Evolution of Conflict in the Federal Circuit Courts

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March 19, 2015

Abstract

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

Conflict between Courts of Appeals is of central importance to the federal judiciary. When circuits split, federal law is applied differently in different parts of the country. As an empirical matter, the existence of a circuit split is one of the best predictors of Supreme Court review. However, despite its importance, scant empirical evidence exists outside of this fact. How many circuit splits go unresolved altogether? Of those that are resolved, for how long do they persist before they are resolved?

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

In order to answer these questions, we compiled an original dataset that comprises a sample of conflicts between Courts of Appeals that existed between 2005 and 2013, which includes both conflicts the Supreme Court resolved and conflicts it has not yet resolved. We thus provide the first look at the universe of existing conflicts. This allows us to explain how long conflicts typically last before they are resolved, how many conflicts go unresolved altogether, and how the evolution of a conflict in the lower courts affects the likelihood the Supreme Court grants *cert*. It also offers the most comprehensive picture to date of cross-circuit litigant strategy, understanding how conflicts evolve and how litigants manipulate that evolution. In this paper, we present our data and begin to investigate the lifecycle of an intercircuit conflict.

1   Intercircuit Conflict

Federal Courts of Appeals decide over 50,000 cases every year (Administrative Office of the United States Courts 2015). In disposing of cases within its own jurisdiction, a given circuit court is not obligated to follow precedent that is binding in any other circuit. When a circuit declines to follow other circuits' decisions, it creates a circuit split or conflict, under which similarly-situated litigants are treated differently in different circuits.

Uniformity in the application of federal law by federal courts is a value as old as Federalist 80. In addition to harming this principle, circuit splits have other potentially undesirable consequences: they make it difficult for lawyers to advise their clients, invite additional litigation, circumscribe potentially legal conduct, and possibly cast doubt on the legitimacy of the legal system itself (e.g., Hellman 1985, Tiberi 1993).

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

Unless a circuit repudiates its past decision to come in line with other circuits, only the

Supreme Court can bring uniformity to a body of law when circuits split. In the Supreme Court's Rule 10, the presence of a circuit split is one of the only factors explicitly mentioned as a consideration in granting writs of certiorari.

We can see the heavy consideration to which the Supreme Court accords intercircuit conflict in the cases it does decide to hear. Consistent with Rule 10, the Supreme Court is far more likely to review cases that implicate a conflict in the lower courts than those that do not (Tanenhaus et al. 1963, Ulmer 1984, Caldeira and Wright 1988, Caldeira, Wright and Zorn 1999, Perry 1991). In a review of Burger Court cases, Hellman (1985) found that intercircuit conflict was the modal reason for granting *cert* and that, in some areas of statutory law, resolving conflict was nearly the only reason the Court heard a case.

The presence of an intercircuit conflict does not guarantee that the Supreme Court will grant review, however.[1] Some conflicts implicate more important areas of the law, potentially affect more litigants, are more likely to persist, involve more contemporaneous disagreement (are more "live"), or involve cases that are harder to distinguish (are more "square") than others. That is, "there are conflicts, and there are conflicts" (Perry 1991, p. 249). Because it is so widely know that the Court is more likely to grant review to cases that implicate conflicts—and Gressman et al. (2007, p. 242) advise petitioners of this reality—allegation of conflict is common. Much of a clerk's task is distinguishing genuine from alleged conflict (Estreicher and Sexton 1984).

Empirical investigations into the Court's *cert* decisions show that the Court is far more likely to review cases of true conflict (Estreicher and Sexton 1984) or "strong" or deep conflicts as opposed to shallow ones (Black and Owens 2009). Of course, what constitutes a conflict worthy of review is subject to interpretation. Even the justices themselves disagree over which conflicts, if any, are tolerable (Perry 1991). Occasionally the notion that the

