Appendix II: *Circuit Court of Appeals Bankruptcy Code Decisions, by Supreme Court*

For simplicity, this Article refers to the aspects of the *Bankruptcy Code Supreme Court Database* relevant to the question of Supreme Court / circuit court accord as the *Bankruptcy Dataset*.

Bankruptcy law provides a useful single-topic comparative study for several reasons. First, examining a single area of law reduces the potential for aggregating areas of law that might foster greater ideological discord together with those that may not.¹¹⁷ Although there are varied issues even within a single area of law, focusing on one area of law allows one to compare apples to apples, at least, if not necessarily Honeycrisp™ to Honeycrisp™.¹¹⁸ Second, bankruptcy law presents a case study large enough to be meaningful, yet discreet enough to be

Decisions, Alphabetical, 1981-2012, lists each of the seventy-four Supreme Court bankruptcy cases decided during the 1981-2012 Terms, in alphabetical order, together with each of the 248 circuit court decisions that found their way to the Court, either directly as circuit of origin or indirectly as a sleeper circuit behind a circuit split in those seventy-four cases; Appendix III: *Circuit Court of Appeals Bankruptcy Code Decisions, by Circuit, 1981-2012*, organizes the information contained in Appendix II on a circuit-by-circuit basis.

This Article, and the *Bankruptcy Code Supreme Court Database*, omit decisions that incidentally arose from bankruptcy cases but involved no bankruptcy related issues, namely *United States v. Galetti*, 541 U.S. 114 (2004) (considering applicability of statute of limitations in tax matter regarding partners and partnership), and *Rivet v. Regions Bank*, 522 U.S. 470 (1998) (clarifying the removal issues raised in *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981)), and cases in which the Court simply vacated and remanded or dismissed as moot a Bankruptcy Code decision, namely *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997) (vacating and remanding for reconsideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997)), and *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) (denying *vacatur* and dismissing appeal as moot).

The *Bankruptcy Code Supreme Court Database* also compiles additional variables not relevant to this Study, including each Justice's individual votes, party affiliation of each Justice's appointing president, the specific issues presented, vote splits, and methods of statutory interpretation applied.

117. Even in areas of the law that are evolving or likely to cause ideological divide, the Court rarely reverses itself absent the passage of significant time, social change, change in the composition of the Court, or a combination of these factors. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

118. The reasons Honeycrisp™ varietal apples are so scrumptious are considered in John Seabrook, *Crunch: Building a Better Apple*, THE NEW YORKER (Nov. 21, 2011), <http://www.newyorker.com/magazine/2011/11/21/crunch>.

manageable. The number of bankruptcy cases from each circuit during this period is also sufficiently balanced to permit comparison. Third, because bankruptcy cases frequently, but by no means always, come to the Court due to circuit splits, bankruptcy law presents a viable opportunity to compare reversal rates to abrogation rates in a single area of law.¹¹⁹

2. Methods, Coding and Selection Determinations

Three significant data selection and coding decisions affecting the *Bankruptcy Dataset* are worth mention. Each of these decisions is driven by the nature of the inquiry, i.e., the question of accord between the Court and the circuits.

First, the *Bankruptcy Dataset* includes a circuit as a sleeper circuit if any of the following refer to the sleeper circuit's underlying decision: the Court's majority opinion, the Court's separate opinions, or the opinions in the circuit of origin case to which the Court granted certiorari.¹²⁰ Second, if a case involves two distinct issues on which the Court treats the underlying circuits differently, this Study reports the case as two observations rather than one, for all purposes.¹²¹ (If a circuit has issued more than one decision on the same issue, the circuit's position is counted only once.) Finally, the Study codes the Court's treatment of the circuit court decision as "agree" or

119. Of the seventy-four Bankruptcy Code cases the Court considered during the 1981 through 2012 Terms, fifty-two cases (70%) involved circuit splits. See *Bankruptcy Code Supreme Court Database*, Appendix II, *supra* note 116.

120. The Supreme Court does not always expressly state that it is resolving a circuit split, nor does it always identify the cases involved in the split. To balance replicability and accuracy, this Article and *Bankruptcy Code Supreme Court Database* identify as sleeper circuits both (i) the underlying circuit court decisions the Supreme Court expressly mentions, and (ii) additional underlying circuit court decisions that the circuit of origin decisions mention. Cf. *Hangley Study*, *supra* note 104 (limiting inquiry to cases in which the Court expressly states that it is resolving a circuit split); Hansford, *supra* note 72, at 1161-62 (examining circuit splits during four Supreme Court terms to determine whether patterns exist with respect to circuit court success rates and regional judicial specialization).

121. The three cases that merit this treatment are *Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229 (2010), *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996), and *Bd. of Governors v. MCorp Fin., Inc.*, 502 U.S. 32 (1991).

“disagree.” Consequently, if the Court affirms a circuit court’s result while clearly and expressly rejecting its holding and reasoning, the case is coded as “disagree” with respect to that circuit.¹²²

As more fully elaborated in Part V, to the extent that direct comparisons between overall data and bankruptcy data are appropriate, this Article specifies whether it compares the entirety of the *Roberts Court Dataset* and *Bankruptcy Dataset*, or trims those data to create matching parallels. Where trimmed data is useful, the analysis trims the Roberts Court data to cover only the twelve circuits in which bankruptcy cases could arise (i.e., it excludes data from state courts and the Federal Circuit), and trims the bankruptcy data to cover only the 2005 through 2011 Terms (i.e., the period to which the Roberts Court data applies).¹²³

V. Findings: Differences Between Reversal Rates and Abrogation Rates

A. Overview of Findings

This Article concludes that: (i) there are measurable differences between affirm / reverse rates as compared to approve / abrogate rates on both an aggregate and circuit-by-circuit basis, in both the *Roberts Court Dataset* and the *Bankruptcy Dataset*; (ii) some of the differences are statistically significant, others are not; and (iii) the observed differences are

122. In order to balance replicability with validity, this exception is applied only where the difference between “affirm / reverse” and “agree / disagree” is express and virtually indisputable. The one case that merits this treatment is *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982), in which the Supreme Court affirmed the outcome reached by the Tenth Circuit but expressly rejected the Tenth Circuit’s reasoning and holding on both issues presented. The Tenth Circuit had held that Bankruptcy Code § 522(f)(2) was intended to apply retroactively, and consequently violated the Fifth Amendment to the United States Constitution. *See Rodrock v. Sec. Indus. Bank*, 642 F.2d 1193 (10th Cir. 1981); *see also* 11 U.S.C. § 522(f)(2) (1976 Supp. V); U.S. CONST. amend. V. The Supreme Court affirmed the result, reasoning that § 522(f)(2) was not intended to apply retroactively and did not violate the United States Constitution. *See United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982).

123. *See* discussion *infra* Part V, at Table II and accompanying text.

significant enough to demonstrate that one cannot employ simple affirm / reverse rates to draw reliable inferences regarding Supreme Court agreement with the circuit courts of appeal, either in the aggregate or on a circuit-by-circuit comparative basis.

Nevertheless, this Article does not suggest that a researcher could draw definitive conclusions regarding agreement between the Court and the individual circuits merely by replacing affirm / reverse rates (which do not account for sleeper circuits) with approve / abrogate rates (which do). One cannot draw reliable inferences without controlling for other critical variables. These include, most notably, the effect that issue disparity, circuit size, and circuit workload may have on apparent levels of accord between the Court and the respective circuit courts. Although this Article does not directly analyze these factors, it does reveal sufficient evidence to suggest the fundamental importance of issue disparity. This evidence includes marked differences between abrogation rates for all issues, bankruptcy issues, and habeas corpus issues, as well as differences in the magnitude of divergence between affirm / reverse and approve / abrogate results in the overall dataset as compared to the single-subject datasets. This evidence is detailed where relevant throughout the analysis to caution against overly simplistic application of this Study's findings and to define the parameters of questions meriting further study, particularly with respect to issue disparity.¹²⁴

Select findings that support these conclusions, within the specific parameters of the Study, include the following:

(1) On an aggregate (all circuit) basis:

(a) *Roberts Court Dataset* overall abrogation rates are significantly lower than overall reversal rates; in other words, the Court disagrees with the circuits far less than simple reversal rates would suggest;¹²⁵

124. See discussion *infra* text accompanying Figures 5, 6, 8, 13, 14.

125. See *infra* Table II and accompanying text.

(b) *Bankruptcy Dataset* abrogation rates are not significantly different than bankruptcy reversal rates;¹²⁶ habeas corpus abrogation rates are not significantly different than habeas corpus reversal rates; in other words, examining the Supreme Court / circuit court relationship on an topic-by-topic basis reveals different patterns of accord than consolidated-issue analysis suggests;

(c) bankruptcy abrogation rates mirror overall abrogation rates;¹²⁷ habeas corpus abrogation rates are significantly higher than overall abrogation rates; in other words, the nature of the issue presented may significantly affect the degree to which the Court agrees with the circuit courts.

(2) On a disaggregated by circuit basis, abrogation rates reveal less variation among the circuits and less divergence between the Court and individual circuits than reversal rates alone would suggest. Specifically:

(a) in the *Roberts Court Dataset*, eleven circuits' individual abrogation rates are closer to the fiftieth percentile than are their respective reversal rates;¹²⁸ only three circuits' abrogation rates deviate from the mean to a degree that has strong statistical significance; and only one deviates to a degree that has mild statistical significance;¹²⁹

(b) in the *Bankruptcy Dataset*, eight circuits' individual abrogation rates are closer to the fiftieth percentile than are their respective

126. See *infra* Table I, Table II and accompanying text.

127. See *supra* note 126.

128. See *infra* Table III and accompanying text.

129. See *supra* note 128.

reversal rates;¹³⁰ none deviate from the mean to a degree that has strong statistical significance¹³¹; and only one deviates to a degree that has mild statistical significance.¹³²

Part V.B details aggregate finding and conclusions. Part V.C details disaggregated by circuit findings and conclusions.

B. Differences Between Reversal Rates and Abrogation Rates: Aggregate Findings

Part B compares simple circuit of origin only Supreme Court case disposition rates (affirm / reverse) to overall circuit of origin plus sleeper circuit rates (approve / abrogate) on an aggregate (all circuit) basis.

1. Employing Statistical Analysis to Measure Significance: Roberts Court Dataset, Aggregate Findings

The *Hangley Study* reports simple percentage reversal and abrogation rates for all Roberts Court merits cases during the 2005 through 2011 Terms.¹³³ These data reveal an aggregate reversal rate of approximately 72%, compared to an aggregate abrogation rate of approximately 57%.¹³⁴ Figure 1 and Figure 2 illustrate these findings.

