TWELVE SISTERS: THE U.S. FEDERAL COURTS,

REGIONAL INDEPENDENCE,

AND THE RULE OF LAW(S)

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ABSTRACT

The U.S. federal judiciary is the organ of national government responsible for the authoritative resolution of disputes arising under federal law. For reasons related to its historical institutional development, the system is itself a source of conflict through the issuance of non-uniform holdings by the twelve circuit courts of appeals. Due to the regional independence of these 'sister circuits' and the limited supervisory capacity of the U.S. Supreme Court, a substantial proportion of circuit conflicts—or circuit splits—appear to linger indefinitely. This phenomenon makes possible the cultivation of distinct bodies of national law in the twelve regions over which the appellate courts preside.

Debate centers on whether regional independence and the propensity for conflict constitutes an intolerable flaw or a beneficial feature of the U.S. federal courts. Though this debate is motivated in part by competing normative commitments, it largely turns on competing assumptions about the number of conflicts, their persistence, and the consequent costs and benefits to the legal system.

In this study, I examine 151 active circuit splits across four legal subject areas—search and seizure, employment discrimination, securities, and labor law—to evaluate the quantity, duration, and legal significance of intercircuit conflicts, and test whether they are resolved in a manner that suggests judicial learning. Overall, I find little evidence that conflict serves a learning function. This study sheds empirical light on the operation of the U.S. federal court system.

DEDICATION

For Zo, Li, Sabiha, and Amena—yes, now I am finished!

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THE U.S. FEDERAL COURT SYSTEM, REGIONAL INDEPENDENCE, AND THE RULE OF LAW(S)

"Collectively [the Courts of Appeals] are the vital center of federal judicial system… The vital center, however, is composed of [twelve] centers, not one" (Howard 1981, 8).

An irony lay at the heart of the United States federal judiciary. Though its basic task is to authoritatively resolve disputes arising under federal law, "that centralizing task has been dispersed among the most decentralized institutions of the government" (Howard 1981, 3). The reason lay in the haphazard institutional development of the federal courts themselves. Although the seeds of the federal judiciary are found in Article III of the U.S. Constitution, nearly all of the structural design features of the courts have evolved over time through a long succession of statutory enactments, each initiated by distinct political coalitions in response to the exigencies of the day and constrained by the politics of the day. The articulation of the federal courts as a system—its ability to "avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories"—turns on structural features and operating norms that have emerged from that process. To date, this process has produced a system of lower courts which operate as a polycentric order, with multiple "potential nodes of competition and conflict" (Howard 1981, 8).

Though much scholarly attention has been devoted to the Supreme Court, the functioning of the federal courts as a system largely turns on the operations of the lower courts. In 2017, over 340,000 cases were filed at the district court level; over 50,000 appeals were filed in the Courts

of Appeals. The Supreme Court received about 8,000 petitions for review, of which it accepted less than 80. The massive volume of cases adjudicated by the lower federal courts taken together with the limited and discretionary docket of the U.S. Supreme Court, means that the three-tiered system is primarily managed at the intermediate tier by the twelve circuit courts of appeals, each presiding over district courts in geographically-defined jurisdictions. These courts of appeals operate under a regional independence norm in which circuit precedents are binding authority within the circuit itself, while precedents of other circuits are regarded merely as persuasive authority (Hellman 1995).

When a panel in one circuit announces a rule inconsistent with that announced by a panel in another circuit, an intercircuit conflict, or circuit split, is generated, resulting in different federal law in operation in different regions of the country. Ulmer (1984) informs us that:

> At one time or another, courts of appeals have held that 1) under federal law, a bank robber who perpetrates a kidnapping while robbing a national bank commits one offense (U.S. v. Faleafine, Ninth Cir.) and commits two offenses (Clark v. U.S., Tenth Cir.); 2) under the Internal Revenue Code, the legal expenses of a corporate liquidation are deductible as an ordinary and necessary business expense (U.S. v. Mountain States Mixed Feed Co., Tenth Cir.) and not deductible (Lanrao Inc. v. U.S., Sixth Cir.); and 3) conviction for making a threat against the President of the United States requires proof that the defendant intended to carry out the threat (U.S. v. Patillo, Fourth Cir.) and does not require such proof (Watts v. U.S., D.C. Cir.) (Ulmer 1984, 902).

Since WWII, population growth, economic expansion, and a proliferation of federal law has led to dramatically increased caseloads in the lower federal courts. Meanwhile, the number of cases reviewed by the Supreme Court has gradually declined, leaving the courts of appeals as "the courts of last resort for the great mass of federal litigants" (Howard 1981, 8). More cases mean more conflicts and a lower likelihood of review and resolution. Indeed, "when it is recognized

that such conflicts are multiplied many times across the circuits and that they can exist for many years, the complexity of the problem is easily appreciated" (Ulmer 1984, 902).

But court scholars and jurists disagree on how much normative import to attach to uniformity in federal law. Is the regional accretion of federal law via a polycentric judiciary a flaw in need of reform or a tolerable quirk for which the cure "may in the long run prove worse than the disease" (Wallace 1983, 914)? Still more, many scholars and jurists argue that regional accretion is a beneficial feature of the American judicial system. Permitting the law to "percolate"—i.e., develop over time in a highly decentralized and competitive process—has the potential to improve the quality of judicial outputs over time. Thus far, however, there has been very little empirical study of the costs *or* benefits of this phenomenon, and a dearth of carefully-specified theory about precisely how either costs or benefits accrue to the system. This study is a modest effort to fill this gap in our understanding of a core American institution.

This project critically examines both the causes and the consequences of intercircuit conflict and the regional accretion of federal law. The present structure of the system and its embedded norms are far from inevitable features and are not the product of far-sighted conscious design. Recognition of this fact can help to clear the decks for an clear-eyed reassessment of institutional arrangements to which we have become long-accustomed. Chapter 2 is a historical-institutional account of the origins and development of America's polycentric federal court system, peculiar even among federal political systems (Howard 1981; Meador 1981). I examine the critical junctures of American political development that produced such a system.

The next three chapters focus on the consequences of intercircuit conflict and regional accretion. What are the potential costs? Concern centers on the propensity to cause unfairness to litigants, nonacquiescence among federal agencies to conflicting authority, economic harms to

multicircuit actors, and repetitive litigation from litigants seeking to initiate or exploit circuit conflict. Despite the potential costs of disharmony, other scholars and jurists tout the benefits of intercircuit conflict—judicial learning through a process commonly described as "percolation."

Chapter 3 introduces newly-gathered data on 151 conflicts across four legal subject areas—employment discrimination, search and seizure, securities, and labor law—active from 1998-2010. As an initial effort to empirically evaluate the tolerability question, each conflict is assessed for (1) persistence, (2) the presence of characteristics that carry potential costs, and (3) legal significance.

Chapter 4 develops a theory of judicial-learning-by-percolation, derives several tests therefrom, and evaluates the data for patterns suggestive of judicial learning.

Chapter 5 draws on evidence adduced in the preceding chapters to compare the costs and benefits of intercircuit conflict and regional accretion. Ultimately, I find that, though difficult to quantify with precision, the costs are real and substantial. On the other side of the ledger, the evidence gathered herein fails to fit even the most loosely specified model of percolation. Percolation, I argue, appears more of a post hoc rationalization for a system in need of reform.

Constituted in the 1780's and restructured in the 1890's, the U.S. federal judiciary now confronts new challenges and requires reform to meet them. Chapter 6 concludes with a brief look ahead to the further research needed to support that effort.

Even among federal political systems, intercircuit conflict is a uniquely American phenomenon (Meador 1989). The value of America's polycentric judicial order has long been a subject of debate among legal academics, political scientists, and jurists. Yet, "neither side in the debate has produced evidence convincingly supporting its position" (Tiberi 1993, 862-63). Data

limitations and underdeveloped theory are the main reasons for the lack of evidence. This study advances the literature on both fronts.

CHAPTER 2
THE HISTORICAL INSTITUTIONAL DEVELOPMENT OF A POLYCENTRIC JUDICIAL SYSTEM

"Putting the theory after the history constitutes what I regard as the correct approach to analysis: theories ought to be inferred from facts, and not the other way around." Fukuyama 2011, 24

"[S]cholars of path dependence emphasize some contingency at the moment of institutional innovation and suggest that the forces behind the creation of a particular institution may be quite different from the forces that sustain it over time." Thelen 2003, 218

I. Establishing a National Court for a More Perfect Union

This chapter presents a historical-institutional account of the origins and development of America's decentralized federal court system. Much of the debate about the role of regional accretion in the federal judiciary turns on competing assumptions about the origin and purposes of the institution, especially with regard to regionalism and the regional independence of the lower courts. A look at the history of the system reveals that neither the system's structure or the embedded norms that guide the behavior of the system's authorities are the product of far-sighted conscious design. A lack of institutional design at the time of the Constitution's framing left the federal judiciary underdeveloped. Subsequent institution building would be pursued by distinct political coalitions, in pursuit of various goals, operating under historically-nested constraints. The system's development might be regarded less as an instance of institutional design than as the accumulation of institutional specifications over time.

As in the life of many institutions, it is difficult, therefore, to identify a single purpose that legitimates the current structure and function of the federal judiciary. Moreover, as the account below makes clear, many institutional features remain even after the circumstances that gave rise to them cease to be relevant. Reducing the normative significance that attaches to notions of a single authoritative purpose allows for a more open inquiry into the role of the federal judiciary today and whether regional accretion helps or hinders it in that role. This chapter places the regional structure of the federal judiciary and the regional independence of the lower courts into context in order to clear the decks for the institutional analysis that follows in subsequent chapters.

The story of the U.S. federal judiciary begins as one of reluctant state-building in a political context highly distrustful of centralized administration. Early American political culture—born of rebellion against remote, centralized authority—exhibited a fiercely localistic orientation (Skowronek 1982). Prior to the adoption of the federal Constitution of 1787, the United States operated as a confederal political order under the Articles of Confederation. Under this scheme, each of the former thirteen colonies jealously guarded their newly asserted prerogatives as sovereign states even as they banded together in "a firm league of friendship." Public policy was a state and local affair. Policy *among* the several states was the product of consensus among state governments through their recallable delegations in Congress assembled. All courts in the United States were courts of the individual states, exercising jurisdiction over state law matters and, problematically, over interstate matters as well (Crowe 2012).

Drafted for the purpose of achieving "a more perfect union" among these regional centers of authority, the 1787 Constitution partially subordinated the states to a set of national institutions, the structures of which were outlined in the first three "articles" of the document.

Article I instituted a new bicameral legislature with expanded national law-making powers and a more direct electoral link to the citizenry. Article II instituted the office of the presidency, a chief executive elected on a national basis via a state-based college of electors. Article III included a new federal judiciary with a Supreme Court at its summit and any "such inferior Courts as the Congress may from time to time ordain and establish."

This early experiment in state building was undertaken with "no acceptable models," and the degree of centralization achieved—modest by European standards—was "extorted from the grinding necessity of a reluctant nation" (Skowronek 1982, 20, 21). Each of the three institution-creating constitutional articles was drafted and debated in Convention in roughly the order of their ultimate placement in the document. Each reflects some combination of carefully-crafted compromise on the one hand and vague under-specification on the other—the latter tendency prevailing as the Convention wore on (McDonald 1985). McDonald informs us that "The delegates devoted less time to forming the judiciary—and less attention to careful craftsmanship—than they expended on the legislative and executive branches" (McDonald 1985, 253). The Convention delegates' fatigue following protracted negotiations over the new Congress combined with a general impression that the court was "the least powerful and least active branch of government" explain the under-specification of the third branch (McDonald 1985, 253). Despite consensus on the necessity of overlaying the existing state court system with a federal judiciary capable of "general superintendence" to avoid "the contradictory decisions of a number of independent judicatories" (Federalist 22), the delegates declined to determine the structure of that system, leaving the matter for another day and another body (Crowe 2012).

Ambivalent state-building produced an early central government that was embryonic by European standards and would still leave most of the substantive tasks of governing to the states.

Throughout the nineteenth century, operations within the national government centered on Congress, which served as a forum for logrolling compromises in service of state interests (Skowronek 1982). National political parties dominated this process as large-scale interest aggregators. But national policy programs require a mechanism for finer articulation and adjudication than can be accomplished in a legislative body. In more developed states such functions fell to a national bureaucracy. In the U.S., federal courts increasingly became "a surrogate for a more fully developed administrative apparatus" (Skowronek 1982, 28). Hence, though born of ambivalence and neglect, the federal court system has been constructed in piecemeal fashion over time as political actors employed it to serve their own immediate purposes.

Following its initial establishment, the development of the federal judiciary can be understood as proceeding in three distinct phases. In the first stage, political actors developed court capacity as an instrument of party competition and as an avenue of state aggrandizement. In the second stage, political actors developed court capacity in service of specific policy goals. In the third stage, political actors developed court capacity in order to enhance its performance over the broad range of responsibilities that had accumulated within its province. What all three phases have in common is that, in each case, court-building efforts were guided by specific, historically-nested purposes rather than a far-sighted exercise of institutional design.

This chapter is organized as follows. Section two details the system's beginning, highlighting the constitutional under-specification of the federal judiciary and how early congressional haggling over its structure established expectations that would inform and constrain subsequent institutional development. Section three examines the first stage of court building and the political goals that motivated that effort. That story takes us up to the American

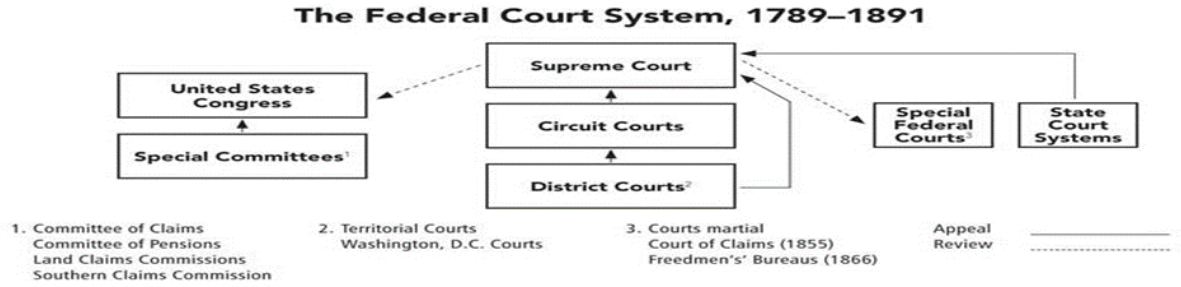
Civil War. Section four examines the social and economic policy goals which drive the court's development in the wake of the Civil War as political actors develop federal courts into an effective instrument to vindicate the rights of the freedmen and facilitate the development of a national market. Next, Section five examines the performance goals that take center stage in court-building efforts as the federal judiciary struggled to meet the growing demand for its services. Section six follows with a survey of the challenges of consistency and uniformity that have dominated reform efforts over the last century. Section seven looks back over the court's development through a new institutionalist lens, arguing that today's polycentric federal juridical structure emerged not to serve any extant purpose, but to serve multiple historically-nested purposes. As with many institutions, the structures persist long after the circumstances that give rise to them, and it is a mistake to infer purpose from current functions. Rather than rationalize contemporary institutional structure and infer conscious design from current function, the federal judiciary must be evaluated to determine whether and to what extent it serves extant purposes. Section eight concludes.

II. An Inauspicious Beginning: Resistance to a Truly National Court

As ratified in 1788, no third branch of national government emerged from the text of the Constitution. Article III is the shortest of the Constitution's structural provisions, and the bulk of its 388 words are dedicated to specifying the jurisdiction of the Supreme Court. That jurisdiction extends to all cases and controversies arising under federal law, and, aside from a stipulated class of cases, the Supreme Court's jurisdiction would be appellate in nature. This appellate role implies the existence of nisi prius courts, and the text merely indicates that "*Congress* may…establish" such courts. Thus, it fell to Congress to do "precisely what the Convention had declined to do in the Constitution—namely, invent a federal judicial system" (Crowe 2012, 30).

The First Congress immediately undertook the work of establishing a federal court system, culminating in the enactment of the Judiciary Act of 1789. The framework established by the Act is still somewhat recognizable today. It established the federal judiciary in three parts. The Supreme Court, consisting of a six-member panel, was to exercise appellate jurisdiction over circuit courts in civil law cases in which the amount in controversy exceeded $2000, as well as over "state supreme court decisions that invalidated federal statutes or treaties or that declared state statutes constitutional in the face of a claim to the contrary" (Wheeler and Harrison 2005, 4). The two lower federal courts—district and circuit—were organized as follows. The Act established 13 district courts to serve as federal trial courts, one for each of the eleven states that had ratified the Constitution, plus one each for Maine and Kentucky, which were still subsumed within Massachusetts and Virginia respectively. Each district, consisting of one judge, "served mainly as courts for admiralty cases, for forfeitures and penalties, for petty federal crimes, and for minor U.S. plaintiff cases" (Wheeler and Harrison 2005, 4). The act also established three regional circuits—Eastern, Middle, and Southern—in which each of the district courts were contained. See Figure 2.1.

Figure 2.1: Federal Court System Organization, 1789-1891



Circuit courts were to meet only twice a year and were not assigned dedicated judgeships. Rather, when it met, a circuit court was to sit as a three-member panel consisting of two Supreme Court justices and the district judge of the district wherein the panel met. This meant that the

justices would have to ride circuit, i.e., travel semiannually to an assigned circuit to decide circuit cases. Members of Congress thought circuit-riding necessary to keep the judiciary in touch with the people and to avoid the expense of additional judicial salaries, but the practice was quite onerous to the justices themselves (See Marcus 1992, 16-22.). See Figure 2.2.

Figure 2.2: Federal Court Map, 1789

The circuit courts were primarily trial courts with complementary jurisdiction to that of district courts, but also served as courts of appeals for some larger civil and admiralty cases in the district courts (Wheeler and Harrison 2005). Although Article III provided for federal court jurisdiction which could "extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority," Congress, in the first Judiciary Act, circumscribed federal court jurisdiction in such a way that most federal questions could only be filed in state courts—a restriction meant to allay concerns that the federal courts would displace state courts.

Three things are important to note about the establishment of the federal judiciary that are crucial to understanding its subsequent institutional development. First, the convention

delegates' lack of "craftsmanship" with respect to the structure of the federal courts essentially left the structural and functional contours of the system unspecified (McDonald 1985, 253). Second, the dearth of constitutional specification ensured that the system would be dependent on the other branches for further development, which undermined the status of the federal judiciary as a true third branch. The institutional development of the courts would follow a path dictated by other political actors in pursuit of various goals.

Third, kicking the institution-building can down the road to the first Congress did not ease the task of institutional design. Crowe tells us that:

> Article III gives Congress, an institution charged with a fair number of functions, the primary authority to build the federal judiciary but offers little guidance about which tools to use or what type of structure to erect. Building a judiciary of this sort—a complex one with multiple tiers of judges, varying grants of jurisdiction, and both trial and appellate functions—was an unprecedented task, one that few members of Congress understood intuitively (Crowe 2012, 81).

The federal judiciary was neither destined to take any distinct form nor was the path taken prescribed by some grand scheme. Its history has been one of ongoing piecemeal development in the crucible of American politics.

The Judiciary Act of 1789 illustrates the point. Though the federal judiciary was initially conceived as a nationalizing institution, the first statutory enactment relating to it greatly circumscribed its jurisdiction, leaving most matters of federal law to be settled by state courts.[1] The reason lay partly in concerns about the expense of maintaining a fully vested system of federal courts over an extended geographic area—burdensome to a young nation still debt-laden and reeling from war—and partly to allay the suspicion of the states toward centralized power

[1] "Although a few observers believed that the Constitution itself vested federal jurisdiction and that Congress was powerless to alter it, most of those in Congress acted on the assumption that the Constitution merely set the outer limits of their power." Marcus 1992, 16.

(See Marcus 1992, 13-30.). This early retreat toward localism exerts a powerful influence on the subsequent development of the courts long after the causes which gave rise to it pass into history.

III. Political Goals

"Precisely in the political realm," writes Kathleen Thelen, "we should expect institutions to be not just the site but also the object of ongoing contestation" Thelen (2003, 231). Indeed, as political parties emerged in the early years of Congress, the federal judiciary immediately became both a site and object of partisan competition (Skowronek 1982; Crowe 2012). As with institutional change more generally, the initial catalyst came in the form of a change in the institutional environment. Population and territorial growth in the first half of the 19th century required an expansion of the judicial apparatus established under the first Judiciary Act. But the manner of expansion shaped the expectations of congressional court builders in ways that would inform and constrain subsequent court development.

In the Judiciary Act of 1801, an early attempt by the Federalist Party to expand the federal judiciary and create dedicated circuit court judgeships was motivated in large part by the need to incorporate new states into the 1789 structure, streamline judicial administration, and end circuit-riding for road-weary Supreme Court justices. The Act also expanded federal court jurisdiction in hopes of bringing greater uniformity in the interpretation and application of federal law. In many ways, this effort was a return to the early vision of a truly national court system. Notwithstanding these goals of efficiency in administration and uniformity in the development of national law, the Federalist effort was tainted by the party's other goal of partisan entrenchment by filling lifetime judicial appointments with co-partisans even as their electoral prospects were declining (Crowe 2012, 67). The ascendant Democratic-Republican Party could view the Act as nothing more than a desperate power-grab by a lame-duck

congressional majority. Sweeping into power in 1801, the Democratic-Republicans "retaliated by repealing the Judiciary Act of 1801 and returning the judicial system to its 1789 structure with the Judiciary Act of 1802" (Crowe 2012, 61).

Despite repeal, there were two residual effects of the Federalist reform effort. First, the Democratic-Republicans retained, albeit in altered form, the reorganization of the system into six circuits. Second, the injection of transparently partisan considerations established an unfortunate precedent and "transformed the judiciary into an object of partisan attention and manipulation" at a critically early stage in its development. Despite their nationalizing goals, it would be the Federalists' alloying of court-building and partisan goals that would have the largest impact on subsequent institutional development.

The need for expansion would not disappear along with the Federalist Party. In fact, even with its restructuring into six circuits, the 1789 system as reconstituted in the Act of 1802 still left Kentucky, Tennessee, and the newly minted Ohio outside of the circuit-based framework. The abolition of circuit-riding proved too closely associated with the Federalist reform effort to be a feature of Democratic-Republican reform, and some members of Congress still balked at the expense of funding new judgeships. Crucially, in addition to hindering the recruitment of quality candidates to the Supreme Court, the practice of circuit riding imposed a logic on subsequent reform efforts. As a practical concession to the difficulty of travel "by stage, horseback, or riverboat" over rugged terrain, Supreme Court Justices routinely kept residence in or near the districts wherein the justices presided as circuit judges (Rehnquist 1986, 4).[2] In the Judiciary Act of 1807, Congress created a Seventh Circuit to encompass the three forlorn states, added a

[2] Moreover, as Justice Rehnquist noted, "the Justice had to be a practicing lawyer in one of the states of his circuit because so much of the trial work was in diversity cases where state law was applicable" (Rehnquist 1986, 2).

seventh seat to the Supreme Court, and stipulated that the new Supreme Court seat be filled by an individual residing in the new circuit.

Though the geographic stipulation in the Judiciary Act of 1807 was motivated by quite practical concerns regarding efficient travel for circuit duty, and apparently passed without eliciting comment, "it nonetheless served to connect new states, new circuits, and new Supreme Court justices" in ways that set the stage for a different sort of political competition (Crowe 2012, 88). Another significant precedent had been set. Going forward, states—and their congressional delegations—would expect westward expansion to require new circuits and new Supreme Court seats to accompany them. These new justices would come from a state within the region encompassed by the new circuit, a significant point of prestige for a newly established state. Of course, once the connection was made, no state's congressional delegation would refrain from lobbying for representation on the court. An early decision made to promote efficiency had borne unintended children: "the politics of regionalism" (Crowe 2012, 91). In addition to partisanship, geographic representation on the Supreme Court was now a goal to be furthered both in the filling of vacated seats and the adding of new seats that would accompany the country's westward expansion. Through the antebellum period, federal court-building would be even "more forcefully driven by geography than partisanship" (Crowe 2012, 126).