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

Supreme Court either lacks the capacity to resolve important conflicts or is abrogating its duty to do so has given rise to Congressional inquiries. At the behest of the 1990 Federal Courts Study Committee, Hellman (1995) investigated the number, "tolerability," and "persistence" of intercircuit conflicts implicated by cases in which litigants petitioned for cert but that the Supreme Court nonetheless declined to hear. In the 1989 term, Hellman estimated that the Supreme Court denied *cert* to petitions implicating between 168 and 274 different intercircuit conflicts. Among those petitions, about one-third involved conflicts that had the potential to cause harm to multicircuit actors, either through the existence of inconsistent obligations or by necessitating compliance with the most restrictive rule. Between one-quarter and one-third involved disagreement over rules that were clear cut enough that the choice of rule would most certainly change the outcome of the case, and an additional thirty to fifty percent involved differences over rules that would favor one side or the other in a class of disputes. That is, a large majority of cert petitions alleging conflict that were denied review involved conflicts that were serious enough to alter the behavior of relevant actors and/or lead to different case outcomes across similar cases. In a similar set of denied petitions from the 1984 and 1985 terms, Hellman found that only about one-third were resolved by the Supreme Court by the 1992 term, though an additional 25 percent were mooted in other ways.[2]

Beyond workload considerations or potential shirking, one reason the Supreme Court may allow a live conflict to persist is so that the question at issue may percolate. That is, the justices may learn something by allowing multiple circuits to weigh in before they grant *cert* to resolve a conflict. Clark and Kastellec (2013) develop a theoretical model of

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[2]Some were resolved by legislation, some by subsequent lower court decisions, and some led to no further litigation. Of those conflicts that were still live, Hellman found that about two-thirds resulted in continued differential treatment of litigants across circuits, while the other third did not obviously control case outcomes. From this, he concludes that the Supreme Court processes adequate capacity to resolve conflicts.

a court that faces a tradeoff between promoting uniformity in the law and learning about legal issues from percolation in the lower courts. The court grants cert to resolve an issue when the costs to allowing the conflict to percolate outweigh the benefits of learning from additional lower courts weighing-in. Using data on conflicts resolved between 1985 and 1996, they test and show support for one prediction from this model—that the Supreme Court is more likely to grant certiorari when a conflict arises late in the percolation process than when a conflict arises early in the percolation process.[3] To the extent that the Court does seek to balance learning and uniformity, there is little evidence that "percolated" decisions are more well-received than non-percolated ones.[4]

The presence of a conflict also interacts with other, potentially extra-legal, considerations in the *cert* process. Black and Owens (2009) and Epstein, Martin and Segal (2012) evaluate how the probability of *cert* is affected by the interaction between ideological and non-ideological factors, and find that ideology only plays a role in cases where non-ideological factors—including lower court conflict—suggest the probability of a *cert* grant is moderate (not too high or too low).

In an attempt to study how conflict grows over time—how long it lasts in terms of both years and the number of circuits involved, and how the number of circuits on either side of the split affect resolution—a number of scholars have studied conflicts that have been resolved (Lindquist and Klein 2006, Clark and Kastellec 2013). But as Bruhl (2014) notes, the conflicts that are resolved—and especially those the Supreme Court *states* it is resolving—are likely to be different from those that go unresolved. Grant, Hendrickson and

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[3]This analysis assumes the Court can choose to resolve in any period, i.e. whenever a lower court makes a decision, whether or not there is a petition for cert.

[4]Tiberi (1993) finds that negative reviews of Supreme Court decisions, dissents, and Congressional overrides are just as common, if not more so, when the Supreme Court weighs in on an issue on which multiple circuits have spoken. Of course, one cannot tell how well percolated decisions would have been received had they not been allowed to percolate.

Lynch (2012) compare granted *cert* petitions to denied petitions and find that ideological divergence between circuits on one side of a conflict and the other is positively associated with Supreme Court review. But litigants are likely to be strategic; using only cases in which there was a *cert* petition still yields a biased sample.

2   Data

Our data are Courts of Appeals decisions, clustered into conflicts—some of which have been resolved and some of which have not been resolved. Because our data includes conflicts that have not yet been resolved, we are able to study differences between conflicts that are resolved and conflicts that are not.[5]

Identifying and codifying conflicts poses severe methodological and epistemological obstacles, both for the Court and for researchers. Whether one decision is really in conflict with another is often arguable. Identifying all decisions that are in conflict with any given one is functionally impossible, given the number of cases decided in the federal courts each year. In a comprehensive study of circuit court judges' behavior around intercircuit conflict, Wasby (2002) argues that judges tend to know, discuss, and remark in the written opinion when they create an intercircuit conflict (Wasby 2002, pg. 162). We therefore dealt with these identification issues by relying on the courts' own descriptions of conflicts—specifically, we found explicit mentions of conflict and built two datasets by relying on those.[6] We built a dataset of resolved conflicts by relying on the Supreme Court's opinions, and of existing conflicts by relying on the Courts of Appeals' opinions.

