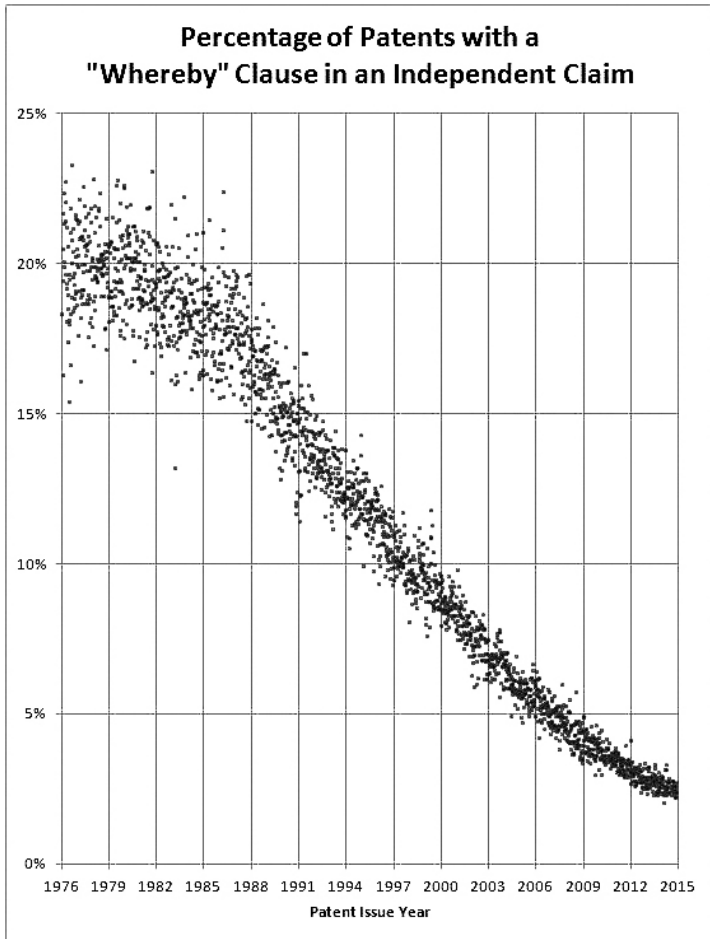


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About the cover

We are always keeping an eye out for those who are gathering, interpreting, and presenting interesting data relating to the law. One such person is Professor Dennis Crouch, at the Patently-O blog (patentlyo.com/). In one recent post, he charted the decline of the “whereby” clause in the independent claims of U.S. patents. The “whereby” clause “generally states the result of the patented process. However, when the ‘whereby’ clause states a condition that is material to patentability, it cannot be ignored in order to change the substance of the invention.” 3-8 *Chisum on Patents* § 8.06 n.194. (quoting *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1329 (Fed. Cir. 2005) (per curiam)). As one can see from the graph on the cover, such claim drafting has fallen notably out of favor in the last 30 years. We will leave the implications of that to the patent scholars, but wanted to share the graph on our cover as another great example of an interesting presentation of legal metrics. Graph credit to Professor Dennis Crouch (patentlyo.com/patent/2014/11/demise-whereby-clause.html) – Eds.

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MEASURING CIRCUIT SPLITS

A CAUTIONARY NOTE

Aaron-Andrew P. Bruhl[†]

INTRODUCTION

Circuit splits and other divisions of authority in the lower courts are interesting and important for a number of reasons, perhaps most of all because a split of authority is probably the single most important factor in triggering Supreme Court review.¹ Although the study of such conflicts is not new, the topic holds renewed interest because scholars have begun publishing improved measures of the Court's behavior in resolving conflicts. The simple observation that the Supreme Court reverses much more often than it affirms – it has reversed about 70-75% of the decisions it has reviewed, in recent years² – actually tells us very little about how well the lower courts fare on review. That is because any particular lower-court decision reviewed by the Supreme Court is usually just one of several conflicting decisions to have addressed the legal question at issue. Therefore, even when the Court reverses the decision directly under review, the Court might be indirectly “affirming” several other lower courts.

A more meaningful measure of the Court's supervision of the lower courts would take this fact of indirect or “parallel” review into account, and that is exactly what several recently published studies

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¹ See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE 246 (1994) (“Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”).

² See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 271 (5th ed. 2012).

aim to do.³ As one of those studies, published in this *Journal*, states, “[o]nce data regarding decisions on parallel review are added to the decisions on primary review, a more accurate – and much different – view of federal appellate court performance emerges.”⁴ Although the figures reported in these studies differ depending on the precise methods and time periods involved, the findings show the Supreme Court agreeing with the lower courts much more often than one would gather from the crude information provided by primary reversal rates.

These new measures improve our understanding of the relationship between the lower courts and the Supreme Court, but we should understand these measures’ limits. Providing an accurate accounting of the Supreme Court’s treatment of lower courts requires that the researcher define which categories of the Court’s cases should be studied, identify those cases on the Court’s docket, and then determine which lower courts are indirectly affirmed or reversed in each of those cases. These tasks turn out to be surprisingly difficult.

The main purpose of this comment is to explain why those tasks are difficult and how the difficulties mar the resulting measurements. Once the difficulties are fully appreciated, researchers can and should adjust their aims, methods, and reporting so as to improve accuracy and reduce the risk of misstatement. But to some degree the culprit is the Supreme Court’s own practices – practices that impede precise measurement and, more worryingly, may introduce systematic bias into researchers’ findings. A secondary goal of this comment is to highlight the limitations of the Supreme Court Database as a tool for identifying Supreme Court cases resolving splits,

³ See, e.g., Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L. (1 J. LEGAL METRICS) 59 (2012) [hereinafter *App. Rev. I*]; Tom Cummins & Adam Aft, *Appellate Review II – October Term 2011*, 3 J.L. (2 J. LEGAL METRICS) 37 (2013) [hereinafter *App. Rev. II*]; Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011); John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393 (2011). Hansford’s study had the broader goal of determining whether circuits fare better in the Supreme Court in fields in which they have expertise, but answering that question required him first to compile (like the other studies above) a more complete measure of circuit performance.

⁴ *App. Rev. I*, *supra* note 3, at 62.

whether for purposes of constructing measures of reversal rates or for other purposes that may be of interest to lawyers and political scientists.

I. BRIEF OVERVIEW OF PARALLEL REVIEW AND ITS USES

Before delving into the difficulties, we should begin by briefly introducing the idea of parallel review and its many uses. The basic idea is simple but powerful. Consider a hypothetical Supreme Court that resolves three cases, one each from the Sixth, Seventh, and Ninth Circuits. The Supreme Court affirms in the case from the Seventh Circuit and reverses in the other two, which yields a reversal rate of 67%. In truth, however, the Supreme Court has reviewed not just three decisions but several times that number, because each of those three cases presented legal questions that had divided the lower courts for years. Suppose the legal question in each case can be represented as a binary choice between two options such as *X* or not-*X* (e.g., a limitations period is subject to equitable tolling or is not, the “search incident to arrest” doctrine applies to smartphones or does not). A more complete picture of the Court’s appellate reversal rates would then look like this:

	Case 1 (<i>X</i> or not- <i>X</i>)		Case 2 (<i>Y</i> or not- <i>Y</i>)		Case 3 (<i>Z</i> or not- <i>Z</i>)		Overall reversal rate
Circuit positions on the question	<i>X</i> : 1st, 2d, 9th, DC	Not- <i>X</i> : 3d, 6th	<i>Y</i> : 7th, 5th, 10th	Not- <i>Y</i> : 2d, 6th, DC	<i>Z</i> : 4th, 10th	Not- <i>Z</i> : 5th, 9th, 8th, 11th	
Circuit directly reviewed by S. Ct.	6th		7th		9th		
S. Ct. ruling	<i>X</i>		<i>Y</i>		<i>Z</i>		
S. Ct. disposition on direct review	reversed 6th Cir.		affirmed 7th Cir.		reversed 9th Cir.		67% (2 of 3)
Reversal rate incl. parallel review	33% (2 of 6)		50% (3 of 6)		67% (4 of 6)		50% (9 of 18)

A few important differences between direct and parallel review now become apparent. For one, the full measure of the Supreme Court's reversal rate can differ significantly from the rate on direct review. The figures in this hypothetical – 50% versus 67% – are broadly reflective of the findings of the recent studies, which show that lower courts fare much better once parallel review is considered.⁵ Moreover, accounting for parallel review can alter which lower courts appear best and worst. In this hypothetical, the Ninth Circuit was reversed 100% of the time on direct review (one reversal out of one opportunity in Case 3), but it was indirectly affirmed in Case 1, so perhaps it is not performing badly after all. And the “best” performance – two wins and no losses for the 10th Circuit – came from a court that was not directly reviewed at all.

The concept of parallel review has many uses. The Cummins/Aft and Summers/Newman studies are primarily aimed at measuring parallel review rates and using them to produce better assessments of circuit performance,⁶ a matter of keen interest to observers of the courts. One could also use this comprehensive measure as one step toward answering more complex research questions. For example, if one wants to know whether courts with greater experience in a field (say, the Second Circuit in securities litigation) perform better than non-expert courts, one might consider how often the Supreme Court adopts the view of that expert lower court – and in doing so one would probably want to include cases in which the expert court's rule came up to the Supreme Court indirectly via a different lower court's decision.⁷ Similarly, if a researcher wants to know whether the Supreme Court is influenced or constrained by the rulings of the lower courts, parallel re-

⁵ See *App. Rev. II*, *supra* note 3, at 37-38; Summers & Newman, *supra* note 3, at 3.