IV. Policy Goals

Partisan and geographic considerations do not pass away after the Civil War, but they are eclipsed by social and economic policy goals which define the era. These policy goals were present during the antebellum period, but, with 13 states added between 1812 and 1848, simple expansion drove the agenda. In keeping with the patterns laid down in 1801 and 1807, direct

pursuit of specific policy objectives often lay submerged in broader attempts to develop the courts as instruments of coalitional power and state aggrandizement (Crowe 2012).

During Reconstruction, institution building efforts shifted in orientation. The federal judiciary was empowered tactically to effect and entrench a post-war Constitutional vision of racial and economic liberalization (Skowronek 1982; Gillman 2002; Crowe 2012). The new national policies encountered significant local resistance, and implementation required coordinated efforts across the major institutions of national government.

The U.S. Constitution divides governmental power among four national organs—a bicameral legislature, an executive, and a judiciary. The interdependence of these institutions imposes a collective action problem on political officials as they pursue their respective policy objectives (Tsebelis 2002). It is precisely this collective action problem that parties quickly emerged to overcome. The raison d'être of political parties is to form coalitions of like-minded officials capable of bridging institutional cleavages and unifying power to achieve common policy objectives (Aldrich 2011; Graber 2005). The Republican Party's post-war judicial reforms illustrate this logic. By the late 1860's, the same federal judiciary that helped to forestall challenges to slavery a decade earlier had become, in Republicans hands, an instrument for enforcing the rights of the freedman.

The Republican Party sought to protect the freedmen and their sympathizers from harassment and discrimination, especially in the defeated and resentful South. In fact,

> Most legislation passed by the federal government in the 1860s was wildly unpopular throughout the South. Seeking to thwart the enforcement of national policy, Southern judges, politicians, and citizens confiscated property owned by Union sympathizers, approved Black Codes established to oppress freed slaves, subjected Republicans to prejudiced judicial proceedings, and manipulated litigation so as to deny Northern supporters the chance to have their grievances heard in federal courts (Crowe 2012, 148).

The Republican-dominated Congress passed a slew of legislation in 1866 and 1867 designed to create federal causes of action to protect freedmen and Unionists and ensure their access to federal courts.

But Republicans in Congress also sought to expand access to federal courts more generally, reminiscent of the Federalist vision of a truly nationalizing federal court system. Congress enacted the Jurisdiction and Removal Act of 1875 which expanded circuit court jurisdiction to include "any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court…and arising under the Constitution or laws of the United States" (federal question jurisdiction), "or in which there shall be a controversy between citizens of different States" (diversity jurisdiction), provided that the amount in controversy exceeded $500 (Jurisdiction and Removal Act of 1875). This act expanded federal court jurisdiction to the full extent permitted by Article III—with explosive potential for federal court workload—but still permitted state courts to exercise concurrent jurisdiction, giving litigants a choice of venue in many instances. Its main purpose, notes Gillman, "was to redirect civil litigation involving national economic interests out of state courts and into the federal judiciary" (Gillman 2002, 517).

Wheeler and Harrison comment on the dual goals reflected in jurisdiction-enhancing legislation of this period:

> [The Jurisdiction and Removal Act of 1875] was adopted two days following the 1875 Civil Rights Act, and, as one observer has said, the two statutes together "may be seen as an ultimate expression of Republican reconstruction policies. One recognized a national obligation to confer and guarantee first-class citizenship to the freedman. The other marked an expression of the party's nationalizing impulse and complementary concern for the national market" (Wheeler and Harrison 2005, 12).

Although hindered at the framing by Antifederalist fears of an over-bearing federal court superstructure, the eventual expansion of federal court jurisdiction appears to have been motivated in part by concerns about fair and impartial justice to litigants—especially the freedmen—and the uniformity in federal law required to sustain a growing national market. On the latter score, one legislator justified the push for a strong national court system by insisting that "Capital…will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor" (Wheeler and Harrison 2005, 18).

In essence, the regionalism that defined antebellum court development was gradually eclipsed as a new congressional coalition with new national policy goals sought to "change the bias inherent in existing structures" in its favor (Gillman 2002, 515). During the first half of the 19th century,

> one of the principal ways national power had been kept in check was by ensuring that the principle agents of national law would be appointed with local or regional considerations in mind and (for good measure) would be over-worked, poorly paid, and authorized to enforce only a subset of federal law (the rest of which would be filtered through state proceedings). Given that this was the goal, it is not surprising that when the federal courts experienced serious caseload pressures in the decades before the Civil War, Congress felt no obligation to offer relief (Gillman 2002, 514).

Prior to the Civil War, "the perceived utility of federal judicial power was very issue-specific, and all antebellum efforts to expand the general significance and power of federal courts in the political system were ignored or rebuffed" (Gillman 2002, 514). Once Republicans took Congress, however, they "had their first opportunity to create a strong and effective national court system that could be the agent of Republican interests" (Gillman 2002, 514).

V. Performance Goals

By 1880, the federal judiciary had developed substantially from its origins a century before. It spanned a much larger territory—expanding from three circuits along the East Coast to nine circuits stretching across the continent and included the new states of California, Oregon, and Nevada. It handled many more cases and was populated by many more judges. Congress, in the Judiciary Act of 1869, even provided a circuit judge for each of the nine circuits—each of whom would "reside in his circuit" and exercise the same powers as a circuit justice. Hence, circuit courts could now be presided over by the district judge sitting in combination with the circuit judge *or* the designated circuit justice, greatly relieving the burden on the latter.

But, for all the expansion, the 1789 framework had largely remained in place. Districts were still organized on a state-by-state basis and states were still organized into regional circuit jurisdictions, with very little administrative sinew binding the system together. These features incidentally promoted the development of judicial fiefdoms. As Peter Fish notes:

> The decentralizing features of the Act of 1789 were everywhere in evidence. Throughout the country appeared a multitude of single-judge district courts which, until the Court of Appeals Act of 1891, disposed of a major share of all litigation in the federal courts. Isolated and sometimes underworked district judges thus stood at the crossroads of the federal judicial system. In an era of limited federal jurisdiction, mastery of the law lay well within their grasp. They became lions of their relatively remote thrones (Fish 1973, 13).

Among district court judges, the "psychic security flowing from isolation" fostered a highly localistic culture predicated on a "rugged individualistic type" (Fish 1973). By the time of federal judiciary's development into a truly national institution, the logic of localism had taken deep root. All subsequent reforms were judged by faithfulness to the now-canonical 1789 framework which distributed power regionally (Fish 1973; Crowe 2012).

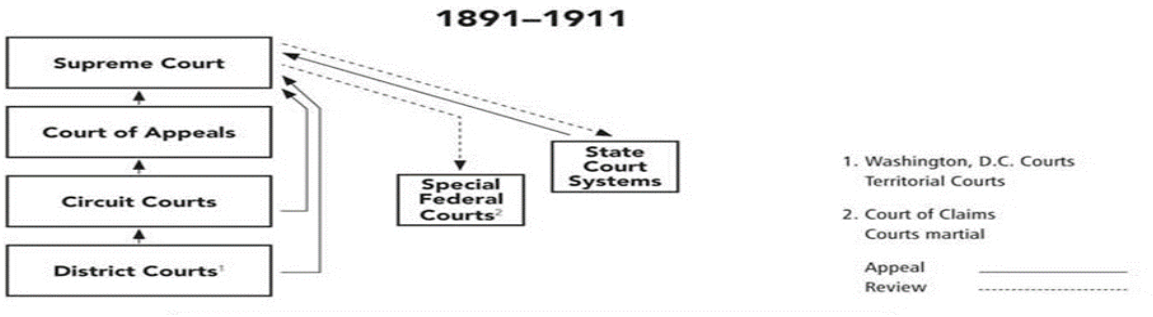
The first major structural change to the federal courts since the Judiciary Act of 1789 came in the form of the Circuit Court of Appeals Act of 1891. Congress, in response to ballooning federal caseloads and a multi-year backlog at the Supreme Court, created a new Court of Appeals within each regional circuit which could hear appeals directly from the district courts. The old circuit courts were stripped of the little appellate jurisdiction they had and, until officially abolished in 1911, served simply as separate federal trial courts.[3] The Act authorized a total of two judgeships for the appellate court of each circuit. Each court of appeals was to sit as a three-member panel consisting of the two circuit judges with a district judge from the circuit or with a Supreme Court justice. As Wheeler and Harrison explain,

> The Act provided a right of direct Supreme Court review from the district courts in some categories of cases and from the circuit courts of appeals in others. It routed all other district court cases—notably criminal, diversity, admiralty, and revenue and patent cases—to the courts of appeals for final disposition. The appellate court could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari. The Act's effect on the Supreme Court was immediate—filings decreased from 623 in 1890 to 379 in 1891 and 275 in 1892 (Wheeler and Harrison 2005, 18).

Thus, some cases were appealed directly from the two trial courts to the Supreme Court while others followed the now-familiar route from trial court to intermediate court of appeals to the Supreme Court. See Figure 2.3.

[3] Indeed, "the continued existence of the original circuit courts meant that the federal judiciary included 'two courts of substantially concurrent jurisdiction, with no little uncertainty and confusion in determining the few instances in which their jurisdiction was not concurrent'" (Crowe 2012, 189) Ironically, "the work of these two overlapping trial courts—each with its own clerks and own records—was increasingly performed by one set of judges" (Crowe 2012, 189).

Figure 2.3: Federal Court Organization, 1891-1911



The U.S. Courts of Appeals were established in 1891 to relieve the rapidly expanding post-Civil War appellate caseload of the U.S. Supreme Court. These intermediate courts were installed in the geographically defined jurisdictions developed previously to facilitate the justices' circuit-riding—a duty which, ironically, was effectively abolished in the same legislation.[4] The Act said nothing about how these courts would relate to one another, but three factors in particular set the stage for the development of a norm of regional autonomy.

First, grafted as they were into a pre-existing judicial culture, the new appellate judges would be socialized into the localistic orientation that had come to characterize that culture. Moreover, although the Courts of Appeals were new, the new judges were not stepping into a totally new role. The original circuit judges were Supreme Court justices. Later came dedicated circuit judges who, in their appellate capacity, sat in place of Supreme Court justices and enjoyed the latter's authority. This chain of succession would impress upon appellate judges their direct and personal Article III mandate to decide cases and controversies under the law (Fish 1973; Crowe 2012).

Second, the slowness with which the federal courts developed any centralized and hierarchical administration only reinforced the notion that circuits were isolated fiefs and appellate judges, like the isolated lower federal court judges before them, would be masters of

[4] Circuit-riding would not be officially abolished until 1911.

their domain (Fish 1973). The federal courts would not develop a coherent administrative apparatus until the judge-led reforms of the 1920's and 30's (Fish 1973). Delay in the development of centralized administrative capacity was in part symptomatic of the resistance to centralization characteristic of early American state-building more generally (Skowronek 1982). But the independent streak among judges and lawyers as highly-regarded local professionals steeped in distinct legal cultures made such Weberian ideals as uniformity of output difficult to develop and institutionalize even in the heyday of scientific administration (Fish 1973).

Third, the Supreme Court's fateful decision when confronting the question directly solidified regional independence. In *Mast, Foos & Co. v. Stover Manufacturing Co.* (1900), the Supreme Court rejected the petitioner's argument that the Seventh Circuit should be bound by a rule announced previously by the Eighth Circuit. This decision, reached just a few years after the establishment of the courts of appeals, appears to be the first instance of the Supreme Court confronting the issue of intercircuit conflict (Weis 1995). In *Mast*, the Court reasoned that to bind one circuit to the precedent of another would mean that "the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle" (*Mast* 1900, 488).[5]

Thus, the early isolation and autonomy enjoyed by the system's authorities planted the seed of regional independence. The lateness with which the system was bound together by a cohesive administrative structure fostered the growth of that seed. Viewed in this light, the Supreme Court's reasoning in *Mast* both reflects and reifies a norm that had already coalesced within the system—the regional independence of "coordinate tribunals" to each exercise "individual judgment" until "a higher court has settled the law" (*Mast* 1900, 488-489).

[5] *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U.S. 485, 488 (1900).

VI. Consistency and Uniformity

For over a century, the three-tiered federal judicial system crafted in the Judiciary Act of 1891 has remained remarkably durable even as the nation it serves has undergone dramatic changes. Its main challenges have been maintaining outputs of consistent quality and uniformity even as it expands to serve a growing population, modernizing economy, and the increasing federalization of American law (Miner 1987; Miner 1993; Miner 2012). Piecemeal reforms continue to characterize its development and calls for more radical restructuring have been resisted.

Following the Judges' Bill of 1925, in which the Supreme Court was given virtually full discretion over its docket, concern about Supreme Court workload abated for the next several decades. However, the average number of cases annually filed with the Court climbed from 737 in the 1920's to 3,683 in the 1970's (Estreicher & Sexton 1984). This growth prompted Chief Justice Burger to appoint the Study Group on the Caseload of the Supreme Court, known as the Freund Committee, "to study the caseload of the Supreme Court and to make such recommendations as its findings warranted" (Freund Committee Report 1972, 576). The Freund committee confirmed the Supreme Court's workload crisis and saw conflict among the circuits as one of the drivers of the Court's caseload. The committee recommended, among other things, that a National Court of Appeals (NCA) be instituted to screen all petitions for certiorari and to refer only the most cert-worthy cases to the Supreme Court. The NCA would handle many routine matters, including the resolution of intercircuit conflicts, leaving the Supreme Court to focus its attention on more important matters. This recommendation soon died amid controversy.

Attention next turned to the growing strain within the circuits, which had borne the brunt of increasing caseloads. As the Freund Committee was completing its work, Congress formed

the Commission on the Revision of the Federal Court Appellate System, known as the Hruska Commission, and charged it to issue reports in two phases. Phase I required the commission to "study the present division of the United States into the several circuits and to report…its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business" (Hruska Report 1973, 2). Phase II required the commission to "study the structure and internal procedures of the Federal courts of appeal system, and to report…its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process" (Hruska Report 1975, 7).

The Hruska Commission was primarily concerned with maintaining "consistency and uniformity" in federal law in the face of burgeoning balkanization (Hruska Report 1975, 8). It concluded that "the circumstance [of regionally-fragmented legal development] is admittedly an unhappy one" (Hruska Report 1975, 6). The Hruska Commission too recommended the establishment of a National Court of Appeals, but not one which would *screen* cases for the Supreme Court. Rather, the Hruska NCA would hear cases *referred to it* by the Supreme Court, and cases transferred to it by the regional courts of appeals to resolve or forestall intercircuit conflict and achieve "a nationally binding decision at the first level of appellate review" (29 U.S.C. § 160(b) (1982)). This proposal, though far more popular than that of the Freund Committee, also died amid controversy.

Until at least the early 1950's, the Supreme Court resolved virtually all lower court conflicts (Algero 2002, 613). As the Federal Courts Study Committee (FCSC) made clear in its 1990 Report on the Federal Courts, the "appellate caseload crisis" besieging the circuits made

this prospect increasingly untenable (FCSC 1990, 109). Second Circuit Judge Roger Minor, reflecting on the report's findings two decades later, declared that

> the crisis of volume is now much more acute than when the Committee's Final Report was written. In 1990, 40,898 appeals were filed. Eighteen years later, the number of [appellate] filings for the twelve-month period ending September 30, 2008, reached 61,104 (an increase of 49.41%). For that year, there were 448 terminations on the merits and 156 procedural terminations per active judge nationally. From the twelve-month period ending September 30, 2008, to the twelve-month period ending September 30, 2011, total filings declined 9.7%, from 61,104 to 55,126; however, the terminations per active judge rose during the same period to 456 terminations on the merits (an increase of 1.79%) and 151 procedural terminations (a decrease of 3.2%) on a national basis… The increase in the number of active judges from 168 twenty years ago to 179 today obviously has done nothing to stem the tide of individual judicial caseloads (Miner 2012, 519).

Judge Minor has long attributed the dramatic growth in federal court caseloads to a proliferation of federal statutory law: "new statutes eventually will require interpretation and enforcement in federal court proceedings, giving rise to more cases in the geometric progression of our workload" (Miner 1987, 257). Congress' post-WWII enthusiasm for enacting new statutes even in domains traditionally reserved to the states, such as criminal law, meant that "federal judges do have cause for alarm every time Congress meets" (Miner 1987, 257). More federal law meant more cases entering the system at the district court level, but the FCSC also found "a heightened proclivity to appeal district court terminations" (FCSC 1990, 110). In 1945, litigants sought review of one in every forty district court terminations; by 1990, that figure was one in eight.

Contemporary circuit court volume makes circuit splits more likely and Supreme Court review and resolution less likely. Over the last few decades, despite dedicating 30 to 70 percent of its annual docket to intercircuit conflict cases (Ginsburg 2003; Bruhl 2014), the Court "has

long since given up granting certiorari in every case involving an intercircuit conflict" (FCSC 1990, 124-125). Just how far short the court now falls in addressing annually-generated conflicts remains unclear. But the regional independence of the circuits and the limited supervisory capacity of the U.S. Supreme Court dictate that "a federal statute may mean one thing in one area of the country and something quite different elsewhere—and this difference may never be settled" (FCSC 1990, 125). This phenomenon makes possible the cultivation of distinct bodies of law in the twelve regions over which these appellate courts preside (Dragich 1996; Dragich 2010).

VII. Institutional Development and the Limits of Human Purpose

The regional distribution of appellate resources and the lack of a formal mechanism for intercircuit consensus evinces an apparent "contradiction between institutional purpose and design" (Howard 1981, 148). But as the preceding historical survey should make clear, the institutional development path of the federal judiciary has been shaped by a historical succession of *different* purposes. The structure of the system reflects an accumulation of institutional specifications rather than a coherent design in service of a singular purpose. Thus, students of the courts should be careful how much to infer from the system's current structure or the norms that guide the behavior of the system's authorities. In this final section, I highlight two unhelpful frames for analyzing the structure of the federal judiciary and set the stage for the institutional analysis in the chapters that follow.

A. Structure and Function

Some students of the courts regard intercircuit conflict as a virtually inevitable feature of regionalized adjudication. "The structure of our court system," writes Sydney Ulmer, "assures

that the uniformity principle will be frequently violated" (Ulmer 1984, 903). The assumption that structure determines function is common in the study of complex systems. But the assumption is perhaps least applicable to purposive human structures—that is, institutions—where expectations drive function (Pierson 2004). Expectations are, in turn, framed by experience, especially the experience of prior human interactions (North 1990; Ostrom 1990; Pierson 2004). In other words, the entrenchment of behavioral norms is historically-contingent rather than inevitable. "[I]nstitutions are defended by insiders and validated by outsiders, and…their histories are encoded into rules and routines" (March and Olsen 2005, 9). Therefore, rather than assume regional structure alone causes disharmony, it is more productive to attend to the historical processes that produced both the structure of the federal judiciary and the expectations that guide the behavior of its chief actors.

The division of the federal judiciary into regional decisional units no more determines disharmony than does its hierarchical structure determine compliance by judges in lower tiers to those in higher tiers. Harmony among coordinate units of an organization, like compliance by lower units to higher, flows from the ways in which the individuals operating within each organizational division understand their collective work (Simon 1997; March and Simon 1993). Whether acting in physical proximity or sprawled across a continent, what makes individuals into "an organized body or any other kind of social entity is a question which can only be answered by understanding the meaning which they themselves attach" to their shared enterprise (Mises 1998, 43). This requires an exercise not of "our senses, but understanding" (Mises 1998, 43).

Countless organizations are divided into administrative subunits and, nonetheless, harmonize their outputs.[6] The outputs of large complex human enterprises, organized into multiple discrete, coordinate units, will be uniform if the persons who comprise the organization expect them to be so and fashion mechanisms to make them so (Ostrom 1990; Williamson 1996). The U.S. federal judiciary has always had the potential to be a nationalizing institution. Under-specification at the time of the framing left it vulnerable to forces pushing in other directions. Precedents established early in the development of the system set it on a path of regional administration. Those same precedents helped to foster a norm of adjudication—discussed at greater length in Chapter 4—that prioritizes goals such as legal soundness over uniformity.

B. Purpose and Function

If not inevitable, it is tempting to infer from the fact of the system's regional organization that regional independence serves a desirable function. Estreicher and Sexton argue that "the federal judicial system… reveals in its very structure that a degree of conflict is desirable" (Estreicher and Sexton 1984, 698-699; see also Luse, McGovern, Martinek, and Benesh 2009). The assumption that current function indicates prior purpose has intuitive appeal but can lead us astray. Indeed, "one of the most significant mistakes made by proponents of rational choice explanations of institutional change is the practice of working back from identifiable institutional effects to determine the institutional preferences of the actors involved in the institutionalization process" (Knight 1999, 33-34). A second mistake is to assume path efficiency, i.e., that the outcome of institutional evolution is optimal (March and Olsen 2005). I address each in turn.

[6] The study of the franchise model in organizational theory chiefly concerns the question of how franchisors maintain output uniformity across a large and geographically-dispersed group of independently-operated franchisees.

Rather than "read[ing] backward off their current functions or features" (Thelen 2003, 218) we must be willing "to go back and look" for the intentions of institutional designers. Our examination of the origins of the federal judiciary reveals less than fully realized purposes at the moment of its founding. To call the work of the Convention delegates with respect to Article III an exercise in institutional design would be generous indeed. It is their failure of design that placed the court in Congress' hands.

Members of Congress took seriously their constitutional mandate to establish a court system but proved inattentive to what little guidance was left to them in the Article III text, and already conflicted about the role of the institution they were designing. Congress acted quickly to enact institution-building legislation within mere months of taking office. But they "paid less attention to the constitutional language, ambiguous as it was, than to contemporary political necessities" (Marcus 1992, 13-14). Over the objections of "observers [who] believed that the Constitution itself vested federal jurisdiction and that Congress was powerless to alter it," Congress brushed aside such concerns and drastically circumscribed federal court jurisdiction "on the assumption that the Constitution merely set the outer limits of their power" (Marcus 1992, 16) Following a "bruising ratification battle, the drafters of the Judiciary Act overwhelmingly concerned themselves with creating a judicial system that safeguarded federal interests without antagonizing those who favored a strong role for the states" (Marcus 1992, 29).

In addition to under-specification and early ambivalence, precedents established in 1801 and 1807 set the system on a developmental path that would be dictated more by the vagaries of contemporary politics than attempts at grand design. Pierson describes the frequently short-sighted nature of institution-building more generally:

> Political actors, facing the pressures of the immediate or skeptical about their capacity to engineer long-term effects, may pay limited attention to the long term. Thus, the long-

> term effects of institutional choices, which are frequently the most profound and interesting ones, should often be seen as the by-products of social processes rather than embodying the goals of institutional actors (Pierson 2004, 14)

Indeed, both the structure and the function of the U.S. federal judiciary should not be understood as the institutional embodiment of any single coherent purpose but as a by-product of multiple competing purposes in the crucible of American political development.

Rather than rationalize contemporary institutional structure and infer conscious design from current function, the federal judiciary must be evaluated to determine whether and to what extent it serves present needs. Moreover, there is no reason to assume that the evolution of the federal judiciary to its present arrangement is optimal. Institutional "changes are neither instantaneous nor reliably desirable in the sense of moving the system closer to some optimum" (March and Olsen 2005, 13). Ultimately, the desirability of regional independence and the consequent regional accretion of federal law can only be determined by institutional analysis.

VIII. Conclusion

The foregoing clears the deck for a thorough re-examination of the structure and function of the U.S. federal judiciary, specifically with regard to the regional independence norm. Ultimately, whether an institution's development is characterized by relative stability, unconscious drift, or conscious change does not answer the question of fit between any given set of extant arrangements and current needs (March and Olsen 2005). That is a question requiring institutional analysis, which the subsequent chapters undertake.