130. See *infra* Table IV and accompanying text.

131. See *supra* note 130.

132. See *supra* note 130.

133. See *Hangley Study*, *supra* note 104, at Exhibit I.

134. See *infra* Figures 1, 2; see also *Roberts Court Dataset*, *supra* note 110 and accompanying text.

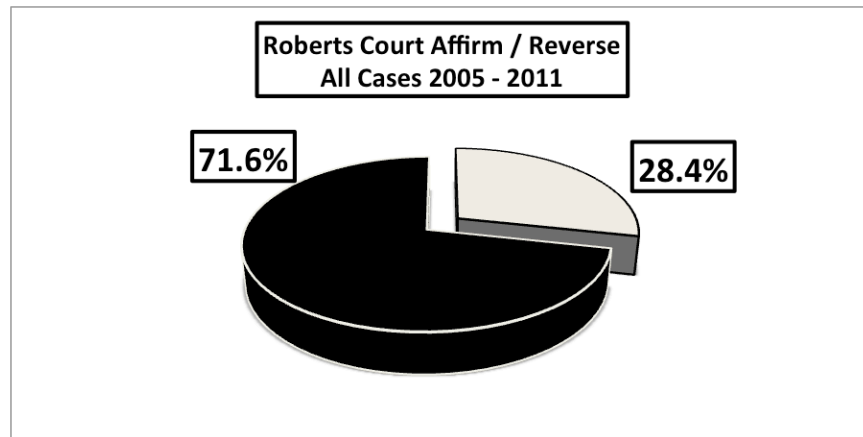


Figure 1, Data Source: *Hangley Study* Exhibit 1

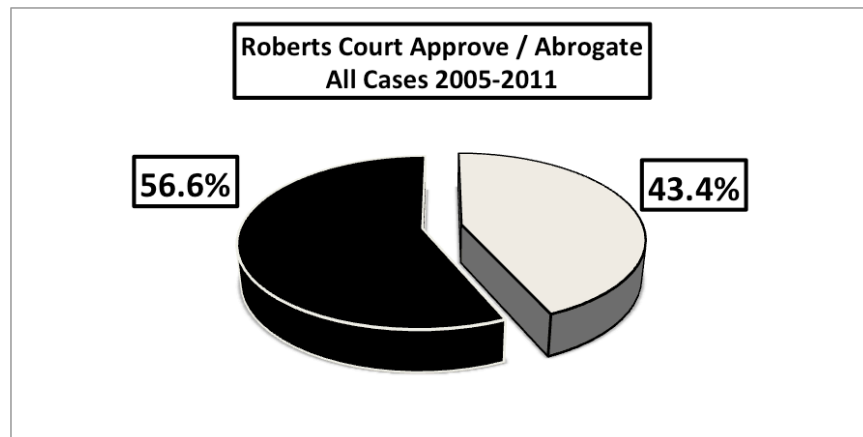


Figure 2, Data Source: *Hangley Study* Exhibit 1

The Study this Article reports creates the *Roberts Court Dataset* to convert the *Hangley Study* affirm / reverse data and approve / abrogate data from summary format to individual observations. It then applies statistical analysis tools to

determine the probability that the observed differences between these rates are significant, that is, whether these differences are random or meaningful. That analysis reveals that the difference between aggregate reversal rates and aggregate abrogation rates in the *Roberts Court Dataset* is highly significant.¹³⁵ In other words, simple case disposition data (affirm / reverse rates) do not accurately reflect the degree to which the Court overtly agrees with the courts of appeal, on an aggregate basis. Further analysis in the balance of this Article reinforces this conclusion. For reasons discussed below in the context of issue disparity, however, the mere fact that the aggregate reversal rate exceeds the aggregate abrogation rate cannot support a blanket inference that the Court grants certiorari primarily to reverse the lower court (i.e., as an error-correcting mechanism).¹³⁶

2. Significance: *Bankruptcy Dataset*, Aggregate Findings

For bankruptcy cases, the Study examines the entirety of the Supreme Court's thirty-two year Bankruptcy Code jurisprudence through the 2012 Term. Table I compares affirm / reverse rates to approve / abrogate rates in bankruptcy cases.

Column 1 reports the aggregate number of bankruptcy cases in which the Court granted certiorari.¹³⁷ Column 2 reports the

135. $p < 0.0001$. Statistical analyses " p " values report the results of classical tests of hypotheses, two-variable means comparison analyses (i.e., "t-Test"), unless otherwise noted. A t-Test result of $p < 0.01$ is reported as "highly" or "strongly" significant (i.e., 99th or greater confidence interval in the probability that the result is significant); $p < 0.05$ is reported as "significant" (i.e., 95th confidence interval); $p > 0.05$ but < 0.1 is reported as "mildly" significant (i.e., 90th confidence interval).

136. See, e.g., discussion *supra* note 120 and accompanying text; *infra* text accompanying Figures 5, 6, 8, 13, 14.

See generally, Kastellec & Lax, *supra* note 6, at 408 (considering whether the Supreme Court selects cases for certiorari in order to reverse and correct errors); Mak, *supra* note 6, at 54-55 ("[T]he certiorari stage at the Supreme Court . . . goes beyond simple error correction of the lower courts. Deciding which cases to decide serves as an opportunity for the justices to pursue their policy preferences."); cf. SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

137. These data derive from *Bankruptcy Code Supreme Court Database*, Appendix I, *supra* note 116.

number of those cases in which the Court affirmed / reversed each circuit, and the simple affirm / reverse rate. Column 3 reports the aggregate number of bankruptcy cases that the Court reviewed overall as circuit of origin plus sleeper circuit. Column 4 reports the number of those cases in which the Court approved / abrogated the circuits' positions, and the aggregate approve / abrogate rate.¹³⁸ To establish a parallel comparison with overall data from the *Roberts Court Dataset*, for reasons to be discussed shortly, Table I also reports a trimmed portion of the bankruptcy data covering only the 2005 through 2011 Terms.

<p>Table I Affirm / Reverse versus Approve / Abrogate All Circuit Aggregate</p> <p>Supreme Court Bankruptcy Code Cases: 1981-2012 Terms Roberts Court Bankruptcy Code Cases: 2005 – 2011 Terms</p>				
	<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>
	<i>Number of observations Circuit of origin only</i>	<i>Affirm–Reverse Number Percent Circuit of origin only</i>	<i>Number of observations Origin & Sleeper circuits</i>	<i>Approve–Abrogate Number Percent Origin & Sleeper circuits</i>
1981-2012 Terms	76	39–37 51.32–48.68 %	251	108–143 43.03–56.97 %
2005-2011 Terms	15	8–7 53.3–46.7%	43	22–21 51.2–48.8%

138. These data derive from *Bankruptcy Code Supreme Court Database*, Appendix II, *supra* note 116.

Source: *Bankruptcy Code Supreme Court Database*, filename: SCT
Reversals WinLoss Overview *139

During the period studied, there were seventy-six circuit of origin case observations compared to 251 circuit of origin plus sleeper circuit case observations. Aggregate reversal and abrogation rates hovering near 50% are the norm. The aggregate abrogation rate is approximately 57% in bankruptcy cases.¹⁴⁰ The aggregate reversal rate is approximately 49% in bankruptcy cases.¹⁴¹ Statistically, these differences are not significant, given the numbers of cases presented.¹⁴² Figure 3 and Figure 4 illustrate these aggregate bankruptcy case findings.

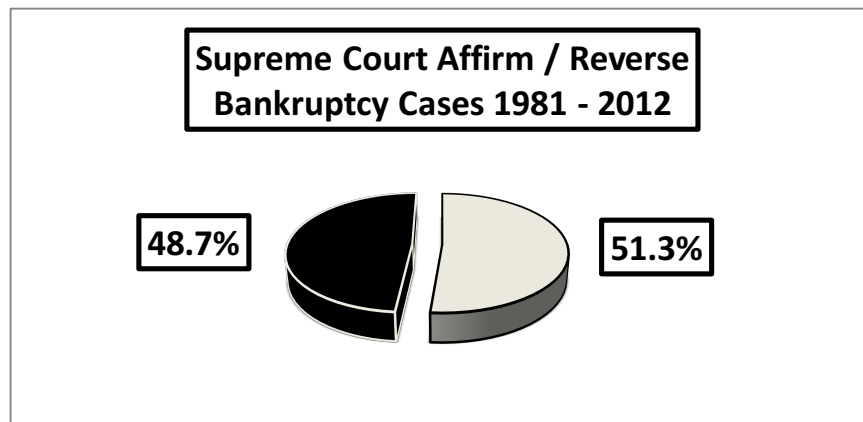


Figure 3, Source: Table I

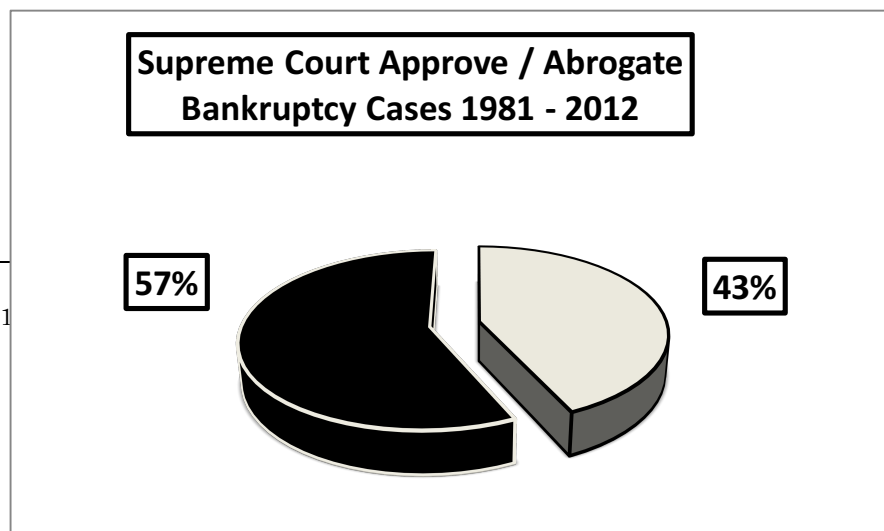


Figure 4, Source: Table I

The insignificance of the differences between aggregate reversal rates and abrogation rates in bankruptcy cases sheds little direct light on the application of reversal data to the question of Supreme Court / circuit court agreement. Part V.C considers the extent to which disaggregated by circuit data provide greater insight.¹⁴³

3. Implications of Issue Disparity: Aggregate Evidence

Before examining disaggregated data, however, consider the differences between the *Roberts Court Dataset* overall aggregate results, the *Bankruptcy Dataset* single-topic results, and habeas corpus single-topic results. The contrast between overall and single-issue results suggests that issue disparity may affect apparent rates of accord between the Court and the circuit courts. Although a thorough analysis of this topic is beyond the scope of this Study, the evidence this Study does reveal warrants an important detour. This detour identifies concerns that require deeper analysis regarding how issue disparity affects apparent rates of accord, and cautions against drawing inferences from these data without engaging in that deeper analysis.