⁶ See *App. Rev. I*, *supra* note 3, at 59-60; Summers & Newman, *supra* note 3, at 1-2. For earlier studies using similar methods and pursuing similar goals, though with a focus on the Ninth Circuit in particular, see Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 412-15 (1998); and Stephen L. Wasby, *How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 SETON HALL CIR. REV. 119 (2005).

⁷ This, in essence, is the question studied in Hansford, *supra* note 3.

view is much more informative than direct review.⁸ Indeed, a measure of reversal rates that incorporates parallel review is probably the more appropriate measure for *most* research questions.

But whatever use one wants to make of parallel review, one has to proceed carefully. One first has to identify the set of Supreme Court cases one wants to study, which presents both definitional questions as well as practical problems. Then, having defined and identified the relevant Supreme Court cases, one has to determine which lower courts were involved and what the Court did with all of them. Those tasks are harder than they might seem, in part because the Court is, alas, not as attuned to the needs of empirical researchers as one might wish.

II.

COMPLEXITIES OF IDENTIFYING SPLITS

A. Defining the Cases of Interest

An initial question that confronts the researcher, though ultimately not one of the more complicated questions, is how to define the category of Supreme Court cases one wishes to study. Any study of parallel review will, obviously, include those cases involving conflicts in the lower courts. At the other end of the spectrum from the conflicts are the cases involving issues that one and only one lower court has addressed, such as because one lower court has exclusive jurisdiction over the topic (as in some areas of patent law and administrative law, for example) or because the question is so fact-bound that it does not present any generalizable issue of law. An additional, intermediate category is composed of cases in which multiple lower courts have addressed a question, all of them have agreed, and the Supreme Court affirms or reverses all

⁸ This is one of the questions addressed in Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014). Lindquist and Klein address similar questions in a 2006 article, in which they treated the majority view in the lower courts largely as a proxy for legal correctness, the influence of which they compared to other potential influences like ideology. See Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 141-42 (2006).

of them.⁹ The existence of these various categories raises the question of what one means by “conflicts” and, more broadly, the question of why one might want to study conflicts-so-defined instead of a broader or narrower range of cases.¹⁰ Some or all of the non-splits could be ignored if one is interested in the Court’s resolution of lower-court conflicts *per se*, but it is not so clear that one should ignore them – especially the non-splits involving the unanimous views of multiple lower courts – if one is interested in understanding how the Supreme Court relates to the lower courts, how often it agrees with them, how well the lower courts are performing, etc. Further complications concern whether to study all lower courts or only some of them (most notably the federal courts of appeals) and whether to include the Supreme Court’s summary dispositions as well as fully argued cases. In any event, the decision to include and exclude certain categories of cases should be acknowledged and then supported by some reason rooted in the research question.

B. Undercounting of Splits in the Supreme Court Database

Let us assume that the category of cases to be studied either includes, or is entirely limited to, Supreme Court cases resolving conflicts in the lower courts. There next arises the deceptively difficult problem of finding those cases. One approach, employed by some researchers in the field, is to locate conflicts by relying on the renowned Supreme Court Database (“the Database”) maintained by Harold Spaeth and his collaborators.¹¹ Among the dozens of pieces of

⁹ See, e.g., *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1133-35 (2011) (noting that several lower courts had ruled a particular way and reversing them all); *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1332 (2012) (affirming every court of appeals to have addressed the question); *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) (observing that the lower courts were in accord on one issue in the case and affirming them all). In the cases just cited, I rely on the Supreme Court’s representations that the lower courts were unanimous.

¹⁰ Summers and Newman acknowledge the issue and report reversal rates for different categories of cases, which is helpful. See Summers & Newman, *supra* note 3, at 3.

¹¹ SUPREME COURT DATABASE, scdb.wustl.edu/index.php (last visited Aug. 10, 2014). The initial iterations of the Cummins/Aft studies of parallel review relied primarily on the Supreme Court Database to identify cases. See *App. Rev. I*, *supra* note 3, at 64. Other researchers, especially in political science, have relied on the Database to locate splits for purposes

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information collected about each case, the Database includes a variable for “certReason”: the reason, as reported by the Court’s opinion, that the Court granted certiorari. That variable can take on a number of different values, including several corresponding to different types of splits (splits between different federal courts, splits between federal and state courts, confusion in the lower courts, etc.).¹² Someone looking at the Database’s split-related coding would probably realize, if he or she gave the matter some thought, that those codes would not capture cases where there was no division in the lower courts, even if multiple lower courts had ruled on the question. But one might at least assume that one could use the split-related values for the “certReason” variable to identify Supreme Court cases resolving splits. And yet that assumption may be perilous.

Relying on the Database’s coding to identify the universe of splits causes undercounting and a serious risk of bias. Some initial hint of the problem is apparent if one compares the number of cases in which the Database shows the reason for the grant of certiorari as split-related to the total number of cases in the Database for the same year, as follows:

2010 Term:	25 coded splits out of 85 cases (29.4%)
2011 Term:	22 coded splits out of 77 cases (28.6%)
2012 Term:	32 coded splits out of 79 cases (40.5%)
2013 Term:	24 coded splits out of 75 cases (32.0%) ¹³

These figures would strike most observers as low, given the widely shared understanding that a majority of the Supreme Court’s docket is composed of cases in which the lower courts have divided.¹⁴

besides compiling rates of reversal on parallel review. See *infra* note 21 (citing examples).

¹² See Harold Spaeth et al., *Supreme Court Database Code Book* 35, 95 (July 23, 2014), SUPREME COURT DATABASE, scdb.wustl.edu/documentation.php?s=2.

¹³ These figures reflect the sum of “certReason” variable codes 2 through 9, which involve various types of splits or confusion in the lower courts. These figures come from the following version of the database: *2014 Release 01, Case-centered/Citation-organized dataset* (July 23, 2014), SUPREME COURT DATABASE, scdb.wustl.edu/data.php.

¹⁴ See, e.g., Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 521 (2003) (“Currently, about 70 percent of the cases we agree to hear involve deep divisions of opinion among federal courts of appeals or state high courts.”); David R. Stras,

Part of the explanation for these low figures (though, as we will see, only one part) is that 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's lead opinion 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. But here are a few examples from recent years of cases that were *not* coded as splits:

- *Astra USA, Inc. v. Santa Clara County, Cal.*,¹⁵ coded as "no reason given":

We granted certiorari[FN3] and now reverse the Ninth Circuit's judgment.

[FN3]: U.S. Courts of Appeals have divided on the circumstances under which suits may be brought by alleged third-party beneficiaries of Government contracts. [Several citations provided.]

- *CSX Transportation, Inc. v. Alabama Dep't of Revenue*,¹⁶ coded as "no reason given":

CSX petitioned for a writ of certiorari, arguing that the Eleventh Circuit had misunderstood *ACF Industries* and noting a split of authority concerning whether railroads may bring a challenge under § 11501(b)(4) to non-property taxes from which their competitors are exempt.[FN4] We granted certiorari and now reverse.

[FN4]: [Many citations provided.]

- *Gonzalez v. Thaler*,¹⁷ coded by the Database as granted "to resolve the question presented":

The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 TEX. L. REV. 947, 981 (2007) (concluding that approximately 70% of the Supreme Court's cases from 2003-2005 involved splits in the lower courts).

¹⁵ 131 S. Ct. 1342, 1347 (2011) (citation omitted).

¹⁶ 131 S. Ct. 1101, 1106-07 (2011) (citation omitted).

¹⁷ 132 S. Ct. 641, 647 (2012).

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We granted certiorari to decide two questions, both of which implicate splits in authority: (1) whether the Court of Appeals had jurisdiction to adjudicate Gonzalez’s appeal, notwithstanding the § 2253(c)(3) defect;[FN1] and (2) whether Gonzalez’s habeas petition was time barred under § 2244(d)(1) due to the date on which his judgment became final.[FN2]

[FN1]: The Circuits have divided over whether a defect in a COA is a jurisdictional bar. [Citations to several cases.]

[FN2]: The Circuits have divided over when a judgment becomes final if a petitioner forgoes review in a State’s highest court. [Citations to several cases.]

For a different and more subtle kind of example, consider *Riley v. California*, which concerned whether police may routinely search an arrestee’s cell phone without a warrant.¹⁸ The Database lists the case as “no reason given,” but a split of authority is logically discernible within the four corners of the decision: the *Riley* opinion actually decided two consolidated cases, and the Court’s opinion described the two lower courts as coming out on opposite sides of the question presented.¹⁹

The number of facially apparent splits that are not captured by the Database’s coding probably varies from year to year.²⁰ Among the last few Supreme Court terms, the 2010 Term may be especially notable: the Database coding shows twenty-five splits that year, but there are at least ten more cases that the Database does not show as splits but in which a split in authority is evident from the face of the opinions. These cases are listed in the Appendix – Table 1. To be clear, the “missing” splits are not always so obvious as they are in some of the examples shown above, in which splits are mentioned right next to the grant of certiorari. In some cases one has to look at other parts of the majority opinion or at a concurring or dissenting

¹⁸ 134 S. Ct. 2473, 2482 (2014).

¹⁹ Compare *id.* at 2481 (stating that the California Court of Appeal upheld a warrantless search of a cellphone incident to arrest), with *id.* at 2482 (stating that the First Circuit invalidated a similar search).

²⁰ In some cases, it is possible that the coding is simply an error. But there are too many cases for that to provide a full explanation. The protocol is just strict about listing conflicts as the reason for the grant.

opinion to find the evidence. (Here we are not even considering those other cases, discussed in the next section, in which there are splits that one cannot detect within the four corners of the opinions at all.)

