

**Unresolved Intercircuit Conflicts:
The Nature and Scope of the Problem**

Final Report: Phase I

December 1991

Arthur D. Hellman
University of Pittsburgh School of Law

Federal Judicial Center Contract
No. 91-092800-JXXXXXC-84432-2501

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Acknowledgments

Although work on the intercircuit conflict project continues into a second phase, it is not too soon to express thanks to the many people and institutions who have made it possible to bring this first phase to completion.

Throughout the study we received full cooperation from the Supreme Court itself. Members of the Court gave generously of their time, and I have benefited greatly from their insights. The Court's staff was extremely helpful; I must particularly thank Francis J. Lorson, Chief Deputy Clerk; Richard G.R. Schickele, Counsel to the Court; and Benny Lu and William V. Gullickson of the Clerk's Office.

Much of the administrative work required by a project of this magnitude was carried on at the University of Pittsburgh School of Law. In particular, I am grateful to LuAnn Driscoll and the staff of the word-processing center for assistance in preparation of the data and to Dean Mark A. Nordenberg for his continuing encouragement and support.

In the course of the work, I had the benefit of counsel from a number of friends and colleagues; at the risk of omitting others, I must mention Harry Flechtner, Leon J. Gleser, and David L. Kaye. For sound advice at key moments, I thank Jerry and Bonnie Hellman.

Five students of the University of Pittsburgh School of Law took part in the work on this project. Among other tasks, they examined literally thousands of cases and ran hundreds of computer searches. Maryellen Noreika, Todd Tiberi, and Peter G. Berger also provided editorial, administrative, and technical support. Madelaine Baturin and Rebecca Rosenberger furnished additional assistance in the research.

As the sponsor of the research, the Federal Judicial Center has provided a maximum of support with a minimum of bureaucracy. Darlene Davis, Research Associate, has helped in various ways throughout the project; Patricia A. Lombard, Senior Research Associate, provided assistance at a critical early stage. William B. Eldridge, Director of the Division of Research, made the impressive resources of the division, as well as his own insights, available to our project. Russell G. Wheeler, Deputy Director of the Center, and Charles H. Nihan, his predecessor, facilitated project arrangements under great time pressure.

I must express special thanks to James B. Eaglin, Assistant Director of Research, and to Judge William W. Schwarzer, the Director of the Center. Working with Jim Eaglin has been a pleasure as well as a rewarding professional experience. Although Jim soon learned that a phone call from me usually meant that the project needed something, I could count on him to do his best, not only to come through with resources, but also to offer thoughtful suggestions for every aspect of the project. Judge Schwarzer gave me a rare opportunity: he invited me to investigate a fascinating problem, provided the tools, and let me do the job.

One final note is in order. A study of intercircuit conflict is, in the end, a study of precedent; and in such a study there is no escaping the need for judgment. Although I have had a great deal of help in research and organization, I take full responsibility for the judgments that underlie the results reported here.

Executive Summary

In section 302 of the Judicial Improvements Act of 1990, Congress took steps to address long-felt concerns about the capacity of the federal judicial system to provide, within a reasonable time, a uniform construction of federal laws where uniformity is needed. Adopting a recommendation of the Federal Courts Study Committee, Congress requested that the Federal Judicial Center undertake a study to determine "the number and frequency of conflicts among the judicial circuits . . . that remain unresolved because they are not heard by the Supreme Court." The Center asked me to design and conduct the study. The first phase of the research has now been completed, and the results are presented in this report.

Sampling the docket. The method devised for the study was to analyze two groups of cases -- one concentrated, the other dilute -- that the Supreme Court declined to hear. The first group included all cases in the three most recent Terms (1988, 1989, and 1990) in which Justice White dissented from denial of certiorari, whether or not he specifically noted the presence of a conflict. The second group was a random sample drawn from the 1989 Term.

The Dissent Group was chosen as the starting point because, over the years, Justice White has repeatedly called attention to the Court's failure to resolve intercircuit disagreements. We could therefore expect that the Dissent Group would give us minimum figures on the number of conflicts denied review in the study period. The Dissent Group included 237 cases.

Of course, we could not assume that Justice White invariably flags every case in which review is denied despite the presence of a conflict. Thus, it was necessary to supplement the "dissent group" with a random sample of cases, both to determine the extent to which conflicts were present in cases in which Justice White did not dissent and to obtain a more comprehensive estimate of the total number of unresolved conflicts. To that end, we analyzed one of every five paid cases denied review in the 1989 Term after the filing of a brief in opposition. That sample consisted of 253 cases. We also examined a small sample of *in forma pauperis* petitions.

Identifying conflicts. Scholars, judges, and lawyers have disagreed for more than half a century over what constitutes an intercircuit conflict. In section 302, Congress framed the inquiry in a way that made it largely unnecessary to rely on any abstract definition. The statutory language suggested that the task of assessing the consequences of conflicts -- and thus their tolerability -- should be separated from the determination whether a conflict exists. And the legislative history called for a study that would provide, to the extent possible, objective data. These themes shaped the methods and criteria that we used for identifying conflicts.

The first step in our analysis of each case was to determine whether a claim of conflict was presented in the certiorari materials. If the answer was "No," we put the case aside and did not study it further. If a conflict was asserted, we examined

the opinions to ascertain if the disagreement was acknowledged by one or more of the courts of appeals that had decided the issue. Acknowledged conflicts were included in the tally without any attempt to determine whether the conflict was "genuine" or to assess its significance or impact.

If the conflict was not acknowledged, we researched the issue in the computerized databases (Lexis and Westlaw) and other published materials. The aim was to discover whether the assertion of conflict was supported by writings of judges, commentators, or other participants in the legal system. Only when all of these sources proved unavailing did I undertake my own analysis of the decisions.

In short, we based our conclusions primarily on what the courts said and how their decisions were interpreted in other published sources, rather than on our own reading of the cases. The materials we consulted served both as surrogates for the practicing lawyer and as authorities that would influence the lawyer's perception.

Using these techniques, we found 166 substantiated claims of conflict among Justice White's dissents: 38 in the 1988 Term, 59 in 1989, and 69 in 1990. All but 11 of the 166 were either acknowledged by a court of appeals or recognized by other participants in the system.

Applying the same criteria to the paid cases in the Random Group, we found 43 conflicts, all but 2 of which were acknowledged or recognized. Since the sample represented a one-in-five "cut" of the paid cases that were not heard by the Court, we could multiply by five to get an estimate of the total number of conflicts on the paid docket in which review was denied in the 1989 Term. That number is thus 215.

Implications. Two initial conclusions can be drawn from these findings. First, the study has established that Justice White does not dissent in every case in which certiorari is denied despite the presence of a conflict. On the contrary, he is quite selective in choosing cases for public notation of certworthiness. Moreover, it is not difficult to find important and recurring issues among the conflict cases in which Justice White remained silent.

This conclusion suggests a second: the number of intercircuit conflicts that are not heard by the Supreme Court is large enough that the existence of a problem of "inadequate national capacity" is not negated by the numbers alone.

Beyond these points, the significance of the numbers cannot be assessed without consideration of two important factors on which the data are not complete.

First, at this writing, less than two years has elapsed since the denial of review in many of the cases in the Random Group. We know from prior research that conflicts denied review in one Term will often be resolved when they are brought to the Court by another petitioner in a subsequent Term. Thus, to determine the number of conflicts that *remain* unresolved because the Supreme Court does not hear them, it will be necessary to examine the Court's handling of conflict cases over a longer period of time.

Second, it is quite possible that research methods responsive to the language and legislative history of section 302 have produced raw numbers that, viewed in

isolation, convey an exaggerated picture of the *problem* of unresolved conflicts. In particular, by giving dispositive weight to acknowledgments of intercircuit disagreement and treating separately the question whether those disagreements are likely to change outcomes, I have undoubtedly counted some conflicts that would not have been identified as such if I had factored in the various considerations that bear on tolerability. To have proceeded otherwise, however, would have reintroduced some of the subjectivity that Congress sought to avoid; it would also have blurred the distinction between identifying conflicts and assessing their consequences. By starting with a relatively inclusive number and making the winnowing process transparent, I hope not only to provide data on the extent of unresolved conflicts, but, no less important, to illuminate the circumstances that make conflicts "intolerable" rather than merely "undesirable," or "undesirable" rather than "insignificant."

The persistence of unresolved conflicts and their consequences for lawyers and judges will be the focus of a second phase of research. To shed light on persistence, the study will determine the fate of conflicts denied review by the Supreme Court in earlier Terms. To assess the tolerability of the unresolved conflicts, I shall undertake a program including field research as well as legal analysis. A report will be submitted on or before October 1, 1992.

