Evolution of Conflict in the Courts of Appeals

Deborah Beim*
Department of Political Science
Yale University
deborah.beim@yale.edu

Kelly Rader
Department of Political Science
Yale University
kelly.rader@yale.edu

May 12, 2015

Abstract

Conflicts between the Courts of Appeals are of central importance to the American judiciary. When circuits split, federal law is applied differently in different parts of the country. It has long been known that the existence of a circuit split is the best predictor of Supreme Court review, but data availability has constrained understanding of circuit splits to this fact. In this paper, we explore the “life cycle” of an intercircuit split. We analyze an original dataset that comprises a sample of conflicts between Courts of Appeals that existed between 2005 and 2013, including both conflicts the Supreme Court resolved and conflicts it has not yet resolved. We show how long a conflict exists before it is resolved and how many go unresolved altogether, which conflicts are resolved soonest, and how a conflict grows across circuits.

*Preliminary draft prepared for the 2015 Midwest Political Science Association Annual Meeting. For helpful comments, we thank Steve Wasby, Paul Collins, Chris Zorn, John Kastellec, the Law, Economics, and Organization workshop at Yale Law School, and the audience at the conference on Influences on Judicial Behavior. Thanks to Shelby Baird, Joy Chen, Ian Crichton, Michelle Kim, Alisha Jarwala, Adam Kunz, Tony Nguyen, and Tory Stringfellow for excellent research assistance; to the Center for the Study of American Politics and the Institution for Social and Policy Studies at Yale University for research support; to John Summers for generously sharing data; and to Rebecca Hilgar, Patrick Coughlin, and Christine Gaddis from the Seton Hall Circuit Review for their generous help.
Conflict between Courts of Appeals is of central importance to the federal judiciary. When circuits split, federal law is applied differently in different parts of the country. As an empirical matter, the existence of a circuit split is one of the best predictors of Supreme Court review. However, despite its importance, scant empirical evidence exists outside of this fact. How many circuit splits go unresolved altogether? Of those that are resolved, for how long do they persist before they are resolved?

Past attempts to answer questions about conflicts in the lower courts have been limited by data availability. Those that have considered conflict holistically, considering all those cases that are in conflict with each other, have studied only conflicts that the Supreme Court has already resolved—which are likely systematically different from those the Court chooses not to resolve. Those studies that have considered the effect of conflict on Supreme Court review, or certiorari, have considered each petition for cert independently rather than seeking to understand how conflicts change and when they are resolved. Additionally, even outside the study of conflict, there is very little quantitative research on litigants’ decision to petition for certiorari.

In order to answer these questions, we compiled an original dataset that comprises a sample of conflicts between Courts of Appeals that existed between 2005 and 2013, which includes both conflicts the Supreme Court resolved and conflicts it has not yet resolved—and may never resolve. We thus provide the first look at the universe of existing conflicts. This allows us to explain how long conflicts typically last before they are resolved, how many conflicts go unresolved altogether, and how the evolution of a conflict in the lower courts affects the likelihood the Supreme Court grants cert. It also offers the most comprehensive picture to date of cross-circuit litigant strategy, understanding how conflicts evolve and how litigants manipulate that evolution. In this paper, we present our data and begin to investigate the lifecycle of an intercircuit conflict.
1 Intercircuit Conflict

The Courts of Appeals decide over 50,000 cases every year (Administrative Office of the United States Courts 2015). When disposing of cases within its own jurisdiction, a given circuit court is not obligated to follow any other circuit’s precedent. When a circuit declines to follow other circuits’ decisions, it creates a circuit split—disagreement about federal law that means similarly-situated litigants are treated differently in different parts of the country.

Uniformity in the application of federal law by federal courts is a value as old as Federalist 80. In addition to harming this principle, circuit splits have other potentially undesirable consequences: they make it difficult for lawyers to advise their clients, invite additional litigation, circumscribe potentially legal conduct—including making it difficult for business to operate in multiple jurisdictions, or to make contracts that are enforceable nationwide—and possibly cast doubt on the legitimacy of the legal system itself (e.g., Hellman 1985; Tiberi 1993). Circuit splits may also have beneficial effects, most notably, when many circuits consider similar issues and develop law the Supreme Court faces the opportunity to select among many options for the best available doctrine (e.g., Beim 2014; Estreicher and Sexton 1984).

These divergent doctrines—circuit splits—may arise for a number of reasons. Judges across circuits may simply have different preferences over doctrine. Even in the absence of preference heterogeneity, judges across circuits may face informational asymmetries, depending on the particular cases that arise within their jurisdictions or on the particular arguments litigants make. This may be especially true when there is no clear Supreme Court precedent. Empirically, evidence is mixed as to what consideration Courts of Appeals judges give to precedents in other circuits. Klein (2002) argues that judges on the Courts of Appeals are actively attuned to the decisions in other circuits that precede them. Wasby (2002) argues,
likewise, that circuit judges consider other circuits’ decisions, are somewhat wary of creating conflicts, and when a conflict already exists, tend to join the majority of circuits. On the other hand, not all circuit judges claim to give deference to their sibling circuits’ decisions (Tiberi [1993], note 65), and circuit splits are a common phenomenon.

