Evolution of Conflict in the Courts of Appeals

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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 were born 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.

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Supreme Court decisions implicate some of the most important issues in American government—campaign finance, the definition of marriage, voting rights, affirmative action, and many more issues that affect Americans' daily lives. Choosing to approach such an issue is sensitive and complex. The Supreme Court does not simply decide *whether* to approach these issues; it must also decide *when* to approach them. This requires choosing a case that presents the facts well—what the justices call choosing a "good vehicle", biding time for the politically correct climate, learning enough about the issue through lower court decisions—what justices term "percolation"—and waiting until the Court is ready to open the Pandora's box of subsequent disputes and clarifying questions (Beim, Clark and Patty 2016). In other words, the Supreme Court's decision to grant *cert* to any given case is contextual and filled with dynamic considerations. In this paper, we advance the literature on *certiorari* by moving beyond which *cases* are decided to identify which issues are resolved and when they are resolved.

We do so by focusing on intercircuit splits—instances where different circuits of the Courts of Appeals come to different conclusions on the same legal question. 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? In this paper, we answer these questions—which in turn allows us to speak to which issues the Court chooses to resolve and when.

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. We show that many conflicts are created each year—far more than are resolved each year. Conflicts are born relatively early, in the sense that few circuits have previously weighed in by the time conflict arises. We then show that conflicts are relatively young when they are resolved, both in terms of the number of circuits involved and in terms of the number of years they have been percolating. But, simultaneously, many young conflicts are unresolved. This suggests many conflicts are unlikely to ever be formally resolved by the Supreme Court. In the conclusion, we discuss ongoing data collection that will shed light on what happens to these unresolved conflicts.

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.[1] Some conflicts implicate more important areas of the law, potentially 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 resolv-

[1] At least since 1950. See Tiberi (1993).

ing 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)?[2]

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

[2]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 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.

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-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).[3] 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

[3]Of 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).

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 25 percent were mooted in other ways.[4]

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.[5] 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

[4]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.

[5]Hellman (1995) is the exception, though his data are over twenty years old and do not include petitions that were granted.

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.[6]

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 (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.

[6]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.

2 Data

Our data are Courts of Appeals decisions, clustered into conflicts. Some of these conflicts have been resolved and some of them have not been resolved. In each conflict, some circuits are on one side of the conflict and other circuits are opposed. (Most conflicts have only two sides.) We call these sides "teams" and study how many circuits are on each team, how many circuits are involved in the conflict as a whole, and when those circuits joined the conflict. Because our data includes some conflicts that have not yet been resolved, we are able to study differences along these dimensions between conflicts that are resolved and conflicts that may never be.[7]

Identifying and codifying conflicts poses severe methodological and epistemological obstacles, both for the Supreme Court and for researchers. How can we discover conflicts between Courts of Appeals? Some unresolved splits are well-known—the *Washington Post* wrote about the intercircuit split on gay marriage bans ultimately resolved in *Obergefell v. Hodges* as soon as the split was created, before a *cert* petition had been filed (Barnes 2014). But these salient conflicts are unusual. For example, many of the conflicts we identified are about the Employee Retirement Income Security Act (ERISA). One such conflict is over whether, when the fiduciary seeks reimbursement of funds from a beneficiary under Section 502(a)(3)'s equitable relief, the beneficiary can raise "equitable defenses". The majority of circuits held that equitable defenses cannot be raised. The minority held that they could be raised. (The Supreme Court resolved this dispute in *US Airways, Inc. v. McCutchen* (133 S.Ct. 1537, 2013), ruling that equitable defenses can be raised.) It is more challenging for a researcher to identify these everyday conflicts that go unreported in newspapers and unnoticed by many observers. Whether one decision is really in conflict with another is

[7]Since 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.

often arguable. For either a researcher or a practioner in the courts, 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, we found explicit mentions of conflict in Courts of Appeals' opinions.[8] This general approach of relying on judges' or Justices' descriptions is standard in the discipline (see Lindquist, Haire and Songer (2007), Baker and Malani (2015), and Shauku (2015), but see Bruhl (2014)).