I. Background

Starting in the early 1970s, prominent members of the American legal community began to call attention to an anomaly in the structure of the federal judicial system. The elements of the problem were summarized in one of the last works of the late Professor Paul M. Bator.¹ "If we were to sit down to design a reasonable and just legal system for a new society," Professor Bator wrote, "it would never enter our heads that it is sensible to have one that possesses all of the following attributes:

- (1) a huge and ever-growing body of dynamic national substantive law with an ever-wider jurisdiction over the details of the lives and affairs of a complex and dynamic society . . . ;
- (2) an ideological atmosphere and set of economic incentives that make it extremely attractive to litigate;
- (3) a huge and ever-growing body of district court, administrative and state court disputes involving issues of federal law;
- (4) a regional appellate system that in turn generates 33,000 federal and perhaps another 20,000 state court cases determining issues of federal law in opinions without nationwide . . . authority;
- (5) and, finally, controlling and supervising all of this, *one* court with national jurisdiction . . . , a court whose capacity to decide is rigidly limited to 150 to 175 cases each Term."

The essence of the problem, then, is "inadequate national decisional capacity," or in Professor Bator's more homespun phrase, "a system that is jammed at the top." Fifteen years ago, the Commission on Revision of the Federal Court Appellate System (Hruska Commission) concluded that the problem was already so serious that it warranted "creation of a new national court of appeals, designed to increase

¹ Paul M. Bator, *What Is Wrong with the Supreme Court?* 51 U. PITT. L. REV. 673, 679 (1989) (lecture delivered in 1987).

the capacity of the federal judicial system for definitive adjudication of issues of national law."² Although the Commission supported its recommendation with several empirical studies (including one that focused on intercircuit conflicts), the proposal aroused little interest among judges and lawyers. Bills were introduced in Congress, but never proceeded beyond the hearing stage.

In 1990, the Federal Courts Study Committee, as part of a wide-ranging examination of the problems of the federal judicial system, took another look at the appellate structure and its capacity to meet the needs of burgeoning federal law in a complex and dynamic society.³ The Committee explicitly disavowed the Hruska Commission proposal for a national court of appeals, but it expressed similar concerns about the ability of the system to provide, within a reasonable time, a uniform construction of federal laws where uniformity is needed. In particular, the Committee focused on unresolved conflicts between judicial circuits.

The Committee's treatment of intercircuit conflict was somewhat ambivalent. One recommendation -- for a "pilot project" that would authorize the Supreme Court to refer selected conflict cases to a randomly selected en banc court of appeals -- permitted the inference that a problem of serious (though uncertain) dimensions had already been shown to exist. But the Committee also recommended that the Federal Judicial Center "study the number and frequency of unresolved conflicts" and determine how many "intolerable" conflicts are likely to remain unresolved by the Supreme Court.

² Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 208 (1975) [hereinafter Hruska Commission Report].

³ FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 116-29 (1990) [hereinafter STUDY COMMITTEE REPORT].

In section 302 of the Judicial Improvements Act of 1990, Congress adopted the more modest of the Committee's recommendations and requested that the Federal Judicial Center undertake a study along the lines set forth in the Committee report. Congress also asked the Center to prepare a report on appellate structural alternatives. In the spring of 1991 the Center commissioned me to design and conduct the intercircuit conflict study. Phase I of the study has now been completed, and the results are presented in this report.

The report is divided into eight chapters. Chapters 2 through 4 describe the scope of the study, the method for sampling the Supreme Court's docket, and the criteria and methods used for identifying conflicts. Chapter 5 presents data on the number and frequency of conflicts denied review in the three Terms of the study. Chapters 6 and 7 focus on the tolerability of conflicts. The report concludes with suggestions for further research.

In July 1991, legislation was introduced in the Senate to authorize an "intercircuit conflict resolution demonstration program."⁴ As the name suggests, the bill would implement the Federal Courts Study Committee's recommendation for a "pilot project" that would use randomly selected en banc courts of appeals to decide conflict cases chosen by the Supreme Court. This report will not address the policy issues raised by the pending legislation. However, the data presented here should help to assess the need for the experiment and to give some idea of the kinds of cases that might be referred to en banc courts if the proposal were adopted.

⁴ S. 1569, 102d Cong., 1st Sess. § 101; see 137 Cong. Rec. S 11062 (daily ed. July 26, 1991) (remarks of Sen. Heflin).

II. The Scope of the Study

Potentially, a study of intercircuit conflict could be an enormous undertaking. In the Judicial Improvements Act, however, Congress formulated the question in a way that suggested some significant limitations on the scope of the inquiry. If the research is to address the larger issues raised in the Federal Courts Study Committee report (or, indeed, to provide empirical underpinnings for the study of structural alternatives), it will have to go beyond those limitations, but in this first segment I have chosen to adhere rather strictly to the terms of the statutory request.

The relevant language is found in the first two paragraphs of section 302. Subsection (a) describes the object of the study: to determine "the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court." Subsection (b) provides some guidance as to the aspects of intercircuit conflicts that Congress particularly wanted the Center to consider.⁵

Focus on the Supreme Court. In its initial description of the study and again in the listing of the factors to be considered, Congress has made clear that the subject of the research is the universe of unresolved conflicts but only those that are brought to the Supreme Court. At least in the past, others have taken a broader view of the problem. For example, the Hruska Commission spoke of a possible "hidden docket," composed of "cases in which counsel chose not to seek review only because the probability of a decision on the merits is too low to warrant the expense."⁶ My view today is that it is highly unlikely that the "hidden docket" contains any substantial

⁵ The full text of section 302, as well as key extracts from the legislative history, will be found in the Appendix to this report.

⁶ Hruska Commission Report, *supra* note 2, at 211.

number of certworthy cases. Others may differ.⁷ In any event, the phenomenon is not addressed in this study.

Cases denied review. The Act of Congress calls for "a study . . . on the number and frequency of conflicts among the judicial circuits . . . that remain unresolved because they are *not heard* by the Supreme Court" (emphasis added). In view of this language, we excluded from consideration, in this first phase, the cases that the Supreme Court did review. From the broader perspective suggested by the "structural alternatives" study, however, it would be desirable to study the cases heard as well as those denied. This is so for three reasons. First, as noted in Chapter 1, the larger issue is one of appellate capacity, and it would be important to know what proportion of the plenary docket is devoted to conflict resolution and what proportion to the decision of cases that are heard for other reasons. Second, the research for this project has strongly confirmed what scholars have long believed: that "conflict" is not a well-defined phenomenon, but rather one segment of a spectrum of precedential relationships. Examination of the cases in which the Supreme Court as an institution has taken on the task of conflict resolution will provide a yardstick against which to measure assertions of conflict in the cases denied review. Finally, as will be developed more fully in Chapter 8, an important aspect of conflicts is their persistence. We would want to know, for example, whether the Court generally grants certiorari the first time a conflict is brought before it or, if not, what factors appear to influence the determination to defer resolution until a later

⁷ For example, the chairman of the Federal Courts Study Committee stated recently, "Many litigants do not have the economic incentive or reasonable expectation of securing certiorari that leads parties to bring a conflict to the attention of the Supreme Court, even though the intercircuit disagreement may have wide effect." Statement of Judge Joseph F. Weis, Jr., Before the Subcomm. on Courts and Admin. Practice of the Senate Judiciary Committee at 14 (Oct. 3, 1991) [hereinafter Weis Statement].

case. But, as I have said, these issues will have to wait until a later phase of the research.

Cases from state courts. The statute refers to "conflicts among the judicial circuits." But intercircuit conflicts may be presented to the Court in petitions from state courts, as in the recent case of *Dennis v. Higgins*,⁸ where the Court resolved a longstanding conflict over the question whether suits for violation of the Commerce Clause may be brought under section 1983. Obviously, we would have to include such conflicts in assessing "number and frequency." And we would not always know whether one or more circuits had taken a position until we had checked out the claim of conflict. By that time we would have done a good deal of the work involved in researching the issue.

Our approach, therefore, was this. In the initial stages we treated state-court cases in the same way as those from the federal courts of appeals. Once I was satisfied that there was no evidence of a conflict between federal judicial circuits, I recorded that judgment and proceeded no further. If the certiorari papers did suggest an intercircuit conflict on the issue presented, I proceeded with the inquiry outlined in Chapter 4. To have done less would have risked omitting conflicts that fell squarely within the description in the statute.