In short, although the Supreme Court Database's strict coding rules for the certiorari variable are not inherently objectionable – just about any protocol is fine as long as one understands it – the Database is not a good tool for identifying cases that resolve conflicts, at least if one wants anything like comprehensiveness. Whether one needs a complete list depends, of course, on the aims of one's study. Incompleteness is certainly a problem if one's goal is to provide a precise accounting of how many splits the Court resolved in a given term or to produce a scorecard of how various circuits fared. Mere incompleteness is not necessarily a problem if one's aim is instead to detect empirical regularities in a large- n study of multiple years – though, as discussed in Part II.D, the possibility that the omitted observations are biased in various ways is a real concern.

As a final comment about using the Supreme Court Database to identify splits, I should emphasize that the pertinent limitations of the Database and the limitations of studies of parallel review only partly overlap. Researchers in law and political science can and do rely on the Database coding to locate splits for purposes besides deriving measures of parallel review; depending on what those studies aim to do, the limitations of the Database will be problematic to greater or lesser degrees.²¹ At the same time, one can construct measures of parallel review that do not involve using the Database at all, and some researchers have done just that. But, as I show next, eschewing reliance on the Database hardly solves all of the problems.

²¹ For studies using the Database to locate splits for purposes besides compiling measures of parallel review, see, e.g., Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 164 (2013); Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 546 (2010); Lindquist & Klein, *supra* note 8, at 144. In these studies, the ultimate aim is typically not to catalogue the results of every circuit split, and so the underinclusiveness discussed above is less of a worry. But the existence of certain types of bias in the data, which is a risk addressed in Part II.D, could well be a problem, depending on the aims of the study.

C. Splits Not Revealed in the Supreme Court's Opinions

One can capture additional splits by actually examining the Supreme Court's opinions to look for mentions of the lower courts, which is the approach taken in some other recent studies.²² In many cases, the information about a circuit split is readily locatable near the end of the section of the majority opinion setting forth the case's procedural background. To be more exhaustive, one would need to examine other parts of the majority opinion and separate concurrences and dissents as well, as the evidence of a split is not always in the most obvious location.²³ One can supplement visual skimming by searching the opinions for key words or terms such as "F.," which will find citations to the *Federal Reporter*.²⁴

How many more cases will one find by examining the Supreme Court's opinions? The number may fluctuate from year to year, and it will certainly depend on how closely one scrutinizes the opinions and how one defines the cases of interest. My examination of the Supreme Court's opinions from the 2010 Term revealed numerous splits that the Supreme Court Database did not include, but even my augmented count of splits represents less than half of the Court's docket for that year. Summers and Newman's methodology involved looking at the Court's opinions, and they similarly reported, for the 2005 to 2010 Terms, that fewer than half of the cases reaching the Supreme Court from the federal courts of appeals revealed

²² This is the approach employed in Summers & Newman, *supra* note 3. See *Supreme Court Project*, www.hangley.com/Supreme_Court_Project/ (last visited May 24, 2014) (describing their method). Hansford used Westlaw to search opinions for key terms likely to occur when a split is mentioned ("conflict," "division," etc.). Hansford, *supra* note 3, at 1175. Going forward, Cummins and Aft (now joined by Cumby as a new co-author) will read the opinions rather than relying on the Supreme Court Database as they did in the first two installments of their study – a change for which I commend them.

²³ See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2361 (2011) (not mentioning circuit split as the reason for granting certiorari but mentioning the division of authority shortly thereafter). Compare *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (stating that the Court granted certiorari "to resolve two questions," but not citing conflicting decisions), with *id.* at 1417 (Sotomayor, J., dissenting) (describing the conflicting approaches of several courts of appeals).

²⁴ My own recent study of the Supreme Court's handling of circuit splits combined approaches in this way. See Bruhl, *supra* note 8.

splits, which they defined broadly to include any case in which more than one circuit had addressed a question (even if those courts had not disagreed).²⁵ Depending on one's criteria and methods for defining and identifying splits, one might generate a somewhat higher count, but a figure in the ballpark of 50% still seems low, given what we know of the Court's case-selection practices.²⁶ The figure suggests that some splits are simply not being revealed anywhere in the Supreme Court's opinions.

Such "silent splits" do in fact exist. It is easy to discover instances in which the opinions are silent about conflict despite quite a long history of lower-court disagreement.²⁷ No amount of scouring of the *U.S. Reports* will find these cases. If one remains within the four corners of the decisions, one will totally miss some non-trivial number of resolutions of circuit splits. This compromises our ability to measure many things, including how often the Court agrees with the majority of the lower courts, which lower courts fare best, and the like.

D. Bias in the Omitted Data

Possibly even more distressing, though, is not the fact of undercounting but the risk of systematic bias in the omitted data. That is, the cases that a particular methodology misses might not be a ran-

²⁵ Summers & Newman, *supra* note 3, at 2.

²⁶ See *supra* note 14.

²⁷ For a notable recent example, consider *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), which concerned whether *Chevron* deference applies to an agency's determinations of its own "jurisdiction." That question had been dividing the lower courts for years, but the Court does not reveal this history. See *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012) (citing conflicting cases stretching back for decades), *aff'd*, 133 S. Ct. 1863 (2013). Similarly, the decision in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), which concerned the "cat's paw" theory of liability for employment discrimination, did not reveal that virtually every circuit had weighed in on how to apply that theory under various anti-discrimination statutes, that various tests had developed, etc. See Brief for the United States as Amicus Curiae, *Staub v. Proctor Hosp.*, 2010 WL 942803 at *7-9 (citing conflicting decisions from twelve circuits). There are many other examples of Supreme Court decisions that do not hint at the longstanding conflict that preceded them, and the phenomenon is not new. See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 436-37 (1996) (noting examples from the mid-1990s and linking the phenomenon to the development of an aloof, "Olympian" Supreme Court); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1167 (2012) (noting this phenomenon in the context of Fourth Amendment law).

dom subset of all cases resolving circuit splits. Bias could arise, for instance, if the Justices differ in their habits regarding whether and how to present splits in the opinions they author. And, in fact, it seems that they do differ in that regard. Justice Scalia has traditionally been especially likely *not* to mention the existence of a split even when one exists.²⁸ Thus, if one captures splits by relying on the opinions themselves, any such sample of cases is likely to underrepresent Scalia opinions.

The skew is even more pronounced if one identifies splits only by relying on the Supreme Court Database because, as discussed above, its protocol for coding the reason certiorari was granted appears to be quite sensitive to how exactly the opinion's author phrases the key language mentioning the grant. It is stunning to say, but the Database's coding for the 2010 through 2013 Terms – four years of decisions – reveals a total of only *three* Scalia majority opinions in which the grant of certiorari was motivated by conflict in the lower courts. Justice Sotomayor, by contrast, has *eighteen* opinions during those same years that are coded as involving splits. Any study of these years that uses the Database to identify splits will therefore include six times as many Sotomayor majority opinions as Scalia majority opinions. Other wide disparities include Chief Justice Roberts on the low side (five cases) and Justice Kagan on the high side (seventeen cases). Appendix – Table 2 provides the full results. To be sure, some of this variation may reflect the fact that the Justices are not assigned equal numbers of cases resolving splits,²⁹ but some of the

²⁸ My assessment is based, in part, on my impression of things after having reviewed many cases. As illustrations, note that *City of Arlington* and *Staub*, discussed in the previous footnote, were both Scalia opinions. My observations about Justice Scalia's stylistic tendencies accord with those of Arthur Hellman, who detected this pattern some years ago. Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 149 (2001). To be clear, this is not to say that Justice Scalia never mentions circuit splits; for recent instances in which he did, see *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1385 (2014); and *United States v. Woods*, 134 S. Ct. 557, 562 (2013). (The Database shows *Woods* as a conflict but not *Lexmark*, probably because the discussion of the conflicting circuit views in the latter was slightly separated from the sentence noting the grant of certiorari.)

²⁹ For example, one might expect that Justice Kagan, as the Court's most junior member, gets more than her share of technical statutory cases that the Court hears only because the

variation simply reflects differences in the Justices' writing styles.

Whether the disparities just mentioned are a serious problem depends on the research question being studied, but it should be a matter of concern for many questions. To give just one example, if Justice Scalia tends not to disclose splits as a matter of writing style, and also tends not to give much weight to the views of lower courts as a matter of methodological principle,³⁰ then those missing cases may feature lower agreement rates between the Supreme Court and the lower courts than one would find in the rest of the Court's cases.

Further, it may be that the Justices, or at least some of them on some occasions, reveal or obscure circuit splits selectively, so as better to bolster their opinions. That is, the authoring Justice (or his or her clerks) could, consciously or not, mention the split when the Court sides with the majority of the lower courts but remain silent otherwise. The presence of a dissent can act as a deterrent to self-serving biases or outright manipulation, or at least draw attention to such behavior, though that would not work when the Court is unanimous. Here I concede that I lack solid proof of strategic revelation of splits, but one need not be extraordinarily cynical to appreciate that it is a psychologically plausible scenario. And like the "Scalia effect" mentioned above, it could easily lead to overstatements of the rate at which the Supreme Court agrees with lower courts. At the same time, one could probably come up with plausible opposing stories according to which the Supreme Court's opinions could understate the rate of agreement.³¹

question has created a deep divide in the lower courts. In contrast, Chief Justice Roberts and Justice Kennedy, by virtue of their respective roles as Chief Justice and frequently decisive "swing Justice," may get a disproportionate share of the assignments in high-profile constitutional cases in which splits are less common (or at least less important in explaining the certiorari decision).