We identified conflicts on civil, criminal, and bankruptcy law that were active between 2005 and 2013 by relying on the *Seton Hall Circuit Review*'s quarterly summaries of circuit splits.[9] 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 occurrences by reading Court of Appeals opinions that explicitly mention a split or disagreement with another circuit. After reading all conflicts the *Seton Hall Circuit Review* identified, we have a dataset of 145 conflicts involving 738 precedent-setting cases. As of 2015, 40 of these have been resolved. Some of the remaining conflicts may never be resolved.

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. But

[8] Our data collection procedures are described in further detail in the appendix.

[9] We exclude conflicts over immigration law because of the incredibly large number of citing cases in each conflict.

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 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.

The *Seton Hall Circuit Review* indicates that a conflict exists between two or more Courts of Appeals. For each conflict the *Seton Hall Circuit Review* identified, we then used Westlaw to find all precedential opinions in the conflict—that is, to identify all circuits involved in the conflict and when they joined, even if not all circuits acknowledged the existence of a split. (In other words, we capture a split so long as one judge from one circuit mentioned it in his opinion—even if only one judge mentioned it and even if that judge mentioned it in a dissenting opinion.) In doing so, we discovered that judges' citations to other circuits are not comprehensive in their listing of circuits involved in a conflict, and are very unreliable in describing the order in which circuits joined the conflict.[10] For each precedent-setting case, we then identified all subsequent decisions in that circuit that cited the precedent-setting case on the point of law on which there was a conflict. This allows us to estimate how active a split is and creates the universe of opportunities the Supreme Court had to resolve the conflict.

We also 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,

[10]Our expansion of the data identified, on average, 1 new circuit per conflict.

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. (Again, 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 Court's decision from the Spaeth Supreme Court Database (Spaeth 2011). If the Supreme Court resolved the conflict, we take the year of resolution as the calendar year in which the Supreme Court issued a written opinion resolving the conflict.

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 data, an average of 16 conflicts are "born" each year. This is certainly an undercount of the number of conflicts that exist in the Courts of Appeals each year. Many conflicts are live but inactive (that is, no circuit is joining them.) Still more may be active but unidentified because the courts in question do not explicitly state they are entering a conflict.

A conflict typically arises very quickly after an issue begins percolating in the Courts of Appeals, and spreads very quickly across the country. The mean number of circuits involved by the end of the year in which a conflict began is 3.4. (Sometimes multiple circuits decide opposite each other on a case of first impression in the same year, functionally joining simultaneously.) The median is 3.

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 72% of our sample. In other words, most conflicts have not been resolved.

This is true across issue areas. Criminal and civil conflicts are equally likely to be resolved. Conflicts over bankruptcy law are much rarer and are more likely to be resolved.[11] In no issue area is the Supreme Court more likely to resolve conflicts than not to.

	Unresolved	Resolved
Bankruptcy	5	5
Criminal	48	17
Civil	52	18

Table 1: Resolved and unresolved conflicts by issue area.

Within our Courts of Appeals data, we identified 30 conflicts born in 2005, 2 of which were resolved in 2006, 1 of which was resolved in 2008, and 27 of which remain unresolved. Figure 1 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.

Of course, our analysis is right-censored—a conflict may be resolved in the future, after we have stopped collecting data. However, this does not severely bias our analysis because of another empirical reality about resolution: if a conflict is resolved, it is young when resolved.

[11] Schwartz (2007) argues that because the Supreme Court hears bankruptcy cases so rarely, circuits should resolve intercircuit splits on their own.