Other intercourt conflicts. The federal judicial system and the judicial systems of the several states, Alexander Hamilton wrote in an oft-quoted passage, are "parts of ONE WHOLE."⁹ In recent years the Supreme Court has given new force to this truism by reiterating that in the absence of a clear Congressional

⁸ 111 S. Ct. 865 (1991). *See id.* at 868 n. 2 (citing conflicting decisions of federal courts of appeals).

⁹ The Federalist No. 82, p. 132 (E. Bourne ed. 1947), *quoted in* *Howlett v. Rose*, 110 S. Ct. 2430, 2439 (1990).

command to the contrary, federal causes of action may be litigated in state courts.¹⁰ Thus, when the Federal Courts Study Committee expressed dismay at the prospect that "a federal statute may mean one thing in one area of the country and something quite different elsewhere," its description applied not only to intercourt conflicts, but also to disagreements between state courts of last resort or between a state's highest court and a federal court of appeals. Reflecting this equivalence, the Supreme Court's own rules draw no distinctions among the three kinds of conflicts in delineating "the special and important reasons" that will justify a grant of certiorari.

Against this background, a comprehensive study of the adequacy of the national appellate capacity would have to encompass all three classes of intercourt conflicts. Section 302, however, refers only to "conflicts among the judicial circuits." This limitation may well have been an inadvertent product of the statute's origins as the recommendation of a committee charged with studying the operations of the federal courts. Whatever the reason, the mandate is clear. And if a certiorari petition in our study asserted only a conflict between state courts or between a state court and a federal court of appeals, I did not pursue the analysis outlined in Chapter 4. I did, however, take note of the claim, so as not to foreclose the possibility of doing followup work in a future study.

¹⁰ See, e.g., *Tafflin v. Levitt*, 493 U.S. 455 (1990) (civil RICO claims); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990) (Title VII employment discrimination claims).

III. Sampling the Docket

There are several ways in which one could attempt to determine "the number and frequency of conflicts [that] remain unresolved because they are not heard by the Supreme Court." For example, one could examine all petitions denied in a single Term, or in several Terms. That would be an enormous task, and earlier research suggests that the rewards would not be proportional to the work required. At the other extreme, one could examine a limited number of petitions that have one or more characteristics that are believed likely to correlate with "certworthiness." That is a much more promising approach (indeed, it is basically what I have done in some of my previous work), but it would lack the "objective" cast that Congress wanted for this project.

Drawing on discussions with Center staff and with knowledgeable persons at the Supreme Court, I designed a research plan that, I believe, avoids both of these extremes. The essence of the plan was to analyze two groups of cases in which review was denied in the three most recent Supreme Court Terms (1988, 1989, and 1990). The first group included all cases in which Justice White dissented from the denial of certiorari. The second encompassed a random selection of cases large enough to give us a sense of the extent to which conflicts were present in cases in which Justice White did not dissent. In this chapter I shall explain the reason for choosing the first group and the method for choosing the second.

A. The "dissent group"

The first group of cases in the study consisted of all cases in the three most recent Terms in which Justice White dissented from the denial of certiorari, whether or not he specifically noted the presence of a conflict. The reason for starting with these cases was simple: over the years, Justice White has repeatedly called attention

to the Court's failure to resolve intercircuit conflicts.¹¹ He is the only member of the Court who frequently dissents from the denial of certiorari without expressing any views on the merits of the issues presented. Advocates of legislation to increase the "national appellate capacity" have often cited Justice White's dissents as evidence of the need.¹² More recently, Justice Sandra Day O'Connor suggested publicly that by looking at Justice White's dissents it would be possible to identify the cases that the Supreme Court is "not taking [and] that arguably [it] should."¹³

Starting with Justice White's dissents has enabled us, in an extremely efficient way, to get an initial sense of the "the number and frequency of conflicts . . . that remain unresolved because they are not heard by the Supreme Court." It has provided a baseline against which to measure the results of the random-group study. Perhaps most important, this effort generated a substantial but manageable corpus of cases that we used to refine the classification schemes and other tools of analysis.

I estimated that the "dissent group," as I have called it, would include no more than 200 cases from the three Terms. In fact, Justice White issued a substantially larger number of dissents in the three most recent Terms than he had done in the three Terms that preceded them. The total thus turned out to be 237. In 20 cases Justice White published a brief opinion explaining why review should have been

¹¹ See, e.g., *Beaulieu v. United States*, 110 S. Ct. 3302 (1990) (White, J., dissenting from denial of certiorari); *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) (White, J., dissenting from denial of certiorari); *Metheny v. Hamby*, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari).

¹² See, e.g., *Intercircuit Panel of the United States Act: Hearing Before the Subcomm. on Courts of the Senate Judiciary Comm., 99th Cong., 1st Sess.* 48 (1985) (statement of Sen. Heflin); *id.* at 158 (testimony of A. Leo Levin).

¹³ Supreme Court Roundtable, Ninth Circuit Judicial Conference, Anchorage, Alaska, June 13, 1990 (transcript on file with author).

granted. The remaining dissents simply noted that "Justice White would grant certiorari."¹⁴

B. The "random group"

Obviously, we could not assume that Justice White invariably flags every case in which review is denied despite the presence of a conflict. Thus, it was necessary to supplement the "dissent group" with a random sample of cases, both to determine the extent to which conflicts were present in cases in which Justice White did not dissent and to obtain a more comprehensive estimate of the total number of unresolved conflicts. The random sample would also enable us to gain knowledge that would help in shaping the direction of future research.

Determining the number of cases to be included in the "random group" and how they should be selected involved several interrelated questions. I shall address them one at a time.

One Term or two? Because it was necessary to select the random sample before the 1990 Term had come to an end, the choice lay between a relatively large sample drawn from a single Term and a smaller sample drawn from 1988 and 1989 combined. I concluded that it was preferable to look at a single Term, 1989. The reason was twofold.

First, it seemed to me that we were likely to get a better sense of the comprehensiveness of Justice White's dissents if we compared the dissent group with a substantial sample from a single Term.

¹⁴ Twice in the three Terms, Justice White issued opinions listing or discussing multiple cases that he believed should have been heard. *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) (White, J., dissenting from denial of certiorari); *Metheny v. Hamby*, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari). In about one-third of the dissents, Justice White was joined by one (or occasionally two) other members of the Court.

Second, there was a possibility that we would want to enlarge the sample in later phases of the study. It would be awkward at best to extract a second set of cases from a Term that had already been subjected to the sampling process. Starting afresh with a Term not sampled would be more straightforward; it would also give us a chance to learn from experience. The final chapter of this report will offer some suggestions along that line.

Paid cases only? The statistical reports issued by the Supreme Court recognize only one basis for classifying certiorari petitions: paid versus *in forma pauperis* (IFP). The distinction is purely mechanical, and is reflected in a dual numbering system for docketed cases. Petitioners who cannot afford to pay court costs get IFP status and docket numbers of 5001 and above. Those who pay go into the numbering system that starts with 1 each Term.¹⁵

Without exception, previous large-scale studies of intercircuit conflict have been limited to paid cases, and probably we would not have gone far wrong to follow suit. Over the years, the proportion of IFP cases heard by the Court has remained at a level far below that for paid cases. As Justice Brennan wrote in 1983, "in all but a handful of" these cases, "the merits involved are almost certainly insufficient to demand full review."¹⁶ This would mean, among other things, that the cases generally do not present intercircuit conflicts. And there was much to be said for using our limited time to study the segment of the docket in which conflicts are most likely to be found.

¹⁵ The paid segment of the docket is sometimes referred to as the "Appellate Docket." Since 1970, however, the "appellate docket" has encompassed both paid and IFP cases. See Bennett Boskey & Eugene Gressman, *The 1970 Changes in the Supreme Court's Rules*, 49 F.R.D. 679, 691-93 (1970); STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 192 (3rd ed. 1988). In this report I shall refer to the "paid" docket and the "IFP" docket.

¹⁶ *Brown v. Herald Co.*, 464 U.S. 928, 930 (1983) (Brennan, J., dissenting).

Two considerations gave me pause about selecting the sample from the paid cases alone. Casual observation indicated that several of Justice White's dissents were issued in IFP cases. Moreover, in the last Term or two the number of IFP cases given plenary consideration has increased substantially, both in absolute numbers and proportionally. These facts suggested that the study should include at least some examination of IFP cases.

I decided to follow a middle course. We did not exclude IFP cases from the study. But we used a smaller sampling ratio to constitute the sample. And we turned to the IFP cases only after the study of the paid docket was well under way.