CHAPTER 3
REGIONAL INDEPENDENCE AND TOLERABILITY: CONSIDERING THE COSTS OF CIRCUIT CONFLICT

"To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice. This is the more necessary where the frame of government is so compounded…" (Federalist 22)

"While we note that the law in the *Seventh Circuit* differs from the law in *this circuit*, that issue does not concern us here…" *U.S. v. Salgado,* 6th Cir. 2001

I. Introduction

The organ of national government charged with authoritatively declaring what the law is[7] frequently produces "contradictory decisions [from] a number of independent judicatories" (Federalist 22). The federal judiciary routinely introduces non-uniform interpretations of federal law through the issuance of conflicting holdings by the circuit courts of appeals, the intermediate tier of its three-tiered hierarchy. Though the courts of appeals are but "arms of a single sovereign, they enjoy independence from one another when interpreting federal law" (Wallach 1986, 1501). Due to the regional independence of these 'sister circuits,' the recent proliferation of federal law, and the limited supervisory capacity of the U.S. Supreme Court, a substantial

[7] Justice Story declared that: "The constitution has presumed… that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." Story went on to stress "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution… [Otherwise, t]he public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution" 14 U.S. 304, 347-48, (1816).

proportion of intercircuit conflicts appear to linger indefinitely. This phenomenon makes possible the cultivation of distinct bodies of law in the twelve regions over which these appellate courts preside, a fact that has become so commonplace as to be readily passed over in the *Salgado* opinion quoted above.

There is as yet little consensus about how regional accretion should be regarded or its impact on the coherence of U.S. law. Jurists and court scholars fit roughly into three camps. Precisionists, "who place a higher value on stability, uniformity, and predictability" in national legal development, regard the regional accretion of federal law as a flaw (Ginsburg and Huber 1987, 1424). At the opposite pole, Percolationists, "who emphasize the value of flexibility, experimentation, and adaptation," regard it as a feature (Ginsburg and Huber 1987, 1424). Between these two poles, we must interpose a third camp—Trivialists—who assume intercircuit conflicts are few in number, brief in duration, or small in legal significance and, therefore, a "tolerable" quirk in the system (Hellman 1995, 730; see also Hellman 1998.).

We can frame regional independence and the regional accretion of national law in cost-benefit terms. Defenders see two important and related benefits flowing from decentralized decision-making. First, given the power of federal courts to modify or even displace the pronouncements of the two elected branches of national government, decentralization serves to diffuse that power and legitimate its exercise: "When disparate and independent courts ask and answer the same question and render the same answer, the legitimacy of that answer is greatly enhanced" (Krotoszynski 2014, 1027). Second, the very existence of "conflicting decisions better illuminate the issue and sharpen the competing arguments" with the potential to enhance judicial deliberation, contribute to judicial learning, and improve the quality of judicial outputs over time (Tiberi 1993, 862).

Over and against the benefits of decisional legitimation and judicial learning, critics have expressed four compelling concerns. First, "where differences in legal rules applied by the circuits result in unequal treatment of citizens… solely because of differences in geography," the relevant concern is one of *unfairness*, particularly salient when litigants face "liability to criminal sanctions" (Hruska Report, 1975, 6). Second, where federal agencies, such as the Securities Exchange Commission, confront conflicting masters and must decide whether to apply different rules in different regions or "to acquiesce nationwide to [only] one circuit's view," this concern is often termed *agency nonacquiescence* (Koh 1991, 433; see also Hellman 1995.). Unfairness and nonacquiescence are essentially normative concerns that center on the integrity of the judicial system. We might refer to them collectively as rule-of-law costs.

Third, where firms operate in multiple circuits and incur the additional expense of ensuring compliance with conflicting interpretations of the same statute, such as provisions of the National Labor Relations Act, this concern might be termed *economic inefficiency* (Hellman 1995). Fourth, the lack of system-wide finality following an appellate ruling in any given circuit produces an incentive for litigants to exploit an existing conflict or actualize a potential one (Hellman 1995). This lack of finality, or *legal uncertainty*, taxes the capacity of the system itself. Rather than settle a matter, judicial outputs generate demand for additional judicial outputs (Wallach 1986). Inefficiency and uncertainty are essentially performance-oriented concerns. We might refer to them collectively as suboptimization costs.

It is to these costs of circuit conflict that this chapter is addressed. The analysis consists of three component questions. First, how many active conflicts remain unresolved? Conflicts which are quickly resolved do not implicate rule-of-law or suboptimization costs to the same degree as those that linger indefinitely. Second, of persistent conflicts, how many possess

characteristics that carry the costs we are considering? Even lingering conflicts may be set aside if they do not carry substantial costs. Third, of those conflicts which linger *and* carry substantial costs, how many present legally-significant issues? Conflicts which survive the first and second stage of inquiry may yet be dismissed at this third stage if the legal question at the heart of the conflict is unlikely to systematically impact the distribution of costs and benefits.

The number of conflicts which survive this sifting analysis provides considerable insight into the question of tolerability. If conflicts are few, quickly resolved, and/or tend to involve legal issues of rather limited significance, we might safely embrace the Trivialist position. If

1. many conflicts are generated, and
2. a considerable proportion persist which
    a. trigger any of the four articulated concerns, and
    b. possess characteristics that make them legally significant,

then, it will be difficult, at the very least, to dismiss regional accretion as a trivial phenomenon in the context of American legal development. Any further claims must await an assessment of benefits in the chapter that follows.

This chapter is organized as follows. Section II surveys the relevant literature on circuit conflict and introduces a basic framework for the consideration of the costs of conflict. Section III describes the methods employed herein and introduces the data collected. Section IV analyzes the data and answers the three component questions relevant to a consideration of costs. Section V concludes with a discussion of the implications of the findings and the limitations thereof.

II. Literature and Theory

In its 1975 report, the Hruska Commission expressed major concerns over the increasing prevalence of intercircuit conflict and its potential threat to the consistency and uniformity of

federal judicial outputs. Federal court watchers feared balkanization and incoherence in a body of law nominally national in scope (Howard 1981, 8; Strauss 1987, 1105).

Contrary to these dire pronouncements, however, Ninth Circuit Judge J. Clifford Wallace suggested that intercircuit conflict presented the legal system with benefits as well as costs. Benefits, he proffered, include "the potential for improving the quality of federal justice by encouraging more reasoned and principled decisions on issues of federal law" (Wallace 1983, 930). Thus, would-be reformers should evaluate the *value* of regional accretion before contemplating drastic reforms. Wallace summarized as: V = Q – (D + U), wherein "value of intercircuit conflict (V) equals the improvement in quality of the resulting rule (Q) less the sum of the cost of the delay in producing a definitive answer (D) and the cost of the resultant uncertainty (U)" (Wallace 1983, 930). Judge Wallace's formula is a helpful frame for analyzing conflict. But applying it requires a much clearer picture of how much conflict is generated by the system. Moreover, implicit in the formula is the assumption that all or most conflicts are resolved after some period of "delay."

As part of the Judicial Improvements Act of 1990, Congress commissioned the Federal Judicial Center to ascertain "the number and frequency of conflicts among the judicial circuits in interpreting the law that remained unresolved because they are not heard by the Supreme Court" (JIA 1990, Sec. 302(a)). By framing the question in this way, Congress necessarily limited the scope of inquiry to unresolved conflicts. Arthur Hellman, the lead investigator, simplified his task further by analyzing "a selected group of cases in which Supreme Court review was sought but denied, and would ascertain how many of them presented unresolved intercircuit conflicts" (Hellman 1995, 702). "In concrete terms," said Hellman, "I would be examining unsuccessful petitions for certiorari" (Hellman 1995, 702-703). Hellman concluded that there were more

conflicts generated than previously thought, only about one-third were ultimately resolved, but that those which lingered often involved trivial legal issues and were thus "tolerable" (Hellman 1995, 760).

At present, empirical political science scholarship bearing directly on the extent of intercircuit conflict is sparse. Most studies that examine conflict do so only tangentially, typically aimed at answering specific questions about the Supreme Court.[8] Ulmer (1984) finds that the existence of conflict influences Supreme Court agenda-setting, i.e., increases the likelihood that a circuit court case will be reviewed by the Supreme Court (see also Estreicher and Sexton 1984; Caldeira and Wright 1988). Clark and Kastellec (2013) are also interested in Supreme Court agenda-setting. They examine at what point in the chronological development of a conflict the Supreme Court is most likely to opt for review. Employing a formal optimal-stopping model and testing its predictions against a set of conflict cases identified through the Spaeth Supreme Court Database,[9] the authors conclude that the Supreme Court will allow conflicts to percolate—i.e., persist to allow additional circuits to weigh in—for their informational value before resolving them.

Lindquist and Klein (2006) look at *how* the Supreme Court weighs in on intercircuit conflict to answer a different question, namely, "the impact of attitudinal and jurisprudential factors" on the Supreme Court's decision in the event of resolution (Lindquist and Klein 2006, 135). Examining a set of conflict cases identified in the Spaeth Supreme Court Database, they find that

[8] Beim and Rader note that "most of what is known empirically about intercircuit conflicts is…about Supreme Court behavior." (Beim and Rader 2016, 7).
[9] The Supreme Court Database, http://scdb.wustl.edu/index.php. Clark and Kastellec (2013) use conflict data initially gathered from the Database by Lindquist and Klein (2006).

> justices are (1) more likely to follow the reasoning process adopted by the majority of circuits involved in the conflict,[10] (2) less likely to adopt the conflict position marred by contrary dissents and concurrences in the circuit court opinions, and (3) more likely to adopt the conflict position endorsed by prestigious circuit court judges (Lindquist and Klein 2006, 135).

Klein (2002) directs his attention squarely at the courts of appeals. His interest is in what conflicts can tell us about judicial behavior at the circuit level. In particular, he asks how these judges decide cases in unsettled areas of law where they possess greater latitude in shaping policy. Klein uses secondary legal research tools[11] to identify "the announcement and treatment of new legal rules" and his "study is based primarily on an examination of U.S. Courts of Appeals cases decided between 1983 and 1995 in the areas of antitrust, search and seizure, and environmental law" (Klein 2002, 7-8). By focusing on novel questions of law, Klein is implicitly examining when circuit judges, in the absence of Supreme Court precedent, will go along or chart their own path. In addition to his empirical results, Klein interviews 24 circuit judges. Overall, he finds that these judges "do not adhere slavishly to precedents from other circuit judges, and circuit conflict is fairly common. Their decision making appears individualistic… Yet there are also strong currents running in the other direction, toward uniformity" (Klein 2002, 8). Circuit judges pay attention to the work of their peers in other circuits, and "their confidence and self-reliance are tempered by respect and a sense of participation in a shared enterprise" (Klein 2002, 9).

Like Lindquist and Klein (2006) and Clark and Kastellec (2013), Lindquist (2000) utilizes the Spaeth Supreme Court Database to identify intercircuit conflicts, but her focus is on

[10] See also Klein & Hume (2003).

[11] Klein explains his method: "To identify cases in which new rules were announced, I read through casebooks, law review articles, and research supplements such as the American Law Reports (ALR) and *West's Federal Digest*. Other cases came to my attention as I read court opinions….The succeeding cases were located through the use of *Shepard's Citations* , *West's Federal Digest*, and LEXIS citation and keyword searches" (Klein 2002, 42).

the proximate causes of conflict among the sister circuits, a phenomenon which she views as "a puzzle of coordination and cooperation" (Lindquist 2000, 24). Lindquist finds that a substantial minority of conflicts are initiated unknowingly—e.g., where panels in different circuits are addressing the same question contemporaneously and are not yet aware of the other's holding—and that most conflicts arise from ambiguous statutory language and legislative history.

Interesting patterns also emerge in the Lindquist study regarding the resolution of conflicts. On the one hand, she finds that the deviating circuit is most often affirmed in the event of Supreme Court review, suggesting that splits reveal important hidden information that might contribute to the ultimate adoption of a superior rule. Such a finding is consistent with notions of judicial learning-by-conflict. On the other hand, rather than steeping for a modest period, 65% of the conflicts were granted certiorari within one year of initiation, and "close to 79% of all conflicts were resolved within one year of the first post-conflict petition for certiorari" (Lindquist 2000, 22). Similarly, Beim and Rader find that "if a conflict is resolved, it is young when resolved" (Beim and Rader 2016, 14).

Each of the above studies suggest that conflicts are quite prevalent, and "many conflicts are created each year—far more than are resolved each year" (Beim and Rader 2016, 2). In fact the majority of conflicts apparently escape review entirely (Algero 2002; Miner 2012; Beim and Rader 2016). Taken together, the findings of Lindquist and others suggests that the learning-by-percolation model might not describe the greater universe of conflicts, a universe in which the Supreme Court resolves some conflicts immediately and leaves most to linger indefinitely. Given that Supreme Court review capacity is quite limited relative to the number of cert-seekers, it may be that the Supreme Court is more likely to review salient conflicts which give it the opportunity

to announce broad policy (e.g., *NFIB v. Sebelius* 2010; *Obergefell v. Hodges* 2015) or conflicts where the disagreements are severe (Black & Owens 2009; Beim 2014; Beim and Rader 2016).

The Costs of Conflict: A Framework

The only prior attempt to empirically assess the *tolerability* of intercircuit conflict is Hellman's authoritative study in the 1990's, and that is where I begin in developing a framework for considering conflict costs. Hellman looked to the text of the congressional statute commissioning his study for relevant factors. I likewise begin with the text of the statute. The Judicial Improvements Act of 1990 directed the Federal Judicial Center to focus its attention on conflicts unresolved by the Supreme Court and to consider whether each conflict:

> (1) imposes economic costs or other harm on persons engaging in interstate commerce;
> (2) encourages forum shopping among circuits;
> (3) creates unfairness to litigants in different circuits; or
> (4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for different circuits that are unlikely to be resolved by the Supreme Court. (JIA 1990, Sec. 302)

From these factors, we can identify four concerns which collapse into two cost categories.

Factors 3 and 4 in the statutory list are essentially normative concerns. The nature of the unfairness concern was best articulated in the earlier Hruska Report:

> Where differences in legal rules applied by the circuits result in unequal treatment of citizens with respect to their obligations to pay federal taxes, their duty to bargain collectively or their liability to criminal sanctions, solely because of differences in geography, the circumstance is admittedly an unhappy one (Hruska Report 1975, 6).

The nonacquiescence concern is similar but focused on uniform administration. Federal agencies, which are charged with the nationwide administration of federal law, confront multiple co-equal juridical authorities in different regions. Consequently, they sometimes must "choose to

apply the Ninth Circuit rule over the Eleventh Circuit rule, or vice versa, or apply the rule of the First, Fourth, or Xth Circuit," or "acquiesce nationwide to one circuit's view, essentially ignoring any contrary interpretations" (Koh 1991, 433). As Daniel Meador observes:

> One of the most basic features of law is that it embodies a set of rules and principles applicable to everyone in like manner throughout the jurisdiction it purports to govern… [L]egal doctrine differing because of the happenstance of the place of litigation and of the particular judges sitting on the case is hostile to the reign of law (Meador 1989, 639).

Many scholars and jurists regard the propensity for unfairness and nonacquiescence as a fundamental threat to the "integrity of courts" (Wallach 1986, 1502) and as deviations from the "rule of law" (Carrington and Orchard 2010, 583). They can be lumped together as *rule of law costs*.

Despite their conceptual overlap, each of the rule of law costs are triggered under different circumstances. Unfairness is triggered in any conflict centering on the interpretation of a rule that affects the rights, duties, or liability of litigants who are natural persons. The normative import here rests on the prospect that actual people are treated differently under the same law based upon the arbitrary placement of a juridical boundary. Nonacquiescence is triggered in any conflict centering on a rule that depends for its application on the action of a federal agency. The normative import here rests on the expectation of the uniform administration of a single body of law by a single sovereign.

Factors 1 and 2 of the Judicial Improvements Act present distinct difficulties. As the report of the Federal Courts Study Committee indicates, the first of these concerns regards "economic costs or other harm to multicircuit actors, such as firms engaged in maritime and interstate commerce" (Study Committee Report 1990, 125). Though national firms already face compliance costs associated with operating in different states, the addition of several more

jurisdictions with different requirements further add to these burdens. Moreover, while states are distinct political authorities, "[c]ircuits lack… attributes of sovereignty that make jurisdictional boundaries meaningful" (Wallach 1986, 1501), and "for law that we think of as federal—that is, nationally uniform—[such variation] is at least unusual" (Strauss 1987, 1105). This concern is one of national *economic inefficiency* associated with multifarious compliance.[12]

Factor 2 of the statutory list is forum shopping. Forum shopping refers to any instance in which a litigant confronting a choice of venue in more than one circuit makes the choice strategically based upon the prospect of a more favorable result in Circuit A rather than in Circuit B. As Hellman put it, "whenever forum shopping is a possibility, it would tempt anyone who, in the ordinary course, would be subject to an unfavorable rule" (Hellman 1995, 728). But, as Hellman himself conceded, it is difficult to conceive of forum shopping as (1) a flaw or (2) inherent in a system of decentralized adjudication. It is, after all, Congress that affords "plaintiffs the option of filing suit in more than one federal judicial district [and t]he fact that litigants take advantage of this choice can hardly be viewed as evidence of malfunctioning in the system" (Hellman 1995, 755).

The real concern stems not from forum shopping *per se* but from variation in federal law—both actual and potential—inherent in a national judicial system managed largely from its middle tier by twelve centers of co-equal authority (Howard 1981). The mere possibility that the Sixth Circuit *might* hold differently than the Seventh Circuit encourages litigation that might not otherwise occur:

> The absence of definitive decision, equally binding on citizens wherever they may be, exacts a price whether or not a conflict ultimately develops. That price may be years of uncertainty and repetitive litigation, sometimes resulting from the unwillingness of a

[12] Meador 1989, 615: "It is axiomatic that federal law should be uniform throughout the United States. If we want a human activity to be subject to diverse and varying regulation, we leave it to the states."

> government agency to acquiesce in an unfavorable decision, sometimes from the desire of citizens to take advantage of the absence of a nationally-binding authoritative precedent (Hruska Report 1975, 207).

"Federal attorneys," says Howard, "regularly relitigate adverse decisions in other circuits" and hold that "adverse circuit rulings are not authoritative until three circuits concur" (Howard 1981, 81). Moreover, litigants have been known to seek circuit conflict in the hopes of increasing the likelihood of Supreme Court review (Hellman 1995). This lack of finality, or "persevering possibility of differences developing" creates *legal uncertainty* (Hruska Report 1975, 207). Uncertainty—quite apart from the economic resources expended by litigants—taxes the already strained capacity of the federal courts "by a cyclical dynamic. Greater uncertainty breeds more litigation, more litigation breeds greater uncertainty" (Tiberi 1993, 862).

Unlike unfairness and nonacquiescence, inefficiency and uncertainty are less normatively-laden and more performance-oriented concerns. Each of the latter pair involve likely calculable costs—borne by economic actors or the federal courts themselves—that are higher relative to a circumstance in which intercircuit conflicts did not exist. They can be lumped together as *suboptimization costs*.

As with rule of law costs, each of the suboptimization costs are triggered under different circumstances. Inefficiency is triggered in any conflict centering on a rule that requires compliance by a multicircuit actor or in any conflict involving a multicircuit actor as a party. Uncertainty, on the other hand, is endemic in the system. The very potentiality of conflict creates some baseline level of uncertainty. However, for present purposes, we will narrow the specification of uncertainty to actual conflicts which prove persistent. Presumably, once a conflict is definitively resolved, the degree of uncertainty with respect to that legal issue recedes.

Conversely, conflicts that remain active yet escape resolution fuel uncertainty and opportunistic litigation.

Table 3.1 depicts the two cost categories, their respective concerns, and the circumstances under which each concern is triggered.

Table 3.1: Conflict Costs, Underlying Concerns, and Triggers

Costs	***Concerns***	***Triggers***
Rule of Law	*Unfairness*	*Conflicts centering on the interpretation of a rule that affects the rights, duties, or liability of litigants who are natural persons*
	Nonacquiescence	*Conflicts centering on a rule that depends for its application on the action of a federal agency*
Suboptimization	*Inefficiency*	*Conflicts centering on rule requiring multicircuit actor compliance or involving multicircuit actor as a party*
	Uncertainty	*Conflicts which prove persistent (i.e., active and unresolved)*

III. Methods and Data

In this section, I describe the methods and data employed herein. I start by describing my methods for identifying conflicts, including their initiation and resolution. Next, I describe the four legal subject areas in which conflicts are identified for this study and the reason for their selection. I conclude this section with a description of the data this process yields.

A. Identifying Conflict

An intercircuit conflict is initiated whenever one circuit announces a ruling on the interpretation of a provision of federal law which is inconsistent with the prior ruling of at least one other circuit (Hruska Report 1975; Hellman 1995). One important limitation of the literature

is the way in which conflicts are identified. Most studies rely upon certiorari petitions or the Spaeth Supreme Court Database to identify conflicts (Bruhl 2014). Both sources can be problematic. Reliance on cert petitions excludes from view all conflicts in which Supreme Court review is not sought—these constitute a "hidden docket" (Hruska Report 1975, 17). Hellman dismissed such cases, considering it "unlikely that the hidden docket… contains any substantial number of certworthy cases" (Hellman 1995, 702). But the hidden docket may contain a substantial number of conflicts in important areas of law. As Joseph F. Weis, chairman of the Federal Courts Study Committee, stated in 1991: "Many litigants do not have the economic incentive or reasonable expectation of securing certiorari that leads parties to bring a conflict to the attention of the Supreme Court, even though the intercircuit disagreement may have wide effect."[13] Where the expected costs of continued litigation are great and the expected benefits are remote and speculative, many litigants may decline to seek certiorari, even where their case involves an intercircuit conflict. Whether individual litigants find it individually rational to pursue their case to the utmost is no certain gauge of whether such cases are, in the aggregate, systemically important. Thus, we cannot be sure how many splits exist or how tolerable they are if we ignore cases in which cert is not sought.

Reliance on the Spaeth Supreme Court Database is even more problematic for our purposes. The Database codes cases according to many factors, saving court scholars a great deal of labor. Scholars who use it to identify conflict cases generally rely on the "certReason" variable, which identifies cases in which the Supreme Court listed conflict as the reason for granting review. As Bruhl explains,

[13] Federal Courts Study Committee Implementation Act of 1991: Hearings on S.1569 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 38, 48 (1991) (Statement of Hon. Joseph F. Weis, Jr.) quoted in Hellman 1995, 702, fn 36.

> the Database's "certReason" variable is coded in a precise, narrow way. Based on my observations of how the coding protocol is applied, the Database does not show a case as involving a split unless the Supreme Court describes that as the *reason* for granting certiorari, *even when the Court reveals the division of authority near the mention of the grant*. If the opinion of the Court says, "We granted certiorari in order to resolve a conflict in the circuits concerning X," that will count… (Bruhl 2014, 7, italics original)

But, as Bruhl goes on to catalogue, in many instances the Court *does* indicate the existence of conflict—though with superficial changes in phrasing or placement—and the database codes as "no reason given" (Bruhl 2014, 7). In reliance on the Database, Lindquist and Klein (2006) found that "conflict cases have made up about 30 percent of the Court's docket in recent years" (Lindquist and Klein 2006, 157). Similarly, Bruhl (2014) found that the "certReason" variable in the Database shows that an average of 32.63% of the Supreme Court's docket during the 2010-2013 terms were split-related.[14] But Justice Ruth Bader Ginsburg reported in 2003 that "about 70 percent of the cases we agree to hear involve deep divisions of opinion among federal courts of appeals or state high courts" (Ginsburg 2003, 521). Hellman (1996) found 68.7% during the 1993-1995 terms; Stras (2007) found 59.8% during the 2003-2005 terms.

There are several caveats to note. First, while Hellman apparently read the cert grants himself, Justice Ginsburg and Stras' methods of identifying the reason for cert are unclear. Second, neither Hellman, Justice Ginsburg, nor Stras limit their definition of conflict to *intercircuit* conflict, so their higher percentages may be somewhat inflated by an unknown number of state-court-only conflict cases. Third, some degree of variation can be expected from year to year. Nevertheless, the huge gap between the Database figures which hover around 30% and the substantially higher non-Database figures—taken together with Bruhl's observation

[14] In a discussion of this question as far back as 1987, Baker and McFarland note that "The one-third portion has been consistent throughout all major studies of the Court's docket…" (Baker and McFarland 1987, 1404, fn 27).

regarding the Database's narrow coding—does suggest that the Database severely undercounts conflict cases on the Supreme Court's docket.

In sum, reliance on cert petitions to identify conflict cases obscures from view conflicts in which cert is not sought by the litigants. The Spaeth Database, by coding only those cases in which cert was sought *and granted*, and by failing to identify all of those—is an even less appropriate tool for mapping the conflict landscape. We must have a better idea of how many splits are generated and how many persist before assessing the consequences of conflict on the system. The two most common methods cannot get us there.