We captured conflicts resolved between the 2005 and 2012 Supreme Court terms, and part of the 2013 term, by reading Supreme Court opinions that explicitly stated they were

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[5]Since we select on the existence of conflict, we cannot speak to whether a case would have been heard had it not been involved in a conflict.

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

resolving a conflict.[7] This dataset gives us a look at conflicts that *were resolved.* In this dataset, there are 171 conflicts involving 842 circuit court cases.

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

We call the datasets the Supreme Court Dataset and the Courts of Appeals Dataset, according to which court identified the conflict. Relying on courts' explicit mentions of conflict does not capture all conflicts—many conflicts are mentioned by the Courts of Appeals, but in phrases such as, "we depart from our sister circuits" rather than using the word "split." We do not capture these. We also do not capture conflicts that escape acknowledgement altogether. Likewise, the Supreme Court does not always explicitly state that it is resolving a conflict between Courts of Appeals.

	Identified by Supreme Court	Not Identified
Identified by Courts of Appeals	28	18
Not Identified	143	0

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

For conflicts resolved between 2005 and 2013, Table 1 shows the crosstab of conflicts we identified from the Courts of Appeals, and conflicts that the Supreme Court identified between 2005 and 2013. Neither completely overlaps the other—sometimes the Supreme

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[7]The Spaeth Supreme Court Database (Spaeth 2011) records the reason for granting *cert*, and we relied on that coding.

Court resolves a conflict without acknowledging that it is doing so, sometimes the Courts of Appeals do not explicitly state they are in conflict with each other. In other words, although both these datasets are samples of intercircuit conflicts, they are not comparable samples and neither has comprehensive coverage. We cannot hope to capture the universe of circuit splits—when no Court of Appeals mentions a conflict, and the Supreme Court either does not resolve it or does not acknowledge doing so—the conflict escapes researchers' attention. (Hellman (1985; 1995) relies on lawyers' briefs and other court documents to supplement judges' opinions, which can increase the number of conflicts captured but still cannot capture all of them.)

Therefore, we treat these datasets as samples of the universe of existing conflicts. In this paper, we analyze each of these datasets separately.[8] We use conflicts identified by the Courts of Appeals to compare resolved to unresolved conflicts, and conflicts identified by the Supreme Court to study resolved conflicts in more depth.

The courts' summaries—those in Supreme Court opinions and those in Courts of Appeals opinions summarized by the Seton Hall Circuit Review (Staff 2005:2013)—describe which cases are involved in each conflict, and which side of the conflict each case is on. We relied completely on the court's interpretation and description of the conflict and coded this information. Then we looked up each Court of Appeals decision mentioned as being involved in the conflict on Westlaw, and from there collected case-level information including the judges on the panel, the year of the decision, the composition of the circuit, whether the decision was published, whether there was a concurrence or a dissent, which party appealed from the district court's decision, and whether there was a petition for *cert*. If so, we noted

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[8]We hope to determine, in future iterations of this project, how closely our data approximates a *random* sample of conflicts. Conflicts acknowledged by the Courts of Appeals may be different from unacknowledged conflicts, but conflicts described by the word "disagree" may be no different from conflicts described by the word "depart."

which party petitioned for *cert*, whether *cert* was granted, and, if *cert* was granted, whether the Supreme Court resolved the conflict in its decision. (In most conflicts, there are only two sides and they are clear.) We also collected information at the conflict-level, including issue area and whether the Supreme Court resolved the conflict. For those cases in which the Supreme Court did resolve the conflict, we took case-level information on the Supreme Court's decision from the Spaeth Supreme Court Database (Spaeth 2011).

3   Analysis

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

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

A conflict typically arises very quickly after an issue begins percolating in the Courts of Appeals. The mean number of circuits involved by the end of the year in which a conflict began is 3. (Sometimes two circuits decide opposite each other on a case of first impression in the same year, functionally joining simultaneously.) The median is 2.