Similarly, there are many avenues by which a circuit split may end. A circuit may repudiate its past decision to come in line with other circuits, Congress or an administrative agency may pass regulations that functionally overrule circuit doctrine, or the split may become dormant. This can happen either because the issue never arises again, or because litigants put it to rest, for example, by following the strictest requirement any circuit has articulated. Resolution by the Supreme Court is the most formal way to bring uniformity to a body of law when circuits split. In the Supreme Court’s Rule 10, the presence of a circuit split is one of the only factors explicitly mentioned as a consideration in granting writs of certiorari.

We can see the heavy consideration to which the Supreme Court accords intercircuit conflict in the cases it does decide to hear. Consistent with Rule 10, the Supreme Court is far more likely to review cases that implicate a conflict in the lower courts than those that do not (Tanenhaus et al. 1963, Ulmer 1984, Caldeira and Wright 1988, Perry 1991, Caldeira, Wright and Zorn 1999, Black and Owens 2009, Epstein, Martin and Segal 2012). In a review of Burger Court cases, Hellman (1985) found that intercircuit conflict was the modal reason for granting cert and that, in some areas of statutory law, resolving conflict was nearly the only reason the Court heard a case. In recent years, conflict cases have composed about one-third of the Court’s docket (Lindquist and Klein 2006).

The presence of an intercircuit conflict does not guarantee that the Supreme Court will grant review, however. Some conflicts implicate more important areas of the law, potentially

\[^{1}\text{At least since 1950. See Tiberi (1993).}\]
affect more litigants, are more likely to persist, involve more contemporaneous disagreement (are more “live”), or involve cases that are harder to distinguish (are more “square”) than others. That is, “there are conflicts, and there are conflicts” (Perry 1991, p. 249). Because it is so widely know that the Court is more likely to grant review to cases that implicate conflicts—and Gressman et al. (2007, p. 242) advise petitioners of this reality—allegation of conflict is common in cert petitions. Much of a law clerk’s task is distinguishing genuine from alleged conflict (Estreicher and Sexton 1984). In a sample of all petitions filed in the 1986-1993 terms, Epstein, Martin and Segal (2012) find that over half alleged conflict but only 14% of those were genuine according to clerks. Even among those that had genuine conflict, only about 16% were granted (compared to less than 2% of petitions that did not).

Thus, even though the Supreme Court is theoretically and empirically interested in resolving intercircuit conflicts, it often declines to review them. For better or worse, intercircuit conflicts persist and often spread, even after litigants bring them to the attention of the Court.

1.1 Lack of Theory about Intercircuit Conflict

Theory about intercircuit conflict is shallow in both the legal and political science literatures. In the legal literature, the main theoretical questions involve whether conflict is good or bad for the development of law. When the Supreme Court allows a conflict to persist, or to “percolate” in the lower courts, do the justices learn something by allowing multiple circuits to weigh in before they grant cert to resolve a conflict (Stevens 1982, Wallace 1983, Estreicher and Sexton 1984, Beim 2014)? Or do they cause harm to litigants by not bringing unity to application of federal laws (Rehnquist 1986, Baker and McFarland 1987, Meador 1989)?

To the extent that the Court does seek to balance learning and uniformity, there is little evidence that percolated decisions are more well-received than non-percolated ones. Tiberi (1993) finds that negative reviews of Supreme Court decisions, dissents, and Congressional overrides are just as common, if not more.
In the political science literature, all theoretical expectations about intercircuit conflict pertain to Supreme Court behavior. Clark and Kastellec (2013) present the only formal model of how justices view the decision to resolve a conflict. In this model, a court that faces a tradeoff between promoting uniformity in the law and learning about legal issues from percolation in the lower courts. The court grants cert to resolve an issue when the costs to allowing the conflict to percolate outweigh the benefits of learning from additional lower courts weighing-in. Outside of this paper, the political science literature has been primarily an atheoretical exploration of whether conflicts are resolved.

Any theoretical considerations of how justices consider intercircuit conflict operate in the shadow of the founding question of judicial politics—does law influence Supreme Court decision making? That ideological considerations influence justices is perhaps the most well-established finding in judicial politics. Scholars seeking to show the influence of non-ideological or jurisprudential considerations at various decision points include conflict as one of those factors. According to such accounts, resolving conflicts will matter to justices if they care about clarity and uniformity in the law in addition to pursuing their policy goals. Thus, when deciding whether or not to grant cert to a case, justices should be less likely to vote according to their policy preferences if the case is involved in a conflict (Black and Owens 2009; Epstein, Martin and Segal 2012). When deciding a case on the merits in order to resolve a conflict, justices should consider which side of the conflict is more legally persuasive in addition to which side aligns with their policy preferences (Lindquist and Klein 2006).