First, according to the data reported in Part V.B.1, the Roberts Court has reversed the (significant) majority of all decisions on which it has granted certiorari. In other words, the

143. See *infra* Part V.C (disaggregating and analyzing reversal and abrogation rates by circuit).

grant of certiorari seemingly is more likely than not to result in the Court *reversing* the circuit of origin, in all cases decided by the Roberts Court between 2005 and 2011.¹⁴⁴ This might tempt one to conclude that the Court grants certiorari primarily to reverse the lower court, i.e., as an error-correcting mechanism. This assumption is invalid, however, as applied to bankruptcy cases. The grant of certiorari is slightly more likely than not to result in the Court *affirming* the circuit of origin, in bankruptcy cases.¹⁴⁵ Because the difference is not statistically significant, the relationship between the grant of certiorari and whether the Court affirms or reverses appears to be profoundly neutral in bankruptcy cases.¹⁴⁶ In contrast, the grant of certiorari in habeas corpus cases is significantly more likely than not to result in reversal, as discussed following Figure 5.¹⁴⁷

Second, although overall reversal rates are significantly higher than bankruptcy reversal rates, overall abrogation rates are virtually identical to bankruptcy abrogation rates. The *Roberts Court Datasets* (all issues during a seven-year period) shows a significantly higher rate¹⁴⁸ of reversal (approximately 72%) than of abrogation (approximately 57%).¹⁴⁹ In contrast, the *Bankruptcy Dataset* (bankruptcy cases during a thirty-two year period) shows no significant difference¹⁵⁰ between the aggregate reversal rate (approximately 49%) and aggregate abrogation rate (approximately 57%).¹⁵¹ And yet, the aggregate, overall,

144. See *supra* Figures 1, 2 (showing reversal rate of 71.6%, abrogation rate of 56.6%).

145. See *infra* Table II; *supra* Figures 3, 4 (showing reversal rate of 48.68%, abrogation rate of 56.97%).

146. See *supra* Table I ($p = 0.2044$) (comparing the relationship between aggregate reversal rates and aggregate abrogation rates in bankruptcy cases, 1981 to 2012).

147. Habeas corpus reversal rates (approximately 87%) are not significantly different than habeas corpus abrogation rates (approximately 78%), see *infra* Table II ($p = 0.1743$), but both significantly exceed overall abrogation rates (approximately 57%).

148. See *infra* Table II ($p < 0.0001$).

149. See *supra* 110 and accompanying text.

150. See *supra* note 116 and accompanying text.

151. See *supra* note 116, Figures 3, 4; see *infra* Table II.

Roberts Court abrogation rate of 57%,¹⁵² is virtually identical to the aggregate, bankruptcy-only abrogation rate of 57%.¹⁵³

Third, these patterns remain if one controls for both the different time periods these datasets cover¹⁵⁴ and the different

152. See *supra* Figure 4 (56.6%).

153. See *supra* Figure 2 (56.7%).

154. Bankruptcy Code cases do not arise in the Federal Circuit or state supreme courts. Therefore, the Roberts Court data is trimmed to cases arising in the eleven numbered circuits and the District of Columbia Circuit, in order to match the bankruptcy data. The bankruptcy data covers thirty-two Terms (1981 through 2012), whereas the Roberts Court data covers seven Terms (2005 through 2011). Therefore the bankruptcy data is trimmed to cases arising during the 2005 through 2011 Terms, in order to match the Roberts Court data.

Both overall reversal rates and bankruptcy reversal and abrogation rates have remained fairly stable during the period 1981 through 2012. The overall reversal rate the *Hangley Study* reports for the Roberts Court (71%) is consistent with overall reversal rates over several decades. *Hangley Study*, *supra* note 104, at Exhibit I. During the period reported by SCOTUSBlog, *supra* note 14, for example (namely, the Supreme Court's 1995 through 2012 Terms), the Court reversed the circuit of origin in 67% of all cases combined. See Tom Goldstein, *Stat Pak Archive*, SCOTUSBLOG, <http://www.SCOTUSBlog.com/reference/stat-pack/> (last visited Dec. 17, 2015) (showing a total of 1,299 cases and 875 reversals between 1995 and 2012). This Study does not independently re-calculate the annual statistics reported by Mr. Goldstein. Rather, it employs his annual reports to calculate aggregate sixteen-year simple reversal ratios. *Id.* When data from HARVARD LAW REVIEW'S summaries of the 1981 through 1994 Terms are added to this, it appears that the Court reversed the circuit of origin in 65% of all cases during the 1981 through 2012 Terms. See *The Supreme Court, 1994 Term: The Statistics*, 109 HARV. L. REV. 340 (1995); *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 372 (1994); *The Supreme Court, 1992 Term: Leading Cases*, 107 HARV. L. REV. 376 (1993); *The Supreme Court, 1991 Term: Leading Cases*, 106 HARV. L. REV. 382 (1992); *The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 423 (1991); *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 363 (1990); *The Supreme Court, 1988 Term: Leading Cases*, 103 HARV. L. REV. 398 (1989); *The Supreme Court, 1987 Term: Leading Cases*, 102 HARV. L. REV. 354 (1988); *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 366 (1987); *The Supreme Court, 1985 Term: Leading Cases*, 100 HARV. L. REV. 308 (1986); *The Supreme Court, 1984 Term: Leading Cases*, 99 HARV. L. REV. 322 (1985); *The Supreme Court, 1983 Term: Leading Cases*, 98 HARV. L. REV. 311 (1984); *The Supreme Court, 1982 Term: IV. The Statistics*, 97 HARV. L. REV. 295 (1983); *The Supreme Court, 1981 Term: IV. The Statistics*, 96 HARV. L. REV. 304 (1982). Bankruptcy case reversal rates and abrogation rates have remained similarly consistent over time. During the period 1981 to 2012, the Court reversed the circuit of origin in bankruptcy cases at an average rate of 49.3%, and abrogated the underlying circuit court at an average rate of 56.7%. See *supra* Table I. During the period 2005 through 2011, the Roberts Court reversed the circuit of origin in bankruptcy cases at a

courts from which the cases arise. Table II trims the data to create a closer parallel between the datasets by comparing only bankruptcy cases in the 2005 through 2011 Terms to all cases that arose only in the eleven numbered circuits and the District of Columbia in the 2005 through 2011 Terms (the “trimmed data”). To further highlight the potential implications of issue disparity, Table II adds habeas corpus data as well for this same period.¹⁵⁵

Columns 2 and 3 report the number of circuit of origin case observations and aggregate affirm / reverse rates, for: overall cases, bankruptcy cases and habeas corpus cases. Columns 4 and 5 report the number of circuit of origin plus sleeper circuit case observations and aggregate approve / abrogate rates, during this same period. Column 6 reports the degree of significance, if any, of the difference between affirm / reverse rates and approve / abrogate rates, during this same period. Column 5 reports the degree of significance, if any, of the difference between (i) bankruptcy abrogation rates and overall abrogation rates, (ii) habeas corpus abrogation rates and overall abrogation rates, and (iii) bankruptcy abrogation rates and habeas corpus abrogation rates.

comparable average rate of 46.7% and abrogated the underlying circuit court at a comparable average rate of 48.8%. *See infra* Figure 5.

155. The *Hangley Study* does not distinguish state and federal habeas corpus cases. *Hangley Study*, *supra* note 104.

Table II Affirm / Reverse versus Approve / Abrogate Overall, Bankruptcy, Habeas Corpus Roberts Court 2005 - 2011 Terms Circuits 1-11 and DC*					
<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>	<i>Column 5</i>	<i>Column 6</i>
<i>Issue Presented</i>	<i>Origin only: Number of Cases</i>	<i>Origin only: Affirm/Reverse Number Rate</i>	<i>Origin & Sleeper: Number of Cases</i>	<i>Origin & Sleeper: Approve/Abrogate Number Rate</i>	<i>Significance of Difference Between Affirm/Reverse Rate and Approve/Abrogate Rate</i>
All Issues	432	126–306 29.4–70.6 %	1187	533–654 44.9–55.1%	Significant $p < 0.0001$
Bankruptcy Cases	15	8–7 53.5–46.7 %	43	22–21 51.2–48.8%	Not significant

				(deviation from overall rate is not significant, $p=0.4182$)	$p=0.8886$
Habeas Corpus Cases	53	7–46 13.2–86.8 %	86	19–67 22.1–77.9% (deviation from overall rate is significant, $p<0.00001$)	Not Significant $p=0.1743$
Source of Roberts Court data: <i>Hangley Study</i> Exhibits I, II Source of bankruptcy data and all statistical analysis: Table I; <i>Bankruptcy Code Supreme Court Database</i> , filename: SCT Reversals WinLoss Overview *Excludes Federal Circuit, Specialized Federal Courts, and State Supreme Courts					

These trimmed data reveal the same comparative relationships as the untrimmed data; i.e., *Roberts Court Dataset* overall reversal rates (approximately 71%) are significantly higher than overall abrogation rates (approximately 55%);¹⁵⁶ bankruptcy reversal rates (approximately 47%) are not significantly different than bankruptcy abrogation rates (approximately 49%);¹⁵⁷ and Roberts Court overall abrogation rates (approximately 55%) are not significantly different than bankruptcy abrogation rates (approximately 49%).¹⁵⁸ In

156. See *supra* Table II ($p<0.0001$). Compare to untrimmed Roberts Court data, *supra* note 154.

157. See *supra* Table II ($p=0.8886$).

158. See *supra* Table II ($p=0.4182$).

The Supreme Court decided fifteen bankruptcy cases between 2005 and 2011. The Court affirmed the circuit of origin in eight cases, and reversed the circuit of origin in seven cases, for an aggregate average affirm / reverse rate of 53.3 / 46.7%. See *Bankruptcy Code Supreme Court Database*, Appendix I, *supra* note 116; *Bankruptcy Code Supreme Court Database*, filename: WinLoss Overview, *supra* note 139. During this same period, there were a total of forty-three underlying court of appeals bankruptcy case decisions. The Court agreed with the lower courts in twenty-two cases, and abrogated the lower courts in twenty-one cases, for an aggregate average approve / abrogate rate of 51.2% to 48.8%.

contrast, although habeas corpus reversal rates (approximately 87%) are not significantly different than habeas corpus abrogation rates (approximately 78%);¹⁵⁹ habeas corpus abrogation rates (approximately 78%) are significantly higher than overall abrogation rates (approximately 55%).¹⁶⁰ Figures 5 and 6 illustrate these comparisons.