We begin our analysis by studying the duration of conflict, investigating when, if ever, the Supreme Court terminates the percolation of a conflict and resolves it. The advantage of
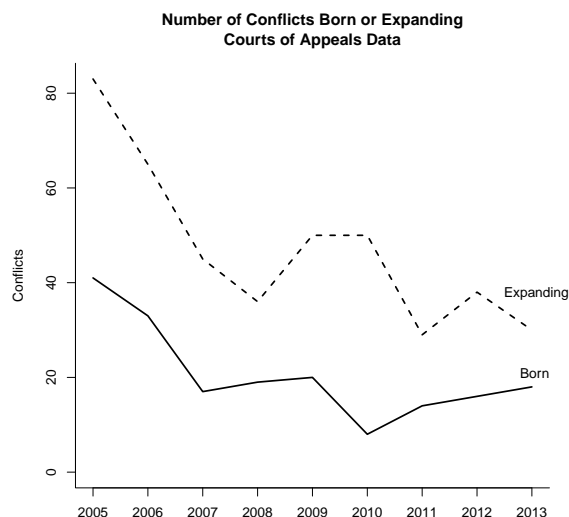
Figure 1: Number of conflicts that are born and expand in each year in the Courts of Appeals Dataset.

doing so with our Courts of Appeals data is that we can observe both resolved and unresolved conflicts, the latter of which make up almost 90% of our sample.

Within our Courts of Appeals data, we identified 41 conflicts born in 2005, one of which was resolved in 2006, one of which was resolved in 2010, and 39 of which remain unresolved. This dramatically underestimates the number of conflicts that are actually resolved in these years. We can get a sense for this by looking within our Supreme Court data, which itself is only a subset of the conflicts the Supreme Court resolved during this period. In this dataset, among the cases the Supreme Court resolved in its 2006 term, 8 were born in 2005. Between the 2005 and 2012 terms, the Supreme Court resolved 19 conflicts it identified as having been born in 2005. Figure 2 reveals that this low resolution rate in the Courts of Appeals database is a general trend. The graph shows the number of years a conflict lives before it is resolved (if at all) in the Courts of Appeals database. As the number of years increases, most conflicts remain unresolved. Over 80% of the oldest conflicts we observe remain unresolved.

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Length of Conflict before Resolution
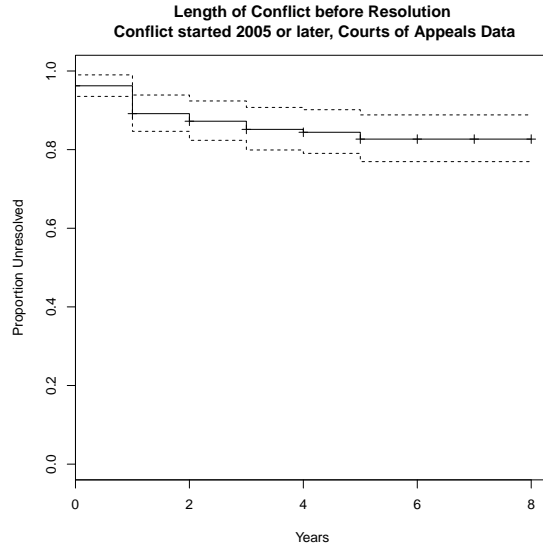**Conflict started 2005 or later, Courts of Appeals Data**

Figure 2: Proportion of conflicts resolved, by age of conflict in years. Data are conflicts from the Courts of Appeals database born in or after 2005.