All extant theories of intercircuit conflict treat conflict as exogenous. And yet, who creates conflicts? Judges and litigants. Appellate judges are thought to be rational, forward-so, when the Supreme Court weighs in on an issue on which multiple circuits have spoken. Of course, one cannot tell from this how well percolated decisions would have been received had they not been allowed to percolate. This debate, then, is largely theoretical.
looking, and strategic in their decision making (see e.g. [Murphy 1964] Cameron, Segal and Songer 2000, Epstein, Landes and Posner 2013) (but see [Klein and Hume 2003]). They can be thought of as either in a principal-agent relationship with the Supreme Court that, with the help of various monitoring mechanisms, seeks to enforce compliance over them (see e.g. Cameron, Segal and Songer 2000, Beim, Hirsch and Kastellec 2014), in a team that seeks the correct answers given limited information (Cameron and Kornhauser 2005; Westerland et al. 2010), or in a legal community that values clarity and consistency (Bueno de Mesquita and Stephenson 2002; Staton and Vanberg 2008; Lax 2012). Litigants are also rational, forward-looking, and strategic (e.g. Priest and Klein 1984). They may care not only about the disposition of their own cases but also about legal doctrine. Their decisions to pursue litigation and appeal decisions after a loss are what provide the opportunity for conflicts to arise, for conflicts to spread through other circuits, and for the Supreme Court to resolve them.

Conflict begins and grows as the result of the strategic interactions between judges and litigants. Therefore, understanding the birth and development of conflict is interesting in its own right. And, since these actors are likely forward-looking, understanding these phenomena is crucial for developing a complete understanding of the Supreme Court’s decision to resolve conflict.

1.2 Scant Empirical Knowledge about Intercircuit Conflict

Just as extant theories of intercircuit conflict are limited to describing how conflict affects Supreme Court behavior, most of what is known empirically about intercircuit conflicts is also about Supreme Court behavior. Many empirical studies of conflict compare cert petitions that the Court granted to those it denied. This is how we know that the proportion of petitions that allege conflict is greater among granted than denied petitions, as discussed above. We also know from these comparisons that the Court is far more likely to review cases
involved in true conflicts (Estreicher and Sexton 1984) or deep conflicts as opposed to shallow ones (Black and Owens 2009) ⁵ Consistent with theories positing that legal factors interact with ideological considerations in the cert process, Black and Owens (2009) and Epstein, Martin and Segal (2012) find that the probability of cert is affected by justice ideology to a greater extent when non-ideological factors—including lower court conflict—suggest the probability of a cert grant is moderate (not too high or too low).

Occasionally the notion that the Supreme Court either lacks the capacity to resolve important conflicts or is abrogating its duty to do so has given rise to Congressional inquiries. At the behest of the 1990 Federal Courts Study Committee, Hellman (1995) investigated the number, “tolerability,” and “persistence” of intercircuit conflicts implicated by cases in which litigants petitioned for cert but that the Supreme Court nonetheless declined to hear. In the 1989 term, Hellman estimated that the Supreme Court denied cert to petitions implicating between 168 and 274 different intercircuit conflicts. Among those petitions, about one-third involved conflicts that had the potential to cause harm to multicircuit actors, either through the existence of inconsistent obligations or by necessitating compliance with the most restrictive rule. Between one-quarter and one-third involved disagreement over rules that were clear cut enough that the choice of rule would most certainly change the outcome of the case, and an additional thirty to fifty percent involved differences over rules that would favor one side or the other in a class of disputes. That is, a large majority of cert petitions alleging conflict that were denied review involved conflicts that were serious enough to alter the behavior of relevant actors and/or lead to different case outcomes across similar cases. In a similar set of denied petitions from the 1984 and 1985 terms, Hellman found that only about one-third were resolved by the Supreme Court by the 1992 term, though an additional

---

³Of course, what constitutes a conflict worthy of review is subject to interpretation. Even the justices themselves disagree over which conflicts, if any, are tolerable (Perry 1991).
25 percent were mooted in other ways.\footnote{Some were resolved by legislation, some by subsequent lower court decisions, and some led to no further litigation. Of those conflicts that were still live, Hellman found that about two-thirds resulted in continued differential treatment of litigants across circuits, while the other third did not obviously control case outcomes. From this, he concludes that the Supreme Court possesses adequate capacity to resolve conflicts.}

Comparisons of granted and denied petitions increases our understanding of the Supreme Court’s *certiorari* decisions, but does not allow us to understand doctrine—since we do not know what becomes of the denied petitions.\footnote{Hellman (1995) is the exception, though his data are over twenty years old and do not include petitions that were granted.} They also do not allow us to study conflicts holistically, since we do not know anything about the conflicts, about the other cases involved, beyond the petitions at hand.