Petitions without responses? One of our main goals in formulating the research design was to minimize the time to be spent on petitions that were highly unlikely to present conflicts, while avoiding reliance on arguably subjective *a priori* exclusions. Discussions with Supreme Court staff called to our attention an aspect of the Court's work that seemed to serve this purpose admirably.

Over the years, a practice has developed whereby a respondent who believes that a petition clearly does not warrant review may waive the right to file a brief in opposition.¹⁷ When this occurs, the petition is circulated to the Justices' chambers with a notation that no opposing brief will be forthcoming.¹⁸ If any Justice believes that the petition warrants a response, the Clerk will be directed to ask the

¹⁷ The practice is implicitly authorized by Rule 15.5 of the Supreme Court's rules, which refers to "an express waiver of the right to file" a brief in opposition to a certiorari petition. However, the rules do not explicitly state that the respondent may inform the Court by letter that the respondent waives the right to file a brief.

¹⁸ Letters of waiver cannot include explanatory material, and they are not circulated to the Justices. Thus, any arguments that the respondent may wish to make in opposition to review must be presented in a brief or memorandum.

respondent to file one.¹⁹ Such requests are made in several hundred cases each Term. If no Justice calls for a response, the decision to grant or deny review will be made on the basis of the petition alone. In the 1989 Term, waivers accounted for about one third of the paid cases in which certiorari was denied. Waivers also accounted for one third of the IFP petitions, but this did not mean that responses were received in the other two thirds; rather, in one third of the cases, nothing at all was filed on behalf of the respondent.

Taking these practices into account, I decided to limit the sample to cases in which the respondent submitted a brief or memorandum in opposition.²⁰ Persons familiar with the Court's operations were confident that such a sample would encompass the overwhelming majority of cases in which conflicts are present. Moreover, analysis and research would have been substantially more difficult if we had to work from materials that presented only one side of the argument.

In the Evaluation Design for the project, I said that if the study progressed to a second phase, I would probably want to examine a small random sample of cases without responses to confirm that such cases almost never present conflicts. I now doubt that that step is necessary. The threshold of certworthiness represented by the filing of a response is very low indeed -- not surprisingly, perhaps, since the waiver option is mentioned only in passing in the Court's rules. It is of course conceivable that an occasional conflict may be found in the petitions without responses, but in a study with limited resources, the effort to find them would not be worthwhile.

¹⁹ It is the Court's policy not to grant review without giving the respondent a chance to answer the petition.

²⁰ This category encompasses all cases with formal responses, including the few in which the respondent did not oppose review.

This does not mean that it was a mistake to cast the net as widely as we did. Having taken the more inclusive approach in this study, we can offer future researchers the opportunity to conduct their investigations with even greater efficiency.

Independent search for conflicts? It might be thought that the next step was to determine the sampling ratio and the number of cases to be included in the "random group." Before taking this step, however, it was necessary to resolve a key point of method: if the certiorari papers did not assert the presence of a conflict, should we research the cases to determine independently whether one existed? My answer, at least for Phase I, was an unequivocal "No." The reason rested partly on the language of section 302, but more fundamentally on the adversary system and the role of conflicts in the certiorari process.

In calling for a study of conflicts that are "not heard" by the Supreme Court, the statute presupposes, at least metaphorically, a speaker who asserts that a conflict exists. This presupposition is sound. In an adversary system, courts are expected to resolve only those issues presented by the litigants. If the "speaker" -- usually the party seeking review -- does not claim the presence of a conflict, the Court cannot be expected to undertake a search of its own to determine whether one exists. Nor, one would think, is there any reason for it to do so. No aspect of the certiorari practice is better known, or more heavily emphasized in Supreme Court manuals, than the primacy of conflict as the route to Supreme Court review. Conflict is the first of the reasons for granting review listed in the Court's own rules. If the petitioner does not even assert the existence of a conflict, it would appear safe to assume that none exists.

Notwithstanding this line of reasoning, the Evaluation Design pointed to one circumstance in which the assumption may not be warranted. If the petition is filed

by a pro se litigant who is not a member of the bar, or by a lawyer who, for whatever reason, has not read practice manuals or the Court's rules, the petition may concentrate solely on the merits and fail to mention a conflict. For that reason, we were prepared to look beyond the assertions in the petition itself.

Two other sources were readily available to us, as they were to the Court: the opinions below (required to be included in the Appendix to the petition) and submissions by respondents and amici. I decided that we would examine those materials, but, ordinarily, would not go beyond them and engage in independent research to determine whether a conflict might be present.²¹

How large a sample? The final step in the sampling process was to determine the size of the random sample. Every petition that asserted the presence of a conflict would be subjected to the intensive analysis described in Chapters 4 and 6. Thus we had to take pains to assure that we did not end up with more such petitions than we could study. This effort required a certain amount of guesswork.

Professor Floyd Feeney's study for the Hruska Commission found that conflicts were claimed in about one-third of the paid petitions that were denied review.²² By limiting the sample to cases with briefs in opposition, we were probably excluding the one-third of the filings least likely even to assert conflicts. Thus it was quite possible that as many as half of the petitions in our sample would claim conflicts. On that assumption, I decided to take a one-in-five sample of the paid cases denied review in the 1989 Term after the filing of a brief in opposition. The

²¹ Of course, we did pursue independent research to determine whether claims of conflict were substantiated. See Chapters 4 and 5.

²² Hruska Commission Report, *supra* note 2, at 305.

total number of denials was about 1,850, of which 1,264 drew responses.²³ The Random Group thus included 252 paid cases, of which 7 were also in the Dissent Group.

For the IFP docket, our sampling ratio was one in ten. Although IFP petitions are more numerous than the paid, the proportion with responses is, as already noted, much smaller: in the 1989 Term, 931 out of about 2,800. Thus the number of IFPs in the Random Group proved to be 93, of which 3 were also in the Dissent Group.²⁴

²³ The first figure is an approximation because the statistics issued by the Court do not distinguish among denials, dismissals, and withdrawals of certiorari petitions.

²⁴ The Random Group cases were selected as follows. Through the courtesy of the Clerk's Office, we obtained a computer printout that listed, in docket number sequence, all cases in which review was denied after the filing of a brief in opposition. Every fifth paid case and every tenth IFP case was included in the sample.

IV. Identifying Intercircuit Conflicts: Methods and Criteria

With the study groups selected, the next step was to find out how many intercircuit conflicts were present in each group. Five student researchers assisted me in analyzing the often voluminous materials included in the certiorari files. We paid particular attention to the petition and the petitioner's reply -- the documents which, in an adversary system, were most likely to assert the existence of a conflict. We also examined the lower court opinions, the respondent's brief, and any amicus curiae briefs filed at the certiorari stage. Occasionally the lower courts flagged disagreement among the circuits even when the petitioner did not. In other cases, the respondent (generally a "repeat player" like the United States or a state government) or an amicus (generally a trade organization or other interest group) took the opportunity to call the Court's attention to inconsistent decisions by other courts of appeals.

If, after reviewing the complete certiorari file for a case, we found no assertion of conflict, direct or implied, we recorded that judgment and did not study the case further. All other cases were subjected to more detailed analysis. Three aspects of that analysis are discussed here: the criteria I used to evaluate assertions of conflict; the threshold determinations that had to be made in a relatively small number of cases; and the more substantial problem of the arguably "inappropriate vehicle." The chapter concludes with brief comments aimed at placing the research methods in perspective.

A. Criteria for identifying conflict cases

In all but a handful of cases, our starting point was the assertion of conflict by the party seeking review. That assertion alone, however, would not have justified our

calling the case a conflict case. Common sense suggests, and experience confirms, that advocates seeking to persuade the Court to grant review will see conflicts where a disinterested observer would not. The task, then, was to find criteria that would enable us to correct for the bias of the advocate.

For more than half a century, lawyers, judges, and scholars have debated the question, "What is an intercircuit conflict?"²⁵ In section 302 of the Judicial Improvements Act, Congress cut through the abstractions in three ways. It focused attention on the reasons why conflicts matter -- the four factors specified in section 302(b). It suggested that the task of assessing the consequences of conflicts should be separated from the determination whether a conflict exists. And (in the legislative history) it called for a study that would provide, to the extent possible, objective data.

The two-level approach to the problem of quantifying conflicts was extremely helpful as a device for structuring our research. But it would have defeated the purpose to proceed with the first stage -- identifying conflict cases -- without having in mind the impact analysis called for in section 302(b). Thus, in formulating criteria for determining whether to count a case as a conflict case, I took care not to lose sight of the factors Congress drew to our attention.