Although the Courts of Appeals data estimates a very small proportion of conflicts are ultimately resolved, the estimates from both data sources suggest a similar life-expectancy before resolution. Within our Courts of Appeals data, of those conflicts that were born in 2005 or later and that are resolved, the mean number of years from start of conflict to resolution is 1.5 years. The median is 1. Within our Supreme Court data, of those conflicts that were born in 2005 or later, the mean number of years from start of conflict to resolution is 1.2 years, and the median is 1. Figures 3 and 4 show the age at which conflicts are resolved. On the horizontal axes, the graphs show the proportion of conflicts that age or younger at time of resolution. Looking first at the righthand side of the graph, we see that essentially all conflicts that are resolved are resolved at age 25 or younger. But these conflicts are resolved very young—approximately 70% of resolved conflicts in the Courts of Appeals data and 80% in the Supreme Court data were born in the previous 8 years. The steep curves indicate that conflicts that are resolved are typically resolved very soon after they begin.
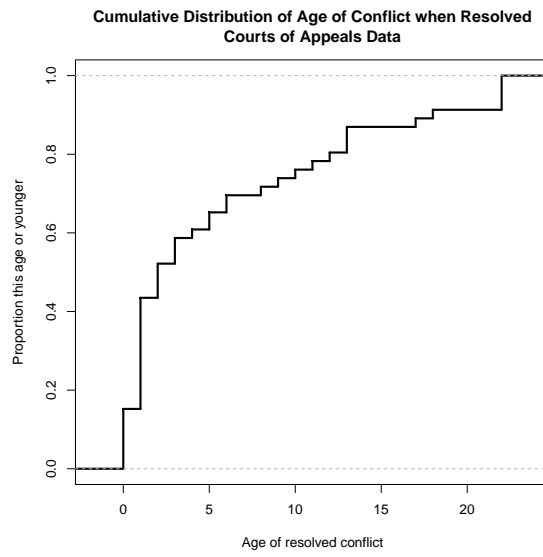
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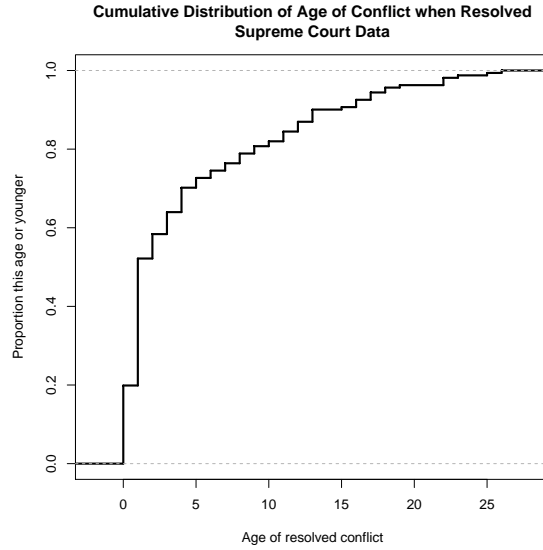Figure 3: Conflict age at resolution; Court of Appeals Dataset.

Figure 4: Conflict age at resolution; Supreme Court Dataset.

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Figures 5 and 6 show Kaplan-Meier curves of the proportion of conflicts unresolved by the number of circuits involved in each of our datasets. In each figure, the horizontal axis represents the number of circuits involved in a conflict; the vertical axis represents the proportion of conflicts unresolved with that number of circuits involved. The dashed lines show 95% confidence intervals around these estimates. As the number of circuits involved increases, the proportion of conflicts unresolved decreases. Since none of the issues in our data were resolved absent a conflict, and since a conflict is only possible once at least two circuits are involved, the solid line starts at 1 at the lefthand side of the graph—all conflicts are unresolved with fewer than two circuits involved. As the number of circuits involved rises past this threshold, the proportion of conflicts resolved increases. For example, of the conflicts in which only three circuits are involved, 93% are unresolved in the Courts of Appeals data and 54% are unresolved in the Supreme Court data. Of the conflicts in which eight circuits are involved, 66% are unresolved in the Courts of Appeals data and only 6% are unresolved in the Supreme Court data.

In comparing Figure 2 with Figure 5, we see that, for the conflicts in our Courts of Appeals data, the number of circuits involved is a stronger predictor of resolution than the age of the conflict. We attribute this in part to differences in the natural rate at which cases arise. A conflict about a maritime issue may arise so infrequently that percolation will proceed very slowly. In contrast, the conflict about constitutionality of Obamacare proceeded extremely quickly.