Therefore, in an attempt to study how conflict grows over time—how long it lasts in terms of both years and the number of circuits involved, and how the number of circuits on either side of the split affect the likelihood of resolution—a number of scholars have studied conflicts that have been resolved by the Supreme Court. For example, Lindquist and Klein (2006) find that the Supreme Court seems to be more likely to agree with the more “legally persuasive” side in a conflict when deciding a conflict case on the merits. Consistent with a prediction from their percolation model, Clark and Kastellec (2013) find that, among resolved conflicts, the Supreme Court is more likely to grant *certiorari* when a conflict arises late in the percolation process than when a conflict arises early in the percolation process.\footnote{Their analysis assumes that the Court could have resolved the conflict in any period, i.e. whenever a lower court made a decision, whether or not there was a petition for cert.}

This approach allows inferences about resolved conflicts only, and the conflicts that are resolved—and especially those the Supreme Court *states* it is resolving—are likely to be different from those that go unresolved.\footnote{Bruhl (2014)} For example, in a rare study that links *cert* petitions alleging conflict with information about the circuits involved in the conflict, Grant, Hendrickson and Lynch (2012) find that ideological divergence between circuits on
one side of a conflict and the other is positively associated with Supreme Court review. However, even this strategy is limited because litigants are likely to be strategic; studying only cases in which there was a *cert* petition still yields a biased sample of all cases involved in conflicts across circuits.

Our project builds on the findings that conflict predicts certiorari, and that the nature of the conflict—including the size, duration, subject matter—affect when and how it is resolved. We resolve the data limitations that have hindered knowledge about lower court conflicts, thereby allowing us to include conflicts that may never be resolved, and explicitly study conflicts holistically rather than studying petitions individually.

2 Data

Our data are Courts of Appeals decisions, clustered into conflicts—some of which have been resolved and some of which have not been resolved. We study the growth of conflicts before their resolution. Because our data includes conflicts that have not yet been resolved, we are able to study differences between conflicts that are resolved and conflicts that may never be.  

Identifying and codifying conflicts poses severe methodological and epistemological obstacles, both for the Court and for researchers. Whether one decision is really in conflict with another is often arguable. Identifying all decisions that are in conflict with any given one is functionally impossible, given the number of cases decided in the federal courts each year. In a comprehensive study of circuit court judges’ behavior around intercircuit conflict, Wasby (2002) argues that judges tend to know, discuss, and remark in the written opinion when they create an intercircuit conflict (Wasby 2002, pg. 162). We therefore dealt with these measurement issues by relying on the courts’ own descriptions of conflicts—specifically,

---

7Since we select on the existence of conflict, we cannot speak to whether a case would have been heard had it not been involved in a conflict.
we found explicit mentions of conflict and built two datasets by relying on those\textsuperscript{8} We built a dataset of resolved conflicts by relying on the Supreme Court’s opinions, and of existing conflicts by relying on the Courts of Appeals’ opinions.

We captured conflicts resolved between the 2005 and 2012 Supreme Court terms, and part of the 2013 term, by reading Supreme Court opinions that explicitly stated they were resolving a conflict\textsuperscript{9} This dataset gives us a look at conflicts that were resolved. In this dataset, there are 171 conflicts involving 842 circuit court cases.

To understand conflicts that are unresolved—some of which may never be resolved—we captured all conflicts that were active between 2005 and 2013 by relying on the Seton Hall Circuit Review’s quarterly summaries of circuit splits. We define a conflict to be active if a circuit joins an existing split or creates a new split; the Seton Hall Circuit Review identifies such cases by reading Court of Appeals opinions that explicitly mention a split or disagreement with another circuit. In this dataset, there are 418 conflicts involving 2082 cases. As of 2013, only 42 of these conflicts had been resolved by the Supreme Court.

We call the datasets the Supreme Court Dataset and the Courts of Appeals Dataset, according to which court identified the conflict. Relying on courts’ explicit mentions of conflict has some costs. This method does not capture all conflicts—many conflicts are mentioned by the Courts of Appeals, but in phrases such as, “we depart from our sister circuits” rather than using the word “split.” We do not capture these. We also do not capture conflicts that escape acknowledgement altogether. Likewise, the Supreme Court does not always explicitly state that it is resolving a conflict between Courts of Appeals. But the method also accords us some benefits. Relying on courts’ own description of conflicts sets a standard for what counts as a conflict. To whit: a judge may articulate a slightly different rule

\textsuperscript{8}Our data collection procedures are described in further detail in the appendix.
\textsuperscript{9}The Spaeth Supreme Court Database (Spaeth 2011) records the reason for granting \textit{cert}, and we relied on that coding.
than did another circuit, but avoid creating a conflict by finding a minor factual distinction between his rule and the other circuit’s. (Hellman (1984) calls this “sideswiping.”) Or a judge may articulate a slightly different rule on precisely the same facts—but the distinction may be so slight as not to qualify as a conflict. By relying on courts’ descriptions of these issues, we identify only the most severe conflicts and avoid having to create our own subjective guidelines for dealing with these issues.

Because our data includes only conflicts, and not issues on which there is no conflict, we cannot explain how much more likely any given case is to be reviewed by the Supreme Court because it is in conflict with another decision. We also cannot interpret how long the Supreme Court waits before resolving a conflict by relying on the Supreme Court dataset, for the Supreme Court is unlikely to cite the earliest case in a conflict. We study which conflicts get resolved, and how long they persist before they are resolved, by comparing resolved and unresolved conflicts.