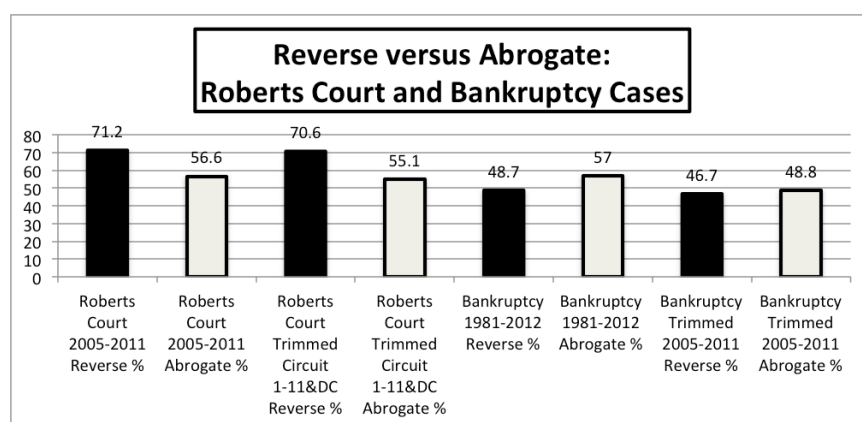


Figure 5, Source: Table I, Table II

Figure 6 illustrates the comparison between reversal rates and abrogation rates for all cases, bankruptcy cases, and habeas corpus cases in the Roberts Court, applying the trimmed data reported in Table II.

Id. The fifteen bankruptcy circuit of origin cases account for approximately 3.5% of the 432 circuit of origin cases the Court decided from the First through Eleventh and District of Columbia Circuits during this period. *Id.* Similarly, the forty-three bankruptcy origin plus sleeper cases account for approximately 3.6% of the 1187 origin and sleeper circuit cases the Court considered from the First through Eleventh and District of Columbia Circuits during this period. See *supra* Table II.

159. See *supra* Table II (p=0.1743).

160. See *supra* Table II (p<0.00001).

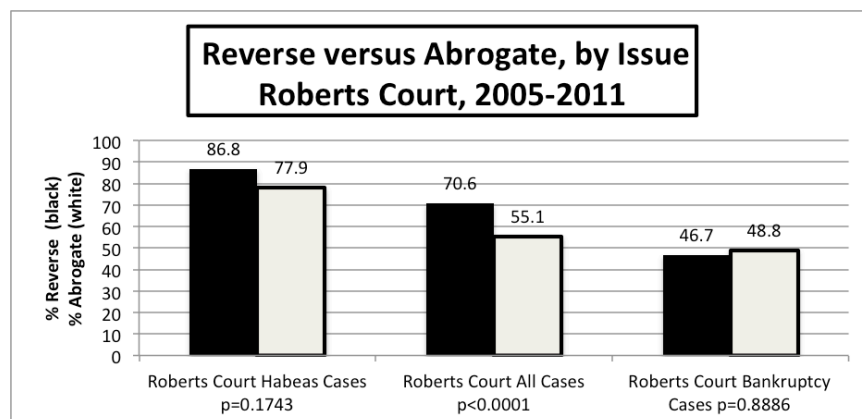


Figure 6, Source: Table II

As Table II reports and Figures 5 and 6 illustrate, there is no statistically significant difference between reversal rates and abrogation rates for bankruptcy cases or habeas corpus cases.¹⁶¹ In contrast, there is a highly significant difference between reversal rates and abrogation rates in overall cases, combined.¹⁶² In other words, the profile of a consolidated-issue comparison of reversal and abrogation rates looks different than the profile of a single-topic comparison. Consistent with this observation, the Court appears to disagree with the lower courts (both through reversal and abrogation) at a significantly higher rate in a least one identified area of law (i.e., habeas corpus cases), than in either another identified area (i.e., bankruptcy cases), or in all cases combined.¹⁶³

These comparisons are important, for purposes of this Article, because they introduce serious questions regarding the viability of comparing the circuits' respective performance before the Supreme Court based on any measure of accord that

161. See *supra* Table II; *infra* Figure 8. The difference between Roberts Court bankruptcy reversal rates and bankruptcy abrogation rates is not statistically significant. Table II ($p=0.8886$). The difference between Roberts Court habeas corpus reversal rates and habeas corpus abrogation rates is not statistically significant. Table II ($p=0.1743$).

162. See *supra* Table II; *infra* Figure 8. The difference between Roberts Court overall reversal rates and overall abrogation rates is strongly significant ($p<0.0001$).

163. Habeas corpus abrogation rates are significantly higher than all issue abrogation rates ($p<0.0001$). See *supra* Table II.

aggregates multiple issues. If the circuits routinely encounter, decide, and ultimately send the Supreme Court different proportions of cases from areas of law in which the Court inherently disagrees with all of the circuits at significantly different rates, issue disparity may help explain differences in the circuit courts' apparent rates of discord with the Court.

A simple hypothetical highlights this problem. Suppose that the Court disagrees with the circuit courts (all circuit courts) in habeas corpus cases around 80% of the time. Suppose that, in contrast, the Court disagrees with the circuit courts (all circuit courts) in some other area of law (e.g., bankruptcy) around 50% of the time, and perhaps in other areas of the law at rates lower than 50%. Suppose, finally, that the cases an average circuit sends the Court for review include about 7% high-disagreement rate habeas corpus cases. If a particular circuit (perhaps one with a large prison population?¹⁶⁴) sends the Court a disproportionate share of high-disagreement habeas corpus cases (say, 10 or 15%) as compared to low-disagreement cases, that circuit may appear to have a higher rate of discord with the Court than a circuit that sends the Court an average or below average share of high-disagreement cases.

164. The questions raised in this section regarding the potential reasons the circuits might send the Court different issues for review are beyond the scope of this Study and merit separate depth of analysis. It is, however, interesting to note that the two circuits with higher than average rates of habeas review and higher apparent rates of discord with the Court also house a disproportionate share of the national incarcerated population. State by state data from the Bureau of Justice Statistics reveal an average percent of the national incarcerated population (2,257,267) per circuit of approximately 7.85%, whereas the Ninth Circuit houses approximately 17% of the national incarcerated population (380,615) and the Sixth Circuit houses approximately 10% of the national incarcerated population (222,264). See BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov> (last updated Dec. 17, 2015); *The Sentencing Project Interactive Map*, THE SENTENCING PROJECT: RESEARCH & ADVOCACY FOR REFORM, <http://www.sentencingproject.org/map/map.cfm> (last visited Dec. 19, 2015); Sara Mayeux, *Mass Incarceration: Breaking Down the Data by State*, PRISON L. BLOG (July 13, 2010), <http://prisonlaw.worldpress.com/2010/07/13/mass-incarceration-breaking-down-the-data-state-by-state/>. Similarly, based on preliminary calculations that warrant more targeted analysis, during the 2005 through 2011 period, habeas corpus cases made up on average about 7% of the cases reviewed from each circuit, but 14% of the cases reviewed from the Ninth Circuit and 15% of the cases reviewed from the Sixth Circuit.

Exploring the potential implications of issue disparity would, at a minimum, require rigorous analysis of: whether the Court disagrees with the circuits (all circuits) at significantly different rates depending on the types of issues presented (habeas corpus, for example); if so, what factors might drive those differences; whether different circuits send the Court different percentages of high-disagreement and low-disagreement types of issues for review; whether any such differences are significant; and, if so, what factors might drive the disparity in issues that arise in different circuits. This type of analysis might shed light on the effects of issue disparity, as well as on the interplay between issue disparity, on the one hand, and the balance between the Court's split resolving function and other bases for granting review, on the other hand.

The importance of these unanswered questions mandates deeper study of how factors such as issue disparity affect Supreme Court / circuit court accord. Although rejecting affirm / reverse rates as the basis for measuring Supreme Court / circuit court accord is essential to reduce the types of obvious error this Study examines, merely adopting approve / abrogate rates instead, without controlling for issue disparity and other variables, would remain insufficient to support definitive conclusions regarding the relative degree of accord between the Court and the circuits.

Part IV.C disaggregates reversal and abrogation data by circuit, and provides additional insight into the challenges that sleeper circuit data and issue disparity raise for using affirm / reverse rates to measure agreement between the Court and the circuits.

C. Differences Between Affirm / Reverse Rates and Approve / Abrogate Rates: Disaggregated by Circuit

Part V.C compares simple circuit of origin only case disposition rates (affirm / reverse) to overall circuit of origin plus sleeper circuit rates (approve / abrogate) on a disaggregated (circuit-by-circuit) basis.

1. Employing Statistical Analysis to Measure Significance:
Roberts Court Dataset, Disaggregated by Circuit

The *Hangley Study* reports simple percentage reversal and abrogation rates for all Roberts Court merits cases during the 2005 through 2011 Terms.¹⁶⁵ These data reveal circuit-by-circuit reversal rates ranging from 47% to 82%, and abrogation rates ranging from 43% to 68%.¹⁶⁶ The *Roberts Court Dataset* converts the *Hangley Study* data from summary format to individual observations and applies statistical analysis tools to determine the probability that the observed differences between these rates are significant.¹⁶⁷ The *Roberts Court Dataset* reveals that (i) including sleeper circuit data moderates success rates for eleven of the twelve circuits; and (ii) the differences between reversal rates and abrogation rates are statistically significant for four of the twelve circuits, individually.¹⁶⁸ Table III reports these findings. The implications are discussed following Table III.

Column 2 reports the number of cases in which the Court granted certiorari to each circuit as circuit of origin.¹⁶⁹ Column 3 reports the number of those cases in which the Court affirmed / reversed each circuit, and the affirm / reverse rate for each circuit. Column 4 reports the overall number of cases that arose in each circuit as circuit of origin plus sleeper circuit. Column 5 reports the number of those cases in which the Court approved / abrogated each circuit's position, and the overall approve / abrogate rate for each circuit. Column 6 reports how far each circuit's individual abrogation rate deviates from the aggregate mean abrogation rate and indicates the significance of that deviation. Column 7 reports the significance, if any, of the difference between reversal rates and abrogation rates for each circuit, individually.

165. See *Hangley Study*, *supra* note 104, at Exhibit I.

166. *Id.*

167. See *supra* note 104.

168. The total number of cases reported in Table III differs from the total number of cases reported in the *Hangley Study* because Table III does not include cases from the state supreme courts or the Federal Circuit. The balance of the data in Table III is drawn directly from the *Hangley Study*. See *Hangley Study*, *supra* note 104.