³⁰ That does seem to be the case. *See, e.g.*, *United States v. Tinklenberg*, 131 S. Ct. 2007, 2018 (2011) (Scalia, J., concurring in part and concurring in the judgment); *Brogan v. United States*, 522 U.S. 398, 407-08 (1998) (Scalia, J., dissenting); *see also* Bruhl, *supra* note 8, at 921 (discussing Justice Scalia's aversion to giving weight to lower courts' views).

³¹ Consider this possibility: 1) Unanimous decisions are more common when the Supreme Court agrees with most of the lower courts than when it disagrees; and 2) unanimous decisions are less likely than other decisions to reveal the state of the law in the lower courts (because, perhaps, there is less need to bolster the opinion). If those propositions

E. Beyond the Four Corners

It is not clear how best to identify all of the splits that are not revealed in the Court's decisions. One could read the certiorari petitions, of course, but taking them at face value would likely lead to overinclusion, given that petitioners have a powerful incentive to claim a conflict whenever possible. As a check on that tendency, one could consult the brief opposing certiorari, the lower-court decision under review, amicus briefs (especially from the Solicitor General), and other sources to see whether they agree with the petitioner. For older cases, one might even consult the Justices' papers to see whether a grant of certiorari was motivated by a split of authority or some other factor. The effort required to examine the briefing and other sources poses a severe problem for political scientists trying to conduct a large- n empirical study covering many years. The undertaking is more feasible if one is aiming for a more nuanced treatment of a smaller group of cases (say, a couple terms' worth).

Apart from the time required, there is the unfortunate fact that departing from the Supreme Court's own characterizations multiplies the subjective judgments involved in identifying the genuine conflicts. A thorough examination of the many complexities of identifying conflicts was written by Arthur Hellman in connection with his painstaking research on circuit splits.³² In addition to examining the Court's opinions to see whether they reported conflicts, he reviewed the certiorari briefing (including amicus briefs), the lower-court decisions of which review was sought and, in some cases, additional materials such as other lower-court decisions and secondary sources.³³ It was a major undertaking and one that required – as

are true, and if one makes certain further assumptions about the distribution of unanimous versus divided opinions and the rate at which each type of opinion reveals splits, the state of the law in the lower courts could be less likely to be mentioned when the Supreme Court agrees with most of the lower courts.

³² Hellman, *supra* note 28. A previous, similarly massive effort was the NYU Supreme Court Project. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 704-709 (1984) (describing the Project).

³³ Hellman, *supra* note 28, at 101-17, 147-53. Hellman looked at cases in which the Supreme Court granted certiorari, and he also looked at cases denied review to determine

Hellman repeatedly acknowledged – plenty of contestable judgment calls.³⁴ (Hellman’s aim was to identify circuit conflicts rather than to count exactly how many courts lined up on each side of a split; the latter task involves even more effort and subjectivity, as we will discuss shortly.)

How far one should go in an attempt to identify splits depends not just on the resources available but also, of course, on the goals of one’s study. If one is interested in how the Court presents itself, one would focus on the opinions. If one is interested in why the Supreme Court grants review, one would focus on the materials that are most certainly before the Court when it acts, namely the certiorari-stage briefing and the lower-court decision at issue.³⁵ If one wants to know how well various circuits predict the Supreme Court’s ultimate decisions or whether the Supreme Court is providing enough guidance to the legal system at large, one might need to look further or look elsewhere entirely.

III. COMPLEXITIES OF COUNTING CASES

Depending on the questions one hopes to answer, the next step after identifying the Supreme Court cases resolving conflicts might be the task of determining how the lower courts lined up on the question presented and which lower courts “won” and “lost.” That is the chore undertaken, for example, by the recent studies of circuit performance mentioned at the outset.³⁶

There are some threshold methodological choices here that can be answered by reflecting on the goals of one’s study. These include questions about which lower-court cases “count” – e.g., whether to include state supreme courts or only federal courts of appeals in

how many of them presented conflicts. The first of those tasks is the more relevant one here, but he used similar methods for both inquiries. *Id.* at 145, 147.

³⁴ See, e.g., *id.* at 103, 108, 111-12, 113-16.

³⁵ See Sup. Ct. R. 14.1(i) (requiring the decision below to be included as an appendix to the petition for certiorari). Of course, the Court’s knowledge is by no means limited to the materials presented to it, especially given modern electronic legal research.

³⁶ See generally *App. Rev. I*, *supra* note 3; *App. Rev. II*, *supra* note 3; Hansford, *supra* note 3; Summers & Newman, *supra* note 3.

one's tallies, whether to include unpublished decisions, and so on.³⁷

Much more vexing is the actual counting of the cases on each side. (The Supreme Court Database, just to be clear, does not attempt to do this even when it codes a case as resolving a split.) An accurate accounting of the size of a split is, like identifying the existence of a split, tougher than it seems. For one thing, even in those cases in which the Court actually refers to a split, sometimes it does not purport to fully document the split but instead writes something like “*Compare, e.g., [case], with, e.g., [another case].*” For instance, the Court’s opinion in *Henderson v. United States*³⁸ cites the case being reviewed and only two other circuits in describing the split, but the Solicitor General’s brief in response to the petition for certiorari detailed a much broader split.³⁹ As with the decision whether or not to reveal a split, it is plausible that Justices are more likely (whether consciously or not) to list more of the lower-court cases that agree with them than cases that disagree.

Moreover, even when all of the conflicting cases appear to be laid out in the Court’s opinions, sometimes the Justices will disagree over how to characterize a split. Consider, to pick one example, *Milner v. Department of the Navy*.⁴⁰ In this case, the majority insisted that the case involved a roughly even division in the lower courts, while the dissent accused the majority of joining the wrong side of a very lopsided split.⁴¹ Which side should we believe?

Given that the Court’s opinions offer only incomplete guidance on the breakdown of the lower courts, perhaps the researcher

³⁷ One’s choices on these matters can occasionally have striking results. For example, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012), is described by Cummins & Aft as a close split (three courts versus two) because they count only federal courts of appeals. *App. Rev. II, supra* note 3, at 47. Yet the two federal courts of appeals on the “minority” side of the split were joined by some *nine* state high courts. See *Perry*, 132 S. Ct. at 723 n.4. So, which is the minority and which is the majority? It depends on whether one is interested in evaluating the performance of the federal courts of appeals in particular (as Cummins and Aft are) or instead studying, more broadly, whether the Supreme Court sides with most lower courts.

³⁸ 133 S. Ct. 1121 (2013).

³⁹ *Compare id.* at 1125, with Brief for the United States, *Henderson v. United States*, 2012 WL 7069951 at *13-15 (citing various circuits).

⁴⁰ 131 S. Ct. 1259 (2011).

⁴¹ *Compare id.* at 1268-69, with *id.* at 1274 (Breyer, J., dissenting).

should independently investigate the underlying case law landscape. Unfortunately, independent investigation would not get at the whole truth either. Going outside the opinions in order to attempt to determine the actual circuit lineups in a split introduces tremendous complexity and subjectivity. The judgment calls include: whether certain cases truly conflict or are instead distinguishable, whether the allegedly conflicting rules are dicta or holdings, whether the lower courts involved in a split would still reach the same decisions today given intervening Supreme Court rulings, how to handle intra-circuit conflicts, how to handle alternate holdings, and so forth. Further, there is no clear stopping point once one departs the four corners of the opinions. Certiorari filings are not necessarily comprehensive and trustworthy. Those petitioning for certiorari may exaggerate conflicts, while respondents minimize or recharacterize them.⁴² Filings by the Solicitor General are more reliable, when they exist, but they are not wholly without guile or agenda. Lower-court opinions often collect cases on either side of a split, but there is no guarantee that those counts are comprehensive or totally evenhanded either. Even the most scrupulous law clerk charged with putting together such a string cite would have to make all of the contestable judgment calls just mentioned. The press of time probably leads the clerks, sometimes, to rely on the litigants' (less scrupulous) characterizations.⁴³ In order to attempt to achieve

⁴² Although Cummins and Aft generally do not consult extrinsic sources to find circuit breakdowns, they do examine the petitions for certiorari in a few instances. *App. Rev. I*, *supra* note 3, at 65 & n.41. If a petition for certiorari claims a conflict as the basis for review and then the Supreme Court grants certiorari, it is reasonable to assume that the case was granted because of the asserted conflict. But it is a different matter to rely on the petition as a source of accurate counts of how exactly the lower courts divided, especially if the petition's assertions are not corroborated by (relatively) more objective sources like the lower-court decision or the Solicitor General. A case that illustrates the risks is *Rehberg v. Paulk*, in which the Court's opinion mentions a split but does not list the participating circuits or how they divided. 132 S. Ct. 1497, 1501 (2012). Cummins and Aft score the decision as a 3-7 split, *App. Rev. II*, *supra* note 3, at 48, apparently in reliance on the petition for certiorari. But the other briefing in the case does not present the case that way, and it is not clear which of the various sources one should believe. After spending some time researching the matter, I am still not sure of the truth. (Part of the difficulty involves the level of generality at which to view the question presented.)

⁴³ An interesting question, suggested to me by Dru Stevenson, concerns *how* a circuit split

a complete and accurate accounting, a researcher would have to investigate all of the legal questions independently, but even a diligent investigation is by no means guaranteed to find an objective answer – indeed, the measurements may become more debatable the deeper one digs.