<table>
<thead>
<tr>
<th>Identified by Supreme Court</th>
<th>Not Identified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identified by Courts of Appeals</td>
<td>28</td>
</tr>
<tr>
<td>Not Identified</td>
<td>143</td>
</tr>
</tbody>
</table>

Table 1: Conflicts resolved between 2005 and 2013, identified by the Supreme Court and identified by the Courts of Appeals.

For conflicts resolved between 2005 and 2013, Table 1 shows the crosstab of conflicts we identified from the Courts of Appeals, and conflicts that the Supreme Court identified between 2005 and 2013. Neither completely overlaps the other—sometimes the Supreme Court resolves a conflict without acknowledging that it is doing so, sometimes the Courts of Appeals do not explicitly state they are in conflict with each other. In other words, although both these datasets are samples of intercircuit conflicts, they are not comparable samples and neither has comprehensive coverage. We cannot hope to capture the universe of circuit
splits—when no Court of Appeals mentions a conflict, and the Supreme Court either does not resolve it or does not acknowledge doing so—the conflict escapes researchers’ attention.\(^{10}\)

Therefore, we treat these datasets as samples of the universe of existing conflicts. In this paper, we analyze each of these datasets separately\(^{11}\). Within conflicts identified by the Courts of Appeals—some of which have been resolved, and some of which have not been—we compare resolved to unresolved conflicts. We use the Supreme Court dataset to study resolved conflicts in more depth.

The courts’ summaries—those in Supreme Court opinions and those in Courts of Appeals opinions summarized by the Seton Hall Circuit Review (Staff 2005-2013)—describe which cases are involved in each conflict, and which side of the conflict each case is on. We relied completely on the court’s interpretation and description of the conflict and coded this information. Then we looked up each Court of Appeals decision mentioned as being involved in the conflict on Westlaw, and from there collected case-level information including the judges on the panel, the year of the decision, the composition of the circuit, whether the decision was published, whether there was a concurrence or a dissent, which party appealed from the district court’s decision, and whether there was a petition for cert. If so, we noted which party petitioned for cert, whether cert was granted, and, if cert was granted, whether the Supreme Court resolved the conflict in its decision. (In most conflicts, there are only two sides and they are clear.) We also collected information at the conflict-level, including issue area and whether the Supreme Court resolved the conflict. For those cases in which the Supreme Court did resolve the conflict, we took case-level information on the Supreme

\(^{10}\) Hellman (1985, 1995) relies on lawyers’ briefs and other court documents to supplement judges’ opinions, which can increase the number of conflicts captured but still cannot capture all of them.

\(^{11}\) We hope to determine, in future iterations of this project, how closely our data approximates a random sample of conflicts. Conflicts acknowledged by the Courts of Appeals may be different from unacknowledged conflicts, but conflicts described by the word “disagree” may be no different from conflicts described by the word “depart.”
3 Analysis

We analyze the “life-cycle” of an intercircuit split. We focus especially on how long the Supreme Court allows conflicts to percolate before resolving them, and which conflicts go unresolved. The former dynamic has received previous attention in judicial politics, which allows us to reconcile our new data with previous results.

In our Courts of Appeals data, an average of 20 conflicts are “born” each year, and an additional 50 conflicts expand (that is, they are joined by new circuits). Figure 1 shows the number of conflicts that are born and expand in each year of the dataset. To be sure, this is an undercount of the number of conflicts that exist in the Courts of Appeals each year. Many conflicts are live but inactive—no circuit is joining them, so they do not appear in this graph for that year. Still more may be active but unidentified because the courts in question do not explicitly state they are entering a conflict.

Figure 1: Number of conflicts that are born and expand in each year in the Courts of Appeals Dataset.
A conflict typically arises very quickly after an issue begins percolating in the Courts of Appeals. The mean number of circuits involved by the end of the year in which a conflict began is 3. (Sometimes two circuits decide opposite each other on a case of first impression in the same year, functionally joining simultaneously.) The median is 2. Figure 2 shows the distribution of the number of years between the case of first impression, and the case that started the conflict. Most conflicts begin very quickly—in the first few years after a decision is issued, another decision is handed down in conflict. The low density on the right tail shows that it is rare to initiate a conflict against a long-standing precedent. In the figure, the black bars are resolved conflicts and the light gray bars are unresolved conflicts. There is no noticeable difference between the two. This means that in the Courts of Appeals data, late-arising conflicts are no more likely to be resolved than early-arising conflicts—a finding that contrasts with Clark and Kastellec (2013), who look among resolved conflicts and find that resolved conflicts are more likely to have been late-arising than early-arising.

Figure 2: Distribution of the number of years between the case of first impression and the year conflict began. Black bars are resolved conflicts, light gray bars are unresolved conflicts.
Our primary focus is the duration of conflict: when, if ever, the Supreme Court terminates the percolation of a conflict and resolves it. There are other ways a conflict may be resolved—acquiescence, Congressional interference, etc.—but we focus here on a formal grant of *certiorari* and resolution by the Supreme Court. The advantage of doing so with our Courts of Appeals data is that we can observe both resolved and unresolved conflicts, the latter of which make up almost 90% of our sample.