169. See *Hangley Study*, *supra* note 104, at Exhibits I & II.

Table III Affirm / Reverse versus Approve / Abrogate Disaggregated by Circuit Roberts Court 2005-2011 Terms						
<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>	<i>Column 5</i>	<i>Column 6</i>	<i>Column 7</i>
<i>Circuit</i>	<i>Number of cases Origin only</i>	<i>Affirm / Reverse Number Percent Origin only</i>	<i>Number of cases Origin & Sleeper</i>	<i>Approve/ Abrogate Number Percent Origin & Sleeper</i>	<i>Abrogate Rate as Percent of Aggregate Mean Abrogate Rate (55.10%) Showing significance</i>	<i>Significance of Difference Between Reverse Rate and Abrogate Rate</i>
1	15	8–7 53–47 %	77	32–45 42– 58 %	106% $p=0.5676$	$p=0.4056$
2	41	12–29 29–71 %	119	55–64 46– 54 %	98% $p=0.7835$	$p=0.1063$
3	23	9–14 39–61 %	83	47–36 57– 43 %	79% $p=0.0382$	$p=0.1395$
4	26	9–17 35–65 %	83	42–41 51– 49 %	90% $p=0.3136$	$p=0.1568$
5	32	10–22	102	48–54	96%	$p=0.1171$

		31–69 %		47– 53 %	<i>p</i> =0.6749	
6	38	7–31 18–82 %	105	35–70 33– 67 %	121% <i>p</i>=0.0220	<i>p</i>=0.0848
7	32	10–22 31–69 %	110	59–51 54– 46 %	84% <i>p</i>=0.0787	<i>p</i>=0.0257
8	22	5–17 23–77 %	82	38–44 46– 54 %	97% <i>p</i> =0.8003	<i>p</i>=0.0463
9	128	28–100 22–78 %	201	64–137 32– 68 %	124% <i>p</i>=0.0005	<i>p</i>=0.0498
10	18	8–10 44–56 %	75	40–35 53– 47 %	85% <i>p</i> =0.1552	<i>p</i> =0.5033
11	37	13–24 35–65 %	94	44–50 47– 53 %	97% <i>p</i> =0.7210	<i>p</i> =0.2282
DC	20	7–13 35–65 %	56	29–27 52– 48 %	87% <i>p</i> =0.3123	<i>p</i> =0.2019
	Total: 432	126–306 29.40– 70.60 %	Total: 1187	533–654 44.90– 55.10 %		<i>p</i><0.0001
Source of Raw Data: <i>Hangley Study</i> , Exhibit I Source of Analysis: <i>Roberts Court Dataset; Bankruptcy Code Supreme Court Database</i> , filename: SCT Reversals Analysis of Hangley Data Key: Boldfaced type indicates abrogation rates. Boldfaced italic type indicates deviations that have at least a mild degree of statistical significance.						

Table III and the following analysis evaluate the reliability of circuit-by-circuit reversal rate data from two perspectives. First, measuring differences between individual circuits' reversal rates and abrogation rates demonstrates that reversal rates do not accurately capture the degree to which each circuit's decisions are in accord with the Court's decisions (Table III Column 7 and Figure 7). Second, measuring the extent to which each circuit's abrogation rate deviates from the mean abrogation rate provides the basis for determining whether apparently higher or lower rates of accord are significant, and establishes an accurate starting point for analyzing factors that might affect differences in accord between the Court and the individual

circuits (such as, perhaps, issue disparity) (Table III Column 6 and Figure 8).

First, the data reported in Table III reveal how the inclusion of the sleeper circuits affects apparent success rates for each circuit. These disaggregated data heighten the previously identified concerns (in the context of aggregate data) with using simple reversal data to draw inferences about circuit courts' discord with the Court.¹⁷⁰ Table III reveals that adding sleeper circuit data to circuit of origin data moderates the circuits' individual success rates (compare Column 3 and Column 5). Not only is the mean abrogation rate (approximately 55%) significantly closer to the fiftieth percentile than the mean reversal rate (approximately 71%),¹⁷¹ but each circuit's individual result also moderates (that is, moves closer to the fiftieth percentile) when sleeper circuit data are included (other than the First Circuit).¹⁷² Moreover, for every one of these circuits (again, excluding the First Circuit), the moderation is in a positive direction of accord. In other words, when sleeper circuit data are included (i.e., using "approve" as the measure of accord), every circuit (other than the First Circuit) shows a rate of accord with the Court that is higher than its apparent rate of accord using only circuit of origin data (i.e., using "affirm" as the measure of accord).

Simple affirm / reverse data (Column 3) show only one circuit with an accord rate within five points of the fiftieth percentile,¹⁷³ and only one additional circuit within ten points.¹⁷⁴ Three circuits have simple affirm / reverse rates more than twenty-five points beyond the fiftieth percentile.¹⁷⁵ Overall approve/abrogate data (Column 5), in comparison, show four

170. *See, e.g.*, discussion *supra* notes 136, 143-46 and accompanying text.

171. *See supra* Table III (bottom row).

172. *See supra* Table III, Columns 3, 5. It is difficult to draw meaningful conclusions regarding the First Circuit because its circuit of origin record is affected by a small dataset; reversal and abrogation rates are both close to 50%; and the difference between reversal rate and abrogation rate is not statistically significant ($p=0.4056$).

173. This is the First Circuit. *See supra* Table III, Column 3.

174. This is the Tenth Circuit. *See supra* Table III, Column 3.

175. These are the Sixth, Eighth and Ninth Circuits. *See supra* Table III, Column 3.

circuits within five points of the fiftieth percentile,¹⁷⁶ two additional circuits within ten points,¹⁷⁷ and every circuit within twenty-five points of the fiftieth percentile.¹⁷⁸

Similarly, the inclusion of sleeper circuit data moderates the presumed extremes of discord. The highest individual circuit reversal rate is 82%; the highest individual circuit abrogate rate is 68% (Column 5). In comparison, six circuits show simple reversal rates in excess of 68% (Column 3).¹⁷⁹ Figure 7 illustrates the divergence between reversal rates and abrogation rates, by circuit, in the Roberts Court.

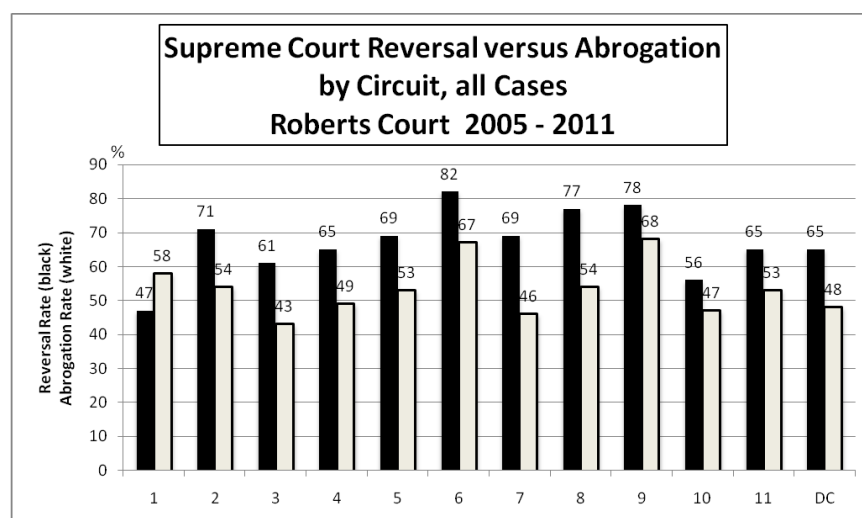


Figure 7, Source: Table III

Table III, Column 7, reports the statistical significance of the divergences illustrated by Figure 7. Not only is the divergence between aggregate reversal and abrogation rates highly significant, the divergence between reversal rates and abrogation rates is statistically significant (at least mildly) for

176. These are the Second, Fifth, Eighth and Eleventh Circuits. *See supra* Table III, Column 5.

177. These are the First and Fourth Circuits. *See supra* Table III, Column 5.

178. *See supra* Table III, Column 5.

179. These are the Second, Fifth, Sixth, Seventh, Eighth and Ninth Circuits. *See supra* Table III, Column 3.

four of the circuits, individually (namely, the Sixth, Seventh, Eighth and Ninth Circuits).¹⁸⁰ In other words, using simple reversal rates to measure the degree to which the Court “disagrees” with these circuits, individually, would be significantly erroneous. These differences, alone, demonstrate the unreliability of using reversal rates to compare circuit courts’ relative success rates before the Supreme Court.

The *Roberts Court Dataset* reveals additional errors in analysis and conclusions that would arise from employing reversal rates rather than abrogation rates to measure individual circuits’ accord with the Court. For six circuits, the presumed “result” in terms of accord with the Supreme Court would be simply wrong. One circuit that would be recorded as “majority affirmed” using circuit of origin only data, is instead recorded as “majority abrogated” using circuit of origin plus sleeper circuit data.¹⁸¹ Five circuits would be recorded as “majority reversed” using circuit of origin only data, but as “majority approved” using circuit of origin plus sleeper circuit data.¹⁸² The degree of accord would also be misstated for every circuit. Eleven of the twelve circuits’ success rates moderate (that is, move closer to the fiftieth percentile) when sleeper circuit data is added.¹⁸³

Second, Table III, Column 6, compares the circuits’ relative discord with the Supreme Court based upon the extent to which each circuit’s individual abrogation rate deviates from the aggregate mean abrogation rate for all Roberts Court cases (approximately 55%).¹⁸⁴ Figure 8 illustrates these deviations.

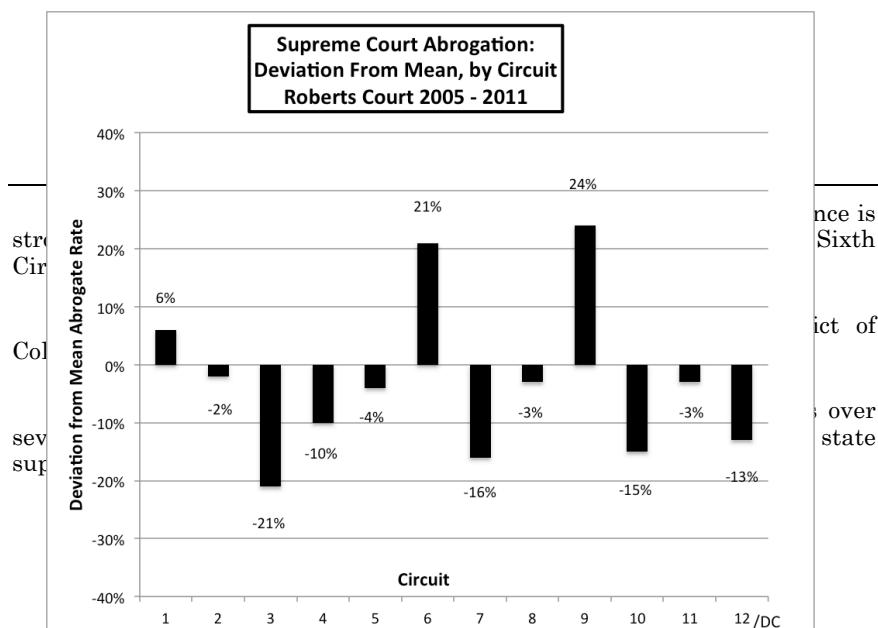


Figure 8, Source: Table III

Table III and Figures 7 and 8 reveal that four circuits' abrogation rates deviate from the mean to some degree of significance. Particularly, the Court agrees more than average with the Third Circuit to a significant degree,¹⁸⁵ and Seventh Circuit to a mildly significant degree.¹⁸⁶ The Court disagrees more than average with the Sixth Circuit to a significant degree,¹⁸⁷ and the Ninth Circuit to a more significant degree.¹⁸⁸ The other eight circuits' abrogation rates deviate from the aggregate mean to a degree that has no greater significance than random chance. In other words, the degree to which the Court agrees with these circuits is not significantly different than the degree to which the Court agrees with the other circuits.