A more natural, though more time-intensive, method would be to look to circuit court opinions themselves. We can reasonably identify a conflict according to whether the system's authorities consider their own work or the work of colleagues as constituting a conflict (Shauku 2015; Beim and Rader 2016). As a matter of convention, circuit court opinions tend to note when legal issues relevant to the case implicate a conflict among the circuits. While some conflicts may escape mention in some circuit court opinions, it seems unlikely given the ubiquity of the practice that many conflicts will go unremarked by all judges involved in all relevant cases. Conversely, some conflicts might be indicated which turn out, upon inspection, to be reconcilable. "Determining whether or not a conflict exists is often subjective" (Perry 1991, 249). Yet judges themselves seem reluctant enough in declaring the existence of conflict that undercounting still seems the greater risk (Perry 1991; Hellman 1995; Wasby 2002). To preserve transparency and replicability, I adhere closely to the characterization of the controversy by the circuit judges themselves. A split is a split if the system's authorities regard it so.

This method, which requires careful attention to a voluminous body of circuit court opinions, would have been perhaps prohibitively time-consuming at the time of Hellman's

authoritative studies in the 1990's. But two subsequent developments reduce the burden of this work. First, *U.S. Law Week*, a legal news periodical, began publishing a regular *Circuit Splits Roundup* in 1998 which reports on a monthly basis all conflicts noted in circuit court opinions and organizes them by legal subject area. This report provides a helpful starting point for the researcher wishing to stay abreast of conflict cases. Because the report is triggered by any mention of conflict in a circuit court opinion, it allows the researcher to capture not only splits initiated during a given reporting period, but also those initiated in prior periods yet which remain active, i.e., relevant to litigation in the period under observation. Thus, the roundup catalogues conflicts initiated since 1998 but also conflicts initiated in prior periods, but which remain active in later periods. Like Hellman (1998), I assume that dormant (or inactive) conflicts do not contribute meaningfully to the costs I noted above, and my method necessarily excludes them. The second labor-saving development is the advent of legal research software produced by companies such as Westlaw and Lexis Nexis. Using cases identified in USLW as seeds, I turn to Westlaw's embedded search tools to fully map all cases and circuits implicated in the conflict.[15]

B. Conflict Resolution

Intercircuit conflicts can be resolved in at least three ways. Most obviously, the Supreme Court may review a case implicated in the split and authoritatively declare a single interpretation. As previously noted, the Supreme Court resolved virtually all lower court conflicts until at least the 1950's (Algero 2002, 613). In recent years, however, despite dedicating 30 to 70 percent of its annual docket to intercircuit conflict cases (Ginsburg 2003; Bruhl 2014), the Court apparently leaves many conflicts unresolved (Miner 2012; Beim and Rader 2016). Alternatively, the circuits

[15] For a detailed account of the method of conflict mapping employed herein, see Appendix.

themselves may ultimately converge on a single interpretation in subsequent decisions,[16] or Congress may amend a statute in such a way as to render the conflict moot. Absent affirmative resolution via Supreme Court review, circuit convergence, or congressional action, changed circumstances may simply reduce or eliminate the significance of the underlying legal issue, leaving the conflict technically *on the books* while generating no additional litigation (Hellman 1998). Thus, a conflict may technically persist but lay dormant. As indicated above, by focusing on references to circuit conflict in legal opinions, my approach necessarily excludes dormant conflicts.[17] I regard a conflict as resolved in the event of Supreme Court review, circuit convergence, or congressional action that ends the controversy.

C. Legal Subject Areas

"In classifying conflicts," says Hellman, "it is natural to begin by identifying the area of law in which the conflict has developed…" (Hellman 1995, 728). So too, it helps to specify an interval over which to begin the classification. To narrow the scope of inquiry to manageable proportions, I examine conflicts in four legal subject areas—employment discrimination, search and seizure, securities, and labor law—active during the interval 1998 to 2010. Each legal

[16] Circuits on one side of a conflict may distinguish subsequent cases and limit the holdings of prior cases to their specific facts. In this indirect manner, "precedents have been rejected through the stratagem of distinguishment" (Comment 1941, 1449). More directly, if a circuit reviews a relevant case en banc, it may overrule a prior decision outright. Either practice may "flip" that circuit to the other side of a conflict. By either of these means, the First Circuit, for example, might end an intercircuit conflict by capitulating and adopting an interpretation announced by the Third, Fourth, and Fifth Circuits.

[17] The dormant/active distinction merits further discussion, and Hellman's studies from the 1990's are particularly relevant here. In his initial study, Hellman found a total of 237 conflicts in the 1988, 1989, and 1990 Supreme Court terms in which Justice Byron White dissented from the denial of review (Hellman 1995). Randomly sampling 1-in-5 paid cases in which cert was denied in the 1989 term alone, Hellman found a total of 44 conflicts.[17] After accounting for overlap between the dissent group and random group, 201 conflicts remained. But, as Hellman aptly noted in his follow-up study, understanding the impact of intercircuit conflict requires more than counting "the number of conflicts in existence at a particular moment in time without asking what happens to those conflicts over a span of years" (Hellman 1998, 249). "Of the 201 conflicts," he found that:

> 62 have been put to rest by legislative or judicial action. Another 63 conflicts have died a natural death; either the underlying issue has disappeared or there is no longer any evidence of intercircuit disagreement. Among the conflicts that have not been put to rest, there are no more than 50 that manifest characteristics that contribute to intolerability (Hellman 1998, 256-257).

subject area involves important questions of American law. Search and seizure law has its basis in the U.S. Constitution and typically involves the availability of the Fourth Amendment's protection to criminal defendants against unreasonable searches and seizures. Employment discrimination involves the interpretation of key provisions of statutes such as Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) in cases where plaintiff/employees seek remedies for alleged violations of such acts by defendant/employers. Labor law involves employees and employers as well but implicates broader national labor regulations such as those arising under the National Labor Relations Act and overseen by the National Labor Relations Board (NLRB). Securities law typically involves disputes arising out of the enforcement of the Securities Exchange Act and related amendments as overseen by the Securities and Exchange Commission (SEC).

Each legal subject area contributes to the consideration of costs. If what the law requires in any of these areas—e.g., what constitutes a reasonable accommodation for a disabled employee, the legality of a search, the *mens rea* required to establish liability for securities fraud, whether a worker of a given job description constitutes a protected non-supervisor—turns solely upon differences in the geography of the litigants, *unfairness* is implicated. Where a statutory scheme is overseen by a federal agency (e.g., SEC and NRLB) which must enforce different interpretations of the same legal provision or else "acquiesce nationwide to [only] one circuit's view" (Koh 1991, 433), *agency nonacquiescence* is implicated. Where the matter involves employers and employees (employment discrimination and labor law) or firms and investors (securities law) in the national economy, *economic inefficiency* is implicated. Where additional litigation may be generated in any of these legal subject areas due simply to the "persevering

possibility of differences developing" (Hruska Report 1975, 207), this *uncertainty* taxes the capacity of the federal court system.

D. The Data

A total of 151 conflicts were identified across the four legal subject areas: 27 in search & seizure, 64 in employment discrimination, 39 in labor, and 21 in securities law. See Table 3.2.

Table 3.2: Number of Intercircuit Conflicts Resolved Via Each Mechanism

	Search & Seizure Conflicts	**Employment Discrimination Conflicts**	**Labor Conflicts**	**Securities Conflicts**	**Total**
Resolved by Review	5	20	7	7	39
Resolved by Convergence	2	1	1	2	6
Resolved by Congress	0	0	1	0	1
Not Resolved	20	43	30	12	105
Total	**27**	**64**	**39**	**21**	**151**

Of the 27 search & seizure conflicts, 7 were resolved—5 by Supreme Court review and 2 by convergence of the circuits. Of the 64 employment discrimination conflicts, 21 were resolved—20 by Supreme Court review and 1 by convergence. Of the 39 labor conflicts, 9 were resolved—7 by Supreme Court review, 1 by convergence, and 1 by the revision of a statute by Congress. Finally, of the 21 securities conflicts, 9 were resolved—7 by Supreme Court review and 2 by convergence.

Though generated over a span of decades, each of these conflicts actively contributed to litigation and were referenced in circuit court opinions during the 1998-2010 observation period. Over half of the splits originated prior to 1998, with a few stretching back to the 1960's and 70's. Yet only 46—30 percent—were resolved by the end of calendar year 2015.

IV. Analysis: The Costs of Conflict

With the data in hand, we can now turn to the three questions motivating this study:

1. How many active conflicts remain unresolved?

Of the 151 conflicts that were active across the four legal subject areas during the 1998-2010 interval, 70 percent went unresolved by any of the three mechanisms as late as 2015. Because a substantial subset of the conflicts originated well before the 1998 beginning threshold, many of these conflicts persist much longer than the 18-year period implied by the 2015 cut-off. The average length of the unresolved conflicts is 20 years (median of 19 years), the longest being a labor law conflict reaching all the way back to 1962! That conflict—a dispute over whether the parol evidence rule is fully applicable to collective bargaining agreements—is a 7-1 split in which the Ninth Circuit is the lonely outlier. Such a longstanding conflict might be regarded as moot if not for the fact that it continues to be relied upon in circuit court opinions in the Ninth Circuit and referenced by its sister circuits. The Sixth Circuit, in *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund* in 2000, was the last circuit to declare a position in the split.

Of the 46 conflicts that *were* resolved, 33 percent were resolved quickly (within 18 months of initiation), while 50 percent took 6 years or more, and 33 percent took ten years or more to reach resolution. Thus, consistent with Lindquist (2000) and Beim and Rader (2016), the courts appear to act immediately to resolve some conflicts, leave some to linger before resolution, and neglect most to linger indefinitely despite their ongoing relevance in subsequent litigation. These initial findings alone seriously undermine any functionalist account of conflict, learning or otherwise. Rather they suggest a body of national law significantly fragmented across twelve appellate jurisdictions. On the other hand, many of these conflicts may disturb the legal

landscape very little beyond that which is already tolerated in a system of common law adjudication. Thus, we turn to our second question.

2. Of persistent conflicts, how many possess characteristics that carry costs?

Rule of law costs are those that raise two concerns, unfairness and/or nonacquiescence.

Unfairness

Unfairness is triggered in any conflict that centers on a rule affecting the rights, duties, or liability of natural persons. In each of the four legal subject areas this turns out to be an easy criterion to satisfy. In employment discrimination, all of the unresolved conflicts involve natural persons seeking to vindicate statutory rights to nondiscrimination in employment.[18] Similarly, in search and seizure, all of the unresolved conflicts involve natural persons seeking to vindicate a constitutional right against unreasonable search or seizure of person or property. In securities, all of the conflicts involve either the rights and duties of natural persons or the liability of natural persons under securities statutes or corresponding regulations. In labor, most of the conflicts center on broad labor policies between labor unions and corporate employers, decidedly *not* natural persons. Nonetheless, all of the unresolved conflicts involve the rights and duties of natural persons—either directly through individual employee suits or indirectly through labor policy controversies which determine the balance of rights and duties between workers and their employers. Hence, all 105 unresolved conflicts trigger the unfairness concern.

Nonacquiescence

Nonacquiescence is triggered in any conflict that centers on a rule that depends for its application on the action of a federal agency. In unemployment discrimination, the EEOC is vital in screening claims, issuing right-to-sue letters, and pursuing litigation on behalf of claimants.

[18] For a catalog of the legal question forming the basis of each unresolved conflict, see Appendix.

Any conflict bearing upon an employee right, employer duty, or the prospects for a successful claim also constrains the EEOC's execution of each of its functions. Thirty-seven of the 43 unresolved employment discrimination conflicts meet this description. In search and seizure, all of the conflicts involve constraints on law enforcement agencies relating to constitutional search and seizure protections for criminal suspects. Many of the cases involve alleged Fourth Amendment violations by state and local law enforcement agencies. But of course, the Fourth Amendment's guarantees bind federal law enforcement agencies as well. Hence, either directly or indirectly, 16 of the 20 unresolved search and seizure conflicts trigger agency nonacquiescence concerns. The SEC enforces securities statutes and its own regulations promulgated under the authority of those statutes. The SEC also oversees non-governmental regulatory bodies such as the Federal Industry Regulatory Authority (FINRA).[19] Each of the 12 unresolved securities conflicts center on rules that involve SEC oversight and trigger the nonacquiescence concern. Labor law is overseen by federal agencies such as the National Labor Relations Board (NLRB) and the National Mediation Board (NMB), and 21 of the 30 unresolved conflicts center on rules under their purview, triggering the nonacquiescence concern. Hence, 86 of the 105 unresolved conflicts trigger the nonacquiescence concern.

Suboptimization costs are those that raise two other concerns, inefficiency and/or uncertainty.

Inefficiency

Inefficiency is triggered in any conflict centering on a rule requiring multicircuit actor compliance or involving a multicircuit actor as a party. In unemployment discrimination, 37 of the 43 unresolved conflicts meet this description; in search and seizure, none do. In securities, 10

[19] FINRA is the successor of the National Association of Securities Dealers (NASD).

of the 12 conflicts require compliance by multicircuit actors; in labor, that number is 24 of 30. Hence, 64 of the 105 conflicts trigger the inefficiency concern.

Uncertainty

Uncertainty is triggered in any conflict that persists. Of course, all of the 105 unresolved conflicts meet this description. If we also count conflicts that persist for 10 or more years before resolution, the total number of conflicts contributing to uncertainty climbs to 120—80 percent of all conflicts. If we count all conflicts that took six or more years to reach resolution, the number climbs to 128—85 percent.

Tallying Costs

All of the unresolved conflicts carry rule of law costs—with each triggering the unfairness concern and 82 percent triggering the nonacquiescence concern. Similarly, all of the unresolved conflicts carry suboptimization costs—with each triggering the uncertainty concern and 61 percent triggering the inefficiency concern. See Table 3.3.

Table 3.3: Cost Tally

Costs	***Concerns***	***Emp Discrim %***	***Search %***	***Securities %***	***Labor %***	***Total %***
Rule of Law	*Unfairness*	*100%*	*100%*	*100%*	*100%*	***100%***
	Nonacquiescence	*86%*	*80%*	*100%*	*70%*	***82%***
Suboptimization	*Inefficiency*	*70%*	*0%*	*83%*	*80%*	***61%***
	Uncertainty	*100%*	*100%*	*100%*	*100%*	***100%***

At this penultimate stage of analysis, the potential costliness of intercircuit conflict is evident. But there remains the possibility that many of the conflicts that have survived to this stage of analysis can be dismissed as trivial. Thus, we turn to our final question.

3. Of those conflicts which linger and carry costs, how many present legally-significant issues?

Completing the final stage of analysis requires a plausible test of legal significance. The subject matter classification used to determine which splits trigger what kinds of concerns cannot, without more, tell us if the legal questions at the heart of each split is likely to significantly influence the behavior of legal actors in ways that instantiate the corresponding costs to any significant degree. "At one extreme," writes Hellman, "are conflicts involving rules that directly regulate primary conduct" (Hellman 1995, 731). The types of questions that arise under such rules are most likely to influence the behavior of legal actors and instantiate corresponding costs because they are, by their very nature, outcome-determinative. For example, determining whether "a parent corporation [is] liable as an 'owner or operator' for environmental clean-up costs incurred by its wholly owned subsidiary" under the Superfund Act (CERCLA) will determine the outcome of litigation (Hellman 1995, 731). Any split involving such a question is likely to force agencies such as the EPA to choose between uniform administration and faithfulness to multiple juridical masters (nonacquiescence); require multicircuit actors to adapt their production practices, personnel management, training, etc. to different regulatory standards (inefficiency); and encourage strategic and repetitive litigation among litigants in search of a more favorable rule (uncertainty).

At "[t]he other end of the spectrum… are procedural rules… which govern the manner and means by which substantive rights are enforced" (Hellman 1995, 731) and rules that contain

"one or more indeterminate elements" (Hellman 1995, 735). Many procedural rules are addressed to judges alone and do not come into play until deep into litigation. But some procedural rules shift the balance between the parties in clear and foreseeable ways, including rules that impact the tolling of limitations periods, the admissibility of certain types of evidence, the availability of presumptions in favor of one party rather than another, and the operation of affirmative defenses. Hence, even procedural rules will have a significant impact on fairness to and the behavior of legal actors to the extent that they impose systematic bias in favor of one class of litigant over another.

Indeterminate rules are more difficult to classify a priori, and their classification is therefore inherently more subjective. Such rules naturally exist on a spectrum and, as Hellman observed, the less determinate a rule the more likely it is to invite as much variation *within* a circuit as between circuits (Hellman 1995). For present purposes, where a conflict involves gradual shadings on a rule so fine "that the result in any given case will depend on the facts and the predilections of the particular panel rather than on the articulated rule" (Hellman 1995, 735), I set it aside. I do so on the rationale that the variation observed in such conflicts fails to rise above the baseline variation inherent in common law adjudication.

Thus, I regard a conflict as legally-significant if the answer to the legal question at the heart of the split:

a. Is outcome-determinative, or

b. Imposes systematic bias in favor of one class of litigant over another.

Unresolved conflicts that satisfy neither condition may be regarded as trivial. Although they are potentially costly, they demonstrate no tendency to instantiate those costs to any significant degree.

In all, 69 percent of the unresolved conflicts qualify as legally significant. But the real question here is what proportion of unresolved conflicts carry costs *and* qualify as legally significant. That number is 61 percent. Of the 151 total conflicts across four legal subject areas active during 1998-2010 interval, 42 percent are:

- **Persistent** (i.e., active *and* unresolved),
- **Potentially costly**, *and*
- **Legally significant**.

This finding provides an initial indication of the costliness of intercircuit conflict. Yet there are several limitations to note. First, at present, I lack a plausible way to generalize from the 151 conflict observations gathered here to the greater universe of circuit splits. *U.S. Law Week*—the source of my seed cases—classifies *conflicts* according to the legal subject area implicated in the split, even if the cases constituting the split revolve mostly around other legal issues. Judicial caseload statistics, such as those gathered by the Administrative Office of the U.S. Courts, typically classify *cases* according to the legal subject that predominates in each case. Therefore, the most straightforward way of generalizing from the conflicts in my data to the greater universe of federal court cases appears unavailable.

Second, I have admittedly used the term "cost" rather loosely. In the case of the abstract normative concerns which I label rule of law costs, this conceit is excusable. However, the performance-oriented concerns which I label suboptimization costs, are potentially calculable. These should be measured, even if measuring them lay beyond the scope of this initial effort.

V. Conclusion

The objective of the chapter was to develop a framework for identifying and analyzing the costs associated with intercircuit conflict and the regional accretion of federal law. Though it

is difficult to quantify these costs with precision—and doing so lay beyond the scope of this initial effort—the concrete nature of these costs is difficult to deny. The majority of conflicts are never resolved and many of those unresolved conflicts are not easily dismissed as trivial. Thus, while a thoroughgoing assessment of the value of regional accretion must await Chapter 4's evaluation of the benefits side of the Wallace equation, we may, even at this early stage of the analysis reject the Trivialist position. Whatever their associated benefits, conflicts are neither few nor, by and large, legally insignificant.

CHAPTER 4
A MULTIPLICITY OF VOICES: REGIONAL INDEPENDENCE AND JUDICIAL LEARNING

"Comity [among the courts of appeals]… has substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing with weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command." *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U.S. 485, 488 (1900).

"It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc*., 338 U.S. 912, 918 (1950).

I. Introduction

Following Judge Wallace (1983), we have framed the analysis of regional accretion in cost-benefit terms. Chapter 3 focused on unresolved conflicts and what they reveal about the costs of regional accretion. The present chapter focuses on resolved conflicts and what they reveal about the benefits side of the equation.

Several related claims emerge from the literature in defense of a norm of regional independence. The first connects conflict with judicial learning. If, in addition to the mere settlement of a legal issue, the system's authorities strive for legal soundness, there is no guarantee that the circuit to decide the matter first will have decided it soundly. Over time, the engagement of multiple co-equal authorities provides opportunity for error-spotting, experimentation, and competition among alternative approaches. These features of a decentralized decisional process among coordinate courts are believed to contribute to judicial

learning (Wallace 1983; Estreicher and Sexton 1984; FCSC 1990; Frost 2008; Clark and Kastellec 2013; Beim 2014; Beim and Rader 2016).

The second claim connects judicial learning to rule quality. As judges in the system learn through the process described above, the overall quality of decisional outputs should be higher (Wallace 1983; Tiberi 1993).

The first two claims are performance-oriented. Law professor Ronald Krotoszynski extends them into normative territory. For Professor Krotoszynski, not only does decentralized decision making via a system of regionally independent courts substantially reduce "the risk of insufficiently considered—reasoned—decision making" (Krotoszynski 2014, 1027), it serves an important legitimation function as well. For

> the popular legitimacy of a judicial act displacing the act of a democratically elected and accountable legislative body or executive officer is surely improved and enhanced when different decision makers, operating independently of each other, reach a common conclusion (whether or not on the same premises or reasoning) (Krotoszynski 2014, 1027).

Article III judges are appointed, rather than elected, and serve life terms. Yet they exercise considerable power over the application of the nation's laws in a political system wherein power is legitimated by a majoritarian democratic process. However defensible such a counter-majoritarian arrangement may be on other grounds, the position of federal judges in a democratic system is at least anomalous (Dahl 1957; Bickel 1986; Graber 2005; Hirschl 2004; Krotoszynski 2014). Decentralization of federal judicial power diffuses that power and ameliorates the counter-majoritarian difficulty. The regional distribution of judicial power vests national authority in "a representative of the community, rather than an outsider" (Krotoszyski 2014, 1043). When consensus is achieved among the system's multiple independent and co-equal

authorities about what federal law requires, "the legitimacy of that answer is greatly enhanced" (Krotoszynski 2014, 1027).

The two performance-related claims are susceptible of empirical investigation, and relatively few studies have evaluated either claim directly. The judicial learning claim is about the virtues of regional accretion as a process; the rule-quality claim focuses on the outcome of the process. To the author's knowledge, only Tiberi (1993) has empirically evaluated the latter claim. The present chapter empirically evaluates the former, examining the putative connection between circuit conflict and judicial learning through a process commonly described as "percolation."

Polycentric decision-making may serve to highlight judicial error and lead to its correction. We cannot assume that a circuit that addresses an issue first necessarily addresses it soundly.[20] Indeed, some court watchers have openly worried that increased reliance on non-judicial court staff to cope with burgeoning circuit caseloads could diminish output quality and increase decisional error (Coffin and Katzmann 2003; Miner 2012). It is plausible then that "conflicting decisions better illuminate the issue and sharpen the competing arguments" which may enhance judicial deliberation, contribute to judicial learning, and improve the quality of judicial outputs over time (Tiberi 1993, 862). So conceived, the costs of conflict might be offset, in whole or in part, by the benefits of judicial learning.

Percolation is the notion that the ability of circuits to deviate from an interpretation of federal law previously adopted by another circuit exposes decisional errors of two kinds: (1)

[20] Highly regarded Judge Richard Posner of the Seventh Circuit puts the matter simply:

> Suppose that in case 1 the Third Circuit holds X; in case 2 the Fourth circuit holds not-X; and case 3 now comes to the Third Circuit and raises the same issue again. I do not think [even] the Third Circuit should…presume the correctness of X. On what basis could the Third Circuit think its earlier decision more authoritative than the Fourth Circuit's contrary decision? It ought to reexamine its previous decision conscientiously… (Posner 1999, 381).

unfaithfulness to controlling authority, and (2) non-administrability (Wallace 1983; Estreicher and Sexton 1984; Wallach 1986; Strauss 1987; Meador 1989; Safranek 1990; Tiberi 1993; Frost 2008; Dragich 2010; Logan 2012; Beim 2014; Beim and Rader 2016).[21] With time and the engagement of multiple co-equal circuit authorities, the Supreme Court may, from an Olympian perch (Shapiro 2006), survey the decisional landscape and discover the best rule (Clark and Kastellec 2013). An important question, therefore, is whether time and a multiplicity of voices substantially serves this judicial learning function.