Section 302(b) is based on the report of the Federal Courts Study Committee, and the legislative history directs us to refer to that report for guidance. In the language of the report, the relevant factors are whether the conflict --

- (1) impose[s] economic costs or other harm to multi-circuit actors, such as firms engaged in maritime and interstate commerce;

²⁵ "The answer to this question . . . imports into the matter the whole of the lawyer's traditional technique of analysis and distinguishing of cases. The concept is not an exact one." Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 268 (1934).

- (2) encourage[s] forum shopping among circuits, especially since venue is frequently available to litigants in different fora;
- (3) create[s] unfairness to litigants in different circuits -- for example, by allowing federal benefits in one circuit that are denied elsewhere; [or]
- (4) encourage[s] "non-acquiescence" by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions.

What these factors have in common is that they refer to behavior that results from intercircuit conflicts. This is clearly true of factors (1), (2), and (4), but it holds for (3) as well, for item (3) speaks of unfairness that comes from differential treatment.

Looking at the problem from a behavioral perspective, I concluded that we could rely primarily on two indicators to identify conflicts in the cases denied review: *acknowledgment* by the courts of decision and *recognition* by other participants in the legal system. In addition, as a kind of safety net, I was prepared to find a conflict if two courts of appeals had articulated plainly inconsistent statements of law that led to contrary results. In this section I shall elaborate on these indicia and explain how we used them.

Acknowledgment. The most important step in an objective study of conflict is to examine the treatment of allegedly conflicting authority in the later decision. The more explicit the acknowledgment of conflict, the more likely it is that people will adjust their behavior to take it into account. Conversely, to the extent that the courts deny the existence of a conflict, lawyers would hesitate before concluding that the prospect of a different outcome in another circuit warrants a change in behavior.

Of course, in a common law system, we would not expect a court's treatment of out-of-circuit precedent to reduce itself to a simple thumbs-up or thumbs-down. On the contrary, the nuances will be many, and there will be room for disagreement over which forms of treatment should count as conflicts and which should not. For

example, it is not uncommon for one court of appeals to criticize another circuit's decision while also pointing out distinguishing features. Thus, in an antitrust case cited in connection with a random group petition, the Tenth Circuit Court of Appeals said:

The States [seeking to bring *parens patriae* claims] urge us to apply the law as enunciated in *Panhandle Eastern* [a Seventh Circuit decision]. This we decline to do. . . . We distinguish the facts of this case from those in *Panhandle Eastern*. . . . The most important difference . . . may be that there was apparently no doubt in *Panhandle Eastern* that the entire overcharge was passed on, and there was no need to apportion damages between the direct and indirect purchasers. In this case, the amount of the overcharge passed on may be an unresolved question of fact. . . . If we were to adopt the reasoning of *Panhandle Eastern*, we would in reality be carving out yet another exception (regulation of public utilities) to the basic rule that only a direct purchaser may sue for the antitrust violation, and this we are unwilling to do.²⁶

Is that a conflict? The Supreme Court thought so.²⁷ Yet others might see the matter differently.

On the basis of my prior research, I prepared a tentative taxonomy that attempted to isolate the major patterns without introducing unnecessary refinements. As the research progressed, I revised and refined the classifications with the aim of providing a reasonably clear line of demarcation. Eventually I concluded that, rather than attempting to shoehorn cases like the one just quoted into one or the other of a pair of binary categories, I would retain a middle tier ("equivocal acknowledgment"), with the possibility of using the second set of indicia -- comments by other participants -- to put the cases on one side of the line or the other.

Some previous researchers have gone behind acknowledgments of conflict and looked independently at the cases to determine whether the conflict was

²⁶ *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286, 1292-93 (10th Cir. 1989).

²⁷ *See Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807, 2811 (1990).

"genuine." I did not do this. For one thing, that approach would have run up against the legislative history and its call for objective data. More important, academic analysis, of itself, would be irrelevant to the behavioral concerns specified in section 302(b). If one court has announced that it takes a different view of a legal problem than another court, that statement alone may create the possibility of forum shopping, harm to multi-circuit actors, and other behavioral consequences. The fact that careful reading of the opinions would find a basis for distinguishing the cases will not necessarily have any effect.

For the same reasons, I treated acknowledgment of conflict as dispositive even when the disagreement did not lead to different results.²⁸ Admittedly, in those circumstances, a lawyer would have to recognize that one or both statements might be regarded technically as dicta. That awareness, however, would be weighed against the fact that a court of appeals had taken the step of explicitly rejecting a position embraced by a sister circuit. In a system where consistency is highly valued, I could not assume that orthodox views of precedent would invariably loom larger than the announcement that a conflict had been created. Even less did I want to base classifications on my own judgments as to whether particular disagreements were likely to lead to different results in future cases.²⁹

²⁸ This situation was quite uncommon, accounting for less than 10 percent of the acknowledged conflicts in the study.

²⁹ The difficulty in making such judgments is illustrated by *Duncan v. United States*, 493 U.S. 906, *denying cert. to* 870 F.2d 1532 (10th Cir. 1989). Dissenting from denial of certiorari, Justice White called attention to a conflict over the interpretation of a federal criminal statute that authorizes a trial judge to order a defendant to make restitution "to any victim of the offense." As Justice White pointed out, the Sixth Circuit had "adopted a narrow definition of 'offense,'" and the Tenth Circuit explicitly rejected that definition. *Compare United States v. Mounts*, 793 F.2d 125, 127 (6th Cir. 1986), *with Duncan*, 870 F.2d at 1537 n.2. But the Sixth Circuit had defined "victim" broadly and affirmed the restitution order. Taking those facts into account, it would have been reasonable to suppose that the Sixth Circuit's narrow reading was unlikely to result in any actual reversals. Yet in *United States v. Miller*, 900 F.2d 919 (6th Cir. 1990), the court cited its earlier precedents and vacated a

This approach does not mean that acknowledgments of conflict should be read in isolation. If two courts have reached parallel results although one has rejected the other's analysis, that fact has a bearing on the probable consequences of the disagreement. So does the possibility that lawyers or judges will be able to find grounds of distinction which, if embodied in the acknowledging opinion, would have avoided the conflict. In our common law system, appellate advocates can argue for a "strict" view of a precedent,³⁰ and appellate courts can legitimately confine their previous decisions within narrow bounds. By the same token, a court of appeals may, in a later case, embrace some aspect of an out-of-circuit decision it has rejected.

All of these considerations are relevant to tolerability -- a concept that by definition looks to the future and calls for normative judgments. For purposes of identifying conflicts, however, I think it best to minimize both speculation and subjectivity by accepting at face value one circuit's repudiation of the law laid down elsewhere.

Recognition by other participants. Under the approach just described, a later court's treatment of another circuit's precedent could, without more, validate a claim of conflict. But the test worked in only one direction: the absence of an acknowledged disagreement did not negate the possibility that a conflict existed. As already noted, the treatment of out-of-circuit precedent in a later opinion can be ambiguous. For other cases in the study, we found, as we expected, that neither of the courts had mentioned the other's ruling. In both situations, we had to look in

restitution order. The court "decline[d] to follow" *Duncan* to the extent it reached a contrary conclusion. *Id.* at 924.

³⁰ See KARL LLEWELLYN, *THE BRAMBLE BUSH* 75 (Oceana Publications, 1981; work originally published 1930).

other legal sources for evidence that would confirm (or refute) the assertion of conflict by the party seeking review.

Reliance solely on the treatment of precedent in the later case would have been insufficient for a second reason. Even if the courts of decision believe that their rulings are consistent, expressions of doubt by other participants in the system may themselves influence behavior of the kind encompassed in the four Congressional factors.

These considerations led to the next step in identifying conflicts through objective criteria: reporting the evaluations of participants in the system.

Specifically, we noted the perception or recognition of conflict in:

- opinions or statements by Justices of the Supreme Court;
- opinions of dissenting or concurring judges in the courts of decision;
- submissions by litigants *opposing* the grant of review (particularly the United States Government, represented by the Solicitor General);
- amicus curiae briefs, especially those filed by the United States in response to a request from the Court;
- opinions of other courts or judges; and
- commentaries and other secondary authorities, especially those likely to be consulted by the practicing bar.

I do not suggest that the reportorial approach entirely avoids the need for judgment. The weight to be accorded a perception of conflict depends in part on who is making the evaluation. As a general matter, we gave greatest weight to comments made outside the context of partisan advocacy. We also took account of the fact that perceptions change over time, as does the reality to be perceived. For example, later decisions by one of the courts of appeals might strengthen or weaken the appearance of intercourt disagreement. The basic thrust of this phase of the

inquiry was to determine whether lawyers and trial judges looking at the caselaw as it stood at the time certiorari was denied would share the view that a conflict existed. We consulted the various sources both as surrogates for the practicing lawyer and as authorities that would influence the lawyer's perception.