For purposes of this Article, these comparisons reveal that simple reversal rates do not reliably reflect the comparative degree to which the Court agrees with the circuit courts of appeal. As previously discussed, however, attributing differences in the degree to which the Court agrees with the circuits to ideological compatibility or other factors would be purely speculative absent a rigorous study of the implications of issue disparity, as well as other variables.¹⁸⁹ For example, there

185. *See supra* Table III, Column 6 ($p=0.0382$).

186. *See supra* Table III, Column 6 ($p=0.0787$).

187. *See supra* Table III, Column 6 ($p=0.0220$).

188. *See supra* Table III, Column 6 ($p<0.0005$).

189. *See supra* note 120, Figures 5, 6, 8 and accompanying text; *see also*

is no obvious blue-state liberal / red-state conservative ideological divide separating the Sixth and Ninth Circuits, which show less accord with the Court (comprising Kentucky (red), Michigan (blue), Ohio (purple), Tennessee (red), California (blue), Alaska (red), Hawaii (blue), Oregon (blue), Washington (blue), Montana (red), Idaho (red), Nevada (purple), Arizona (red) and Guam) from the Seventh and Third Circuits, which show greater accord with the Court (comprising Illinois (blue), Indiana (pink), and Wisconsin (blue), Delaware (blue), New Jersey (blue) and Pennsylvania (blue)).¹⁹⁰ Further empirical study is necessary to explore whether any patterns of issue disparity, circuit size, or other variables distinguish these circuits.¹⁹¹ This Article does not speculate on matters of ideology or issue disparity, but rather, cautions against drawing unsupported ideological or other inferences from differences in either reversal or abrogation rates without rigorous study of and control for factors that might contribute to those differences.

2. Significance: *Bankruptcy Dataset*, Disaggregated by Circuit

The *Bankruptcy Dataset* examines Supreme Court accord on a circuit-by-circuit basis, for all bankruptcy cases during the 1981 through 2012 Supreme Court Terms (Table IV), comparing circuit of origin only data (affirm / reverse rates) to circuit of origin plus sleeper circuit data (approve / abrogate rates).

Including sleeper circuit data in the analysis of bankruptcy cases moderates success rates for most circuits individually and reveals differences in circuit-by-circuit success rates that are significant enough to warrant rejecting the use of simple reversal rates as a basis for comparing the circuits' relative performance before the Court.¹⁹²

infra Figures 13, 14, and accompanying text.

190. See Paul Starr, *Red State, Blue State: Polarization and the American Situation*, THE AMERICAN PROSPECT (Nov. 3, 2014), <http://prospect.org/article/red-state-blue-state-polarization-and-american-situation> (reporting results of four presidential elections, 2000 through 2012).

191. For example, might the Sixth and Ninth Circuit have disproportionately high prison populations and send the Court for review disproportionately high numbers of habeas corpus cases? See *supra* note 164.

192. See *infra* Table IV, notes 190-211 and accompanying text.

Column 2 reports the number of bankruptcy cases in which the Court granted certiorari to each circuit as circuit of origin. Column 3 reports the number of those cases in which the Court affirmed / reversed each circuit, and the simple affirm / reverse rate for each circuit. For example, the Court granted certiorari to the Third Circuit in seven cases, and affirmed the Third Circuit in six of those cases, for an 86% simple affirm rate.¹⁹³

Column 4 reports the overall number of bankruptcy cases that arose in each circuit as circuit of origin plus sleeper circuit combined. Column 5 reports the number of those cases in which the Court approved / abrogated each circuit's position, and the overall approve / abrogate rate for each circuit. For example, although the Court granted certiorari to the Third Circuit in only seven cases, the Court granted certiorari to some other circuit to resolve a circuit split in seventeen additional cases in which a Third Circuit decision had contributed to the split.¹⁹⁴ Thus, the Court reviewed, directly or indirectly, twenty-four Third Circuit decisions. If one considers only the seven cases in which the Court granted certiorari to the Third Circuit, the Third Circuit's 86% affirm rate is impressive. If, however, one includes the Third Circuit's sleeper decisions, the circuit's overall approval rate of 46% hews very close to the fiftieth percentile, and flips from 86% majority agree between the Third Circuit and the Supreme Court to 54% majority disagree.¹⁹⁵

Column 6 reports how far each circuit's individual abrogation rate deviates from the aggregate mean abrogation rate of approximately 57%. For example, the Third Circuit's abrogation rate of 54% is 95% of the mean, which is not a statistically significant difference.¹⁹⁶

193. See *infra* Table IV, Column 3; *Bankruptcy Code Supreme Court Database*, Appendix III, *supra* note 116 (setting forth, by circuit, each circuit of origin and sleeper circuit decision in this Study, and identifying each circuit's circuit of origin decisions).

194. See *supra* Table III, Column 3; *Bankruptcy Code Supreme Court Database*, Appendix II, *supra* note 116 (setting forth, by Supreme Court decision, each circuit of origin and sleeper circuit decision, and identifying the circuit of origin decision underlying each Supreme Court decision); *Bankruptcy Code Supreme Court Database*, Appendix III, *supra* note 116 (setting forth, by circuit, each circuit of origin and sleeper circuit decision in this Study, and identifying each circuit's circuit of origin decisions).

195. See *infra* Table IV, Columns 4, 5.

196. See *infra* Table IV, Column 6.

Table IV Affirm / Reverse versus Approve / Abrogate Disaggregated by Circuit Bankruptcy Cases 1981-2012 Terms					
<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>	<i>Column 5</i>	<i>Column 6</i>
<i>Circuit</i>	<i>Number of Cases Origin only</i>	<i>Affirm / Reverse Number Percent Origin only</i>	<i>Number of cases Origin & Sleeper</i>	<i>Approve / Abrogate Number Percent Origin & Sleeper</i>	<i>Abrogate Rate as Percent of Aggregate Mean Abrogate Rate (56.97%)</i>
1	4	3-1 75-25 %	9	6-3 67- 33 %	59%
2	6	2-4 33-67 %	19	10-9 53- 47 %	83%
3	7	6-1 86-14 %	24	11-13 46- 54 %	95%
4	5	2-3 40-60 %	24	12-12 50- 50 %	88%
5	6	3-3 50-50 %	23	10-13 43- 57 %	99%
6	8	5-3 63-37 %	25	12-13 48- 52 %	91%
7	7	3-4 43 - 57 %	19	4-15 21- 79 %	139%
8	9	4-5	26	11-15	102%

		44–56 %		42– 58 %	
9	9	5–4 56–44 %	34	12–22 35– 65 %	114%
10	9	5–4 56–44 %	23	11–12 48– 52 %	92%
11	5	0–5 0–100 %	22	7–15 32– 68 %	120%
DC	1	1–0 100–0 %	3	2–1 67– 33 %	59%
	Total: 76	39–37 51.32– 48.68 %	Total: 251	108–143 43.03– 56.97 %	
Source: <i>Bankruptcy Code Supreme Court Database</i> , filename: SCT Reversals WinLoss Overview Key: Boldfaced type indicates abrogation rates.					

As with the *Roberts Court Dataset*, this analysis evaluates the reliability of reversal rate data from two perspectives, elaborated below. First, measuring differences between individual circuits' reversal rates and abrogation rates demonstrates that simple reversal rates do not accurately capture the degree to which each circuit's decisions are in accord with the Court's decisions (Table IV Col. 3, 5 and Figure 9). Second, measuring the extent to which each circuit's abrogation rate deviates from the mean abrogation rate provides the basis for determining whether apparently higher or lower rates of accord are significant, and establishes an accurate starting point for analyzing factors that might affect differences in accord between the Court and the individual circuits. (Table IV Col. 6 and Figure 10).

First, these data reveal how the inclusion of the sleeper circuits affects apparent success rates for each circuit. As with the Roberts Court overall data,¹⁹⁷ these effects reinforce the unreliability of using simple reversal data to draw inferences about circuit courts' accord with the Court.¹⁹⁸ Table IV reveals that adding sleeper circuit data to circuit of origin data generally

197. See *supra* Table III and accompanying text.

198. See, e.g., discussion *supra* notes 136, 143-46 and accompanying text.

moderates the circuits' individual success rates in bankruptcy cases.¹⁹⁹ Although the aggregate mean abrogation rate is not significantly different than the aggregate mean reversal rate in bankruptcy cases,²⁰⁰ all but four circuits²⁰¹ results moderate (that is, move closer to the fiftieth percentile) when sleeper circuit data are included. Simple affirm / reverse data show only one circuit with a rate of accord within five points of the fiftieth percentile,²⁰² and five circuits within ten points.²⁰³ Overall approve / abrogate data, in contrast, show five circuits within five points of the fiftieth percentile,²⁰⁴ and seven circuits within ten points.²⁰⁵

Similarly, the inclusion of sleeper circuit data moderates the presumed extremes reflected in affirm / reverse data. The highest individual circuit affirm rate in bankruptcy cases is 100%; the highest individual circuit approve rate is 67%. The highest individual circuit reverse rate is 100%; the highest individual circuit abrogate rate is 79%.²⁰⁶

199. Compare *supra* Table IV, Column 3, with Table IV, Column 5.

200. Table IV reports an aggregate circuit of origin rate of approximately 51% affirm, compared to origin plus sleeper circuit rate of approximately 43% approve, and an aggregate circuit of origin rate of approximately 49% reverse, compared to an aggregate origin plus sleeper circuit rate of approximately 57% abrogate. See *supra* Table IV. The difference between the affirm / reverse rate and approve / abrogate rate is not statistically significant; $p = 0.2044$.

201. These are the Fifth, Seventh, Eighth, and Ninth Circuits. See *supra* Table IV, Columns 3, 5.

202. This is the Fifth Circuit. See *supra* Table IV, Column 3.

203. These are the Fifth, Seventh, Eighth, Ninth and Tenth Circuits. See *supra* Table IV, Column 3.

204. These are the Second, Third, Fourth, Sixth, and Tenth Circuits. See *supra* Table IV, Column 5.

205. These are the Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. See *supra* Table IV, Column 5.

206. The Court reversed all five bankruptcy cases originating in the Eleventh Circuit, as circuit of origin. The Court reviewed twenty-two Eleventh Circuit decisions overall, as origin plus sleeper circuit, which is a sufficiently robust number for purposes of comparison to the other circuits. See *supra* Table IV, Columns 2, 4.