Take *Fowler v. United States*⁴⁴ as one illustration of the difficulties. That case concerned the interpretation of a witness-tampering statute making it a federal crime to kill a person in order to prevent a communication with federal law-enforcement officers about the commission of a federal offense.⁴⁵ The question before the Court was what, if anything, the prosecution had to prove about the likelihood that the victim actually would have communicated with federal officials.⁴⁶ The majority opinion, by Justice Breyer, did not fully document the split of authority: it cited a couple of clearly conflicting circuit decisions, but then it added a “see also” citation to a few more, without offering a parenthetical attempting to characterize their holdings.⁴⁷ Turning to the merits, the majority charted a middle course between an extreme pro-defendant interpretation advanced by Justice Scalia’s concurrence and an extreme pro-prosecution interpretation favored by Justices Alito and Ginsburg in dissent.⁴⁸ Justice Breyer’s majority opinion clearly departed from at least two circuits’ positions, but it is not exactly clear whether it was agreeing with the others. Having examined the assertions in the parties’ briefs (which are predictably conflicting) and the circuit decisions (some of which

comes to be characterized in a certain way. Each actor in the system engages in some independent research and evaluation of the state of the law, but each actor may also borrow from prior actors’ characterizations. That is, the Supreme Court’s description of a split might rely to a degree on how the certiorari briefing or the lower court presented the split, which might in turn depend in part on how the litigants presented the split in the court of appeals, and so forth. Cf. Pamela C. Corley, Paul M. Collins Jr. & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31 (2011) (showing, through the use of plagiarism-detection software, that the Supreme Court’s opinions often copy, with or without attribution, from the decision under review).

⁴⁴ 131 S. Ct. 2045 (2011).

⁴⁵ *Id.* at 2048 (citing 18 U.S.C. § 1512(a)(1)(C)).

⁴⁶ *Id.* at 2048, 2050.

⁴⁷ *Id.* at 2048-49.

⁴⁸ *See id.* at 2050-51.

are opaque or internally inconsistent), I am not quite sure how to score this one – and I am not alone in finding it difficult, as the conflicting assessments of other researchers show.⁴⁹

Another discouraging example is *Staub v. Proctor Hospital*.⁵⁰ Although the case involved a question of employment discrimination law that nearly all of the lower courts had encountered, Justice Scalia's opinion for the Court does not reveal this complicated history.⁵¹ One can seek information about the prior law in the briefs and elsewhere (though, again, finding the correct, complete, and impartial truth of the matter is a different story). Yet it remains hard to be sure which side of the split (if any) prevailed in the Supreme Court. In part, that is because Justice Scalia's opinion does not tell us about the different approaches or tell us which circuits are correct. But the nature of the question presented – namely, “the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision”⁵² – is such that the answer does not lend itself to a binary these-circuits-win-and-these-others-lose tally. We know that the Supreme Court rejected the approach of the court below, but it is not so clear what it actually endorsed. The more general lesson is that certain questions could be answered by the lower courts with every color of the rainbow, and yet the Supreme Court sometimes just tells us “not red or orange.”

As the reader can by now probably imagine, many more examples of the difficulties of accurately tallying circuit splits could be brought forth.

⁴⁹ Cummins and Aft score the case as a victory for four circuits and a loss for two. *App. Rev. I*, *supra* note 3, at 75. Summers and Newman score the case as a loss for all six circuits because the Supreme Court did not expressly agree with either of the camps' approaches. *Supreme Court Project*, *supra* note 22.

⁵⁰ 131 S. Ct. 1186 (2011).

⁵¹ Compare *id.* at 1189-90, with Brief for the United States as Amicus Curiae, *Staub v. Proctor Hosp.*, 2010 WL 942807 at *7-9.

⁵² 131 S. Ct. at 1189.

CONCLUSION

At this point the reader may well be convinced that counting circuit splits is complicated. Still, how much does all of this matter?

It depends. The difficulty of achieving precision is certainly a problem if one is attempting to capture the universe of conflict cases and measure that universe accurately. Accordingly, we should be cautious about statements to the effect that a particular circuit had the best record in the Supreme Court for a given term and came out on the winning side in $X\%$ of the splits the Court resolved. For other purposes, some imprecision and undercounting is acceptable, as long as the limitations are made clear to the reader. More worrisome, though, is the risk that the cases captured and then tallied are unrepresentative along certain dimensions. Justices differ in their writing styles, including their practices regarding whether and how they reveal splits in their opinions. All of the Justices, fallible humans as they are, have the incentive, and sometimes the opportunity, to reveal or obscure the state of the prior law selectively so as to make their decisions look most justified. In sum, although examining the phenomenon of parallel review is far more fruitful than simply calculating how often the Supreme Court affirms or reverses in the eighty or so particular cases on its merits docket, researchers and readers alike should exercise care lest they draw conclusions that are stronger than what the underlying methodology supports and what the nature of the enterprise allows.

APPENDIX

Table 1

Ten cases from 2010 Term that are not coded as splits in the Supreme Court Database but in which a split is revealed on the face of the decision. Note: This list does not include cases in which the lower courts were described as unanimous, which the Database also does not capture; see note 9 and accompanying text for some examples of such cases.

Case name/citation	Location where split is revealed	Database coding for cert. grant variable
L.A. County, Cal. v. Humphries, 131 S. Ct. 447 (2010)	131 S. Ct. at 450 (opinion of the Court)	no reason given
CSX Transp., Inc. v. McBride, 131 S. Ct. 2630 (2011)	131 S. Ct. at 2636, 2640 (opinion of the Court)	to resolve question presented
CSX Transp., Inc. v. Ala. Dep't of Revenue, 131 S. Ct. 1101 (2011)	131 S. Ct. at 1106 (opinion of the Court)	no reason given
Astra USA, Inc. v. Santa Clara County, Cal., 131 S. Ct. 1342 (2011)	131 S. Ct. at 1347 (opinion of the Court)	no reason given
Bond v. United States, 131 S. Ct. 2355 (2011)	131 S. Ct. at 2361 (opinion of the Court)	no reason given
United States v. Tinklenberg, 131 S. Ct. 2007 (2011)	131 S. Ct. at 2014 (opinion of the Court)	to resolve question presented
Freeman v. United States, 131 S. Ct. 2685 (2011)	131 S. Ct. at 2698 (Sotomayor concurrence)	no reason given
Schindler Elevator Corp. v. U.S. ex rel. Kirk, 131 S. Ct. 1885 (2011)	131 S. Ct. at 1890 (opinion of the Court)	no reason given
Cullen v. Pinholster, 131 S. Ct. 1388 (2011)	131 S. Ct. at 1417 (Sotomayor dissent)	to resolve question presented
Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011)	131 S. Ct. at 2816 (opinion of the Court)	no reason given

MEASURING CIRCUIT SPLITS

Table 2

Cases from 2010 through 2013 Terms that are coded as conflicts by the Supreme Court Database’s “certReason” variable, disaggregated by Justice. As with the figures reported in the text accompanying footnote 13, these figures reflect the sum of “certReason” variable codes 2 through 9, which involve various types of splits or confusion in the lower courts. The figures are derived from the following version of the database: *2014 Release 01, Case-centered/Citation-organized dataset* (July 23, 2014), SUPREME COURT DATABASE, scdb.wustl.edu/data.php.

	Roberts	Scalia	Kennedy	Thomas	Ginsburg	Breyer	Alito	Soto.	Kagan	Total
OT2010	1	1	3	3	3	4	2	3	5	25
OT2011	2	1	1	1	4	2	3	5	3	22
OT2012	0	0	3	4	6	4	6	6	3	32
OT2013	2	1	4	2	1	2	0	4	6	22*
Total	5	3	11	10	14	12	11	18	17	101

* This total for OT2013 does not include two cases that the Database codes as conflicts but with no authoring Justice listed. In both cases the Court’s decision was *per curiam*, though in one of these cases the Database apparently bases its coding on information in Justice Breyer’s dissent. *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting from the Court’s dismissal of the writ as improvidently granted).

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APPELLATE REVIEW III

OCTOBER TERM 2012 AND COUNTING

Tom Cummins, Adam Aft, and Joshua Cumby[†]

Twenty-six percent.¹ In reviewing the judgments of the federal appellate courts during the October Term 2012 (“OT12”), the Supreme Court affirmed the judgment below only 26 percent of the time.² By this measure, the circuits appear to be doing rather poorly on appellate review. But, as we at the *Journal of Legal Metrics* have attempted to show over the past few years, appearances can be deceiving.³

With this brief essay, we are pleased to once again offer our preferred metric of federal appellate court performance. We are also delighted to present in this issue Professor Aaron-Andrew P. Bruhl’s *Measuring Circuit Splits: A Cautionary Note*, which identifies certain improvements that can be made to the metric.⁴ We commend that work, and this, to your attention. Now let’s go back a few years.

[†] Tom Cummins and Joshua Cumby are senior editors of the *Journal of Legal Metrics*. Adam Aft is a co-Editor-in-Chief of the *Journal of Legal Metrics*.

¹ See SCOTUSblog, Stat Pack for October Term 2012 (June 27, 2013), at sblog.s3.sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog_StatPack_OT121.pdf (“SCOTUSblog Stat Pack”).

² We recognize that federal district courts also have appellate jurisdiction over some matters. We nevertheless use the shorthand “federal appellate courts” to refer to the U.S. Circuit Courts of Appeals having full confidence in the sophistication and intelligence of our readers.

³ Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L. (1 J. LEGAL METRICS) 59 (2012) (“*Appellate Review I*”); Tom Cummins & Adam Aft, *Appellate Review II – October Term 2011*, 3 J.L. (2 J. LEGAL METRICS) 37 (2013).

⁴ As discussed below, certain of those improvements have in fact been made to the metric for the OT stat pack.