The other, more important explanation for this is that the Supreme Court cannot resolve a conflict at any time—only when there is a petition for *certiorari.* Even within cases that start or expand conflicts—all cases of first impression for the circuit—*cert* petitions are quite infrequent. Figures 7 and 8 show the proportion of conflicts born in each with and without *cert* petitions. The height of each bar in Figure 7 represents the number of conflicts born in
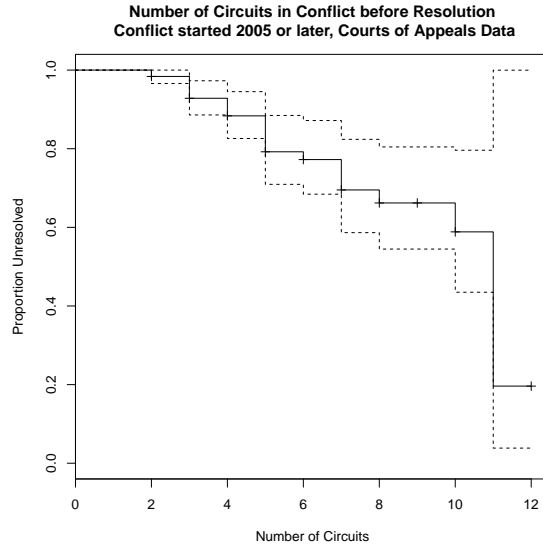
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Figure 5: How many circuits does the Supreme Court allow to join a conflict before resolving it? Kaplan-Meier curve of the proportion of conflicts unresolved with varying number of circuits involved in Courts of Appeals Data.
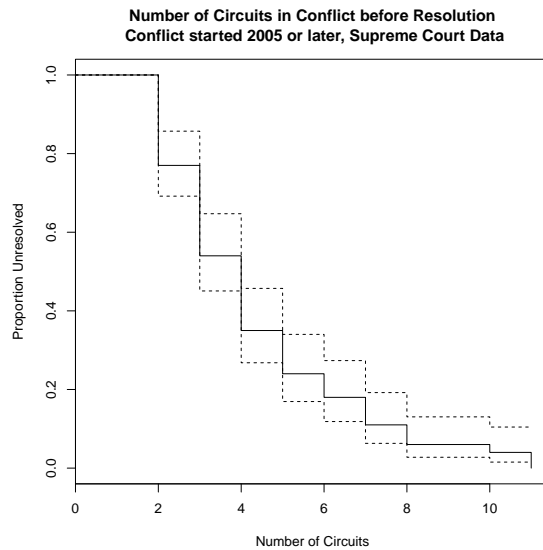

Figure 6: How many circuits does the Supreme Court allow to join a conflict before resolving it? Kaplan-Meier curve of the proportion of conflicts unresolved with varying number of circuits involved in Supreme Court data.

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each year. The height of the dark gray portion of the bar represents the number of conflicts born *with cert* petitions, the light gray portion represents the number of conflicts born *without cert* petitions. It is easy to see that many conflicts see no *cert* petitions in the year they are born. The same is true for expanding conflicts, as Figure 8 reveals. The light gray bars, in both instances, are often higher than the dark gray bars. More conflicts are born and expand with no *cert* petition filed than with a *cert* petition filed. Since the Supreme Court can only resolve conflicts when there is a petition for *cert*, this is an important factor to consider in understanding when conflicts are resolved.
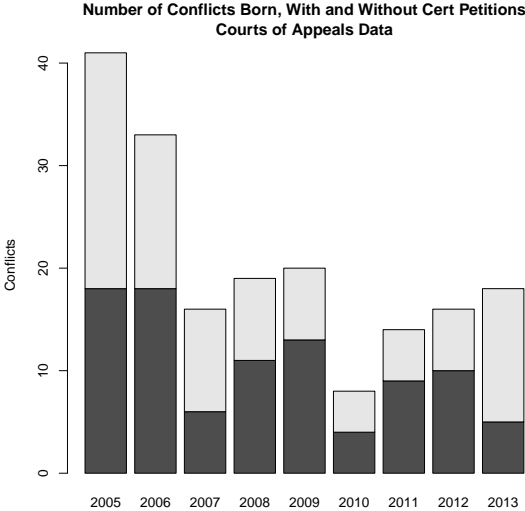

Figure 7: Number of conflicts born each year in Courts of Appeals Data. Dark gray bars represent the number with *cert* petitions.

Finally, we can say which circuits are more likely to start conflicts. We say a circuit started a conflict if it was on the opposite side of the conflict from all circuits that had previously ruled on the question. Note, more than one circuit may start the same conflict if, say, one circuit held that A in 2005 and two circuits both held that B in 2006. We would

Number of Conflicts Expanding, With and Without Cert Petitions
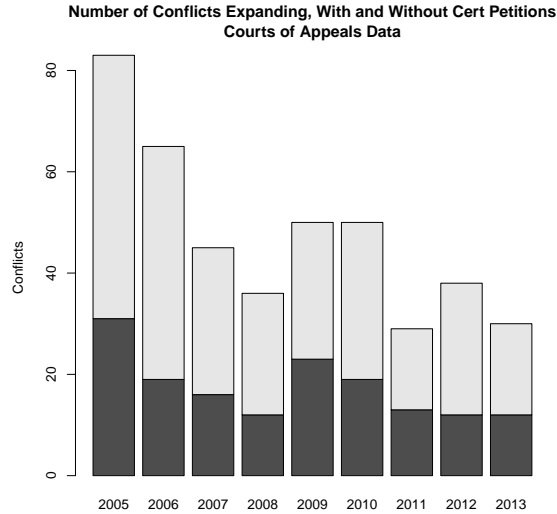**Courts of Appeals Data**

Figure 8: Number of conflicts expanding each year in Courts of Appeals Data. Dark gray bars represent the number with *cert* petitions.

say that the conflict was born in 2006 and that two circuits started it.[9] Figure 9 displays the frequency with which each circuit starts conflicts. This is broadly consistent with the circuits' docket sizes, shown in Figure 10 below.