Despite attaining the status of stylized fact for many jurists and legal scholars, there is as yet no well-specified theory of percolation (Tiberi 1993).[22] However, several key expectations emerge from the literature, each of which are susceptible of empirical investigation. First, most conflicts should ultimately be resolved. Regional accretion absent final resolution merely contributes to the "gradual balkanization of national law" (Strauss 1987, 1105; see also Howard 1981, 8). Second, conflicts require adequate time and the engagement of multiple circuits to provide opportunity for learning (Wallace 1983; Tiberi 1993; Clark and Kastellec 2013; Beim 2014). Conflicts which are resolved immediately with only two circuits weighing in may contribute to uncertainty, but do not necessarily facilitate deliberation and learning (Clark and Kastellec 2013). Conflicts which persist indefinitely and with many circuits staking out various positions neither produce a *best* answer nor even a *definitive* one (Hruska Report 1975; Schaefer 1983; Wallach 1986; Baker and McFarland 1987; Meador 1989; Safranek 1990; Straus 1987; Tiberi 1993; Dragich 2010; Logan 2012). Such conflicts would contribute to the cost side of Wallace's equation with no expectation of corresponding benefit to legal quality.

[21] The latter referring to rules which prove unreasonable or which lead to absurd results across the broad range of activities to which they would apply.

[22] In a relatively recent attempt to address this deficiency, Beim and Rader observe that "the political science literature has been primarily an atheoretical exploration of whether conflicts are resolved" (Beim and Rader 2016, 5)

But how would we know that conflict produces learning? One approach would be to look at judicial outputs for evidence of learning. Tiberi (1993) compared the relative quality of percolated and non-percolated judicial outputs. Developing a reasonably objective measure of improvement in decisional quality is a complicated task (Tiberi 1993), and I will not attempt it here.

Rather than assessing the quality of judicial outputs, a second approach, and the one undertaken herein, is to examine the judicial process for evidence of learning. We can productively interrogate whether patterns of conflict resolution suggest that the regional accretion of national law substantially serves a judicial learning function.

Ultimate resolution after adequate time and engagement are the conditions which establish opportunities for learning. But percolation is no black box. The existing literature gives clues about what specific mechanisms might contribute to judicial learning. Resolutions in which the split-initiating circuit is vindicated suggest that the deviating circuit possesses hidden information (Lindquist 2000). Resolutions in which circuits with greater expertise in a given legal subject area are vindicated suggest that the conflict facilitates the diffusion of specialized knowledge. Resolutions in which circuits in the majority are vindicated suggest that conflict facilitates a kind of judicial crowd-sourcing (Lindquist and Klein 2006).[23] Thus, a careful examination of patterns of resolution can provide evidence of a *process* of judicial learning via conflict.

This chapter is organized around three component questions. First, what proportion of conflicts are resolved? When conflicts are not resolved, they contribute to the costs identified in

[23] On the other hand, resolutions which favor the earliest-adopted position in a conflict suggest the utility of an earliest-decided rule on which circuits commonly rely to ameliorate intracircuit conflict (Duvall 2008).

Chapter 3, but have no tendency to promote learning if *learning* implies the system-wide adoption of a single high-quality rule.

Second, what proportion of resolutions occur with adequate time and circuit engagement to allow for judicial learning? Conflicts that are resolved immediately and with little contention among the system's competing voices, can hardly be considered deliberative in nature. Conflicts that are resolved only after many years and after virtually every circuit has become entrenched suggests procrastination on the part of the system's highest authority.

Third, does the manner of resolution suggest that conflict largely serves a learning function? Again, the focus of this study is on the decision making process in the federal judiciary and whether it exhibits reliance on mechanisms that contribute to learning among "members of an interpretive community... of people capable of and willing to evaluate legal arguments according to some shared standards" (Lindquist and Klein 2006, 141). Resolutions which demonstrate no particular deference to:

- conflict-initiating positions,
- positions supported by relative expertise, or
- positions supported by a majority of the judicial authorities involved

indicate conflict to be sure, but not necessarily learning.

In summary, percolation requires that most conflicts are resolved *and* resolved in a manner that suggests a judicial learning process. A failure of either of these expectations undermines the persuasiveness of percolation as a theory of circuit conflict. A failure of both expectations suggests that percolation may be an inappropriate conceptual frame for understanding the regional accretion of national law.

This chapter is organized as follows. Section II surveys the relevant literature on the federal judiciary and circuit conflict and elaborates a basic theory for the consideration of judicial learning-by-percolation. Section III analyzes the data described in the previous chapter in search of patterns suggesting judicial learning-via-conflict. Section IV concludes with a discussion of the implications of this research and the further questions it raises.

II. Judicial Norms, Conflict, and Learning

Understanding the role conflict might play in judicial learning requires an account of the norms of adjudication—or "conventions of judging"—that guide the work of federal judges (Lindquist and Klein 2006, 138). The federal judiciary is a bureaucratic system responsible for the authoritative resolution of disputes arising under federal law (Howard 1981; Goldman and Jahnige 1985). The primary authorities in the system are judges. Recruited from similar backgrounds, these men and women experience common legal training and socialization, both of which impact their role conceptions (Gibson 1978; Howard 1981; Goldman and Jahnige 1985; Baum 1997; Klein 2002; Posner 2008). Though a substantial body of research shows that judges at every level of the judicial hierarchy are influenced by their own policy preferences (Segal and Spaeth 2002; Spriggs and Hansford 2006; Martin, Quinn and Epstein 2005; Giles, Hettinger and Peppers 2001; Songer 1991; Haire, Lindquist and Songer 2003; Carp and Rowland 1983; Rowland and Carp 1996), there is also a compelling body of evidence in support of the proposition that circuit judges strive for legal correctness and are generally faithful to Supreme Court precedent in matters of settled law (Johnson 1987; Songer, Segal and Cameron 1994; Klein 2002; Randazzo, Waterman and Fine 2006; Hettinger, Lindquist, and Martinek 2006; Luse, McGovern, Martinek, and Benesh 2011). In fact, several scholars find that circuit judges are generally faithful to Supreme Court guidance even when the possibility of reversal is

negligible (Klein and Hume 2003; Songer, Ginn and Sarver 2003). Klein and Hume (2003) suggest role orientation as a likely explanation and speculate "that congruence flows from lower court judges' attempts to reach legally sound decisions" (Klein and Hume 2003, 602).

Moreover, even at the level of the Supreme Court, where justices enjoy life tenure, lack of ambition for higher office, and the absence of any possibility of reversal, justices demonstrate the influence of jurisprudential factors on their decisional outputs (Epstein and Kobylka 1992; Gillman 1993; Knight and Epstein 1996; Cushman 1998; Richards and Kritzer 2002; Lindquist and Klein 2006; Epstein, Landes, and Posner 2012).

In other words, "the interaction between the Supreme Court and lower federal courts might be more productively modeled as a type of mixed-motive coordination game rather than a traditional principal–agent relationship" (Kim 2011, 538; see also Cameron and Kornhauser 2005.). "Courts and judges are certainly part of the political world, but they are also part of a distinctive legal culture" (Richards and Kritzer 2002, 305) in which members value law and legal reasoning for its own sake (Posner 2008; Tribe and Matz 2014). These findings suggest that judges throughout the judicial hierarchy are driven at least in part by a desire to craft good legal rules and, despite ideological differences, often reach a high degree of consonance about what constitutes such a rule. "Although we are not bound by another circuit's decision," writes Judge Donald Lay of the Eighth Circuit Court of Appeals, "we strive to maintain uniformity in the law among the circuits wherever reasoned analysis will allow" (*Aldens, Inc. v. Miller*).[24]

Yet the circuits do often disagree about what federal law requires. Ulmer (1984) concluded that "[t]he structure of our court system… assures that the uniformity principle will be frequently violated" (Ulmer 1984, 903). But, as argued in Chapter 2, the formal structure of the system alone does not dictate that outcome. Countless organizations are divided into

[24] *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979).

administrative subunits which are required to harmonize their outputs (March and Simon 1993). Within the federal judicial system itself, the uniformity principle, stare decisis, exists within each circuit (Duvall 2008), but is not held to apply across circuits. Judges go along by default where there is genuine agreement on a legal issue or where the matter falls within a deciding judge's zone of indifference (Wasby 2002). Judges' common training and socialization dictate that this default condition prevails much of the time (Howard 1981; Goldman and Jahnige 1985; Shapiro 2006; Baum 1997). In the majority of cases, writes Second Circuit Judge Henry J. Friendly, "the law and its application alike are plain" (Friendly 1961, 222).

Moreover, if substantial consensus has already developed among multiple circuits on a new issue, this may create "a sort of hydraulic pressure to adhere to the existing consensus" (Wasby 2002, 145). Wasby describes the tendency of circuit judges to favor the majority rule as a norm of avoidance of intercircuit conflict: "This is essentially a default position that, other things being equal, not only should intercircuit conflicts not be created, but, more strongly, judges should seek to avoid creating or perpetuating such conflicts" (Wasby 2002, 145). I refer to this hypothesized inertia favoring intercircuit harmony as the National Consensus Norm (NCN). This norm explains the high degree of consensus among the twelve sister circuits even in the absence of a formal rule requiring it.

As the inertia metaphor suggests, a circuit judge's preference for intercircuit consensus can be overcome by other forces. Indeed, the existence of intercircuit conflict indicates that the NCN does not always carry the day. As in the Eight Circuit opinion quoted above, circuit judges frequently indicate a willingness to deviate from a rule announced by another circuit when they find the other circuit's decision unreasonable or unfaithful to controlling authority. In either event, circuit judges "do not always value cross-circuit uniformity simply for its own sake, as

they are willing to hold to their own position because they believe the other courts were wrong" (Wasby 2002, 146). I refer to this willingness to deviate from a rule announced by another circuit as the Regional Independence Norm (RIN). It is this norm and the lack of a formal rule requiring uniformity of decision across circuits, not merely the regional structure of the system, which accounts for the violation of the uniformity principle. It is the tension between NCN and RIN which allows for conflict while limiting its prevalence.

Viewing the work of circuit courts as existing in a tension between competing norms of adjudication offers significant leverage. It provides a frame for understanding why conflict happens, why it does not happen with greater frequency, and how it might benefit legal development. In essence, "progress depends on individuals being free to back their own judgment despite collective disapproval" (Lewis 1955, 172). If circuit judges pay a non-prohibitive cost—perhaps both psychic and social—for deviating from the judgment of their peers, they should tend to limit conflict to precisely those legal judgments which would benefit most from the further consideration which conflict affords.

A Theory of Percolation

The notion of percolation that emerges from the literature has a strong temporal component. The primary learner is the Supreme Court, which may find it "desirable to have different aspects of an issue further illumined by the lower courts before making a determination. Wise adjudication has its own *time* for ripening" (*Maryland v. Baltimore Radio Show, Inc.* 1950).[25] Essentially, prolonged circuit conflict aids the Supreme Court in its information-gathering efforts:

[25] 338 U.S. 912, 918 (1950), emphasis added.

> Attorneys on each side of an issue will presumably put forth their most potent arguments. Each side presumably is aware of any existing circuit decisions on the issue at hand and is expected to cite to those in favor of its position, while distinguishing those opposed. When the Supreme Court grants certiorari, any existing conflict among the circuits is almost certainly brought to the attention of the Court…these conflicting decisions better illuminate the issue and sharpen the competing arguments… to lead to a better disposition by the Supreme Court (Tiberi 1993, 861-62).

Clark and Kastellec (2013) look for evidence of this temporal dynamic. They conclude that "Early in the process, conflict actually creates an incentive for the Court not to grant cert immediately in order to facilitate more learning…" (Clark and Kastellec 2013, 166). Their model assumes that the Supreme Court values prolonged conflict and eventually resolves conflicts once sufficient information has been gained.

But how long does the Court need to learn? The Court needs adequate time to recognize a conflict and consider the implications of alternative rules. Litigants also require time to exploit the existence of a conflict and bring cases to the Court that are good vehicles for review and resolution (Perry 1991; Hellman 1995; Beim 2014; Beim and Rader 2016; Beim, Clark, and Patty 2017).[26] Given what we know of judicial procedure, at least two years are required following the initiation of a split to permit opportunity for litigation, observation, and deliberation.

On the other hand, a conflict permitted to persist more than a few years would suggest that the Court lacks the capacity or the inclination to resolve the conflict, rather than judicial

[26] Beim, Clark, and Patty (2017) offer new insight into the question of why resolution may take time. While most scholarly discussion of the 'good vehicle' question focuses on "what has come before and whether [the Court] is prepared to resolve a current case," Beim et al argue, in complementary fashion, that a discretionary court in great demand and possessing limited capacity in relation to that demand may also judge the question prospectively, anticipating that "the resolution of a dispute will trigger a host of new disputes that otherwise would not require resolution" (Beim, Clark, and Patty 2017, 6). Therefore, Supreme Court's initial reticence may have as much to do with an assessment of the "downstream consequences of resolving an issue" as with the characteristics of any particular case or a general need for further legal development (Beim, Clark, and Patty 2017, 6).

learning. This model of learning-via-conflict supposes a reasonably generous time period to wait for the Supreme Court to learn from a conflict, grant cert on a case which is a good vehicle for review, and resolve the legal question. As the Clark and Kastellec (2013) optimal stopping model indicates, conflicts which persist beyond a few years increase the costs associated with delay while failing to meaningfully contribute to additional learning. The costs accumulate, and the benefits peter out, a notion which Clark and Kastellec assume is not lost on the justices themselves. This yields an expectation that can be stated as follows:

> **Percolation Hypothesis 1 (Conflict Ripeness)**: The probability of conflict resolution should gradually build in the first few years following conflict-initiation, peak, and gradually decline in subsequent years.

But Supreme Court learning presumably takes not just time, but a number of "conflicting decisions [to] better illuminate the issue and sharpen the competing arguments" (Tiberi 1993, 862). Beim and Rader consider it a beneficial "when many circuits consider similar issues" and reach differing results because "the Supreme Court faces the opportunity to select among *many* options for the best available doctrine" (Beim and Rader 2016, 3, emphasis added). But how many? The sharpening of competing arguments would probably require not only two competing arguments but a third as well. Beyond some threshold, however, we can expect diminishing informational value to be gained from additional circuits weighing in. This is especially true if we assume, as Clark and Kastellec (2013) do, that the Supreme Court (and presumably all of the judges in this collegial enterprise) value having as prompt a settlement to the legal issue as possible. In a set of 336 conflicts analyzed by Clark and Kastellec, 88 percent of the conflicts that the Court resolved were resolved after 7 or fewer circuits weighed in, with an average length of 4.5 circuits weighing in prior to resolution. This yields an expectation that can be stated as follows:

> **Percolation Hypothesis 2 (Circuit Engagement)**: The probability of conflict resolution should gradually build after the first few circuits weigh following conflict-initiation, peak, and gradually decline.

Conflicts falling within the target range are sufficiently engaged by the circuits to permit Supreme Court learning. For present purposes, conflicts involving fewer than 3 circuits are regarded as under-engaged; those involving more than 7 circuits are regarded as over-engaged.

It is also instructive to examine resolutions that do not conform to these expectations. If time and the engagement of multiple competing judicial authorities aids judicial learning, unpercolated resolutions—i.e., resolutions which occur prior to the initial thresholds for ripeness and engagement—are different from the others for two important reasons. First, the apparent urgency to resolve a conflict might be an indication that the justices are ideologically motivated to resolve a dispute in a desired direction. Second, whatever the justices' motivations for foregoing the percolation process, the lack of learning opportunity may leave the justices more reliant on ideological cues and inclinations. In either event, the justices' ideology should exert stronger influence in unpercolated resolutions relative to all other resolutions. This yields a third prediction that can be stated as follows:

> **Percolation Hypothesis 3 (Ideological Influence)**: The ideology of the Supreme Court is more important in unpercolated resolutions than in all other resolutions.

Confirmation of this hypothesis would be another indicator of learning. It is consistent with the notion of learning as a debiasing process.

Though focus is often placed on the Supreme Court, we should recall that conflicts can also be resolved through convergence among the circuits themselves. Some scholars have cautioned that the high court's capacity to watch and learn is limited: "The notion of the Supreme Court's monitoring the results of experiments in more than 100 conflicting

interpretations each year strains credulity" (Schaefer 1983, 454). Shifting our view from a single Olympian high court, it is well to recall that it is peer courts, subsequently confronting the same issue, that will spot a jurisprudential mistake and offer a workable alternative. Indeed, "when lower courts can learn from one another, a large swath of the Supreme Court's workload is taken over by appellate court judges" (Beim 2014, 24). Because circuit judges pay attention to the work of their peers in other circuits (Howard 1981; Goldman and Jahnige 1985; Wasby 2002; Klein 2002), higher quality legal rules could emerge not just from Supreme Court review but from convergence of the circuits on the most faithful or administrable rule as it presents itself.

If circuit judges operate in a tension between a national consensus norm and a regional independence norm, one circuit's deviation from its sisters and initiation of intercircuit conflict may contain a powerful signal that a jurisprudential mistake has been made. As Tiberi (1993) put it: "The maverick circuit likely will have thoroughly dissected the competing arguments before making such a bold move" (Tiberi 1993, 876-77). Indeed, given Wasby's hydraulic pressure postulate, the greater the number of circuits which agree prior to the initiation of a conflict, the stronger the signal that the deviating circuit possesses information overlooked by its peers. Such may explain Clark and Kastellec's finding that conflicts which emerge at a later stage, after "several lower courts have produced the same signal" (Clark and Kastellec 2013, 164), are more likely to be granted cert immediately, compared with conflicts that emerge earlier. We should also expect judges' common training and "shared standards of decision making" (Klein 2002, 8) to produce a high degree of consonance once the best rule emerges. This yields a prediction which can be stated as follows:

> **Percolation Hypothesis 4 (Maverick Circuit):** The circuit which initiates a conflict is most likely to be vindicated, i.e.,
>
> - be affirmed in the event of Supreme Court review or
> - have its position adopted system-wide via convergence.

Indeed, this mechanism has already been observed. Lindquist (2000) finds that "when circuits deviated 'knowingly,' they were almost twice as likely to have their positions upheld by the Court" than when they deviated unknowingly (Lindquist 2000, 23). Here, evidence of this mechanism in play would be an indication that permitting a circuit to plot its own course, at least for a time, serves an error-correction function in our system. If not, it suggests that there may be some merit in efforts to limit regional variation, such as a proposal to adopt an earliest-decided rule at the national level.

We might also observe learning among the circuits through differential expertise. Due to varying caseloads and opportunities for judicial experience, not all circuit judges are equally expert in every area of law. In essence, "judges across circuits may face informational asymmetries, depending on the particular cases that arise within their jurisdictions…" (Beim and Rader 2016, 3). Klein (2002) found that judges themselves draw a connection between caseload characteristics and expertise and consider certain colleagues more expert than themselves in some legal subject areas. One circuit judge interviewed by Klein stated the matter plainly: "What you get, you learn a lot about" (Klein 2002, 69).[27] But the types of cases vary not just from judge to judge, but from circuit to circuit as well. For example, "the Second Circuit is known for securities law, the Fifth for immigration law, and the D.C. for administrative law" (Hansford 2011, 1146). Therefore, while particular judges within circuits might have differing caseload characteristics, expertise in some legal subject areas varies at the circuit level.[28] If, for example, the Second Circuit is on one side of a conflict that turns on a question of securities law, we might

[27] See also Baum (2009) on the effects of judicial specialization generally and Hansford (2011) who measures the effects of specialization among the federal circuit courts of appeals in particular.

[28] The sort of expertise I have in mind here arises from what Hansford (2011) refers to as 'partial specialization': "A court partially specializes when it decides more cases than other courts in a particular subject matter and gains a relative advantage in deciding that kind of case. A court partially specializes relative to other courts: the Second Circuit partially specializes in securities law because it handles more securities cases than the other federal courts of appeals, but it has not fully specialized because it also hears nonsecurities cases" (Hansford 2011, 1146).

expect the Supreme Court or sister circuits to defer to its expertise and adopt its holding. The Supreme Court and sister circuits might be more likely to agree with the expert circuit for several reasons: due to the soundness of that circuit's holding, out of a collegial deference, or as a simple heuristic device in a question that is otherwise quite close. In either event, this yields a prediction that can be stated as follows:

> **Percolation Hypothesis 5 (Expert Circuit):** The expert circuit is most likely to be vindicated, i.e.,
>
> - be affirmed in the event of Supreme Court review or
> - have their position adopted system-wide via convergence.

This mechanism too has been previously observed, albeit indirectly. Using circuit judge prestige as a rough proxy for expertise, Lindquist and Klein (2006) find that "A justice is more likely to vote for the petitioner's position where…more highly prestigious circuit judges have written opinions supporting the petitioner's position than the respondent's" (Lindquist and Klein 2006, 148). If expertise exerts great force in the resolution of conflicts, it would be an indication that conflict allows for the diffusion of specialized knowledge that improves output quality throughout the system. A finding that expertise exerts little apparent effect in the resolution of circuit conflicts would call into doubt whether conflict serves a learning function.

However, all else equal, the judgment of "the many…may yet, taken all together, be better than the few…"[29] If circuit judges and Supreme Court justices are striving for legal soundness in close cases and view themselves as participants in a shared enterprise, the collective judgment of highly trained and conscientious peers on the same question should exert considerable force. As in the case of differential expertise, the Supreme Court and sister circuits might be more likely to agree with circuits in the majority out of collegial deference or as a

[29] Aristotle, *The Politics*, Bk III, Ch. 11.

simple heuristic device in a question that is otherwise quite close. In either event, this yields a prediction that can be stated as follows:

> **Percolation Hypothesis 6 (Majority Circuit):** The circuits in the majority are most likely to be vindicated, i.e.,
>
> - be affirmed in the event of Supreme Court review or
> - have their position adopted system-wide via convergence.

Again, Lindquist and Klein (2006) find that "A justice is more likely to vote for the petitioner's position where the circuits taking that position outnumber those on the other side" (Lindquist and Klein 2006, 148). Evidence of this mechanism at work in the present study would be an indication that permitting circuit conflicts to play out may not only prevent the system-wide adoption of an unfaithful or non-administrable rule, it may also promote the discovery and system-wide adoption of a universally-recognized 'best' rule. Conversely, a failure of this expectation weakens the conceptual link between conflict and learning.

Percolation has long been the chosen frame for conceptualizing a beneficial function served by regional accretion in the U.S. federal judiciary. This account of the function served by conflict is highly plausible. What has been lacking is a distillation of percolation into an explicit theory of circuit conflict susceptible of empirical investigation. From a survey of the relevant literature, we have established clear expectations of what this model of learning-via-conflict entails. Does the actual process of conflict initiation and resolution fit the percolation model? We are ready to begin our analysis in the next section.