Within our Courts of Appeals data, we identified 41 conflicts born in 2005, one of which was resolved in 2006, one of which was resolved in 2010, and 39 of which remain unresolved. This dramatically underestimates the number of conflicts that are actually resolved in these years. We can get a sense for this by looking within our Supreme Court data, which itself is only a subset of the conflicts the Supreme Court resolved during this period. In this dataset, among the cases the Supreme Court resolved in its 2006 term, 8 were born in 2005. Between the 2005 and 2012 terms, the Supreme Court resolved 19 conflicts it identified as having been born in 2005. Figure 3 reveals that this low resolution rate in the Courts of Appeals database is a general trend. The graph shows the number of years a conflict lives before it is resolved (if at all) in the Courts of Appeals database. As the number of years increases, most conflicts remain unresolved. Over 80% of the oldest conflicts we observe remain unresolved.

Although the Courts of Appeals data estimates a very small proportion of conflicts are ultimately resolved, the estimates from both data sources suggest a similar life-expectancy before resolution. If a conflict is resolved, it is young when resolved. Within our Courts of Appeals data, of those conflicts that were born in 2005 or later and have been resolved, the mean number of years from start of conflict to resolution is 1.5 years. The median is 1. Within our Supreme Court data, of those conflicts that were born in 2005 or later, the mean number of years from start of conflict to resolution is 1.2 years, and the median is 1. Figure 4 shows the age at which conflicts are resolved. On the horizontal axis, the graph
Figure 3: Proportion of conflicts resolved, by age of conflict in years. Data are conflicts from the Courts of Appeals database born in or after 2005.

shows the proportion of conflicts that age or younger at time of resolution. Looking first at the righthand side of the graph, we see that essentially all conflicts that are resolved are resolved at age 25 or younger. But these conflicts are resolved very young—approximately 70% of resolved conflicts in the Courts of Appeals data were born in the previous 8 years. The steep curve indicates that conflicts that are resolved are typically resolved very soon after they begin.

Figure 5 depicts the comparable quantity for the number of years between the case of first impression and the conflict’s resolution. Few conflicts are resolved very soon after the case of first impression—most percolate in the Courts of Appeals before they are resolved.

Figure 6 illustrates the proportion of conflicts that are unresolved by year of first case in the issue that became a conflict. Regardless of whether there is a conflict, justices may prefer to wait before deciding an issue—“justices like the smell of well-percolated cases” (Perry 1991 page 230).
Figure 4: Conflict age at resolution; Court of Appeals Dataset.

Figure 5: Issue age at resolution; Court of Appeals Dataset.
Figure 6: Kaplan-Meier curve of the proportion of conflicts unresolved by year since the case of first impression.

But percolation can mean either of two things. The justices may prefer many cases to be heard on the same issue, to observe how various judges treat them. Or the justices may prefer for many different circuits to weigh in, allowing them the opportunity to operate as laboratories of law and propose alternate doctrines \cite{Beim2014}. How does time to resolution vary by the number of circuits involved? Figures 7 and 8 show Kaplan-Meier curves of the proportion of conflicts unresolved by the number of circuits involved in each of our datasets. In each figure, the horizontal axis represents the number of circuits involved in a conflict; the vertical axis represents the proportion of conflicts unresolved with that number of circuits involved. The dashed lines show 95% confidence intervals around these estimates. As the number of circuits involved increases, the proportion of conflicts unresolved decreases. Since none of the issues in our data were resolved absent a conflict, and since a conflict is only possible once at least two circuits are involved, the solid line starts at 1 at the lefthand side of the graph—all conflicts are unresolved with fewer than two circuits involved. As
the number of circuits involved rises past this threshold, the proportion of conflicts resolved increases. For example, of the conflicts in which only three circuits are involved, 93% are unresolved in the Courts of Appeals data and 54% are unresolved in the Supreme Court data. Of the conflicts in which eight circuits are involved, 66% are unresolved in the Courts of Appeals data and only 6% are unresolved in the Supreme Court data. The mean difference in team size at time of resolution is 1.68—one side is slightly larger than the other at time of resolution.

![Kaplan-Meier curve of the proportion of conflicts unresolved with varying number of circuits involved in Courts of Appeals Data.](image)

**Figure 7:** How many circuits does the Supreme Court allow to join a conflict before resolving it? Kaplan-Meier curve of the proportion of conflicts unresolved with varying number of circuits involved in Courts of Appeals Data.

In comparing Figure 3 with Figure 7, we see that, for the conflicts in our Courts of Appeals data, the number of circuits involved is a stronger predictor of resolution than the age of the conflict. We attribute this in part to differences in the natural rate at which cases arise. A conflict about a maritime issue may arise so infrequently that percolation will proceed very slowly. In contrast, the conflict about constitutionality of Obamacare proceeded extremely quickly.
Figure 8: How many circuits does the Supreme Court allow to join a conflict before resolving it? Kaplan-Meier curve of the proportion of conflicts unresolved with varying number of circuits involved in Supreme Court data.