Here, as with the courts' own opinions, we found that the allegedly conflicting decisions were discussed in a variety of ways, requiring a spectrum of classifications. In this context, however, I saw less need to distinguish gradations in the treatment of precedent. Oblique hints of conflict are not likely to weigh heavily with lawyers when they consider forum choices or how transactions are to be structured. At the same time, it would have been foolish to confine our search to particular language; thus, the use of "*But see*" preceding a citation or the juxtaposition of facially inconsistent summaries signalled that the decisions would probably have been viewed as embodying different views of the law.

We paid more attention to subtleties of treatment in analyzing the briefs filed in opposition to petitions for certiorari. These submissions hold a unique position among the materials we studied. Although they are public documents, they are not widely available, nor are they generally consulted by persons engaged in legal research. Thus, unlike court decisions or commentaries in secondary sources, they are not likely to influence behavior. Nevertheless, their contents are significant because, very often, they will reflect an uneasy balance between adversarial representation and professional responsibility. From an adversary perspective, the respondent's task is to persuade the Court that the case is not certworthy; to this end, counsel will wish to denigrate or deny the petitioner's claim of conflict. At the same time, the professional obligation not to misstate or misrepresent the law may preclude counsel from baldly asserting that no conflict exists. This obligation carries

special weight for the Solicitor General and representatives of state governments, who have an overriding interest in maintaining credibility with the Court.

Not surprisingly, these competing pressures may result in briefs that respond to the assertion of conflict with equivocation, ambivalence, perhaps even internal contradiction. And when we found responses of that kind, we were justified in surmising that other lawyers reading the same decisions would see actual conflict. For these reasons, we took care to note less-than-explicit concessions of conflict by parties opposing review.

Contrary statements with opposing results. Ideally, we would have relied solely on the treatment by courts of decision and other published commentaries to make our "objective" assessment of the intercircuit conflicts claimed by petitioners. On the basis of my prior work, however, I thought it likely that such an approach would be underinclusive. That is, some assertions of conflict would be credible even though they were neither acknowledged by the courts below nor recognized by any disinterested authority. The problem was to identify those conflicts in a reasonably objective way.

In the narrowest sense, a conflict exists when two courts have articulated plainly inconsistent statements of law and have used them to reach different results on the same issue. Each of the elements of this test warrants brief discussion.

Inconsistent statements of law are illustrated by a pair of cases construing the discretionary function exception to the Federal Tort Claims Act. In *Gaubert v. United States*,³¹ the Fifth Circuit stated that when an agency's actions become "operational in nature," they are no longer immunized by the exception. In

³¹ 885 F.2d 1284, 1289 (5th Cir. 1989), *rev'd*, 111 S. Ct. 1267 (1991).

Kennewick Irrigation District v. United States,³² the Ninth Circuit reviewed the Supreme Court's decisions and concluded that the Court had rejected the planning/operational distinction. Because one court affirms a proposition that the other negates, the statements are plainly inconsistent.

In a variation on this pattern, one court may rely on authority that another court repudiates. For example, in *United States v. Author Services, Inc.*,³³ the Ninth Circuit adopted the rule stated in the Fifth Circuit's decision in *United States v. Texas Heart Institute*.³⁴ Less than two years later, the Fifth Circuit convened en banc and in *United States v. Barrett*³⁵ overruled *Texas Heart*. The conflict is unmistakable. (In fact, we did not have to rely on this third criterion to classify *Barrett*; the Solicitor General, on behalf of the respondent, conceded the conflict.)

Inconsistent statements, however, are not enough to satisfy the test; the opposing views must lead to different results. The "results" are "different" if, on the particular issue, the earlier court ruled against the interest or claim that prevailed in the later case or vice versa. Thus, in *Gaubert* the Fifth Circuit rejected the discretionary function defense; in *Kennewick* the Ninth Circuit relied on it to hold that most of the plaintiff's claims were barred.

Often the most problematic aspect of the analysis will be to determine whether the two cases involve the same "issue." For example, in *Rayner v. Smirl*,³⁶ Justice White discerned a conflict on the preemption of state law by federal

³² 880 F.2d 1018 (9th Cir. 1989).

³³ 804 F.2d 1520 (9th Cir. 1986).

³⁴ 755 F.2d 469 (5th Cir. 1985).

³⁵ 837 F.2d 1341 (5th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989) (dissent case).

³⁶ 873 F.2d 60 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989).

whistleblower protection statutes.³⁷ One case involved the Federal Railroad Safety Act; the other, the Energy Reorganization Act. Is the claim of conflict valid when two cases involve different statutes, albeit statutes that are "nearly identical"?

What I proposed to do in such situations was to look at the precedents and other authorities relied on by the two courts. If the courts regarded the same authorities as controlling, I would take this as indicating that the cases presented the same "issue." Doubtful cases were to be resolved in favor of inclusion, but beyond that, I saw the three-element test as only a fallback method for identifying conflicts, to be used when treatment by the courts of decision and other sources provided no answer.

As the study progressed, I began to have doubts that a rigorous construct of this kind fully responded to the concerns that underlie section 302. The problem is similar to the one that Professor Daniel J. Meador has articulated in discussing conflicts within a circuit: even if academic analysis would not find inconsistency between two decisions, "in the rough-and-tumble of law practice and litigation those who must use [the opinions] may not see it quite that way."³⁸ From this perspective, a strong appearance of intercircuit conflict might be created by the manner in which one court distinguished another circuit's precedent. Or the perception might derive from the later court's failure to mention an out-of-circuit decision dealing with a seemingly similar legal problem. Rulings of this kind might, for example, arouse fears on the part of those counselling a national corporation or pension fund that identical transactions would be treated differently in different circuits. At the least, I

³⁷ See *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901, 903 (1989) (White, J., dissenting from denial of certiorari).

³⁸ Daniel J. Meador, *Struggling Against the Tower of Babel*, in *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 195, 199 (Arthur D. Hellman ed., 1990).

could not disregard claims of conflict that reached a certain level of plausibility, whether or not my own analysis would find the claim to be valid. This obligation was especially compelling in situations where the assertion of conflict depended on the merits of the underlying legal argument. My solution, admittedly imprecise, was to add a category of "apparent conflicts" and to place on the agenda for Phase II an inquiry into the way lawyers actually view such situations.

B. Threshold determinations

Our principal task, at this first stage, was to evaluate the assertions of conflict that we found in the certiorari materials. A small number of cases, probably not more than 10 percent of the total, required me to make threshold determinations that had the potential for affecting the final tally of conflicts denied review.

Ambiguous assertions of conflict. As we delved into the random group cases, it became clear that "assertion of conflict" was by no means a self-defining concept. To be sure, many petitions conformed to the expected pattern: they set forth the "question presented" and cited decisions from two or more circuits that had resolved it differently. Contrariwise, some petitions made no effort at all to claim a conflict; instead, they invoked other reasons for review listed in the Court's Rule 10, generally the importance of the issue or an extreme "departure from the accepted and usual course of judicial proceedings." But some cases fell between the two poles.

We could, of course, have limited ourselves to petitions that explicitly asserted the presence of a conflict as a reason for granting review. Or, going one step further, we might have included cases where the word "conflict" or its direct equivalent was used somewhere in the body of the argument. While either approach would have greatly simplified our task, we had two reasons for believing that the result would have been to eliminate from scrutiny some cases that warranted further attention.

First, our experience reviewing the cases in the dissent group taught us that conflicts might be present, at least in the eye of a Supreme Court Justice, even when the petitioner failed to use the language of Rule 10. Second, our initial exposure to the random group gave further evidence that the petitions manifested a wide range of attorney competence, and that assertions of conflict at least as plausible as some that were made in explicit terms could have been made in petitions whose authors were apparently oblivious to Rule 10, practice manuals, or other guides. Thus, to have negated the possibility of conflict simply because the petitioner did not invoke Rule 10 or use particular words would have risked missing some cases that ought to have been included in the tally.