III. Analysis: Regional Independence and Judicial Learning

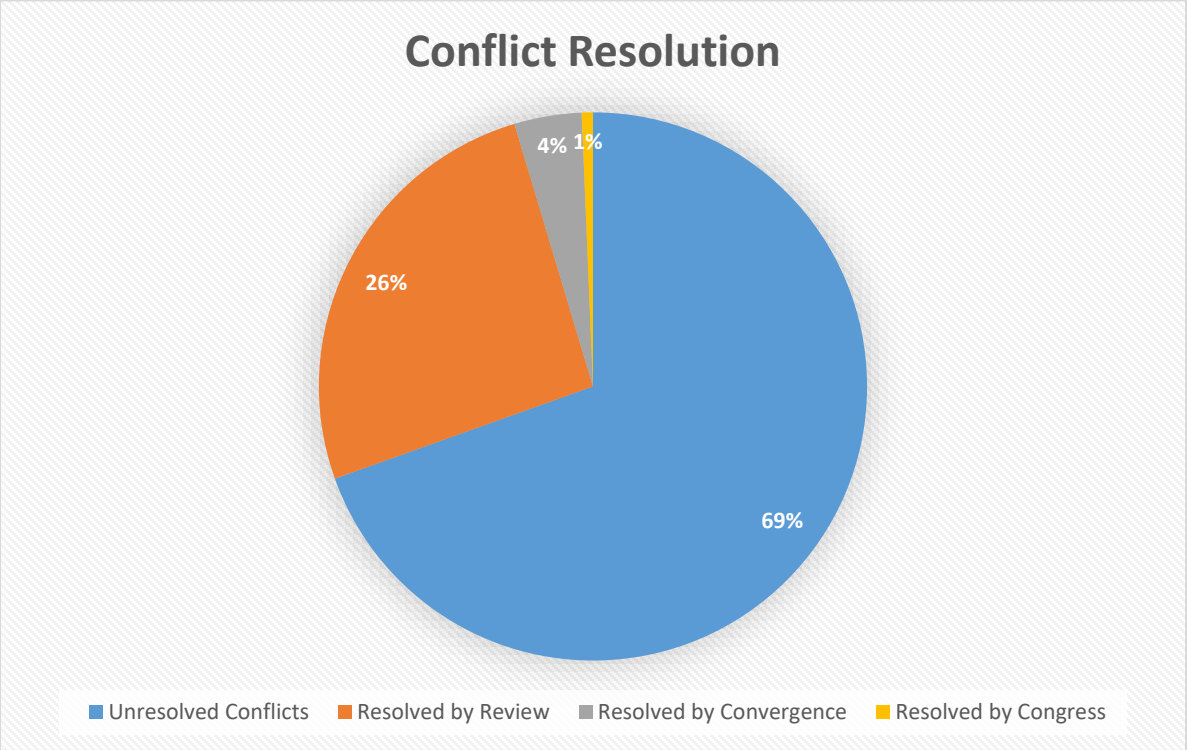
We now turn to the data introduced in the previous chapter. The analysis is organized around three component questions:

1. What proportion of conflicts are resolved?

In the percolation model, circuit conflict is a process characterized by learning, and learning culminates in the system-wide adoption of a single high-quality rule. Therefore, the credibility of the percolation model depends in part on the proportion of conflicts that are actually resolved. Of the 151 conflicts that were active across the four legal subject areas during the 1998-2010 interval, only 46 were resolved by the end of calendar year 2015. See Figure 4.1. Most resolutions came via Supreme Court review, and only one via congressional action. Congress, after a 12-year split over an ambiguity in Section 1446 of the Federal Rules of Civil Procedure, amended the provision to clarify the time allotted to different classes of defendants to request removal to a federal venue.

Circuit convergence settled 6 of the conflicts. In a resolution typical of this category, the Ninth Circuit, sitting en banc in *E.E.O.C. v. Luce, Forward, Hamilton & Scripps* (2003), acknowledged its outlier status and conceded a misreading of a Supreme Court precedent by its earlier 3-judge panel in *Duffield v. Robertson Stephens & Co.* (1998), ending the conflict. In a more notable example, a 3-judge panel for the Ninth Circuit in *U.S. v. Kyllo* (1999) superseded its split-generating decision on rehearing, aligning itself with four other circuits, to hold that the use of thermal imaging by law enforcement does not constitute a search under the Fourth Amendment. One year after this five-circuit consensus was achieved, however, the Supreme Court granted cert in *Kyllo*, reversed the Ninth Circuit, and overturned the consensus in a landmark decision extending Fourth Amendment jurisprudence to keep pace with evolving law enforcement capabilities.

Figure 4.1: Conflict Resolution



Although it is difficult to generalize from the data collected for the purposes of this study to the broader universe of conflicts, this implies a resolution rate of about 30 percent, a rate too low to suggest that *most* conflict leads to learning.

2. What proportion of resolutions occur with adequate opportunity for judicial learning?

A closer look at the resolutions themselves may still reveal a good fit for the percolation model. First, there is the temporal expectation. Percolation is not an open-ended process. Percolationists assume that the period of time to resolution should be *extended*—to permit Supreme Court learning—though not *indefinite*. Expectations here have already been established. Most resolutions should occur following a reasonable interval to determine if the Supreme Court is waiting, watching, and *learning*. Conflicts younger than 2 years might be regarded as unripened, suggesting a lack of opportunity for deliberation; conflicts older than 6 years are

overripe, suggesting dereliction rather than watchfulness (Tiberi 1993). As indicated in Table 4.1, most resolutions occur outside this interval.

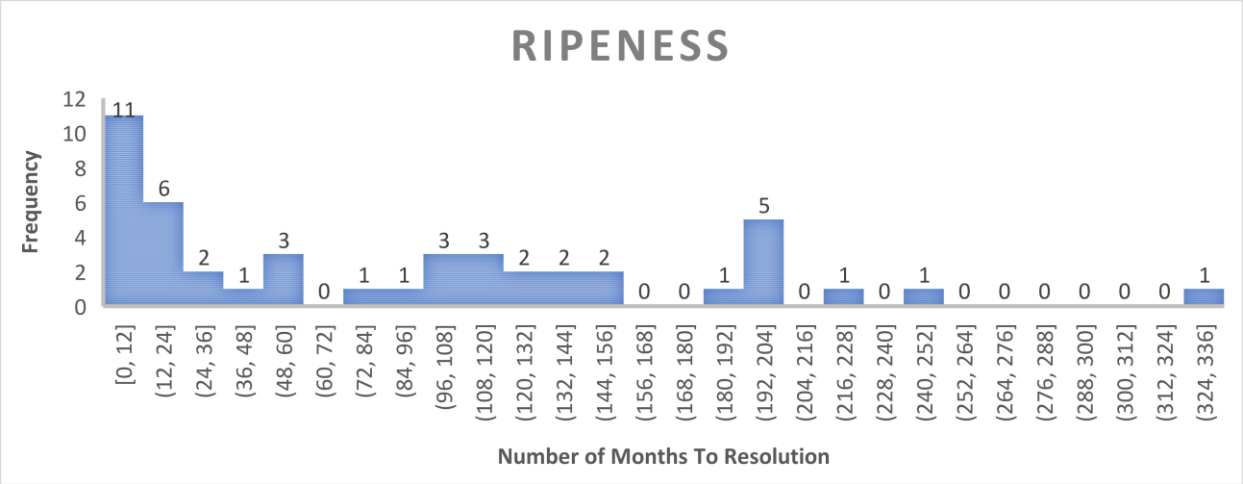
Table 4.1: Ripened Resolutions

	Search & Seizure Conflicts	**Employment Discrimination Conflicts**	**Labor Conflicts**	**Securities Conflicts**	**Total**
Unripened Resolutions	3	6	4	4	17
Ripened Resolutions	1	4	0	1	6
Overripe Resolutions	3	11	5	4	23
Ripeness %	**14.29%**	**19.05%**	**0%**	**11.11%**	**13.04%**

Of the 7 search & seizure resolutions, 1 (14 percent) was resolved within the interval—3 were unripened and 3 overripe. Of the 21 employment discrimination resolutions, 4 (19 percent) were resolved within the interval—6 were unripened and 11 overripe. Of the 9 labor resolutions, none were resolved within the interval—4 were unripened and 4 overripe. Finally, of the 9 securities resolutions, 1 (11 percent) was resolved within the interval—4 were unripened and 4 overripe. Overall, only 13 percent of resolutions occurred within a 2-6 year interval.

These results do not substantially change if the temporal range is expanded considerably. Thirty-three percent of resolutions occurred within 18 months of conflict initiation, and 30 percent of resolutions occurred after 10 years elapsed. See Figure 4.2. Contrary to expectation, most resolutions occur quite early or quite late.

Figure 4.2: Temporal Distribution of Resolutions



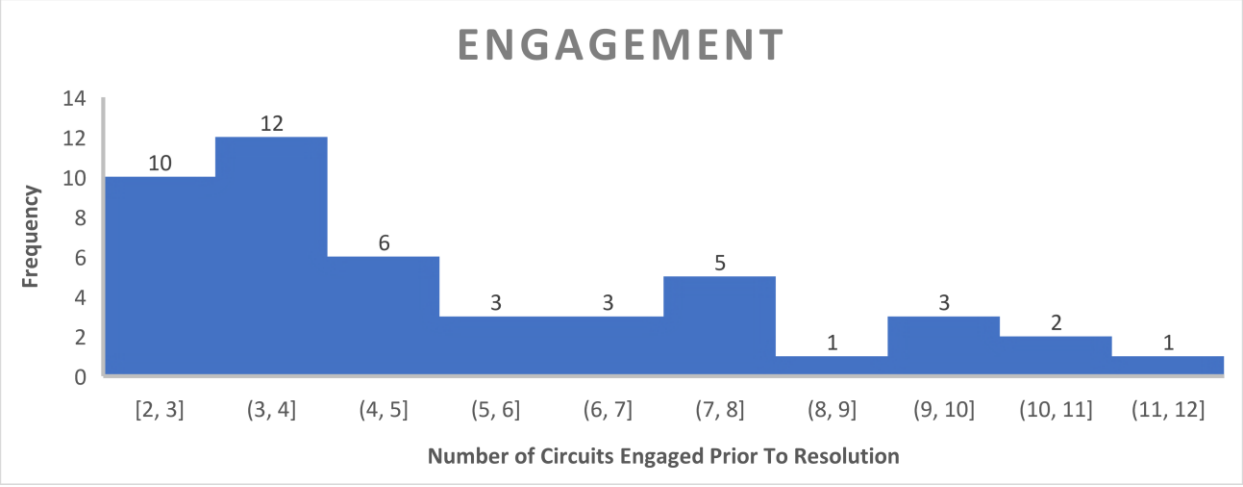
But Supreme Court learning requires more than mere time. It requires the views of multiple circuits to "provide an experimental base and a set of doctrinal materials with which to fashion sound binding law" (Estreicher and Sexton 1984, 719). Our expectation is that most resolutions should occur following the engagement of multiple circuits in the controversial legal issue. For instance, conflicts involving fewer than 3 circuits might be regarded as unengaged, indicating a lack of input. On the other hand, as the Clark and Kastellec (2013) optimal stopping model supposes, once several circuits have weighed in, there may be diminishing informational value to be gained from the addition of yet more circuits. All the while, the costs of delay and uncertainty accrue at a steady rate. We might regard conflicts involving more than 7 circuits as overengaged, suggesting a cacophony of voices rather than a disciplined process of collegial learning. The Conflict Engagement Hypothesis asks whether most resolution occur within the engagement interval, suggesting learning. See Table 4.2.

Table 4.2: Engaged Resolutions

	Search & Seizure Conflicts	Employment Discrimination Conflicts	Labor Conflicts	Securities Conflicts	Total
Unengaged Resolutions	0	2	0	2	4
Engaged Resolutions	7	11	8	5	31
Overengaged Resolutions	0	8	1	2	11
Engagement %	**100%**	**52.38%**	**88.89%**	**55.56%**	**67.39%**

Overall, this expectation was confirmed. Of the 7 search & seizure resolutions, all were resolved within the engagement interval. Of the 21 employment discrimination resolutions, 11 (52 percent) were resolved within the interval—2 were unengaged and 8 overengaged. Of the 9 labor resolutions, 8 (89 percent) were resolved within the interval—none were unengaged and 1 overengaged. Finally, of the 9 securities resolutions, 5 (56 percent) were resolved within the interval—2 were unengaged and 2 overengaged. Overall, 67 percent of resolutions occurred within a 3-7 circuit engagement interval. Although there is considerable variation across legal subject area, all exceed 50 percent.

Figure 4.3: Engagement



Considering ripeness and engagement together lends additional insight. For example, 88 percent of conflicts that are resolved prior to the initial temporal threshold have, nonetheless, already engaged 3 or more circuits. On average, 4 circuits have weighed in prior to the resolution of these conflicts, a sign that litigation afforded opportunity for unusually rapid ripening rather than a lack of ripeness.

Overripeness cannot be so easily accounted for. Of the 23 Overripened Resolutions, only two were under-engaged, one-third were over-engaged, and nearly half persisted 10 or more years after meeting the initial engagement threshold. Thus, overripeness cannot be explained by a lack of engagement or late engagement. The Supreme Court was late in addressing these conflicts either through lack of capacity or inclination.

When we consider Ripeness and Engagement together, at least one thing becomes clear—when conflicts *are* resolved, they tend to be resolved under conditions that allow for judicial learning. But we as yet have no evidence that learning actually took place. Thus, we turn to our final question.

3. What proportion of resolutions suggest learning-by-conflict?

If circuit judges operate in a tension between a national consensus norm and a regional independence norm, one circuit's deviation from its sisters and initiation of intercircuit conflict may contain a powerful signal that a jurisprudential mistake has been made. As Tiberi put it: "The maverick circuit likely will have thoroughly dissected the competing arguments before making such a bold move" (Tiberi 1993, 876-77). Indeed, given Wasby's hydraulic pressure postulate, the greater the number of circuits which agree prior to the initiation of a conflict, the

stronger the signal that the deviating circuit possesses information overlooked by its peers.[30] We should also expect judges' common training and "shared standards of decision making" (Klein 2002, 8) to produce a high degree of consonance once the best rule emerges. The Maverick Hypothesis asks whether, in the event of conflict resolution, the conflict-initiating circuit is usually vindicated by a resolution (via either resolution mechanism) which favors its position in the conflict. See Table 4.3.

Table 4.3: The Maverick Hypothesis

	Search & Seizure Conflicts	**Employment Discrimination Conflicts**	**Labor Conflicts**	**Securities Conflicts**	**All**
Maverick Vindication %	71.43%	42.86%	66.67%	44.44%	52.17%

Overall, the Maverick is vindicated just over half the time. But this average obscures considerable variation. In employment discrimination and securities, the Maverick is vindicated less than half the time, 43 percent and 44 percent respectively. In labor and employment discrimination, the Maverick is vindicated 67 percent and 71 percent respectively.

We might also observe learning among the circuits arising from differential expertise. Due to varying caseloads and opportunities for judicial experience, not all circuit judges are equally expert in every area of law. Klein (2002) found that judges themselves draw a connection between caseload characteristics and expertise and consider certain colleagues more expert than themselves in some legal subject areas.[31] Caseloads in certain subject areas vary considerably from circuit to circuit, and three-judge panels are assembled and assigned to cases in a rotating and semi-random fashion. It follows that "judges on one regional court of appeals have dockets

[30] Such may explain Clark and Kastellec's finding that conflicts which emerge at a later stage, after "several lower courts have produced the same signal" (2013, 164), are more likely to be granted cert immediately, compared with conflicts that emerge earlier.

[31] One circuit judge interviewed by Klein stated the matter plainly: "What you get, you learn a lot about" (Klein 2002, 69).

that vary in significant ways from those of judges on other regional courts of appeals" (Meador 1989, 614). Therefore, expertise in some legal subject areas varies at the circuit level (Hansford 2011). If, for example, the Second Circuit—with its significantly higher volume of securities cases—is on one side of a conflict that turns on a question of securities law, we might expect the Supreme Court or sister circuits to defer to its expertise and adopt its holding. The Supreme Court and sister circuits might be more likely to agree with the expert circuit due to the soundness of that circuit's holding, out of a collegial deference, or as a simple heuristic device in a question that is otherwise close.

The Expert Hypothesis asks whether, in the event of conflict resolution, the circuit with the highest caseload in the legal subject area relative to its peers is usually vindicated by a resolution which favors its position in the conflict. I measure relative caseload by examining the average number of cases in each legal subject area per judge for each circuit over the years 2001-2015.[32] Next, I examine the data for a convenient cut point, where 1-3 circuits have a distinctively higher score on this measure than others. These circuits are the relative experts in each subject area. I omit search and seizure from this treatment. Given the heavy criminal law caseloads across circuits and the ubiquity of search and seizure issues in those cases, it is safe to say that search and seizure is not a legal subject area in which federal circuit judges are likely to

[32] This measure of expertise was taken from Hansford (2011). The source for this data is the Administrative Office of the United States Courts. An average caseload across multiple years seemed most defensible. The AOC only archives this data online as far back as 2001, so that became an obvious begin date; 2015 was selected as an end date because it is the cut off for my search for resolutions and provides a fifteen-year trend from which to draw representative caseloads for each circuit. For the number of judges on each circuit, I used the number of authorized judgeships for the years 1998 to 2015. There was no change in that number for all but two circuits—the DC Circuit lost a judgeship in 2007 and the Ninth Circuit gained one in 2008. Authorized judgeships is an admittedly imperfect proxy considering that some authorized seats go temporarily unfilled, some judges sit by designation from other courts, some judges take part-time senior status, etc. Given the fluidity of those factors across all circuits, accounting for all these variations would seem to net little improvement over the more straightforward measure provided by authorized judgeships.

defer to expertise (Klein 2002).[33] In employment discrimination, the Eleventh, Second, and Seventh Circuits clearly stand out from the pack, with scores of 24.97, 19.22, and 18.27 respectively. The average and median scores for all other circuits are 9.35 and 9.83 respectively. In securities law, the Second Circuit is the clear winner, with 3.84 cases per judge per year, compared with the nearest rival, the Ninth Circuit, at 1.7. Finally, in labor law, the Eleventh, Sixth, and Second stand apart with scores of 8.53, 8.07, and 7.57 respectively. The average and median scores for all others is 4.53 and 4.69 respectively. In Table 4.4, the expert circuits for each legal subject area are labelled A, B, and C, ranked highest to lowest caseload-per-judge.

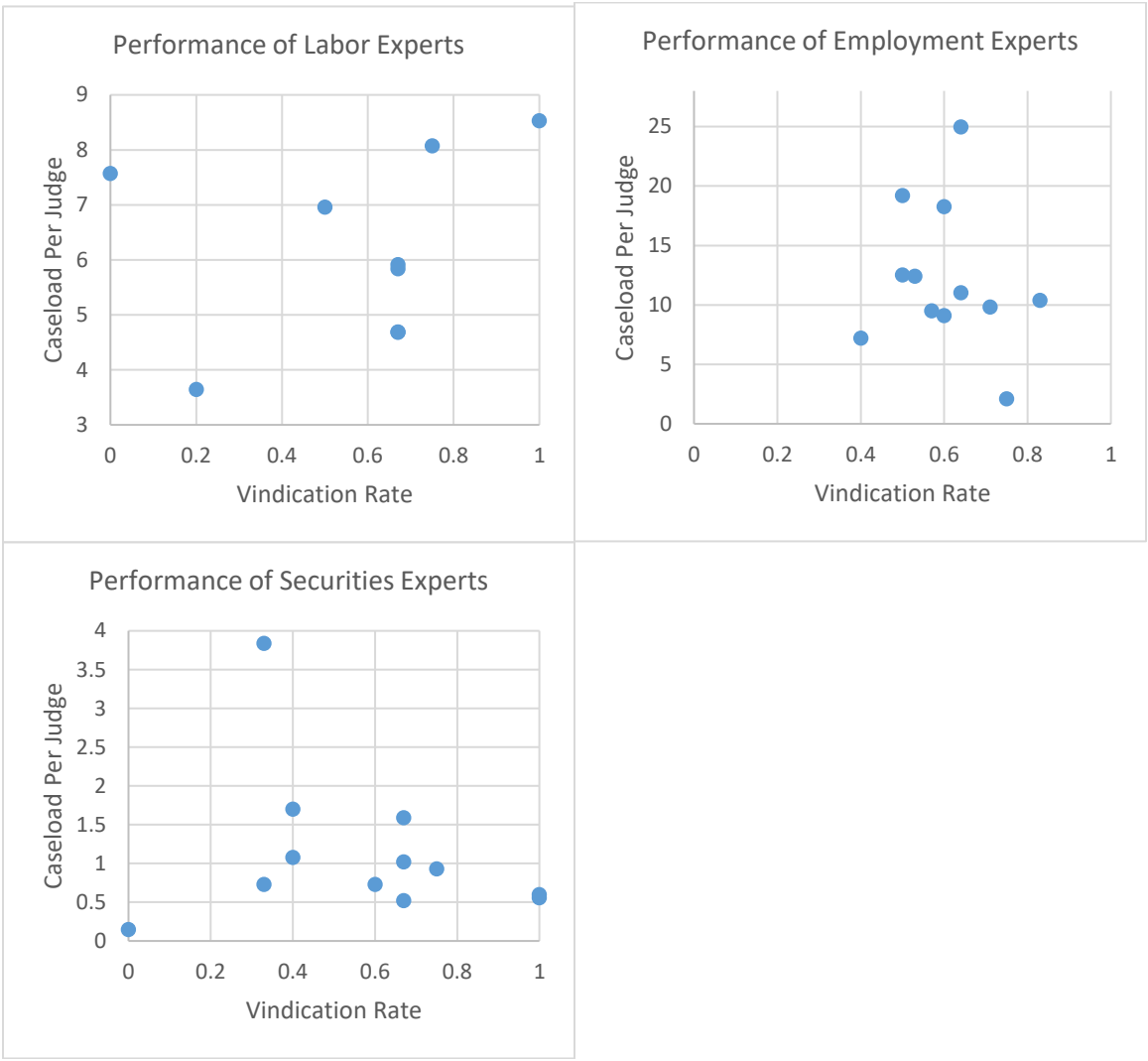
Table 4.4: The Expert Hypothesis

	Employment Discrimination Conflicts	**Labor Conflicts**	**Securities Conflicts**	**All**
Expert A Vindication %	63.63%	100%	33.33%	63.64%
Expert B Vindication %	50%	75%	N/A	57.14%
Expert C Vindication %	60%	0%	N/A	47.37%

Only Labor Law suggests a relationship between a circuit's caseload in a legal subject area and the rate at which those circuits prove correct upon resolution. See Figure 4.4. The number of cases per judge involving employment discrimination is quite high relative to labor and securities. Thus, the degree of experience that each judge has in employment discrimination might be so high as to diminish the marginal effect of expertise in those circuits with more experience. On the other end of the spectrum, securities caseloads are low overall compared with the other legal subject areas, and the degree of difference between the most experienced and least experienced circuits (3.32 cases per judge per year) might be insufficient to establish meaningful differential expertise. With those caveats noted, there is little evidence of learning-by-expertise.

[33] Interviews conducted by Klein (2002) confirm that circuit judges do not perceive much difference between themselves and peers in the field of search and seizure (see Klein 2002, 67-69).

Figure 4.4: Circuit Expertise and Vindication



Yet, there is also strength in numbers. When many circuits weigh in on one side of a conflict, it is plausible that theirs is the superior rule. Therefore, the Supreme Court might be more likely to agree—either due to the unassailable logic embedded in the holdings or out of a collegial deference to the majority where the question is otherwise a close one. The same logic might compel circuits in the minority to alter their position to align with the majority (Convergence).[34] The Majority Test asks whether, in the event of conflict resolution, the circuits

[34] The same logic might also induce Congress to adopt a revisionary amendment to a statute.

holding the majority position are usually vindicated by a resolution which favors their position in the conflict. See Table 4.5. Only in Labor Law is the majority vindicated more than half the time.

Table 4.5: The Majority Hypothesis

	Search & Seizure Conflicts	**Employment Discrimination Conflicts**	**Labor Conflicts**	**Securities Conflicts**	**All**
Majority Vindication %	42.86%	47.62%	66.67%	33.33%	47.83%

Taken individually, none of the three mechanisms of judicial learning perform as expected.[35] At this point, however, it may be helpful to recall what these mechanisms are supposed to achieve. Whether from the bold signal of the Maverick, the firmer command of the Expert, the collective wisdom of the Majority, or some as yet unspecified mechanism, the underlying assumption is that percolation is a process that sharpens, refines, informs, and debiases decision making by the system's authorities. Thus, the ideology of the Supreme Court should be more important in unpercolated resolutions than in all other resolutions.

The Ideological Influence Hypothesis is a correlation test and asks whether ideology exerts greater influence in unpercolated resolutions than percolated resolutions. Since nearly all of the resolutions were engaged, I distinguish unpercolated from percolated resolutions solely on the basis of ripeness. Thus, for purposes of this test, unpercolated resolutions are those resolutions which are resolved prior to the 2-year ripeness threshold. All other resolutions are regarded as percolated.

The Supreme Court was responsible for 39 of the 46 resolutions in the dataset. Of those, only 30 resolutions turned on legal issues that could be categorized in left-right or liberal-conservative terms. Each of the 30 resolutions constitute a single observation. The dependent

[35] The low number of observations limits the range of statistical tools that can be fruitfully employed in search of telling patterns.

variable is the ideological direction of resolution. I coded "1" if the conflict was resolved in a liberal direction and "0" if the conflict was resolved in a conservative direction. The independent variable is the median ideology of the Supreme Court using Martin-Quinn scores.[36] Higher values indicate conservatism and lower values indicate liberalism.