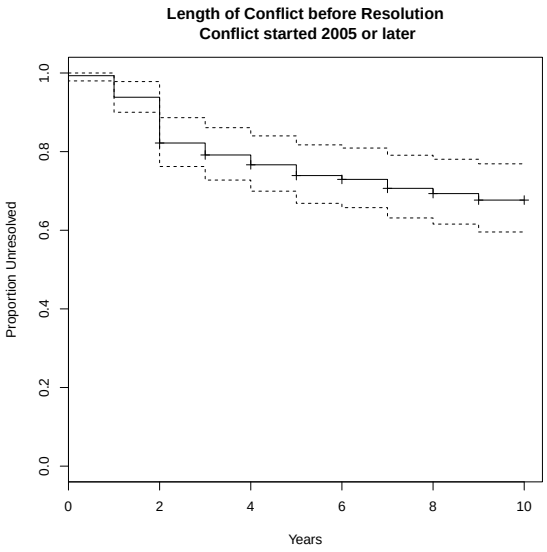

Figure 1: Proportion of conflicts resolved, by age of conflict in years. Data are conflicts from the Courts of Appeals database born in or after 2005.

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 1.8 years. The median is 1. Conflicts that are "stale" may not be resolved for many reasons. Conflicts that survive may be unimportant; or, if a split has existed for many years, intercircuit heterogeneity may be more tolerable than an upheaval of long-known local law.

However, it is not the case that *issues* are resolved so soon after they are born. Many circuits may have weighed in on an issue before that issue became a conflict. Figure 2 illustrates the proportion of conflicts that are unresolved by the number of years since the case of first impression (which may occur long before the conflict arises). Regardless of whether there is a conflict, justices may prefer to wait before resolving an issue—"justices like the smell of well-percolated cases" (Perry 1991, page 230). What justices seek to gain from percolation is not perfectly clear, but scholarship to date supports the idea that justices do gain something by waiting before deciding an issue. Our result that conflicts are resolved

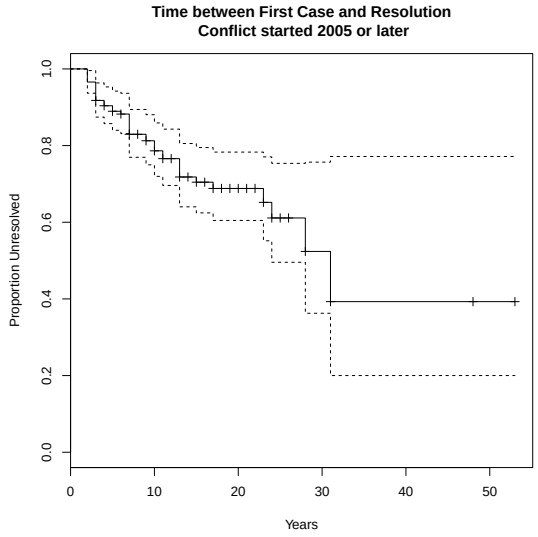

Figure 2: Kaplan-Meier curve of the proportion of conflicts unresolved by year since the case of first impression.

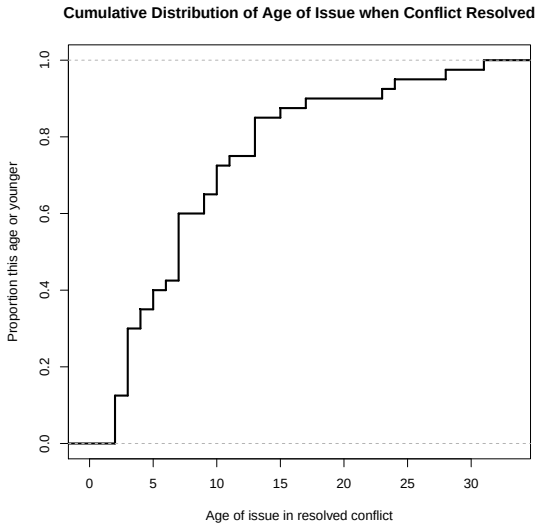

Figure 3: Age of issue at which conflict began.

soon after they arise may seem to contradict the long-held belief that justices let issues percolate. It does not. Figure 2 and Figure 3, which presents a CDF of the age at which conflict began, show that justices do allow issues to percolate, in part because conflict does not always arise immediately after an issue enters the courts. Therefore, justices may allow an issue to percolate without allowing a conflict to persist. An alternative interpretation is that although percolation is advantageous, the costs of legal inconsistency that accrue from allowing conflicts to persist are too much to bear given the benefits of percolation—so justices do not allow conflicts to percolate. We return to this point below.