The District of Columbia Circuit, in contrast, sent the Court only one bankruptcy case, as circuit of origin, and only three cases as circuit of origin plus sleeper circuit over thirty-two years. See *supra* Table IV, Columns 2, 4. Given the particular jurisdiction of the District of Columbia Circuit, it is predictably uncommon for bankruptcy cases to arise in that circuit. See 28 U.S.C. §§ 1257, 1331 (2006 & Supp. 2013) (granting D.C. Circuit jurisdiction over appeals from the District Court for the District of Columbia sitting as the

Figure 11 illustrates the divergence between reversal rates and abrogation rates, by circuit, in bankruptcy cases.

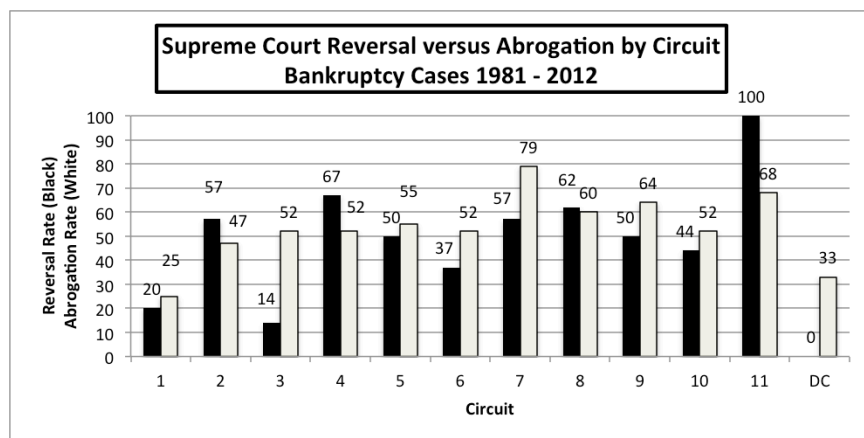


Figure 11, Source: Table IV

These differences between reversal rates and abrogation rates (in the context of bankruptcy cases over a thirty-two year period) again demonstrate that reversal rates do not accurately reflect circuit courts' comparative accord with the Supreme Court. The small datasets make a demonstration of statistical significance difficult on a circuit-by-circuit basis.²⁰⁷ Nevertheless, one circuit (the Third Circuit) does demonstrate a mildly significant statistical difference between reversal rates and abrogation rates.²⁰⁸

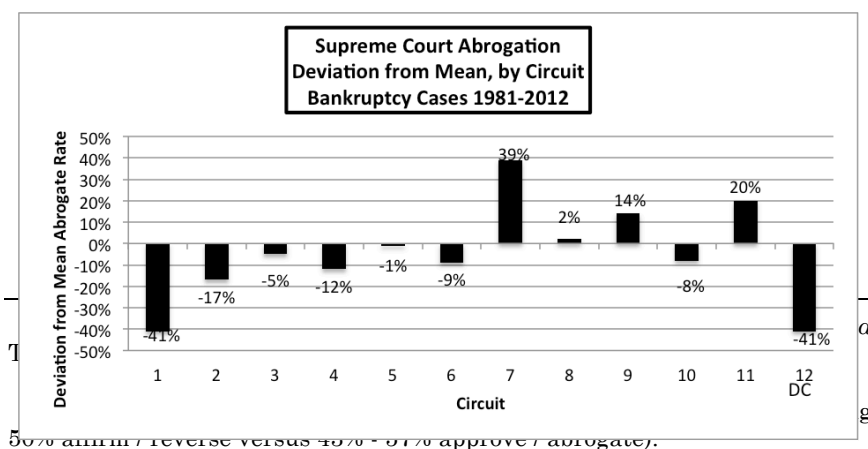
highest court of a "state" or hearing a federal question).

207. As reported in Table IV, no circuit has more than thirty observations as circuit of origin, and only one circuit (the Ninth Circuit) has more than thirty observations as origin plus sleeper circuit. See *supra* Table IV, Columns 2, 4.

208. See *supra* Table IV ($p=0.0654$). The other circuits are as follows: First Circuit $p=0.7867$, Second Circuit $p=0.4307$, Fourth Circuit $p=0.6967$, Fifth Circuit $p=0.7843$, Sixth Circuit $p=0.4906$, Seventh Circuit $p=0.2846$, Eighth Circuit $p=0.9143$, Ninth Circuit $p=0.2798$, Tenth Circuit $p=0.7054$, Eleventh Circuit $p=0.1541$, and District of Columbia $p=1.0$. See *supra* Table IV.

The bankruptcy data demonstrate additional errors that would arise from employing reversal rates rather than abrogation rates to measure individual circuits' accord with the Court. For six circuits, the presumed "result" in terms of accord with the Supreme Court would be simply wrong. Four circuits that would be recorded as "majority affirmed" using circuit of origin only data, are instead recorded as "majority abrogated" using overall circuit of origin plus sleeper circuit data.²⁰⁹ One circuit would be recorded as "majority reversed" using circuit of origin only data, but as "majority approved" using circuit of origin plus sleeper circuit data.²¹⁰ One circuit moves from apparent neutrality using circuit of origin only data to apparent discord using circuit of origin plus sleeper circuit data.²¹¹ The degree of accord would also be misstated for every circuit. Eight circuits' success rates moderate (that is, move closer to the fiftieth percentile) when sleeper circuit data is added; four move farther from the fiftieth percentile.²¹²

Second, the data in Table IV compare the circuits' discord with the Supreme Court based on each circuit's deviation from the mean rate of discord (Column 6). Figure 12 illustrates the degree to which each circuit's individual abrogation rate deviates from the mean abrogation rate for all bankruptcy cases.²¹³



50% affirm / reverse versus 48% + 51% approve / abrogate).

212. Moving closer to the fiftieth percentile are the First, Second, Third, Fourth, Sixth, Tenth, Eleventh, and District of Columbia Circuits. Moving farther from the fiftieth percentile are the Fifth, Seventh, Eighth, and Ninth Circuits. See *supra* Table III, Columns 3, 5.

213. The aggregate mean abrogation rate in bankruptcy cases over thirty-two years is 57%. See *supra* Table I and Figure 2.

Figure 12, Source: Table IV

In general, these data reveal that bankruptcy abrogation rates are relatively stable across circuits and do not vary significantly from reversal rates. Nine circuits' abrogation rates are within twenty percentage points of the mean (six below mean, three above mean);²¹⁴ five are within ten points (four below mean, one above mean).²¹⁵ For example, the differences between the mean abrogation rate and the Ninth Circuit's abrogation rate, which is 14% above the mean, or the Eleventh Circuit's abrogation rate, which is 20% above the mean, have no greater statistical significance than random chance. The outlying result for the District of Columbia Circuit is not statistically significant because of the small number of cases from this circuit. A different result in one or two cases could dramatically affect the results. Similarly, First Circuit's deviation from the mean is not statistically significant.²¹⁶ The only other noteworthy outlier is the Seventh Circuit, with an abrogation rate 39% above the aggregate mean, which translates to mild statistical significance.²¹⁷ In other words, the Court disagreed with the Seventh Circuit somewhat significantly more than average in the bankruptcy cases. None of the other circuits' deviations from the mean abrogation rate is significant.²¹⁸

Again, it would be speculative to infer reasons for these differences without controlling for issue disparity and other variables. Rather, for purposes of this Study, although the

214. These are the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. *See supra* Figure 12.

215. These are the Third, Fifth, Sixth, Eighth, and Tenth Circuits. *See supra* Figure 12.

216. *See supra* Table III ($p=0.1939$).

217. *See supra* Table III ($p=0.0345$).

218. Results for the remaining circuits are as follows: Second Circuit $p=0.4253$, Third Circuit $p=0.7897$, Fourth Circuit $p=0.5104$, Fifth Circuit $p=0.9666$, Sixth Circuit $p=0.6304$, Eighth Circuit $p=0.9423$, Ninth Circuit $p=0.3592$, Tenth Circuit $p=0.6569$, Eleventh Circuit $p=0.2825$, and District of Columbia Circuit $p=0.5518$.

deviations are mild, they reinforce the conclusion that reverse / affirm data do not accurately reflect Supreme Court / circuit court accord.

3. Implications of Issue Disparity: Disaggregated by Circuit

These findings again merit a brief detour regarding the potential implications of issue disparity. If the Court consistently disagrees with particular circuit courts more than others, one would expect to find similar patterns of discord without regard to time periods examined, or issues presented. To test whether such patterns of accord exist within the specific parameters of this Study, Figures 13 and 14 compare circuit-by-circuit bankruptcy abrogation rates to Roberts Court overall abrogation rates. Figure 13 illustrates abrogation rates as a percentage of mean abrogation rates. Figure 14 illustrates these same data in the format of deviation from mean abrogation rate.