Because the dependent variable takes a higher value when conflict is resolved in a liberal direction and the independent variable takes a lower value when the Supreme Court's median ideology is more liberal, a negative relationship between these two variables indicates ideological influence. If percolation debiases judicial decision making, we should observe a negative relationship between the Supreme Court MQ median value and the ideological direction of resolution in unpercolated resolutions. Conversely, we should observe a positive relationship between the Supreme Court MQ median value and the ideological direction of resolution in percolated resolutions.

This expectation is not met. The correlation value is 0.045944 in unpercolated resolutions and -0.09761 in percolated resolutions. These coefficients are in the wrong direction and too small to put much weight on. Nonetheless, the results suggest that if ideology is a factor at all, it exerts its influence where conflicts have had opportunity for ripening prior to resolution. Such a finding constitutes another failure of a prediction derived from our theory of judicial learning-via-conflict. Again, judicial learning here implies in part a disciplining of ideological predilections in judicial decision making. If ideology exerts no less influence in resolutions that occur following an extended period of conflict—and may, in fact, exert greater influence—it is difficult to suppose that conflict fosters learning.

[36] Martin-Quinn scores measure the relative ideological preferences of Supreme Court justices' over time using a Bayesian item response measurement model (Martin and Quinn 2002).

Finally, we might assemble the resolution data to look for any other suggestive patterns. Information on the 30 resolutions is presented in Table 4.6. The first column denotes the individual conflict identifier; the middle three columns indicate (with an X) vindication of the Maverick, the Majority, and the Expert circuit respectively. The last column denotes the ideological direction of Supreme Court resolution of each conflict. Rows highlighted in green denote the co-occurrence of vindication of Maverick, Majority, and Expert circuits tog. Red denotes co-occurrence of non-vindication.

No obvious pattern emerges. There is no apparent relationship between the ideological direction of resolution and whether the Maverick, Majority, or Expert circuit was vindicated. Nor is there any apparent pattern of co-occurrence of vindication between the Maverick, Majority, and Expert circuit or any pairing thereof.

Table 4.6: Vindication and Ideological Direction of Resolution

Conflict ID	Maverick Vindicated	Majority Vindicated	Expert Vindicated	Resolution Direction
EmpDis16		X	--	Liberal
EmpDis24		X	X	Liberal
EmpDis17	X		--	Conservative
EmpDis21	X		X	Conservative
EmpDis22		X	X	Conservative
EmpDis29	X	X	X	Liberal
EmpDis35	X			Liberal
EmpDis1		X	X	Conservative
EmpDis27		X		Liberal
EmpDis45	X			Liberal
EmpDis15				Conservative
EmpDis54		--	X	Conservative
EmpDis32				Liberal
EmpDis44	X	--		Liberal
EmpDis25		X	X	Liberal
EmpDis55	X		X	Liberal
EmpDis37	X			Conservative
EmpDis51	X	--	X	Conservative
EmpDis49		X	X	Conservative
EmpDis23	X	X	X	Conservative
Search6	X	--	--	Liberal
Search3		X	--	Liberal
Search24		X	--	Liberal
Search20	X		--	Liberal
Search1	X		--	Liberal
Labor8	X	X	--	Conservative
Labor13	X	--	X	Conservative
Labor19	X			Conservative
Labor35		X	X	Liberal
Labor36		X	X	Liberal
Total Vindications	16/30	14/25	14/22	
Liberal/Conservative Vindication Ratio	8/8	9/5	6/8	17/13

IV. Conclusion

The object of this chapter was to develop and test a theory of judicial learning through a process called percolation. The investigation was organized around three component questions. I review each in turn.

The first question concerned what proportion of conflicts are resolved. Percolation supposes a judicial process that contributes to higher quality rule adoption than would otherwise occur in a system of imperfect judicial authorities. But the system-wide adoption of a single 'best' rule requires resolution of a given conflict. Persistent conflicts contribute to the costs identified in the previous chapter without the learning effects claimed by Percolationists. Of the 151 active conflicts identified in four legal subject areas during the interval 1998-2010, only 46 were resolved as late as the end of calendar year 2015. Because over half of the conflicts found to be active during the 1998-2010 interval were initiated prior to 1998—some reaching to the 1970's and 1980's—many of these conflicts show every indication of indefinite persistence. This finding alone undermines the notion that conflict serves a learning function in any general sense.

But the inquiry did not end there. Even if too few conflicts are resolved to suggest a general learning function, there remains the possibility that conflicts which *are* resolved do, on the whole, contribute to judicial learning. In this sense, conflict might be an inefficient instrument to achieve a desirable end. Thus, the second question concerned what proportion of resolutions occur with adequate time and circuit engagement to allow for judicial learning. Here the bag was mixed. Nearly all the resolutions occurred within the engagement interval. Almost 87 percent of resolutions fell outside of the ripeness interval. Expanding the ripeness interval considerably—say, decreasing the initial threshold to 18 months and increasing the outer bound to 10 years—still excludes over a third of resolutions on the front end and nearly a third on the

back end. Moreover, while rapid engagement could somewhat explain unripened resolutions, overripeness could not be explained by a lack of engagement or late engagement. Those conflicts lingered despite the contributions of many circuits and despite the relevance of the embedded issues to ongoing litigation.

Moreover, opportunity to learn does not mean learning took place. Therefore, the third question concerned whether the manner of resolution suggests that conflict largely serves a learning function. The focus here was on the decision making process and whether it exhibited reliance on mechanisms that contribute to learning among members of an interpretive community. The evidence adduced on this score was not promising. The manner of resolution demonstrated no particular deference to:

- conflict-initiating positions (Mavericks),
- positions supported by relative expertise (Experts), or
- positions supported by a majority of the judicial authorities involved (Majorities).

Moreover, even a search for a diminution of ideological influence in the case of percolated versus unpercolated resolutions yielded a null result.

On an intuitive level, percolation is an imminently plausible account of the beneficial role conflict might play in the U.S. federal judiciary. But the percolation model is an ill fit with the data. Ultimately, the findings presented in this chapter suggest that percolation is an inappropriate frame for understanding the regional accretion of federal law.

CHAPTER 5
THE VALUE OF REGIONAL INDEPENDENCE

Analysis of intercircuit conflict "would result in an equation something like this: V = Q – (D + U). The value of intercircuit conflict (V) equals the improvement in quality of the resulting rule (Q) less the sum of the cost of the delay in producing a definitive answer (D) and the cost of the resultant uncertainty (U)" (Wallace 1983, 930).

"[To] suggest that it is actually desirable to allow important questions of federal law to 'percolate' in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity… What we need is not the 'correct' answer in the philosophical or mathematical sense, but the 'definitive' answer…" (Rehnquist 1986, 11)

I. Introduction

What is the value of regional independence? The Supreme Court's early endorsement of the phenomenon in *Mast, Foos & Co. v. Stover Manufacturing Co.* (1900), provides an initial conceptual frame for a theory of percolation. The Court grounded its reasoning on five premises:

i. the formal co-equality of Courts of Appeals as "coordinate tribunals" (489),

ii. the independent obligation of each Article III judge "to dispose of cases according to the law and the facts [and] decide them right" (488),

iii. the possibility of error via "the indiscreet action of one court" (488),

iv. the utility of limiting the scope of any one circuit's error so that "the whole country [is not] tied down to an unsound principle" (488), and

v. an expectation of subsequent resolution of circuit conflict after "a higher court has settled the law" (488-489).

While the *Mast* Court stressed the "substantial value in securing uniformity of decision" (488), its conception of the role played by circuit conflict both reflected and reified a norm of regional independence that had already taken historical root in the system.

But how well does this frame hold up? The first premise, co-equality, is unexceptionable. Each circuit judge occupies an equal position in the federal judicial hierarchy and, therefore, enjoys equal decisional authority. The second premise, independent judgment, merits closer inspection. Granting that each Article III judge is subject to a duty of independent judgment, what that duty entails depends on the conventions of judging which are held to apply in a given decisional circumstance. For instance, district judges within the same circuit each occupy an equal position in the federal judicial hierarchy and enjoy equal authority. Additionally, each district judge presumably has a duty of independent judgment to decide legal issues soundly. Yet a district judge is regarded as bound by the prior decisions of a district judge in the same circuit on the same legal issue. This precedential constraint similarly applies to a circuit panel when confronting an issue previously decided by a panel in the same circuit (Duvall 2008).[37] Within each circuit, the tethering of judges to the prior decisions of other judges—*stare decisis*—is not regarded as a:

- denial of co-equality or
- narrowing of the duty of independent judgment.

There is no reason, *a priori*, to suppose that requiring circuit judges to apply precedents established in other circuits threatens either the principle of co-equality or independent judgment.

It is the non-application of *stare decisis* beyond circuit boundaries that produces the regional accretion of federal law. But the lack of system-wide application of *stare decisis* does

[37] Duvall (2008) provides a helpful survey of mechanisms employed within each circuit to ameliorate *intra*circuit disharmony.

not follow necessarily from the first two premises. It rests on assumptions about the benefits of regional independence, which are articulated in premises iii, iv, and v. In this chapter, I consider the value of regional independence in light of the empirical analysis in the previous chapters. I argue that, despite the intuitive appeal of the percolation model, the regional accretion of federal law resembles more of a federal court capacity problem than a designed or evolved solution to a judicial learning problem.

II. Reevaluating the Percolation Model

Though decades of legal scholarship would eventually elaborate thereupon, premises iii-v of the *Mast* opinion frame the early conceptualization of percolation as a model. The third premise, local error, supposes that a circuit panel that decides a matter first may err in its decision making and fail to produce a sound decision. Error may come in the form of unfaithfulness to binding authority or the formulation of a rule that is non-administrable, i.e., tending to lead to absurd results across the broad range of cases to which the rule applies. The fourth premise, containment, supposes that an error committed by one circuit can be limited in its systemic impact if subsequent panels in other circuits are free to back their own independent judgment. Finally, the fifth premise, settlement, is the assumption that a higher court will ultimately resolve conflicts. I first consider premise iii and iv together, followed by a consideration of premise v.

A. Conflict and the Containment of Local Error

Court scholars and jurists disagree for reasons both normative and practical about whether the containment of local error is a worthwhile pursuit.

Normatively, the question is whether the legal fragmentation that results from the pursuit of soundness can be justified in light of the associated rule of law costs.[38] Precisionists view uniformity to be of paramount importance in American law. "It is axiomatic," declares Daniel Meador, "that federal law should be uniform throughout the United States…that it is treated the same in every part of the country" (Meador 1989, 615; see also Logan 2012). Uniformity ("resolution of inconsistent or conflicting interpretations of federal law") and supremacy (upholding "federal law when…challenged by state authority") are regarded as the twin essential functions of Article III courts (Ratner 1960, 161). Some Precisionists go so far as to argue that the two functions are logically interdependent: "A necessary corollary of supremacy is uniformity in the interpretation and application of federal law throughout the United States" (Dragich 2010, 536; see also Levanthal 1975).

Percolationists, for their part, tend embrace federal supremacy as a goal of federal court jurisprudence while downplaying or outright dismissing uniformity as a goal. Historically speaking, writes Judge Wallace, "the Supreme Court's main role is to ensure the supremacy rather than the uniformity of federal law" and "I suggest that uniformity should remain a secondary concern because…conflicts are not intrinsically intolerable" (Wallace 1983, 917, 919; see also Frost 2008). Hellman (1998) argues that given "the indeterminacy that is inherent in common law adjudication," allowing variations across circuits is a difference "in degree but not in kind" (Hellman 1998, 254). I leave this fairly abstract question for others.

A more practical question is whether there exists a 'best' solution to the types of doctrinal quandaries that divide the circuits. Percolationists, if often implicitly, assume that a 'best' solution exists (Estreicher and Sexton 1984). Political scientists such as Clark and Kastellec

[38] "The percolation that produces intercircuit inconsistencies and incoherence may provide intellectual stimulation for academicians, but in the world of human activity it works costly inequities" (Meador 1989, 634). "Rights are not the proper subject of experimentation" (Logan 2012, 1162).

model the interaction between the Supreme Court and circuit courts as a process with at least the potential to produce a superior rule (Clark and Kastellec 2013; see also Lindquist and Klein 2006; Beim 2014).

Precisionists are more skeptical. The late Chief Justice William Rehnquist, for example, noted the indeterminacy of the types of legal questions federal appellate courts face. He argued that "there is no obviously 'correct' solution to many of the problems of statutory construction which confront the federal courts; Congress may have used ambiguous language, the legislative history may shed no great light on it, and prior precedent may be of little help" (Rehnquist 1986, 11).

The present study is agnostic on this point for two reasons. First, it requires general conceptual agreement as to what constitutes a 'best' rule. Second, it requires a measure thereof. To the author's knowledge, only Tiberi (1993) has attempted this. Having fashioned a rough set of quality measures, Tiberi finds that:

> (1) percolated decisions are not better received by commentators;
> (2) percolation does not lead to more harmonious decisions; and
> (3) percolation does not tend to inoculate a decision from congressional override (Tiberi 1993, 882).

Absent evidence of "better decisions," Tiberi concludes, "the argument for percolation is substantially weakened" (Tiberi 1993, 882).

More significantly for present purposes, however, are the implications of the foregoing for premises iii and iv. The assumption that regional independence, at the very least, limits the systemic impact of local error itself rests upon a logical antecedent: some reasonably objective conception of a 'best' or 'better' decision, specifically in the context of circuit conflict. The very fact that such highly trained, experienced, and carefully selected jurists disagree suggests the

intractability of the legal issues that divide them. Whether with regard to the "grandly general mandates" of constitutional law or the "minutely particular federal statutes" (Ginsburg and Huber 1987, 1445), which are frequently "unclear" (Miner 1993, 107) and "riddled with ambiguous language" (Lindquist and Klein 2006, 137), the search for a "correct answer in the philosophical or mathematical sense" (Rehnquist 1986, 11) may very well be a fool's errand. Given the costs of conflict detailed in Chapter 3, it may prove "more important that a rule of law be settled, than that it be settled right" (Brandeis 1927, 42).[39] Put another way, if circuit courts operate in a decisional context where judgment is required and no 'right' solution exists, the concrete benefits associated with national consensus eclipse the speculative benefits associated with regional independence.

B. Conflict and Settlement

In addition to the containment of local error, Percolationists assume some version of premise v, settlement. More than merely limiting the scope of "the indiscreet action of one [circuit] court," Percolationists assume that, ultimately, a higher court *will* settle the law. Ultimate settlement of conflict is important if Percolationists hope to get the better end of the Wallace equation. First, settlement limits the costs associated with delay and uncertainty. Second, settlement is a necessary—though not a sufficient—condition for the system-wide adoption of a higher quality or 'best' rule, assuming such exists. To put the matter another way, unresolved conflicts contribute to the costs side of the ledger but contribute little (except perhaps containment of error) to the benefits side.

How does the settlement assumption fare? The assumption can be considered in strong, intermediate, or weak terms. Each is susceptible of empirical evaluation:

Strong: All or virtually all conflicts are resolved.

[39] *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

The strong version of the settlement assumption—essentially, that all conflicts go to heaven—clearly does not hold. Analysis of the conflict data in Chapter 4 revealed that the vast majority of conflicts, nearly 70 percent, persist indefinitely. This finding is consistent with Beim and Rader (2016). Of the 145 conflicts they identified as active between 2003 and 2014—many of which originated years prior—72 percent remained unresolved as late as 2015.[40] Moreover, "only 10% of the conflicts we identified as being born in 2005 have been resolved as of yet" (Beim and Rader 2016, 21).

Intermediate: All or virtually all *legally significant* conflicts are resolved.

The intermediate version of the settlement assumption, that all *good* conflicts go to heaven, also does not hold. Analysis of the conflict data in Chapter 3 revealed that 69 percent of unresolved conflicts qualify as legally significant. Of all conflicts in the dataset, 42 percent were

- active and unresolved,
- potentially costly, and
- legally significant.

Even Hellman (1998), who concludes that "intercircuit conflicts do not constitute a problem of serious magnitude" finds that perhaps as many as 50 out of the 201 conflicts in his dataset produce "effects that contribute to intolerability" (Hellman 1998, 266).

> **Weak**: A substantial subset of conflicts achieve resolution, and those resolutions lead to judicial learning and the system-wide adoption of sounder legal rules than would otherwise obtain.

For those scholars and jurists that place less normative weight on uniformity and greater weight on legal soundness, the weak version of the settlement assumption can produce support for, or, at the least, acceptance of circuit conflict. But even this much weaker version of the assumption

[40] "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" (Beim and Rader 2016, 22).

does not hold. Analysis of the conflict data in Chapter 4 revealed no evidence of a connection between conflict and learning. Even those conflicts that were ultimately resolved failed to demonstrate the sort of deference to:

- conflict-initiating positions (Mavericks),
- positions supported by relative expertise (Experts), or
- positions supported by a majority of the judicial authorities involved (Majorities)

that would indicate a process of judicial learning. Furthermore, percolated resolutions revealed no diminution in ideological influence relative to unpercolated resolutions.

Though two recent studies show evidence of judicial learning-via-conflict (Clark and Kastellec 2013; Beim 2014), these are based on highly abstract formal models. Both Clark and Kastellec (2013) and Beim (2014) are process-oriented, i.e., focused on percolation as a process. The only study that is outcome-oriented—i.e., focused on evidence of rule-quality enhancements—is Tiberi (1993), who, as discussed above, found a null effect.

What positive support do we have for percolation? The three major premises of the *Mast* opinion turn out, upon inspection, to be weak reeds. Dependent as it is on the notion of a 'best' solution to the legal issues over which circuits split, the existence of local error (iii) is a questionable supposition. Hence, the initiation of conflict as an attempt at containment (iv) imposes real and systemic costs in return for only speculative benefits. When one considers the failure of the settlement assumption (v) in even its weakest form, the speculative benefits of conflict turn out to be to be chimerical.

III. Alternative Grounds for Percolationism

It is well worth noting that some proponents of regional independence make normative claims in support of the norm which are quite independent of the consequentialist grounds that

are the focus of the present study. Beyond expressing skepticism about the importance of uniformity or touting the putative benefits of conflict, some scholars argue that the localism embodied in the regional independence norm is "no mere artifact of history," but reflects a normative commitment to principles of American federalism and democratic representation (Luse, McGovern, Martinek, Benesh 2009, 77; see also Howard 1981; Wallace 1983; Krotoszynski 2014). On this view, the role of the courts of appeals is to "balance uniformity with necessary regional adaptation" (Luse, McGovern, Martinek, Benesh 2009, 77) and "differences in the interpretation of federal law are more likely than not to align with the preferences of the citizens and lawmakers of each region" (Frost 2008, 1590).

Moreover, in the case of judicial review in particular, the fact that "the judicial power of the United States" is vested in "literally a multiplicity of hands" helps to mitigate the counter-majoritarian difficulty: "the popular legitimacy of a judicial act displacing the act of a democratically elected and accountable legislative body or executive officer is surely improved and enhanced when different decision makers, operating independently of each other, reach a common conclusion" (Krotoszynski 2014, 1021, 1027). Therefore, quite apart from notions of error containment and correction, the virtue of "the contemporary structure of the federal courts [is that] decentralized judicial review creates greater breathing room for democratic politics, and hence democratic self-government, to function" (Krotoszynski 2014, 1083).

These claims, interesting and important as they are, lay beyond the scope of this initial effort.

IV. Conclusion

As the arguments of Luse et al (2009), Frost (2008), and Krotoszynski (2014) illustrate, there are compelling normative arguments to be made in favor of the regional independence

norm. These are largely theoretical. On the other hand, to the extent that the debate turns on competing expectations about which side of Wallace's equation—V = Q – (D + U)—predominates in fact, Chapters 3 and 4 offer empirical insight. Chapter 4 demonstrates that there is very little evidence of conflict as a learning process which is likely to lead to rule quality enhancements (Q). Chapter 3 demonstrates that the costs of delay (D) and (U), while difficult to quantify, are also difficult to deny. Empirically speaking, the value of intercircuit conflict appears to be negative.

The model of judicial learning-via-conflict has intuitive appeal and enjoys a robust following among jurists, legal academics, and political scientists. But it is not supported empirically. Percolation appears to be a functionalist account of a phenomenon that arose by virtue of path dependent political development rather than design.

The regional accretion of federal law is not the solution to a problem of learning; it is itself a problem of federal court capacity, or rather the lack thereof. Regional independence and the variation produced thereby was manageable in the first several decades after the establishment of appellate courts within the old circuit boundaries. In those early days of the appellate courts' existence, regional independence and the pretense of conflict as a process of error containment and correction could be indulged with minimal negative consequence. But times have change. Since at least the 1950's, the ratio of appellate court caseload to Supreme Court capacity has rendered the prospect of ultimate settlement of even a majority of intercircuit conflicts laughable.

> The Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints upon its

> time, to review all the decisions that result in a conflict in the applicability of federal law (Rehnquist 1984, 4-5).

The U.S. federal courts have been altered in the past and can be altered again. This requires clear-eyed study and imagination. Rather than "read[ing] backward off their current functions or features" (Thelen 2003, 218), students of the courts should critically reassess the degree of fit between present institutional arrangements and present needs.

CHAPTER 6
NEW JUDICIAL MACHINERY?

"Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generation" (Frankfurter and Landis 1927, 107).

The U.S. federal judiciary is the organ of American government responsible for authoritative resolution of disputes arising under federal law. For reasons related to its historical institutional development, the system routinely introduces non-uniform interpretations of national law through the issuance of conflicting holdings by the twelve circuit courts of appeals, which comprise the intermediate tier of its three-tiered hierarchy. High caseloads, limited Supreme Court review, and the absence of a formal consensus mechanism across regional appellate jurisdictions make occasional disagreement inevitable and potentially long-enduring.

In Chapter 2, I detailed the historical-institutional development of America's decentralized federal court system, peculiar even among federal political systems. That account demonstrated that the present structure of the system and its embedded norms are far from inevitable features and were not the product of far-sighted conscious design.

While the decentralized structure of the courts has potential benefits, many scholars and jurists warn that regional variation of national law carries substantial costs which may prove intolerable. The concerns center on the propensity to cause unfairness to litigants, nonacquiescence among federal agencies to conflicting authority, economic harms to multicircuit actors, and repetitive litigation from litigants seeking to initiate or exploit circuit conflict.

In Chapter 3, I presented and examined newly-gathered data on 151 conflicts across four legal subject areas—employment discrimination, search and seizure, securities, and labor law—active from 1998-2010. As an initial effort to empirically evaluate the tolerability question, each conflict was assessed for (1) persistence, (2) the presence of characteristics that carry costs, and (3) legal significance. Overall, I found that the costs of conflict, though difficult to calculate precisely, are nonetheless undeniable.

Despite these costs of disharmony among the system's legal authorities, some scholars and jurists tout the benefits of intercircuit conflict—judicial learning through a process commonly described as "percolation."

In Chapter 4, I distilled a theory of percolation from a wide-ranging literature informed by legal academics, jurists, and political scientists; derived several testable hypotheses therefrom; and evaluated the intercircuit conflict data for patterns suggestive of judicial learning-via-conflict. No such patterns emerged. Overall, I found that percolation is an inappropriate frame for understanding the role of conflict in American federal jurisprudence.

It is simply one of "the conventions of the courts of appeals…to treat as binding precedent earlier decisions of that same court of appeals…[while] decisions of other courts of appeals…are deemed merely persuasive" (Baker and McFarland 1987, 1407).

In Chapter 5, I put the pieces together. I argued that none of the assumptions that form the basis of support for the norm of regional independence among the circuit courts of appeals survive close inspection. As a clear-eyed assessment of the data reveals, this convention or norm of regional independence among the nation's chief legal interpreters generates concrete costs and, at best, only speculative benefits.

Regional accretion is not the solution to a problem of judicial learning; it is itself a problem of federal court capacity:

> As the system was originally designed in 1891, the newly created circuit courts of appeals were to play the basic role of error correction that the Supreme Court could not. Docket growth at the court of appeals level has, however, threatened this design… [T]hese courts of error, at least for practical purposes, have become the final expositors of federal law in their geographical region in all but a miniscule number of cases (Baker and McFarland 1987, 1406).