I. PARALLEL REVIEW

A few years ago, two of this essay's authors had an idea for a marginally improved way to evaluate the federal courts of appeals' performance: calculate the rate at which the courts' work is tacitly approved of by the Supreme Court in its resolution of circuit splits.⁵

A "circuit split," as we use the term, is when one decision of one federal court of appeals conflicts with another.⁶ For example, assume that the Fifth Circuit decides a particular case using reasoning consistent with an earlier Fourth Circuit decision, but inconsistent with the reasoning of earlier First, Third, and Seventh Circuit decisions. This is a circuit split.

Resolving circuit splits is one of the most frequent reasons that the Supreme Court grants a petition for a writ of certiorari.⁷ Rather than simply calculating how frequently the Supreme Court affirms the specific judgment on which the writ is issued (what we term the "primary review" affirmance rate), we set out to measure how often the Court approves the federal appellate courts' conclusions on issues causing circuit splits.⁸ A mouthful, we know, but really the idea was as straightforward as counting the winners and losers in the circuit split resolutions.⁹ We termed our metric the "parallel re-

⁵ Cummins & Aft, *Appellate Review I*. As discussed in that article, our metric was not entirely novel. See, e.g., Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011).

⁶ Cf. SUP. CT. R. 10(a). In this context, we limit the term "circuit split" to splits between federal appellate courts – more precisely, inter-circuit splits (though we recognize that intra-circuit splits can arise from time to time) – and exclude splits that are limited to disagreements between federal and state courts on an issue (as a semantic matter, we think, these types of splits are not "circuit splits," but lower court splits).

⁷ Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L. (3 J. LEGAL METRICS) 361, 361 (2014).

⁸ From the beginning, we acknowledged that the Supreme Court is not right in picking winners losers because it is necessarily correct on the law; rather, it is right because it is last. Or, as Justice Jackson once put the point, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

⁹ As Professor Bruhl points out, while the idea may be straightforward, the application is not. Bruhl, *supra* note 7, at 362.

view” affirmance rate, as it counts not only the Court’s evaluations of the court below, but also its evaluations of the decisions of other federal appellate courts on the question.

Returning to the above example, assume that the Supreme Court grants cert in the Fifth Circuit decision to resolve the disagreement between the Fifth and Fourth Circuits on the one hand and the First, Third, and Seventh Circuits on the other, and that the Court affirms the Fifth Circuit. The “primary review” affirmance rate captures only the Fifth Circuit decision. The “parallel review” affirmance rate measures not only the Fifth Circuit decision, but also the First, Third, Fourth, and Seventh Circuit decisions. In the example, the Fourth and Fifth Circuits are “winners,” while the First, Third, and Seventh Circuits are “losers.”

Our objective in formulating this metric was (and still is) quite simple. Offer a better set of data on federal appellate court performance than that offered by the ubiquitous primary review metric. The shortcomings of that metric have been examined in some detail elsewhere, including in previous installments of our *Appellate Review*. Here, we merely mention two in passing: sample size and selection bias.

In recent years, the Court has typically reviewed about one tenth of one percent of the judgments of the circuit courts.¹⁰ And these cases are not selected with an equal likelihood of affirmance or reversal; rather, a robust body of research suggests that the Court has a “decided propensity”¹¹ to grant certiorari in cases that it intends to reverse.¹² In short, the primary review metric is under-representative and non-random.

The parallel review metric is not perfect, but it is better. In particular, it substantially mitigates the selection bias problem, as resolving

¹⁰ See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan.-Feb. 2010, at 8 (collecting statistics).

¹¹ Thomas Baker, *The Eleventh Circuit’s First Decade Contribution to the Law of the Nation, 1981-1991*, 19 NOVA. L. REV. 323, 327 (1994) (“The ‘decided propensity’ of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse.”).

¹² See RICHARD FALLON *et al.*, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1469 (6th ed. 2009) (collecting sources).

circuit splits generally involves both winners and losers.¹³ Moreover, the metric compares the courts' performance on the same legal questions. Apples-to-apples, as they say. And the metric compares legal questions of a certain degree of difficulty: those on which the courts have reached conflicting conclusions.

This is not to suggest that the parallel review metric is the only standard by which to measure the review of appellate courts' performance.¹⁴ Rather, it is a marginally improved one. Yet, as Professor Bruhl observes, it is also one that can itself be improved on.

II. THE METHOD

Previously, our data collection started with the Supreme Court Database, which we used to quickly identify Supreme Court opinions addressing circuit splits.¹⁵ From this set, we eliminated opinions that did not both resolve the split and explicitly identify courts involved in the split. Finally, generally confining ourselves to the four corners of the opinion of the Court, we counted up the winning and losing circuits.¹⁶

We recognized that limiting the count this way would likely be under-inclusive. But we did so to provide the most objective data on circuit split resolution.¹⁷ What we did not recognize is that starting

¹³ The resolution "generally," but not always, involves winners and losers. For an example of a resolution from OT12 in which the Court disagreed with both sides of a circuit split and took the law down a third path, see *Ryan v. Gonzales*, 133 S. Ct. 696 (2013). We elaborate on why we characterize this case as a circuit split below.

¹⁴ As two of this article's authors have previously discussed, although parallel review offers an improved review of appellate performance, the metric does not purport to offer a comprehensive assessment of the performance of these courts. Indeed, the metric does not even purport to offer a comprehensive evaluation of the Court's assessment of circuit court performance. For example, evaluating the rate of summary reversals would provide a qualitatively different type of assessment – how often the courts of appeals are getting the answers to straightforward questions, or at least what the Court views as straightforward questions, correct.

¹⁵ *The Supreme Court Database*, scdb.wustl.edu/ (last visited Sept. 24, 2014).

¹⁶ We excluded the Federal Circuit, however, because its jurisdiction is statutorily distinct, and far more limited, than that of the other twelve federal courts of appeals.

¹⁷ In other words, we decided to risk being under-inclusive to eliminate the risk that our interpretative bias would affect the results. The justices' own interpretative biases, if any, were accepted as the least bad solution to the problem of subjectivity inherent in categorizing

with the Supreme Court Database would also be under-inclusive.

Then along came Professor Bruhl.

As the professor powerfully demonstrates, this database is not a wholly reliable source on opinions addressing splits; rather, the database appears to pose a distinct risk of being under-inclusive.¹⁸ Too great a risk for us, in fact. So, with sincere thanks to Professor Bruhl, we have decided to modify our method.

Beginning with our data collection for OT12, we skipped the Supreme Court database and went straight to the opinions themselves. We read them all (78 for OT12, for those keeping track of such things) to identify which resolve circuit splits.¹⁹ In doing so, we found Bruhl's observation holds true for OT12: The Supreme Court Database is both over- and under-inclusive for our purposes. As an initial matter, the Supreme Court Database identifies 23 circuit splits.²⁰ We count 27.²¹ Moreover, we exclude five of the Supreme Court Database's 23 cases because the four corners of the Supreme Court's opinion do not acknowledge the split, identify federal appellate courts on either side, and resolve the split. We also include 10 cases that meet these three criteria that are not identified in the Supreme Court Database.²²

The other components of our method do not change. Specifically, in gathering the parallel review statistics for OT12, we continue

opinions.

¹⁸ Bruhl, *supra* note 7, at 367 n.13 and related text.

¹⁹ Although a more demanding project, the endeavor has been made much more manageable with the addition of the newest member of the *Appellate Review* team, Joshua Cumby. To state the obvious, however, we are neither infallible nor final. See *supra* note 7. Reasonable minds may disagree with our count, perhaps, for some of the cases discussed below in Appendix A.

²⁰ *The Supreme Court Database*, scdb.wustl.edu/ (last visited Sept. 24, 2014).

²¹ The 27 cases are listed in appendix B.

²² The 10 cases are *Bullock v. BankChampaign*, 133 S. Ct. 1754(2013); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013); *Henderson v. United States*, 133 S. Ct. 1121(2013); *Kloeckner v. Solis*, 133 S. Ct. 596 (2013); *Lozman v. The City of Riviera Beach, Florida*, 133 S. Ct. 735 (2013); *McBurney v. Young*, 133 S. Ct. 1709 (2013); *Ryan v. Gonzales* (consolidated with *Tibbals v. Carter*), 133 S. Ct. 696 (2013); *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013); *Salinas v. Texas*, 133 S. Ct. 2174 (2013).

to count the resolution of circuit splits – and only circuit splits.²³ And, as noted, we continue to confine our count to the four corners of the Court’s opinion.²⁴ In light of Professor Bruhl’s thoughtful remarks on these two matters, however, we briefly revisit our reasons for each before turning to the much anticipated (and, admittedly, somewhat delayed) parallel review stats for OT12.

A. Federal Conflicts

Our stat pack for OT12 (for those of you who may have skipped or lightly skimmed the preceding paragraph) includes only the Court’s resolutions of circuit splits. The Court’s resolution of conflicts between federal and state courts are excluded, as are other cases that do not expressly resolve a circuit split. Why exclude these cases? As a threshold matter, comparing one sovereign’s intermediate appellate court to another sovereign’s highest court isn’t necessarily a fair comparison. In general, federal appellate courts share a common role and goals. State courts of last resort have a different role and, perhaps, different goals. Our objective, moreover, remains focused on comparing federal appellate courts’ performance against their peers.

Consequently, for the OT12 stat pack we exclude four federal-state court conflicts: *Evans v. Michigan*,²⁵ *Hillman v. Maretta*,²⁶ *Koontz*

²³ Or opinions, in the case of concurrences or dissents, since our method is confine ourselves to what the justices write (i.e., what is contained within the four corners of the opinions), but not to limit ourselves to only majority opinions.