The other, more important explanation for this is that the Supreme Court cannot resolve a conflict at any time—only when there is a petition for *certiorari*. Even within cases that start or expand conflicts—all cases of first impression for the circuit—*cert* petitions are quite infrequent. Figures 9 and 10 show the proportion of conflicts born in each with and without *cert* petitions. The height of each bar in Figure 9 represents the number of conflicts born in each year. The height of the dark gray portion of the bar represents the number of conflicts born *with cert* petitions, the light gray portion represents the number of conflicts born *without cert* petitions. It is easy to see that many conflicts see no *cert* petitions in the year they are born. The same is true for expanding conflicts, as Figure 10 reveals. The light gray bars, in both instances, are often higher than the dark gray bars. More conflicts are born and expand with no *cert* petition filed than with a *cert* petition filed. Since the Supreme Court can only resolve conflicts when there is a petition for *cert*, this is an important factor to consider in understanding when conflicts are resolved.
Figure 9: Number of conflicts born each year in Courts of Appeals Data. Dark gray bars represent the number with cert petitions.

Figure 10: Number of conflicts expanding each year in Courts of Appeals Data. Dark gray bars represent the number with cert petitions.
Finally, we can say which circuits are more likely to start conflicts. We say a circuit started a conflict if it was on the opposite side of the conflict from all circuits that had previously ruled on the question. Note, more than one circuit may start the same conflict if, say, one circuit held that A in 2005 and two circuits both held that B in 2006. We would say that the conflict was born in 2006 and that two circuits started it. Figure 11 displays the frequency with which each circuit starts conflicts. This is broadly consistent with the circuits’ docket sizes, shown in Figure 12 below.

![Which Circuits Start Conflicts?](chart.png)

Figure 11: Which Circuits Start Conflict?

4 Issues

The analyses presented herein are our first cut at the data. Below we describe some challenges the data poses for more systematic study.

Low resolution rate. Within the Court of Appeals dataset the proportion of conflicts that go unresolved is extremely high. Is it true that the Supreme Court resolves conflict at

---

\[12\] If one circuit held A and one B in 2005, then we would say neither started it.
such a low rate? Or are the conflicts in the Court of Appeals Database unusual in some way? It is unlikely that these conflicts will be resolved in the future—we know from the Supreme Court Dataset that conflicts are usually resolved quickly. Therefore, either the rate of resolution is very low or the Court of Appeals Database disproportionately samples conflicts that are likely never to be resolved. But our sample of unresolved conflicts includes only those conflicts where circuit court judges are explicit that there is a conflict, and we know judges care about identifying conflicts—so these are likely to be serious conflicts. One possibility is that the conflicts that are not acknowledged as these are resolved at a much higher rate. This would include conflicts that are not acknowledged by the lower courts and conflicts that are acknowledged but don’t include the words “split” or “disagree.” We know that sometimes conflicts are not acknowledged by the lower courts because Hellman (1985, 1995) identifies petitions for cert that claim conflict where it is not referenced by the lower court.

*Timing.* The Supreme Court has an opportunity to grant *cert* and resolve a conflict

![Caseload Statistics Across Circuits](chart.png)

Figure 12: Number of cases commenced in each circuit in 2013.
whenever there is a petition for *cert* in a case that implicates the conflict—but only in those instances. Our current data only includes observations of a circuit creating or expanding a split. We cannot assume that the Supreme Court could have resolved the conflict at any time during its existence—during years when there was no *cert* petition the Court had no opportunity to resolve the conflict. But we also cannot assume that the Supreme Court could only resolve the conflict by reviewing these precedent-setting cases—the Court has more opportunities than that. In order to gather all possible opportunities for resolution, we are currently collecting Court of Appeals decisions that cite the precedent-setting cases in question. This will give us more fine-grained information on the life-cycle of a conflict.

**Conflict Selection.** Our data include all conflicts that were active or resolved between 2005 and 2012. This includes some conflicts born as early as 1951, and some born as late as 2012. This creates a slightly troublesome pseudo left-censoring of our data. For conflicts born before 2005, we only observe them if they haven’t yet been resolved by 2005. All of our data is also right-censored because we cease monitoring live conflicts in 2012—so some conflicts that will be resolved have not yet been.

**Immortality.** From the perspective of statistical modeling, there is a minor obstacle posed by the possibility of immortality. Some conflicts in our data may never be resolved. In three particularly extreme instances—one conflict about RICO, one about whether intended third party beneficiaries of consent decrees have standing to enforce the decrees, and one about whether a prisoner may challenge pre-Booker sentence through section 1941 of the U.S. code—all twelve circuits have entered the conflict and the Supreme Court has not resolved it. It is unlikely the Court ever will resolve these conflicts. This means we have two types of conflicts: a type that will be resolved and an immortal type that never is resolved. Modeling the lifecycle under these circumstances poses some challenges.
5 Discussion and conclusion