The question, then, was how far to go in identifying implied assertions of conflict. In borderline cases, we began by considering the treatment of out-of-circuit precedents in the certiorari materials. The more direct the juxtaposition of the possibly conflicting decisions, the more inclined we were to proceed further with our analysis. In addition, we distinguished between petitions that cited other circuits' decisions only for general or abstract propositions and those that used precedents as building blocks for arguments in opposition to the judgment below. Beyond that, we looked for guidance in the factors that Congress specified as tending to make a conflict intolerable. The essence of these factors is that a conflict is not likely to be intolerable unless it is visible. Thus, if the lower court opinion was unpublished, and the certiorari materials cited no published decisions that reached a similar result, that combination of circumstances weighed heavily against finding an implied assertion of conflict. So, too, if the decision below discussed the petitioner's issue only in passing or not at all, or if the potentially conflicting opinions did not cite any of the same authorities. On the other hand, if the later case did cite contrary precedents from other circuits, that was a factor pointing in the opposite direction, for it would have

alerted lawyers to the possibility of conflict and the kinds of behavior reflected in the section 302 factors.

In the end, these were judgment calls. I suspect that I went further than necessary in finding implied assertions of conflict, but even if I did, the fact would have little effect on the tally, for marginal cases at the "assertion" stage almost certainly would not meet any of the criteria at the confirmation stage.

Vague or generalized assertions of conflict. In a few petitions, the assertion of conflict was quite explicit, but so vague, generalized, or abstract that followup work would have required us, in essence, to construct the argument that the petitioner had failed to articulate. Under those circumstances, it was highly unlikely that the alleged conflict would generate any of the consequences that Congress was concerned about. The probability diminished even further if, as often occurred, the opinion below was unpublished. Hence we simply recorded the assertion and proceeded no further.

Multiple assertions of conflict. Some of the petitions claimed conflicts on more than one discrete issue. When they did, we established separate records for each asserted conflict and analyzed the conflicts as though they stood alone.

C. "Vehicle" problems

A study of unresolved intercircuit conflicts necessarily focuses on the Supreme Court's role as ultimate interpreter of the meaning of federal law. Under the Constitution, however, the Court performs that role only as an incident of its Article III power to adjudicate individual cases and controversies. The constraints of a party-driven, case-specific system can be seen pervasively in the substance of the Court's decisions. They also have an impact at the certiorari stage. In particular, the Justices must consider not only whether a conflict exists but also whether the case is an appropriate "vehicle" for resolving it.

"Vehicle" problems can be of many kinds. The issue may not have been raised in the courts below. The judgment may rest on alternate grounds, one of which is fact-based or otherwise uncertworthy. The result might be the same whichever of the conflicting rules is applied.

Admittedly, the presence of a "vehicle" problem does not negate the fact that, in the words of section 302, a conflict has "remain[ed] unresolved because [it was] not heard by the Supreme Court." Moreover, few of the problems are jurisdictional; thus the Court generally could hear these cases if it wished to. But for most of the Justices, most of the time, the presence of a "vehicle" problem will be a sufficient reason to deny review. And a study of conflict would be unrealistic if it did not take that view into account.

"Vehicle" problems are not easily studied, however. Other than the Justices, no one is more conscious of the importance of these obstacles than the lawyers who seek to persuade the Court not to grant review. Indeed, the stronger the petitioner's assertion of conflict, the more assiduously the respondent will strive to demonstrate the conflict's irrelevance to the case at hand. The petitioner in turn may file a reply brief that attempts to show why the conflict is pivotal and the issue unavoidable.

I decided that, in the same way that we were separating the assessment of tolerability from the determination whether a conflict existed, we would separate the problem of the suitable vehicle. Only after identifying a case as one presenting an unresolved conflict would we take note of the procedural obstacles asserted by litigants opposing review.

For the most part, this separation proved workable. For one kind of "vehicle" problem, however, the two inquiries merged. The difficulty arose when the petitioner asked the Court to resolve a preexisting conflict (generally one that had been acknowledged by at least one court) and the party opposing review argued that

the conflict issue simply was "not presented by" the case.³⁹ To minimize subjectivity, I accepted the account of the case in the lower court opinion and asked whether the asserted obstacle was one that left some room for appellate discretion. If the barrier was permeable (such as an alternate ground of decision or the failure to preserve the issue), I counted the case as one presenting a conflict, on the theory that the Court *could* address the issue if it so wished.⁴⁰ The vehicle problems would then be reflected in a separate tally. Only when the record lacked the factual predicates giving rise to the question, or when the issue had not been litigated at all in the lower courts, could it be said that the case did not present a conflict that the Supreme Court could resolve. Fortunately, there were not many petitions that required me to make this kind of judgment.

D. Research methods in perspective

In broad outline, the research methods described in this chapter bear a distinct resemblance to the tasks performed by the Justices themselves in examining certiorari petitions. I emphasize, therefore, that it was not the purpose of this study to replicate the processes within the Court, much less to critique the Court's performance of the case selection function.⁴¹ Our aim was to determine the number of intercircuit conflicts that remained unresolved because the Court did not hear them. Apart from "vehicle problems," we made no attempt to identify the many

³⁹ See, e.g., Brief in Opposition at 9, *Eastern Nebraska Community Office of Retardation v. Glover*, 493 U.S. 932, *denying cert. to* 867 F.2d 461 (8th Cir. 1989).

⁴⁰ See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910-11 (1991); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981).

⁴¹ Among other things, we had the advantage of hindsight. In particular, many of the commentaries and court opinions that we consulted to determine whether an assertion of conflict was substantiated would not have been available to the Justices when they considered the certiorari petitions.

factors that the Justices might have taken into account in deciding not to grant certiorari.

Recent proposals for expanding the national appellate capacity have generally contemplated some form of "reference jurisdiction." Under this approach, the Supreme Court would be authorized to refer conflict cases to another tribunal for decision. Depending on the particulars of the new arrangements, the concerns that in the past have led the Justices to deny review to a case presenting an apparently certworthy issue might or might not remain relevant. Thus, if the findings of the study are to be used as the basis for evaluating such proposals, it will be necessary to examine the certiorari practice in a more comprehensive way. I hope that future researchers will pursue that line of investigation.

V. The Number and Frequency of Unresolved Conflicts

The research for this project was conducted during a six-month period in the summer and fall of 1991. In that time we analyzed a total of 572 cases -- 237 in the Dissent Group, 245 in the Random Group of paid cases, and 90 in the Random Group of IFPs.⁴² The Dissent Group gives us minimum figures on the number of conflicts denied review in the three most recent Terms of Court. The Random Group enables us to estimate with a high level of confidence the total number of conflicts denied review in the 1989 Term. It also provides data from which we can derive an estimate of the number of conflicts denied review in the other two Terms of the study.

A. Minimum numbers for the three Terms

During the three Terms of the study, Justice White dissented from denial of certiorari in 237 cases.⁴³ In 53 of these, no intercourt conflict was asserted by the petitioner or in the other materials before the Court. Rather, the petitioner pointed to the importance of the question, the lower court's failure to follow controlling authority, or perhaps a conflict among state courts. There was thus every reason to conclude that considerations such as these, not the presence of an intercourt conflict, had prompted Justice White to dissent.

⁴² In this chapter and those that follow, I shall use the capitalized terms "Dissent Group" and "Random Group" to refer to the data sets encompassing the cases that we analyzed. The Random Group actually included 252 paid and 93 IFP cases, but 7 of the former and 3 of the latter had already been analyzed as part of the Dissent Group.

⁴³ In the 1988 Term Justice White also dissented from the failure to grant plenary consideration of 4 cases brought by appeal under the recently repealed obligatory jurisdiction. These cases were not included in the study.

I do not want to minimize the significance of the non-conflict petitions. For example, *Tiller v. Fludd*⁴⁴ presented the question whether the Equal Protection Clause limits the use of racially based peremptory challenges in civil cases. The petitioner cited rulings on both sides of the controversy from district courts and state courts, but he conscientiously acknowledged that no federal court of appeals had yet decided the issue inconsistently with the holding below. Justice White nevertheless dissented from the denial of certiorari because the issue was so "important."⁴⁵ It is unlikely that the other Justices disagreed with that assessment; rather, they probably thought it preferable to await further "percolation" and perhaps a contrary resolution by another circuit.⁴⁶ Whatever the merits of that view, *Tiller* in October 1989 did not present an assertion of intercircuit conflict, and cases like it -- however certworthy for other reasons -- were excluded from further analysis in this study.

This brought the number of cases to 184. However, 18 of these involved conflicts that had prompted a dissent by Justice White earlier in the study period. The fact that the Court would turn down more than one opportunity to resolve a recurring issue is itself significant, and will warrant attention in Phase II when the focus shifts to assessing the persistence of conflicts. In the present context, I simply eliminated the duplications from the tally.⁴⁷

⁴⁴ 493 U.S. 872, *denying cert. to Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989).

⁴⁵ See *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901, 902 (1989) (White, J., dissenting from denial of certiorari).