²⁴ The five excluded cases are *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Horne v. Department of Agriculture*, 133 S. Ct. 2053 (2013); *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); and *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). We exclude *Clapper* and *Horne* because the Court does not expressly acknowledge a split, identify circuits on either side, and resolve the split. We exclude *Genesis Healthcare* because the Court expressly states in the opinion that it is not resolving the split. We exclude *Koontz* for reasons explained below in Appendix A. And we exclude *McNeely* because it was a state court split, not a federal appellate court split.

²⁵ 133 S. Ct. 1069 (2013). For those interested in such things, no circuit would have tallied a “win” in *Evans* and one, the Third Circuit, would have tallied a “loss.”

²⁶ 133 S. Ct. 1943 (2013). For those interested in such things, four circuits would have tallied a “win” in *Hillman*: the First, Second, Tenth, and Eleventh Circuits. None would have tallied a “loss.”

v. St. Johns River Water Management District,²⁷ and *Wos v. E.M.A.*²⁸ Of passing interest, all four raise issues of federalism, expressly or otherwise.²⁹

Likewise, although the data set would contain more information if we included all of the Court's opinions, regardless of whether they resolve a circuit split, it is not obvious to us that these additional data points would provide a better measure of federal appellate court performance. Rather, for reasons outlined above, it appears that this would potentially be clouding the evaluation we strive to present – including oranges, as the cliché has it, in an otherwise apples-to-apples comparison. Accordingly, we continue to limit our stat pack to cases resolving circuit splits.

B. Four Corners

We also continue to generally confine the stat pack data to the four corners of the Court's opinions. That is, we include only those cases in which the Court both resolves a split and explicitly identifies courts involved in the split.

Recognizing that this limitation will be under-inclusive, we continue to think that substituting our judgments about whether the Court's opinion addresses a circuit split (instead of relying on the express statements of the Court on the matter) injects an extra dose of subjectivity that is best avoided. More fully, although it is emphatically not the province and duty of the Supreme Court to say what the circuit split is, we continue to think that what the Court actually says is the most reliable source of information on the question, given the practical limitations that constrain our data collection.³⁰

²⁷ 133 S. Ct. 2586 (2013). For those interested in such things, no circuit would have tallied a “win” in *Koontz* and one, the Ninth Circuit, would have tallied a “loss.”

²⁸ 133 S. Ct. 1391 (2013). For those interested in such things, the Fourth Circuit would have tallied a “win” and the North Carolina Supreme Court would have tallied a “loss.”

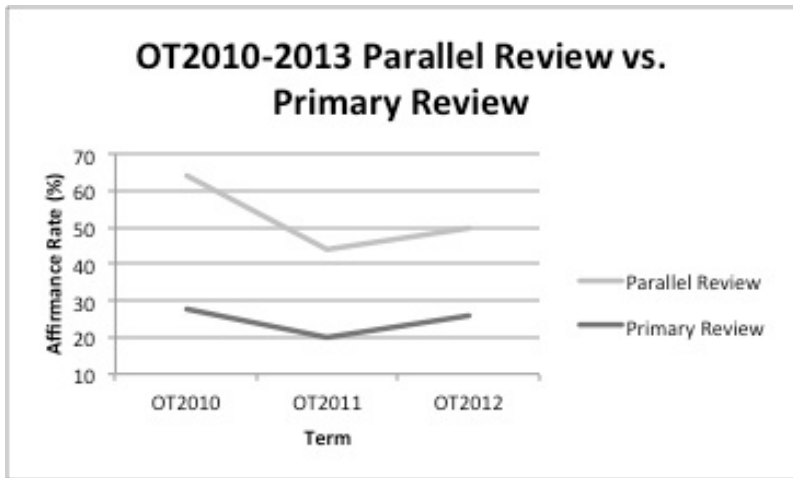
²⁹ *Evans* involved a Double Jeopardy Clause question, *Hillman*, a preemption question, and *Koontz*, a takings question. *See, e.g.*, 133 S. Ct. at 1082 (Alito, J., dissenting).

³⁰ As Professor Bruhl cogently observes, certain justices appear to have a habit of mentioning circuit splits as applicable, while others do not. Bruhl, *supra* note 7, at 373 n.28 and related text.

Consequently, the parallel review stat pack does not include cases such as *Maryland v. King*,³¹ despite the majority opinion observing that “federal and state courts have reached differing conclusions,”³² since neither the majority opinion nor the dissent identify which federal appellate courts reached what conclusions. In short, we are knowingly under-inclusive.

III. THE LATEST RESULTS

This year we are going to let the results largely speak for themselves.³³ Nevertheless, a couple of points merit mention. First, as in years past, we see an overall parallel affirmance rate roughly twice that of primary review.

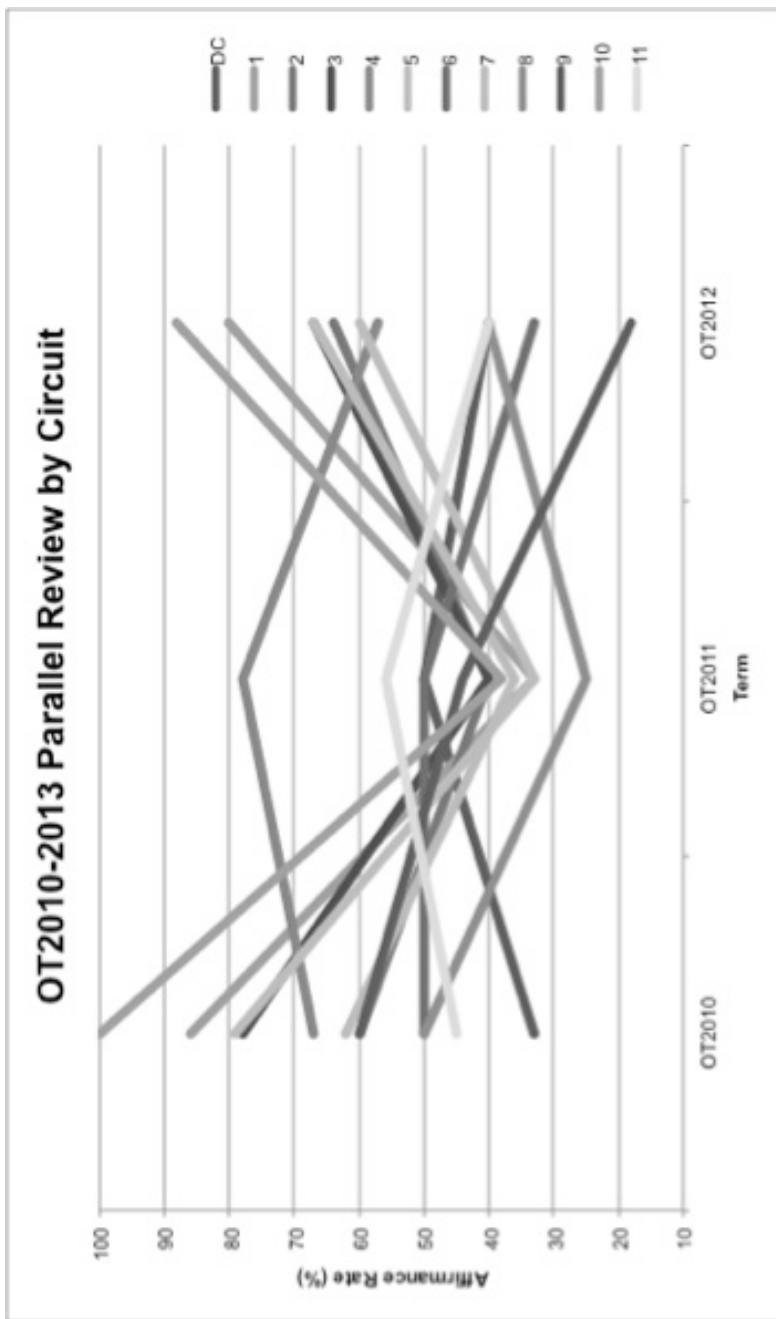


We also continue to see a fairly substantial amount of movement in how the circuits stack up against their peers year-over-year.

³¹ 133 S. Ct. 1958 (2013).

³² 133 S. Ct. at 1966.

³³ This too is due in no small measure to Professor Bruhl’s insights.



And finally, for those interested in rankings, unabashed rankings, without further ado we present the OT12 scorecard:

October Term 2012 Parallel Review Affirmance Rates					
Rank	Circuit	Wins	Losses	AB	Rate
1	10th	7	1	8	88%
2	1st	4	1	5	80%
3	7th	6	3	9	67%
4	2nd	7	4	11	64%
5	5th	6	4	10	60%
6	4th	4	3	7	57%
7	8th	2	3	5	40%
8	11th	4	6	10	40%
9	DC	2	3	5	40%
10	3rd	4	7	11	36%
11	6th	3	6	9	33%
12	9th	2	9	11	18%

After a down year in October Term 2011, the Tenth Circuit has come roaring back to the top of the parallel review rankings. The Ninth Circuit, however, has continued its decline from its lofty start (well, the start of our counting at least) as one of the higher-ranked parallel review circuits. As can be seen on the graph above, albeit busy, many of the other circuits are staying on a similar trend to past years' performances in the parallel review statistics. This observation is one of the more interesting in the context of our long-term tabulation of the parallel review data. If we are able to observe significant trends then we, or other researchers, may be able to look for the meaning behind the trends, what makes a court of appeals more likely to perform well on parallel review cases: homogeneity, heterogeneity, bigger, smaller, large case load, small case load, and many more possible data points to consider in looking beyond the data. To be continued . . .