4   Issues

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

Low resolution rate. Within the Court of Appeals dataset the proportion of conflicts that go unresolved is extremely high. Is it true that the Supreme Court resolves conflict at such a low rate? Or are the conflicts in the Court of Appeals Database strange in some way? It is unlikely that these conflicts will be resolved in the future—we know from the Supreme Court Dataset that conflicts are usually resolved quickly. Therefore, either the rate of resolution is very low or the Court of Appeals Database disproportionately samples

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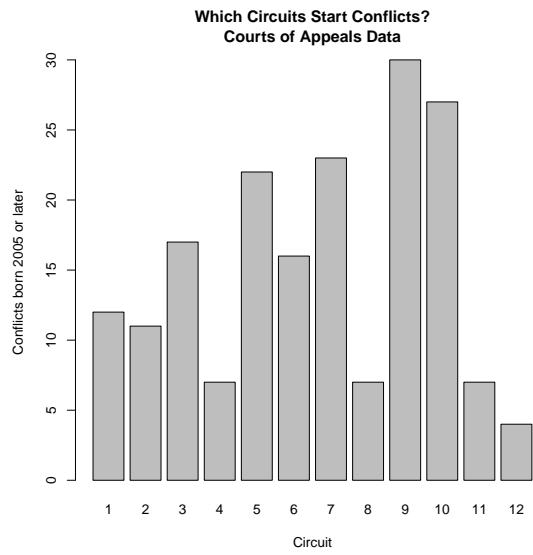[9]If one circuit held A and one B in 2005, then we would say neither started it.

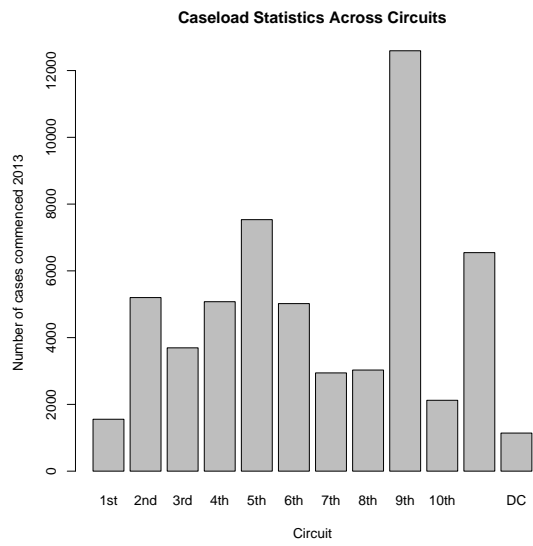Figure 9: Which Circuits Start Conflict?

Figure 10: Number of cases commenced in each circuit in 2013.

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conflicts that are likely never to be resolved. But our sample of unresolved conflicts includes only those conflicts where circuit court judges are explicit that there is a conflict, and we know judges care about identifying conflicts—so these are likely to be serious conflicts. One possibility is that the conflicts that are not acknowledged as these are resolved at a much higher rate. This would include conflicts that are not acknowledged by the lower courts and conflicts that *are* acknowledged but don't include the words "split" or "disagree." We know that sometimes conflicts are not acknowledged by the lower courts because Hellman (1985; 1995) identifies petitions for cert that claim conflict where it is not referenced by the lower court.

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

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

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

5 Discussion and conclusion

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

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about them—namely, that conflict is an excellent predictor of certiorari.

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

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

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

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Appendix

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

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

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

Our measure of circuit-level ideology, the proportion of Democratic appointees on each circuit in each year, is taken from the Federal Judicial Center's database on the biographies of judges of the Federal Judiciary (N.d.). This measure is the proportion of those active (not

senior status) judges who were appointed by a Democratic president. We count a judge as serving for a full year if he served for more than 6 months.