No set of institutional arrangements is sacrosanct. Institutions exist to serve human needs and they can be fashioned and refashioned to better do so. The federal courts have been altered in the past in response to changes in the institutional environment. The ground has shifted yet again. The time is now ripe for law & courts scholarship to critically re-assess the fit between the federal judiciary's present structure and function and current needs. This will require examination of the embedded operational norms that channel the behavior of its chief actors.

Such an undertaking will require extension of the types of analyses presented herein, a survey of alternative institutional arrangements—some of which are employed in other federal political systems—and an evaluation of the desirability of alternative arrangements in light of the evidence adduced.

Overall, this project investigated whether the propensity for conflict and the regional accretion of law constitutes an intolerable flaw, a beneficial feature, or a trivial quirk in a decentralized national judicial system. It contributes to our understanding of American political development, law & courts, public administration, and institutional theory.

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APPENDIX

Conflict Mapping

The first task was to gather the data on circuit splits. I collected the data from Bloomberg BNA's *United States Law Week* (USLW), a legal news periodical which began publishing a regular feature on circuit splits in 1998. This feature "Circuit Splits Round-up" reports any split noted in any circuit court opinion during the previous month and organizes each split topically, according to the area of law implicated in the split. To limit the scope of this project, I identified splits reported during the period 1998-2010 in four legal subject areas: employment discrimination, search and seizure, securities, and labor. These criteria yielded a total of 151 splits—64 in employment discrimination, 27 in search and seizure, 21 in securities, and 39 in labor law.

Next, I turned to the task of identifying all circuits involved in each split. USLW's report is triggered when a circuit court opinion suggests a split of authority on a given legal issue. The report identifies any case noting the existence of a split and provides a cursory list of circuits implicated in the split, as indicated from the text of the triggering opinion. However, USLW makes no attempt to list all the cases constituting the split by name or to comprehensively map all circuits involved. Thus, cases noted by the report become the seeds for further investigation.

With this seed in hand I then turned to Westlaw, an online legal research service used by practitioners themselves to identify conflicting authority. Once I located the seed case in Westlaw's database, I used several embedded research tools to map each split in its entirety. First, Westlaw's History tool allowed me to trace the appellate history of each case. Second, Westlaw's KeyCite feature allowed me to identify any abrogating authority. Third, Westlaw's

Negative Treatment tool allowed me to identify cases in any circuit that cited to the case at hand and criticized any part of the opinion. I followed this process through several iterations with each additional case until I identified all cases in each circuit that weighed in on the controversial legal question. Often this meant following a trail of citations in a circuit court opinion to find a case in each circuit that ruled on the legal issue as a matter of first impression. I retained for analysis each case in each circuit that ruled on the relevant issue as one of first impression and any subsequent case in the same circuit which altered the circuit's position with respect to the conflict.

As far as I can tell, there are two risks associated with this approach: over-counting and under-counting conflicts. Over-counting appears largely ruled out by my method of verifying each split through Westlaw's search tools, the very tools used by lawyers and judges to identify conflicting authority. I count a split as a split by verifying that circuit judges themselves regard it as such and thereby avoid injecting researcher subjectivity. Undercounting is always a possibility. There is no guarantee that USLW identified every conflict among the circuits. But there are three countervailing considerations. First, the risk of under-counting is unavoidable by any method; I do not know what I do not know. Second, for the reasons discussed in Section III, this approach is far less susceptible to under-counting than previous approaches, such as those which rely on cert petitions or the Spaeth Database. Third, and perhaps most importantly, there is no indication that any under-counting of conflicts will systematically bias the results. My findings must simply be discounted by the possibility of an unknown number of unidentified conflicts.

Once the relevant cases were identified for each split, I arranged the data for analysis. My primary interest for this project was to identify the legal question at issue in each split, the

circuits implicated, the duration, and the mechanism by which resolution was achieved if at all. In organizing the data some important judgment calls were made. First, in describing the nature of each split, I took a cue directly from the characterization proffered in the seed opinion. If other circuit court opinions varied in their characterization of the controversy, I adopted the narrowest characterization proffered, which often meant strict application to a core set of facts. Second, I identified the first case in each circuit in which the circuit took a definitive stance on the relevant legal question. Where the opinion expressly stated that the question was one of first impression for the circuit, this line was easy to draw. Often, however, a legal standard coalesces through successive opinions as reasoning from prior decisions is extended by analogy to accommodate novel facts. By adopting the narrowest characterization proffered for each split, I could more readily identify the first case in each circuit to take a definitive stance on the specific legal issue.

A circuit conflict begins when a panel in one circuit issues an opinion adopting an interpretation of federal law inconsistent with a prior interpretation adopted by a panel in another circuit. I coded the split as beginning on the date the split-generating opinion was issued. A split can be resolved in three ways: Supreme Court review, convergence among the circuits on the same interpretation, or congressional action. If the Supreme Court resolved the split, I took the date that the Court granted cert as operative. If a split is resolved through convergence, the split is ended when the last circuit on the capitulating side of the split adopts the position of the opposing circuits. I took the issue date of the capitulating circuit opinion as operative. In only one observation was a conflict resolved by congressional action. Congress amended a statute, and I took the date of the amendment's enactment as operative.

Legal Question in Each Unresolved Conflict

Employment Discrimination

Legal Question	UF	NA	IE	LS
Whether a disabled plaintiff must show his condition was a "motivating factor" versus a "but for" or "sole" cause of termination?	Y	Y	Y	2
Whether the Americans with Disabilities Act is a valid exercise of Congress's power under Section 5 of the 14th Amendment.	Y	Y	Y	1
Whether an employer is a "covered entity" for purposes of the Americans with Disabilities Act is a question of subject matter jurisdiction.	Y	Y	N	2
Whether the Americans with Disabilities Act protects former employees who are no longer able to work from discrimination in the allocation of fringe benefits.	Y	Y	Y	1
Whether to limit Title III's ban on disability discrimination in places of public accommodation to ensuring access for the disabled to physical locations open to the public (or would extend to intangible things like employee benefit plans).	Y	Y	Y	1
Whether the ADA, which permits an employer to impose, as a "qualification standard," a "requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace," encompasses threats to the employee's own health and safety as opposed to merely the employee's own health and safety.	Y	Y	Y	1
Whether Title II of the Americans with Disabilities Act applies to public employers.	Y	Y	N	1
Whether an employer's obligation to enter into the interactive accommodation process under the Americans with Disabilities Act is triggered by the employee's request for an accommodation or the employer's recognition that an accommodation is necessary.	Y	Y	Y	2
Whether an employee has a claim under the Rehabilitation Act or the Americans with Disabilities Act if terminated based on misconduct resulting from drug/alcohol addiction, even if the alcoholism would qualify as a disability.	Y	Y	Y	2*
Whether, absent undue hardship for the employer, allowing an employee to work at home may be a required reasonable accommodation for purposes of the ADA.	Y	Y	Y	2*
Whether interacting with others is a "major life activit[y]" under the Americans with Disabilities Act.	Y	Y	Y	2*
Whether Title I of the ADA prohibits discrimination between mental disabilities and physical disabilities in the duration of benefits offered by long term disability plans.	Y	Y	Y	2*
Whether an employer bears the burden of proof when invoking the "direct threat" defense to a claim of disability discrimination under the ADA.	Y	Y	Y	2
Whether the EEOC was required to meet the traditional test for injunctive relief or whether it needed only satisfy the criteria established in § 706(f)(2) of Title VII, which authorized the agency to seek injunctive relief in the	Y	Y	N	2

public interest.				
Whether an individual is an "employee" under the Age Discrimination in Employment Act: (1) Common Law Test, (2) Economic Realities of Circumstances, (3) Hybrid. Number 1 is most likely to find that a person in NOT an employee entitled to ADEA protection.	Y	Y	Y	2
Whether prevailing Title VII plaintiffs may recover attorneys' fees in "mixed motive" actions even if they are not awarded monetary damages or injunctive relief.	Y	N	Y	3*
Whether the Equal Employment Opportunity Commission may issue a right to sue letter prior to the expiration of the 180-day conciliation period.	Y	Y	Y	2
Whether an employer's failure to address employees' retaliation for allegations of sexual harassment can itself constitute an "adverse employment action" prohibited by Title VII of the 1964 Civil Rights Act.	Y	Y	Y	1
Whether the standard for sexual harassment under Title VII varies depending on the nature of the work environment.	Y	Y	Y	2
Whether the plaintiff's prima facie showing in a reverse discrimination case is higher, e.g., requiring plaintiff to show "background circumstances" indicating that the defendant is "that unusual employer who discriminates against the majority."	Y	Y	Y	2
Whether the exhaustion and limitations requirements of Title VII of the 1964 Civil Rights Act apply to actions brought to enforce a conciliation agreement resolving a discrimination claim.	Y	Y	Y	2
Whether "tester" plaintiffs have standing to sue for employment discrimination under Title VII of the 1964 Civil Rights Act, even if the tester is not genuinely interested in the job for which the tester applies.	Y	Y	N	2*
Whether a court must enforce a contractual agreement to arbitrate employment disputes absent a showing of fraud, duress, mistake, or some other ground upon which a contract may be voided.	Y	Y	Y	2
Whether district courts have the discretion to apply the collateral source rule, which provides that benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages.	Y	N	N	2*
Whether the Bennett Amendment has the effect of allowing the EPA's evidentiary structure to apply in a Title VII gender-based wage discrimination claim rather than the McDonnell Douglas evidentiary framework.	Y	Y	Y	3*
Whether hiring or promotion based on a neutral roster compiled from an allegedly discriminatory civil service exam is a continuing act of discrimination that extends the statute of limitation.	Y	Y	Y	2
Whether the failure to exhaust administrative remedies under Title VII of the 1964 Civil Rights Act is a waivable precondition to suit, rather than a jurisdictional requirement. Jurisdictional would make it harder for a Plaintiff/Employee to gain access to court.	Y	Y	Y	2
Whether there are circumstances in which the failure to give a pretext instruction would constitute reversible error.	Y	N	N	3
Whether a plaintiff bringing a federal employment discrimination claim may recover damages only for acts committed during the period in which a	Y	N	N	3

plaintiff must file his or her claim, even if there was a continuing violation that began before the limitation period.				
Whether a plaintiff may be entitled to punitive damages on a claim asserted under Title VII of the 1964 Civil Rights Act, even though she was not awarded actual or nominal damages.	Y	N	N	2
Whether a private settlement, without further judicial action, in an Americans with Disabilities Act suit constitutes an alteration in the legal relationship of the parties sufficient to make the plaintiff a prevailing party eligible for attorneys' fees.	Y	N	Y	3*
Whether plaintiffs alleging class-wide racial discrimination in promotions are required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact.	Y	Y	N	2
Whether the Equal Pay Act prohibits reliance on prior salary to justify disparate pay levels for men and women in the same positions.	Y	Y	Y	2
Whether "aggravating circumstances" are required to support a claim of constructive discharge.	Y	Y	Y	3*
Whether Title VII of the 1964 Civil Rights Act requires the U.S. attorney general, but not the Equal Employment Opportunity Commission, to issue a right-to-sue notice in all cases involving a governmental respondent.	Y	Y	N	3
Whether a salary discrimination claim under Title VII of the 1964 Civil Rights Act is an ongoing violation, and therefore the statute of limitations restarts every time the plaintiff receives a paycheck.	Y	Y	N	3*
Whether the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units (or Whether SCOTUS's holding in Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) survives Congress' 1991 amendments to 42 U.S.C. § 1981).	Y	Y	Y	3
Whether a "constructive discharge" constitutes a "tangible employment action" for purposes of the affirmative defense to liability for sexual harassment under Title VII of the 1964 Civil Rights Act.	Y	Y	Y	2
Whether, in the context of EEOC complaints, the "single filing rule" (aka "piggyback rule") is limited to class actions.	Y	Y	N	3
Whether res judicata principles prevent a plaintiff who prevailed on discrimination claims under Title VII of the 1964 Civil Rights Act before a state administrative agency and state courts from later suing in federal court for relief that was not available in the state proceedings.	Y	Y	Y	3
Whether the requisite level of control over an adverse employment action that a subordinate must have to trigger an employer's liability in a subordinate bias discrimination suit is causal influence or something more.	Y	Y	Y	3*
Whether the Equal Employment Opportunity Commission has the authority to issue an administrative subpoena against an employer after the charging party has been issued a right-to-sue notice and a private suit has been filed.	Y	Y	N	2
Whether Title VII authorizes an action in federal court that initially includes only a claim for attorney's fees (or whether SCOTUS's Carey precedent (447 U.S. 54) survives the SCOTUS's decision in Crest Street (603 F.3d 1113)).	Y	Y	Y	3

Total:	**43**	**37**	**30**	

Search and Seizure

Legal Question	UF	NA	IE	LS
Whether an analysis of the objective reasonableness of a seizure requires excluding evidence of the events leading up to the seizure.	Y	Y	N	2
Whether when a search warrant relies upon an affidavit to specify the objects of a search, the affidavit need be physically attached to the warrant.	Y	Y	N	3
When the government moves for reconsideration of a suppression order based on new evidence that no Fourth Amendment violation occurred, must it justify its failure to present that evidence at the original suppression hearing?	Y	Y	N	3
Whether an officer's failure to inform bus passengers that they have a right to refuse consent to a search of their luggage makes the search per se unreasonable.	Y	Y	N	1
Whether a camper has a reasonable expectation of privacy, for purposes of the Fourth Amendment prohibition against unreasonable searches and seizures, when camped on land owned by the Bureau of Land Management.	Y	Y	N	1
Whether the federal knock-and-announce statute, 18 U.S.C. § 3109, governs only federal officers and does not apply to the execution of a state warrant by state officers regardless of whether a federal officer participates in that search and/or the evidence is later offered in a federal case.	Y	N	N	2*
Whether, for purposes of the Fourth Amendment, a tenant in a small multi-family dwelling such as a duplex enjoys a reasonable expectation of privacy in the common areas of such a dwelling not generally accessible to non-tenants, distinguishing the common areas of large multi-family dwellings such as apartment buildings.	Y	Y	N	2*
Whether containers such as purses and handbags may be searched pursuant to a premises warrant.	Y	Y	N	1
Whether, for Fourth Amendment purposes, a tenant in an apartment complex has a reasonable expectation of privacy in locked or generally locked common areas of the complex.	Y	Y	N	1
Whether a no-knock warrant can be obtained solely on the basis of evidence showing the probable presence of a weapon in a dwelling associated with drug dealing.	Y	Y	N	1
Whether, during a traffic stop, the Fourth Amendment prohibits a police officer from questioning an individual about matters unrelated to the stop.	Y	N	N	1
Whether sovereign immunity protects governments from money damages sought under Fed.R.Crim.P. 41(e) based on the government's destruction of property seized in a criminal case.	Y	Y	N	1
Whether a stop or arrest can be justified based on the collective knowledge of the officers making the stop or arrest absent evidence of communication among the officers.	Y	Y	N	1*
Whether an individual has been "seized" for Fourth Amendment purposes, place considerable weight on the fact that police officers retained the individual's identification.	Y	Y	N	2
Whether "reasonable suspicion" is the proper standard for evaluating probation searches under the Fourth Amendment.	Y	Y	N	2

Whether a claim under Fed.R.Crim.P. 41(g), which entitles a person to the return of property unlawfully seized by a federal law enforcement officer, may be brought after, as well as before, a defendant's conviction.	Y	N	N	3*
Whether district court's determination that a Fourth Amendment seizure has occurred are reviewed for clear error on appeal (as if they were factual findings) and not de novo (as would be the case for the district court's legal conclusions).	Y	N	N	3
Whether a canine sniff constitutes a search under the Fourth Amendment.	Y	Y	N	1
Whether the use of airport security screeners to check for drugs or money and to report those items to law enforcement exceeds the bounds of a permissible security search.	Y	Y	N	1
Whether the discovery of a valid arrest warrant may serve to dissipate the taint of an unlawful detention.	Y	Y	N	1
Total	**20**	**16**	**0**	

Securities

Legal Question	UF	NA	IE	LS
Whether courts or arbitrators should determine whether an issue is arbitrable under the National Association of Securities Dealers Code of Arbitration Procedure.	Y	Y	Y	3
Whether courts or arbitrators should determine whether a claim is time-barred under the National Association of Securities Dealers Code of Arbitration Procedure.	Y	Y	Y	3
Whether to apply the more lenient "vertical commonality" approach or the more stringent "horizontal commonality" approach to determining whether there is an investment in a "common enterprise" under the test for determining whether a transaction is an investment contract covered by the 1933 Securities Act.	Y	Y	N	2
Whether, in connection with a claim under Section 10(b) of the 1934 Securities Exchange Act, Courts should maintain a presumption of reliance by investors on the regulatory process.	Y	Y	Y	2
Whether a "secondary actor" (such as an accountant) may be held liable under Section 10(b) of the 1934 Securities Exchange Act if significantly involved in preparing false statements that were later made by others and were not attributed to the secondary actor.	Y	Y	Y	1
Whether Section 29(a) of the 1934 Securities Exchange Act prohibits enforcement of non-reliance clauses (in contracts for the sale of securities) to bar fraud claims under Section 10(b) and SEC Rule 10b-5.	Y	Y	Y	1
Whether the statute of limitations for a suit under Section 10(b) of the 1934 Securities Exchange Act begins to run when a plaintiff should have discovered the facts underlying the alleged fraud (rather than when the plaintiff learns facts that would cause a reasonable investor to investigate the possibility of fraud).	Y	Y	Y	2
Whether the 1995 Private Securities Litigation Reform Act allows a federal securities fraud plaintiff to rely on a theory of collective scienter.	Y	Y	Y	2*
Whether the specific removal ban in Section 22 of the 1933 Securities Act trumps the more general removal authorization in the 2005 Class Action Fairness Act.	Y	Y	Y	3
Whether removal of a case under the Securities Litigation Uniform Standards Act requires each co-defendant to submit a timely, written notice of consent to joinder in the removal.	Y	Y	N	3
Whether the 1995 Private Securities Litigation Reform Act's safe harbor provision for forward-looking statements protects knowingly false statements that are accompanied by meaningful cautionary language.	Y	Y	Y	2*
Whether the fraud-created-the-market theory creates a valid presumption of reliance in securities law.	Y	Y	Y	2
Total	**12**	**12**	**10**	

Labor

Legal Question	UF	NA	IE	LS
Whether the National Labor Relations Board erred in concluding that a union may have its own personnel audit the calculation of agency fees. This case is a challenge by nonunion members of a ruling by the NRLB that favors the union.	Y	Y	Y	1
Whether liability for violations of the Worker Adjustment and Retraining Notification Act's (WARN Act) notice provision be measured by calendar days or working days. This is distinction determines how much compensation an employee would be entitled to upon establishing the employer's liability. "Working days" compensates employee only for number of working days during the violation period; "Calendar days" would provide even more compensation to employee.	Y	Y	Y	1
Whether interest on an unfair labor practice award accrues during delay attributable to the NLRB. Allowing for accrual provides workers with higher potential compensation in the event the employer is found liable.	Y	N	N	2
Whether registered and licensed practical nurses are supervisors under the National Labor Relations Act. Supervisors are excluded from the NLRA's protection (to unionize).	Y	Y	Y	1
Whether annual union objection requirements are permitted in agreements governed by the Railway Labor Act. With some reservations, "Yes" favors union membership.	Y	Y	Y	1*
Whether a party has an obligation to arbitrate a dispute occurring after the expiration of the collective bargaining agreement if any of the facts and circumstances leading up to the grievances arose before termination of the agreement. "Yes" appears to make it easier for employees to seek redress of grievances arising under a CBA.	Y	Y	Y	1
Whether the state limitations period for state contract actions should apply to an arbitration enforcement action under Section 301 of the Labor Management Relations Act (rather than the shorter (except for Mass. in the First Circuit's Derwin case) state arbitration limitations period). "Yes" provides unions seeking enforcement and other favorable actions a greater opportunity to do so (with the exception of the Massachusetts statute).	Y	Y	Y	2
Whether the parties to a collective bargaining agreement may contractually exempt pension plans from the arbitration requirement of the Railway Labor Act, 45 U.S.C. § 184.	Y	Y	Y	2
Whether individuals who lack the authority to hire but who have authority to recommend such action are supervisors within the meaning of the National Labor Relations Act. "No" makes it easier for employees to unionize.	Y	Y	Y	1
Whether the Fair Labor Standards Act provision authorizing recovery of "legal or equitable relief as may be appropriate" in private suits for violation of the statute's ban on retaliation, 29 U.S.C. § 216(b), authorizes recovery of punitive damages. "Yes" permits a plaintiff/employee a greater potential recovery.	Y	N	N	2
Whether, to obtain temporary injunctive relief under Section 10(j) of the National Labor Relations Act, the National Labor Relations Board must first establish reasonable cause to believe that the statute has been violated.	Y	Y	N	2

Whether unions that cannot be certified under 29 U.S.C. § 159(b)(3), but nonetheless have been voluntarily recognized by an employer, are generally protected under the National Labor Relations Act. "Yes" makes it easier for employees to receive some protections under the act.	Y	Y	Y	1
Whether state procedural rules govern "hybrid" lawsuits brought under both the Labor Management Relations Act and the National Labor Relations Act that originate in state court prior to removal to federal court. "Yes" apparently preserves the timeliness of plaintiff/employees under these acts when removed to federal court.	Y	N	Y	2
Whether claims of constitutional violations by the NMB should both be examined under the “peek at the merits” framework. "No" is more protective of the rights of plaintiff/employees.	Y	Y	N	3
Whether a piecemeal impasse in negotiations between company and union over a particular issue is sufficient to allow the company unilaterally to impose its preferred resolution of the disputed issue. "No" favors unions.	Y	Y	Y	2
Whether courts should adopt a presumption of irreparable harm in § 10(j) cases when the Board is “likely” to succeed on the merits. "Yes" makes it easier for a plaintiff/employee to obtain injunctive relief.	Y	Y	Y	3*
Whether an injunction entered under Section 10(j) of the National Labor Relations Act prior to certification may include an interim bargaining order. Such an order provides additional relief to plaintiff/employees.	Y	Y	Y	2*
Whether district courts necessarily lack jurisdiction to decide whether employees constitute a single bargaining unit in an action brought pursuant to Section 301 of the Labor Management Relations Act.	Y	Y	Y	3
Whether the appropriate test for accrual for a "hybrid" action under Section 301 of the Labor Management Relations Act is "when the employee knew or should have known of the acts constituting the alleged violation."	Y	N	Y	3*
Whether, in an unfair labor practice proceeding that follows a representation proceeding, a party in the later proceeding can preserve issues raised in the earlier proceeding by providing a firm indication to the National Labor Relations Board of the objecting party's non-abandonment of the issue.	Y	Y	N	3*
Whether a labor arbitrator is necessarily bound by the result in a prior arbitration.	Y	Y	Y	3
Whether a dispute arising out of a side agreement between parties to a collective bargaining agreement must be arbitrated under the collective bargaining agreement's arbitration clause if the side agreement relates to a subject that is within the scope of the arbitration clause, unless otherwise specified.	Y	Y	Y	3
Whether the parol evidence rule is fully applicable to collective bargaining agreements.	Y	Y	Y	3
Whether an employer can exercise a contractual right to punish employees for activity protected by the NLRA. Because "No" affords greater protection to workers and union activity.	Y	Y	Y	2
Whether an employer that lays off or refuses to reinstate an employee who has taken leave under the Family and Medical Leave Act bears the burden of proving that the employee would have been dismissed regardless of the employee's taking of FMLA leave. "Yes" is more favorable to the plaintiff/employee.	Y	N	Y	2

Whether the Railway Labor Act completely preempts state tort claims and, therefore, provides a ground for removal of such state claims to federal court.	Y	N	Y	3
Whether Section 207(h) of the Fair Labor Standards Act permits a district court to offset overpayments made in any work periods against shortfalls in any other work periods.	Y	N	Y	3*
Whether physical and/or mental exertion is relevant in order for the time workers spend donning, doffing, and washing their gear to be compensable under the Fair Labor Standards Act.	Y	N	Y	2
Whether successor employers required to bargain under the terms of a collective bargaining agreement between its predecessor and its employees' union.	Y	Y	Y	3
Whether the trial judge (rather than the jury) determine the amount and availability of front pay in suits brought under the Family and Medical Leave Act.	Y	N	N	3
Total	**30**	**21**	**24**	