Allowing an issue to percolate 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 (Beim 2014). How does time to resolution vary by the number of circuits involved? Figure 4 shows 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, 94% are unresolved. Some of these go on to be resolved once there are eight circuits involved; others stay unresolved. Of the conflicts in which eight circuits are involved, 59% are unresolved.

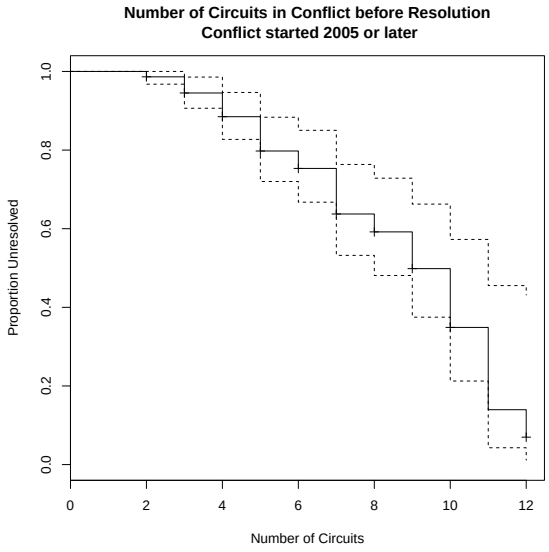

Figure 4: How many circuits does the Supreme Court allow to join a conflict before resolving it? Kaplan-Meier curve of the proportion of conflicts unresolved with varying number of circuits involved in Courts of Appeals Data.

In comparing Figure 1 with Figure 4, we see that the number of circuits involved is a

much stronger predictor of resolution than the age of the conflict. As the number of circuits rises, the Supreme Court becomes *much* more likely to resolve a conflict. This is not true as the number of years rises. 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. We attribute it also in part to the Supreme Court's focus—which is on how many circuits have joined and where they have joined.

Clark and Kastellec (2013) argue that "late-arising" conflicts—conflicts in which many circuits had joined before a conflict began—are more likely to be resolved compared to "early-arising" conflicts. They test this hypothesis on resolved conflicts, asking whether late-arising conflicts are more likely to be resolved *then* rather than earlier on, and relying on the Supreme Court's description of the conflict in their analysis. We use our data to ask the same question: are late-arising conflicts more likely to be resolved than early-arising conflicts? Figure 6 presents the results of our analysis (the figure is comparable to Figure 4B in Clark and Kastellec (2013).) Although the effect is quite muted, we continue to find that late-arising conflicts are slightly more likely to be resolved. Of those 61 conflicts that began immediately (that is, after only 2 circuits were involved), 10, or 16% are resolved. Of those 8 that began after six circuits were involved, 3, or 38% are resolved. It is also noteworthy that very few conflicts are late-arising. Figure presents a histogram of when conflicts arose. Most conflicts arose after very few circuits had joined. Two-thirds of all conflicts arose after three or fewer circuits were involved.

If we call the sides of a conflict "teams," the mean difference in team size at time of resolution is 3. This is substantially larger than the difference for conflicts that are never resolved; by 2015, the mean difference in size for conflicts that had not yet been resolved was 1.8. Figure 7 shows the density of difference in team size for resolved and unresolved

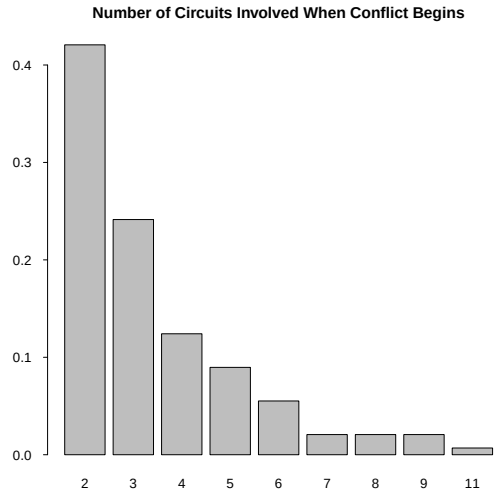

Figure 5: The number of circuits that join before conflict begins.