APPENDIX A: CASE NOTES (I.E., CAVEAT LECTOR)

Our methods of data collection are employed to offer you with the most objective data available. Nevertheless, certain judgments must be made. Three cases included in the OT12 statistics warrant particular explanation.³⁴

1. *Bullock v. BankChampaign*

Some legal issues are readily reducible to a binary yes-no question. The issue in *Bullock v. BankChampaign*³⁵ isn't. The question is how does Section 523(a)(4) of the Federal Bankruptcy Code define "defalcation"? More fully, does defalcation include a scienter requirement? And if so, what type of requirement?

In Justice Breyer's unanimous opinion for the Court, he observes how the question has splintered the federal appellate courts into at least three groups. At one end of the spectrum, the Ninth Circuit finds defalcation to include "even innocent acts of failure to fully account for money received in trust."³⁶ In accord, the Fourth Circuit finds defalcation to occur if "even an innocent mistake" causes misappropriation of money received in trust.³⁷ The Eleventh Circuit, in contrast, requires "conduct that can be characterized as objectively reckless."³⁸ Finally, taking the matter one step further, the First and

³⁴ One case not included in the statistics, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), also merits a few words of explanation. As an initial matter, the case appears to be a somewhat early example of the Court's developing "faux-nanimity." Roberts writes the opinion of the Court on behalf of five justices, holding that the Alien Tort Statute ("ATS") doesn't have extraterritorial reach. The majority does not identify a circuit split. Breyer's four-justice concurrence reads like a rather vigorous dissent, concurring only in the judgment. Pertinent to our purposes, the concurrence observes that "courts have consistently rejected the notion that the ATS is categorically barred from extraterritorial application." *Id.* at 1675 (Breyer, J., concurring) (emphasis added) (collecting cases). In short, no circuit split is identified, although one may well exist (as it appears a split may exist among the justices on the question presented, notwithstanding their ostensible "agreement" in this case).

³⁵ 133 S. Ct. 1754 (2013).

³⁶ *Bullock*, 133 S. Ct. at 1758 (quoting *In re Sherman*, 658 F. 3d 1009, 1017 (9th Cir. 2011)).

³⁷ *Bullock*, 133 S. Ct. at 1758 (quoting *In re Uwimana*, 274 F. 3d 806, 811 (4th Cir. 2001)).

³⁸ *Bullock*, 133 S. Ct. at 1758 (quoting *Bullock v. BankChampaign*, 670 F.3d 1160, 1166

Second Circuits require “something close to a showing of extreme recklessness.”³⁹

Writing for the Court, Justice Breyer concludes that defalcation requires intentional wrongdoing, bad faith, moral turpitude, other immoral conduct, or reckless conduct of the type identified by the Model Penal Code. We count this as a win for the First and Second Circuits and a loss for the Fourth, Ninth, and Eleventh, though we recognize that reasonable minds may disagree with our counting this as a loss for the Eleventh.

2. *McQuiggin v. Perkins*

Similar to *Bullock*, *McQuiggin v. Perkins*⁴⁰ resists ready parallel review categorization. The most that we think can be said from the four corners of the opinion is that the Sixth and Seventh Circuits lose, albeit for different reasons.⁴¹

The two questions presented, as framed by the Court, are: (1) whether a claim of actual innocence may be raised in a federal habeas petition after the statute of limitations has expired; and, if so, (2) whether the delay in filing the petition should be considered in the appraisal of the actual innocence claim.

The Seventh Circuit answered no to the first question, and so did not reach the second.⁴² The Sixth Circuit answered yes to the first question, no to the second.⁴³ The Court, in contrast, answered yes to both questions. So we count this as a loss for both circuits, albeit for different reasons.

(11th Cir. 2012), *rev'd* 133 S. Ct. 1754 (2013)) (brackets omitted).

³⁹ *Bullock*, 133 S. Ct. at 1758 (quoting *In re Baylis*, 313 F. 3d 9, 20 (1st Cir. 2002)); *see also Bullock*, 133 S. Ct. at 1761 (quoting *In re Hyman*, 502 F. 3d 61, 69 (2d Cir. 2007)).

⁴⁰ 133 S. Ct. 1924 (2013).

⁴¹ The Court also references decisions of the Second and Eleventh Circuits, but does not unequivocally state agreement or disagreement with either circuit. *Id.* at 1930-31 (citing *Rivas v. Fischer*, 687 F.3d 514, 548 (2d Cir. 2012); *San Martin v. McNeil*, 633 F.3d 1257, 1267-1268 (11th Cir. 2011)). Because we confine our statistics to the four corners of the Court's opinions, we do not include those circuits in the count.

⁴² *McQuiggin*, 133 S. Ct. at 1931 (quoting *Escamilla v. Jungwirth*, 426 F.3d 868, 871-72 (7th Cir. 2005)).

⁴³ *Perkins v. McQuiggin*, 670 F.3d 665 (6th Cir. 2012), *rev'd sub nom McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013).

3. *Ryan v. Gonzales* (consolidated with *Tibbals v. Carter*)

The question presented in *Ryan v. Gonzales*⁴⁴ is whether death row inmates pursuing federal habeas relief have a statutory right to a suspension of proceedings when found incompetent. The Sixth Circuit held that inmates do, locating the right in 18 U.S.C. § 4241.⁴⁵ The Ninth Circuit agreed that such a right existed, but located it in 18 U.S.C. § 3599.⁴⁶ In short, the circuits split on the question (albeit while reaching the same ultimate answer). The Court consolidated the cases, rejected both approaches, and held that no such statutory right exists. Although reasonable minds may disagree, we count this as a circuit split in which both circuits “lose.”

APPENDIX B:

WINS, LOSSES, AT BATS, AND WINNING PERCENTAGE
(SORTED BY WINNING PERCENTAGE)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court Vote
Levin v. United States	133 S. Ct. 1224	3 to 1	6, 7, 10	9	9 to 0
Sebelius v. Auburn Regional Medical Center	133 S. Ct. 817	0 to 3	None	8, 11, DC	9 to 0
Bailey v. United States	133 S. Ct. 1031	0 to 7	None ⁴⁷	2, 4, 5, 6, 7, 10, 11	6 to 3
Millbrook v. United States	133 S. Ct. 1441	1 to 2	4	3, 9	9 to 0
US Airways v. McCutchen	133 S. Ct. 1537	5 to 2	5, 7, 8, 11, DC	3, 9	5 to 4
Moncrieffe v. Holder	133 S. Ct. 1678	2 to 3	2, 3	1, 5, 6	7 to 2
McBurney v. Young	133 S. Ct. 1709	1 to 1	4	3	9 to 0
Bullock v. BankChampaign	133 S. Ct. 1754	2 to 3	1, 2	4, 9, 11	9 to 0

⁴⁴ 133 S. Ct. 696 (2013).

⁴⁵ *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011), *rev'd sub nom Tibbals v. Carter*, 133 S. Ct. 696 (2013).

⁴⁶ *Gonzales v. U.S. Dist. Ct. for Dist. of Ariz.*, 623 F.3d 1242 (9th Cir. 2010), *rev'd sub nom Ryan v. Gonzales*, 133 S. Ct. 696 (2013).

⁴⁷ Both the majority opinion and dissent note the circuit split, but neither identifies any courts on the “winning” side of the split. *E.g.*, *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013); *id.* at 1048 (Breyer, J., dissenting).

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Case	Cite	Split	Winning Circuits	Losing Circuits	Court Vote
PPL Corp. v. IRS	133 S. Ct. 1897	1 to 1	5	3	9 to 0
McQuiggin v. Perkins	133 S. Ct. 1924	0 to 2	None	6, 7	5 to 4
Henderson v. United States	133 S. Ct. 1121	1 to 2	10	5, DC	6 to 3
Ryan v. Gonzales (consolidated with Tibbals v. Carter)	133 S. Ct. 696	0 to 2	None	6, 9	9 to 0
Amgen Inc. v. Connecticut Retirement Plans and Trust Funds	133 S. Ct. 1184	2 to 2	7, 9	2, 3	6 to 3
FTC v. Phoebe Putney Health System, Inc.	133 S. Ct. 1003	4 to 1	5, 6, 9, 10	11	9 to 0
Marx v. General Revenue Corp.	133 S. Ct. 1166	1 to 1	10	9	7 to 2
The Standard Fire Insurance Co. v. Knowles	133 S. Ct. 1345	1 to 1	10	8	9 to 0
Kloeckner v. Solis	133 S. Ct. 596	2 to 1	2, 10	8	9 to 0
Lozman v. The City of Riviera Beach, Florida	133 S. Ct. 735	1 to 1	5	11	7 to 2
Kirtsaeng v. John Wiley & Sons, Inc.	133 S. Ct. 1351	1 to 2	3	2, 9	6 to 3
Chaidez v. United States	133 S. Ct. 1103	3 to 1	5, 7, 10	3	7 to 2
Peugh v. United States	133 S. Ct. 2072	5 to 1	2, 4, 6, 11, DC	7	5 to 4
Oxford Health Plans v. Sutter	133 S. Ct. 2064	2 to 1	2, 3	5	9 to 0
United States v. Davila	133 S. Ct. 2139	5 to 3	1, 3, 4, 5, 7	6, 9, 11	9 to 0
Salinas v. Texas	133 S. Ct. 2174	1 to 1	11	DC	5 to 4
FTC v. Actavis, Inc.	133 S. Ct. 2223	2 to 1	2, 11	3	5 to 3 (Alito recused himself)
Descamps v. United States	133 S. Ct. 2276	2 to 2	1, 2	6, 9	8 to 1
Vance v. Ball State University	133 S. Ct. 2434	3 to 2	1, 7, 8	2, 4	5 to 4

#