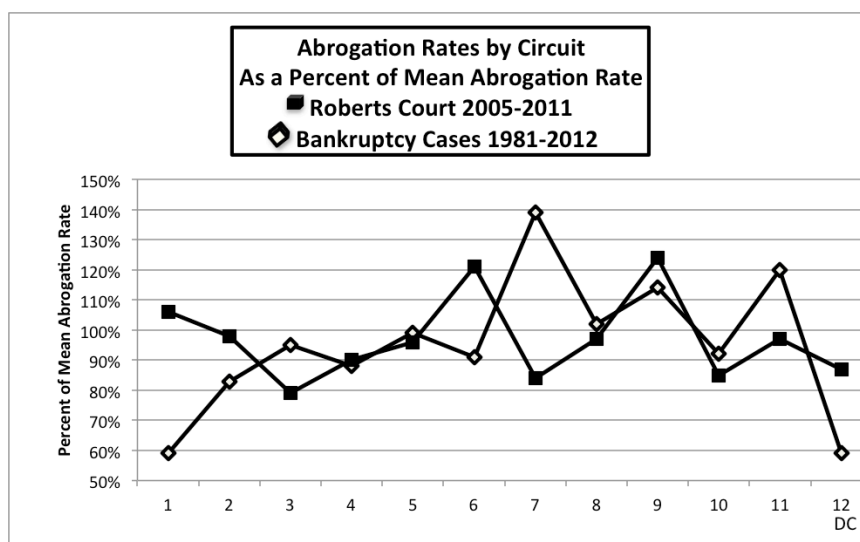


Figure 13, Source: Table III, Table IV

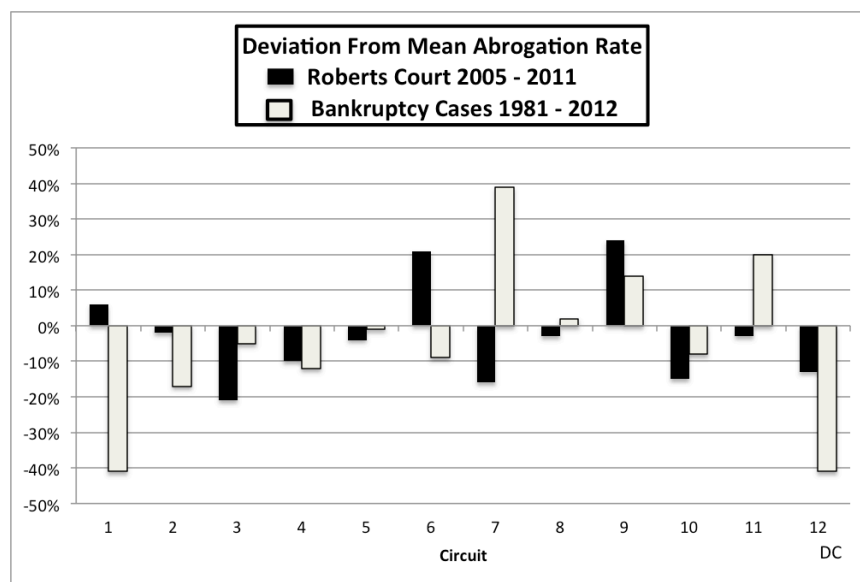


Figure 14, Source: Table III, Table IV

In the *Roberts Court Dataset* (all issues), eight circuits' abrogation rates are within twenty percentage points of the mean (seven below mean, one above mean),²¹⁹ six are within ten points (five below mean, one above mean).²²⁰ In the *Bankruptcy Dataset*, nine circuits' abrogation rates are within twenty points of the mean (six below mean, three above mean);²²¹ and five are within ten points of the mean (four below mean, one above mean).²²²

Several aspects of this comparison are notable. First, if the Court consistently disagrees with particular circuits more than others, one would expect circuit-by-circuit abrogation rates to

219. Below and within twenty points of the mean are the Second, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits; above and within ten points of the mean is the First Circuit. See *supra* Figure 14.

220. Below and within ten points of the mean are the Second, Fourth, Fifth, Eighth, and Eleventh Circuits; above and within ten points of the mean is the First Circuit. See *supra* Figure 14.

221. See *supra* Figure 14.

222. See *supra* Figure 14.

move in lockstep, without regard to issue disparity. In other words, the errant circuits would experience extraordinary abrogation rates without regard to whether one examines cases arising in a single area of law, or all cases in the aggregate. Figure 13 and Figure 14 reveal, instead, incoherently scattered relationships between each circuit's individual abrogation rate in bankruptcy cases and overall cases. In other words, there is no statistically significant relationship between deviation from the mean abrogation rate in Roberts Court cases and deviation from the mean abrogation rate in bankruptcy cases.²²³

Second, three circuits' Roberts Court overall abrogation rates deviate from the mean by more than twenty points. The Third Circuit is twenty-one points below the mean, the Sixth Circuit is twenty-one points above the mean, and the Ninth Circuit is twenty-four points above the mean.²²⁴ Given the numbers of cases from each of these circuits, these deviations are statistically significant for each of these three circuits.²²⁵ For the Ninth Circuit, the deviation is strongly significant.²²⁶ The Seventh Circuit's abrogation rate deviates from the mean by sixteen points (below mean), which is mildly significant for that circuit.²²⁷ None of the other circuits' individual deviations from the mean are statistically significant.²²⁸

These findings are quite different than the findings in bankruptcy cases, in which no circuit's deviation from the mean is strongly significant.²²⁹ The only circuit that diverges somewhat significantly from the mean in both datasets is the Seventh Circuit.²³⁰ The Seventh Circuit's deviation is mild in each dataset, however, and is essentially self-canceling because

223. *See supra* Table IV ($p=0.965348$, Correlation = -0.01408).

224. *See supra* Table IV and Figure 14.

225. At least a mild significance is shown for each, as follows: Third Circuit $p=0.0382$, Sixth Circuit $p=0.0220$, and a strong significance of $p=0.0005$ for the Ninth Circuit. *See supra* Table III, Column 6.

226. *See supra* Table IV ($p=0.0005$).

227. *See supra* Table IV ($p=0.0787$).

228. The results for the remaining circuits are as follows: First Circuit $p=0.5676$, Second Circuit $p=0.7835$, Fourth Circuit $p=0.3136$, Fifth Circuit $p=0.6749$, Eighth Circuit $p=0.8003$, Tenth Circuit $p=0.1552$, Eleventh Circuit $p=0.7210$, and District of Columbia Circuit $p=0.3123$. *See supra* Table III, Column 6.

229. *See supra* note 213 and accompanying text.

230. *See supra* notes 212-13 and accompanying text.

it is slightly above the mean in bankruptcy cases and slightly below the mean in Roberts Court overall cases.²³¹

The fact that the aggregated-issue *Roberts Court Dataset* produces more circuits that deviate significantly from the mean than the issue-specific *Bankruptcy Dataset* again highlights the need for further study regarding the potential implications of issue disparity on Supreme Court / circuit court accord. Why might circuits that do not display significant deviations in an issue-specific bankruptcy case study nevertheless display abrogation rates significantly above (Sixth and Ninth) or below (Third) the mean when all issues are aggregated? The preliminary evidence suggests that the mix of issues the circuits encounter and send to the Court for review may skew their apparent overall success rates before the Court.

VI. Summary, Conclusions and Recommendations

In today's data-driven world, dedicated researchers make available to other researchers and to the public extensive raw data regarding the functioning of our legal institutions. As this Article empirically demonstrates, however, even the most authoritative data can lead to invalid results if those data do not capture the information essential to test a carefully constructed hypothesis.

Supreme Court reversal rates do not embody sufficiently robust data to support valid conclusions regarding accord between the Court and the circuit courts of appeal, let alone to support inferences regarding the circuit courts' relative ideological compatibility with the Supreme Court.

Where more than one circuit has ruled on an issue, the grant of certiorari and consequent designation of the circuit of origin depend upon serendipitous variables that simple affirm / reverse

231. The Seventh Circuit's abrogation rate of 79% in bankruptcy cases over thirty-two years is 139% of the aggregate mean of 56.97% for bankruptcy cases from all circuits. The Seventh Circuit's abrogation rate of 46% in Roberts Court cases over seven years is 84% of the aggregate mean of 55.10% for Roberts Court overall cases from all circuits. *See supra* Tables III, IV. No significance can be attributed to the fact that the Ninth Circuit's abrogation rate exceeds the mean under both datasets because the deviation in the bankruptcy dataset is not statistically significant. $p=0.3592$. *See supra* note 218 and accompanying text.

rates do not capture. These include litigants' and the Court's selection discretion, factual nuance, and the order in which the circuits ruled on an issue. The Study this Article reports finds that this chaotic process results in affirm / reverse rates (considering only the circuit of origin) that differ significantly from approve / abrogate rates (considering circuit of origin and sleeper circuits). Consequently, any comparison of the circuits' performance before the Court must account for circuit splits by incorporating sleeper circuit data in a comprehensive and meaningful way.

Nevertheless, one cannot draw valid conclusions regarding Supreme Court / circuit court accord merely by replacing affirm / reverse rates with approve / abrogate rates. A valid measure of accord must also control for the existence of and interaction among other critical variables, including issue disparity, circuit size, numbers of cases, and variation over time. Chief among these may be the problem of issue disparity, which interacts with and complicates each of the other variables. Comparing the circuits' relative performance based upon any measure that aggregates disparate issues compares apples to bananas if: (i) different circuits send the Court different types of issues, and (ii) the Court inherently disagrees with the lower courts more frequently on certain types of issues as compared to others (perhaps relating to whether review was discretionary, and whether the law is neutral, evolving, controversial or ideological).

The preliminary evidence this Study reports shows significant differences in the patterns of accord between the Court and the circuits in single topic datasets as compared to aggregated topic datasets. These patterns reveal themselves incidental to this Study's focus on reversal rates. Consequently, more targeted studies are necessary to focus specifically on the implications of issue disparity, to determine how issue aggregation affects apparent rates of accord between the Court and the circuits, and to understand how issue disparity intersects with other factors such as the reason the Court granted review. Until these intersections are explored, Supreme Court reversal statistics will remain as diaphanous and deceptive as the mist.

Finally, the problems this Study reveals regarding reversal rate data lead inevitably to two questions: (i) do publication and examination of Supreme Court reversal rates serve any valid purpose, and (ii) if so, should publication of reversal rates be accompanied by caveats warning readers against misapplication of the data?

Reversal rate data may reveal something about the Court's role in correcting errors, but only in a context that recognizes and controls for the variety of roles Supreme Court review serves (such as resolving circuit splits). Typically, however, commentators misapply reversal rate data to compare the circuit courts' relative performance before the Court rather than to explore error-correction. As a measure of Supreme Court / circuit court accord, reversal rate data suffer from the streetlight effect²³² of being easy to locate, but invalid to answer the question presented. At best, researchers may innocently leap from reversal rate statistics to unwarranted conclusions regarding Supreme Court / circuit court accord, and to unsupportable inferences regarding the reasons for supposed patterns of discord. At worst, some commentators may conveniently employ reversal statistics to justify pre-existing biases.²³³

To obviate these concerns, responsible publishers concerned with the misuse of Supreme Court reversal statistics should consider including prominent caveats noting the limited purposes for which reversal rate data are reported, and

232. Data that are not valid for the purposes to which they are applied may be harmful, rather than simply worthless, because they contribute to actions and beliefs based upon erroneous "facts." For explorations of the often repeated tale of a person searching under a streetlamp for something he lost elsewhere, see Evan Esar, "Did You Lose the Keys Here?" "No, But the Light Is Much Better Here." QUOTE INVESTIGATOR (Apr. 11, 2013), <http://quoteinvestigator.com/2013/04/11/better-light/>; David H. Freedman, *Why Scientific Studies Are So Often Wrong: The Streetlight Effect*, DISCOVER MAG. (Dec. 10, 2010), <http://discovermagazine.com/2010/jul-aug/29-why-scientific-studies-often-wrong-streetlight-effect#.UdMyg1KhNsE> (discussing how the "streetlight effect" can lead to invalid scientific studies).

233. See Eisenberg, *Origins*, *supra* note 4, at 1736-37 (noting how the absence of reliable data allows self-interested parties to promote biased data); see also Wermiel, *Ninth Circuit*, *supra* note 69, at 362-65 (discussing popular perception and the media's role in fomenting the Ninth Circuit's reputation; citing examples); Chemerinsky, *supra* note 72, at 1 (discussing public perceptions).

expressly disclaiming the applicability of these data to the question of Supreme Court/circuit court accord, absent control for circuit splits, issue disparity, circuit size and other critical variables.