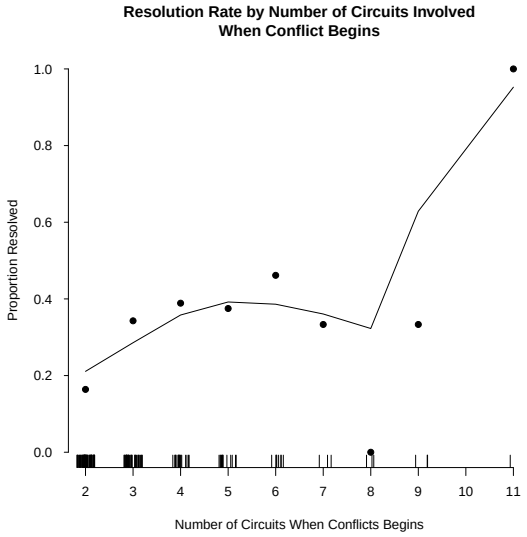

Figure 6: The proportion of conflicts resolved, based on how many circuits had joined prior to conflict starting.

conflicts. There are four conflicts with vastly unequal sizes—those where the difference is 8 or more circuits. All of these are resolved. This complicates the prevailing intuitions about "deep" conflicts, to suggest that conflicts where one or a few circuits are clear outliers may be more likely to be resolved.

Finally, of course, an 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. Because our data includes subsequent citations to precedent-setting cases, we can investigate how often it is a secondary case, and not the precedent-setting case, that goes to the Supreme Court. 31 of those cases granted cert to resolve the conflict were precedent-setting. 11 were not. On average, 2.5 years passed between the precedent-setting case the ultimate certcase being decided.

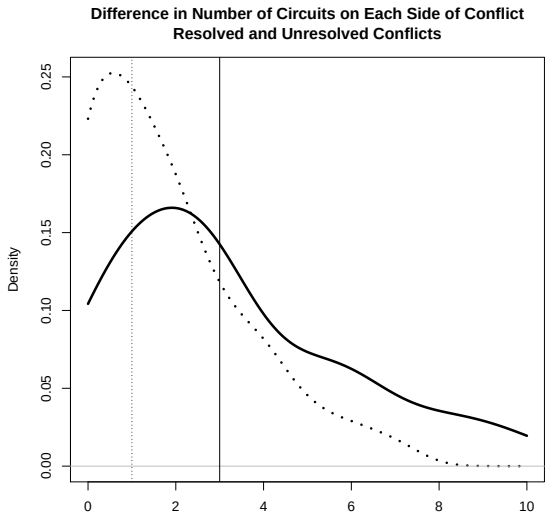

Figure 7: The density of difference in team size for resolved and unresolved conflicts. The solid line is resolved conflicts; the dotted line is unresolved conflicts.

4 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 2014). 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 10% 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—the median number of years between birth and resolution is 1. Some conflicts in our data may never be resolved. In one particularly extreme example about whether a prisoner may challenge his 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 this conflict. 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. It also presents compelling normative questions about the functioning of American courts. In a large number of legal areas, there is no clear federal doctrine.

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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 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. This included which judges were involved in the case, whether there were any concurrences or dissents, and whether the decision was published. We also read the decision to determine whether it was in fact the precedent-setting case in that circuit. If it was not, we replaced it with the precedent-setting case. Then, we used Westlaw to identify all cases from that circuit that cited the opinion on the point of law on which there was a conflict, and coded these. Finally, we read all of these cases involved in the conflict to try to identify other circuits involved in the conflict that had been previously unidentified. When we found such circuits, we identified the precedent-setting case from that circuit and coded the relevant information.

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.