By late 2014, the Fourth, Seventh, and Tenth circuits had heard cases concerning the constitutionality of gay marriage bans. All had agreed that gay marriage bans were unconstitutional. When litigants petitioned the Supreme Court for certiorari, they were denied—as often happens when there is no circuit split. Then, in November of that year, the Sixth Circuit issued a decision upholding a ban, thereby creating an intercircuit conflict. The American Civil Liberties Union immediately issued a press release announcing its intention to petition for certiorari, and the director of constitutional litigation for Lambda Legal, a gay rights organization, told the New York Times, “We’re extremely disappointed for the families in these four states, but this decision highlights the need for the U.S. Supreme Court to right this injustice” (Eckholm 2014). Judge Daughtrey, dissenting from the Sixth Circuit panel’s decision, wrote that, “Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split ... that could prompt a grant of certiorari.” These statements reflect an understanding within American courts and scholarship about them—namely, that intercircuit conflicts are resolved and resolved quickly.

Circuit splits are of critical concern for American jurisprudence. Their persistence causes legal difficulty; perhaps as a result, they are a focus of justices and Supreme Court watchers. Justice White famously wrote a dissent from denial of certiorari whenever the Supreme Court failed to resolve a conflict (Tobias 2003). In the 1970s, Congress established the Hruska commission to investigate whether the Supreme Court was resolving so few conflicts that there should be a National Court of Appeals charged with their resolution. These positions suggest that circuit splits should be terminated immediately. In contrast, some argue that circuit splits allow for percolation and development of better law (see e.g. Beim
We cannot hope to speak to the normative concerns surrounding legal inconsistency without understanding the empirical realities surrounding circuit splits. There is also almost no positivist theory on the growth or resolution of circuit splits. Nearly all the literature on circuit splits takes their existence and character as exogenous, and aside from acknowledging that circuit splits increase the probability of Supreme Court review there is little theoretical attention paid to what might drive their resolution.

Toward this end, we seek to learn how often and how quickly circuit splits are resolved. In order to do this, we collected two datasets of intercircuit conflicts—one wholly original and one supplemented with existing data. Our data includes both circuits splits that were resolved by the Supreme Court and circuit splits that may never be resolved. This new data allows us to answer heretofore unanswered questions, such as how many conflicts go unresolved altogether and how long a typical conflict lasts before it is resolved.

We find that very few conflicts in the Courts of Appeals are resolved—only 5% of the conflicts we identified as being born in 2005 have been resolved as of yet. Those that are resolved are resolved soon after they begin—looking both at conflicts identified by the Courts of Appeals and at conflicts resolved by the Supreme Court, the median number of years between birth and resolution is 1. And they are resolved after relatively few circuits join—within the Supreme Court Database, about half of all conflicts are resolved when there are three circuits or fewer involved.

Moving forward, we have two main goals. The first is to gather all Courts of Appeals decisions that are involved in the conflicts we identify (namely, those that cite the precedent-setting cases we have already identified.) This will allow us to understand how often the Supreme Court has an opportunity to resolve conflicts and when it takes those opportunities. Second, we hope to better understand why the rate of resolution is so low in the Courts of Appeals dataset. Once we have done this, we will be able to assess which conflicts the
Supreme Court chooses to resolve and which it leaves unresolved—a question that is of obvious import to the state of American law.
References


Hilgar, Rebecca. 2015. E-mail correspondence.


Appendix

Our data consist of decisions of the Courts of Appeals, clustered into conflicts, some of which have been resolved and some of which are not yet resolved. We identified conflicts using three sources. For conflicts that have been resolved, we used the Supreme Court’s description of the conflict—including which circuits are involved and which side of the conflict each circuit fell on. For conflicts resolved between 2005 and 2010, we took this information from Summers and Newman (2011). For conflicts resolved between 2011 and 2012, we coded the conflicts ourselves by looking up Supreme Court decisions in Westlaw and reading them.

We then supplemented this data with conflicts that were unresolved. For conflicts that were active between 2005 and 2012, we used the Seton Hall Circuit Review’s quarterly summaries of circuit splits. The Seton Hall summaries are written by searching LexisNexis for the search terms “circuit /5 split or disagree” within the US Courts of Appeals cases (Hilgar 2015). Members of the journal then read through each of the decisions to determine whether the conflict mentioned within them meets the criteria for inclusion. According to Christine Gaddis, the Editor-in-Chief, “The journal summarizes cases in which a court either creates or enters an existing circuit split, or decides an issue of first impression. The journal does not summarize cases in which a court acknowledges the existence of a circuit split or issue or first impression.” We used circuits’ descriptions of the conflict to identify all those circuits involved and which side of the conflict each circuit fell on.

Then, once we had coded which circuits were involved, and which side each circuit was on, we coded additional information about each component lower court decision by looking the decisions up in Westlaw and reading them.

Our measure of circuit-level ideology, the proportion of Democratic appointees on each circuit in each year, is taken from the Federal Judicial Center’s database on the biographies of judges of the Federal Judiciary (N.d.). This measure is the proportion of those active (not
senior status) judges who were appointed by a Democratic president. We count a judge as serving for a full year if he served for more than 6 months.