⁴⁶ Several months after the denial of certiorari in *Tiller*, the Fifth Circuit, sitting en banc, did reach the opposite result. Certiorari was sought in that case as well, and this time the Court agreed to decide the issue. *Edmondson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), *aff'd*, 111 S. Ct. 2077 (1991).

⁴⁷ In a few instances there was room for disagreement over whether two petitions were asserting the same conflict. Doubtful cases were tallied separately.

On the other hand, a few petitions asserted conflicts on two (or occasionally three) discrete issues. Taking both duplications and multiple-issue cases into account, the total number of alleged conflicts in the Dissent Group came to 184: 43 in 1988, 64 in 1989, and 77 in 1990. As is obvious, the trend is upward. Moreover, the increase in the 1990 Term would have been even larger if issues flagged by Justice White in the two preceding Terms had not been excluded.

The next step was to evaluate the claims through application of the criteria described in Chapter 4. In just over 60 percent of the cases,⁴⁸ 114 in all, the conflict was explicitly acknowledged either by the court below or by another court of appeals that had considered the issue.⁴⁹ The acknowledgments took many forms. Most often, the later court explicitly rejected the rule adopted by another circuit. For example:

-- Based on the foregoing, we hold that a member of the armed forces carried on the Temporary Disability Retired List is not, as a consequence of that status, prevented by the Feres exception from bringing an action under the Federal Tort Claims Act. In so

⁴⁸ For purposes of reporting the findings, each separate claim of conflict is treated as a separate "case." This approach has the advantage of permitting the report to use "claim" and "case" interchangeably and thus to avoid undue repetition in language.

⁴⁹ This figure includes one case in which the acknowledgment came in an unpublished opinion. See *United States v. Feaster*, 843 F.2d 1392 (6th Cir.) (table) (text in Westlaw), *cert. denied*, 488 U.S. 898 (1988) (*cited in* *Metheny v. Hamby*, 488 U.S. 913, 914 (1988) (White, J., dissenting from denial of certiorari)). Although full discussion is beyond the scope of this report, I note that the relationship between nonpublication rules in the courts of appeals and the problem of intercircuit conflict warrants further exploration. Our study of the Dissent and Random Groups found several instances in which conflicts were created or exacerbated by unpublished opinions, seemingly in violation of the rules limiting such opinions to routine applications of existing law. Moreover, it was not uncommon to find citations to "unpublished" decisions in the certiorari materials. In an era when legal research is increasingly being conducted through electronic databases, the premises underlying nonpublication rules require re-examination. See STUDY COMMITTEE REPORT, *supra* note 3, at 130-31.

holding, we reach a conclusion directly opposed to that reached by our Eleventh Circuit colleagues.⁵⁰

- [W]e cannot agree with . . . those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive [to show a due process violation based on preindictment delay].⁵¹
- [We hold] that where state law prohibits agreements with employee representatives, public employers may enter into individual overtime agreements with employees . . . In so doing, we refuse to follow the Tenth Circuit case which reached a different result.⁵²
- We agree with the dissent [in a Seventh Circuit case] and reject the approach taken by the [majority] which places a very heavy -- and possibly insurmountable -- burden on the plaintiff with respect to establishing the probativeness of proffered statistical data [in a Title VII suit].⁵³

In other cases, the later court pointed to existing disagreements between two or more courts of appeals⁵⁴ or cited a precedent from another circuit with "*But see*"⁵⁵ or

⁵⁰ *Cortez v. United States*, 854 F.2d 723, 727 & n.2 (5th Cir. 1988) (footnote incorporated into text). The decision rejected by *Cortez* was *Ricks v. United States*, 842 F.2d 300 (11th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) (dissent case).

⁵¹ *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 111 S. Ct. 590 (1990) (dissent case).

⁵² *Dillard v. Harris*, 885 F.2d 1549, 1550 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990) (dissent case). The issue was also presented in *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990) (dissent case).

⁵³ *General Telephone Co. v. EEOC*, 885 F.2d 575, 581 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 370 (1990) (dissent case).

⁵⁴ *See, e.g., King Fisher Marine Serv. v. Hanson Dev.*, 893 F.2d 1155, 1158 (10th Cir.) ("The law among the circuits concerning the scope of ancillary jurisdiction is in some disagreement"), *cert. denied sub nom. Langan Eng'g Assocs. v. 21st Phoenix Corp.*, 110 S. Ct. 2603 (1990) (dissent case).

⁵⁵ *E.g., Automobile Importers of Am. v. Minnesota*, 871 F.2d 717, 724 n.9 (8th Cir.), *cert. denied*, 493 U.S. 872 (1989) (dissent case). The conflict was noted in *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901, 903 (1989) (White, J., dissenting from denial of certiorari).

"*Contra*."⁵⁶ Although the extent of discussion varied, all of the decisions could legitimately be regarded as manifesting, in the words of section 302, a "conflict[] . . . in interpreting the law."

Not surprisingly, in these cases the conflict generally was conceded by the respondent. But in an adversary system such admissions do not come easily. As often as not, the concession was indirect or equivocal. And even when the later court explicitly declined to follow a decision of another court of appeals, respondents sometimes insisted that there was no split in the circuits. For reasons given in Chapter 4, I took the courts' own assessment as dispositive. I note, too, that in many of the cases where the respondent argued that the opposing decisions could be reconciled, the conflict was recognized by other courts or by commentators.

Respondents were on stronger ground when the later court's expression of disagreement was tempered by language pointing to differences between the cases. Various forms of equivocal acknowledgment accounted for 9 of Justice White's dissents. For example, in *Town of Concord v. Boston Edison Co.*,⁵⁷ the First Circuit Court of Appeals said, "[W]e recognize that our reasoning and analysis differs significantly from that in" the opinions of three other circuits. But the court also emphasized various distinguishing features in the case before it, and asserted that "technically speaking, our holding is consistent with" the three earlier decisions.⁵⁸

I suspect that many lawyers would regard "technical" case-matching of this kind as little more than a polite fiction designed to avoid point-blank repudiation of

⁵⁶ *E.g.*, *United States v. Bissell*, 866 F.2d 1343, 1354 n.7 (11th Cir.), *cert. denied sub nom. Caraballo-Sandoval v. United States*, 493 U.S. 876 (1989). This conflict too was noted by Justice White. *McMonagle*, 493 U.S. at 902-03.

⁵⁷ 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1337 (1991) (dissent case).

⁵⁸ *Id.* at 28-29.

the result reached in another circuit. Nevertheless, from the standpoint of predicting the outcome of later decisions, a qualified refusal to follow another circuit's precedent leaves more room for shifting ground than rejection without reconciliation. Thus, although I included these cases in the tally of conflicts, I classified them separately so that readers who disagreed could adjust the figures accordingly.

In 12 of the cases in the Dissent Group the petitioner asserted a conflict even though the later court distinguished the supposedly inconsistent decision without repudiating either the result or the rationale of the other circuit. I might have followed the approach adopted for my study of intracircuit conflict and simply made my own determination of whether the distinctions were clear and cogent.⁵⁹ Instead, I first attempted to discover whether the assertion of conflict had any support in the writings of commentators or other participants in the system. For all but 3 of the claims, our research found at least some expression of confirmation, though for 4 cases it came only from dissenting judges or from the district court that was reversed. In 2 other cases, my own reading of the opinions led to the classification "apparent conflict."

This brings us to the 49 cases in which the later court made no mention of the allegedly conflicting decision or (much less often) cited the other circuit's precedent without evaluation or discussion. In almost half of these cases, a total of 23, the petitioner's assertion of conflict had some support from other participants in the

⁵⁹ See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 564-70 (1989).

legal system. Occasionally the recognition came from the respondent⁶⁰ or an amicus;⁶¹ more often, it was found in the decisions of other courts⁶² or in the works of commentators.⁶³ The number and directness of the comments varied, as did their probative value. In a few cases, the only support came from a dissenting judge in the court of appeals.⁶⁴ Overall, however, the indicia of conflict were considerably stronger than in the cases where the later court distinguished the allegedly inconsistent precedent.

Three cases could be classified as conflict cases on the basis of plainly inconsistent statements of law that led to different outcomes. Thus, in *United States v. Goolsby*⁶⁵ the Fourth Circuit held that jeopardy in a bench trial attaches when the first witness is sworn; in the case cited by petitioner as conflicting, the District of

⁶⁰ For example, in *Davis v. Tennessee Dep't of Empl. Sec.*, 111 S. Ct. 210, *denying cert. to Minority Employees v. Tennessee Dep't of Empl. Sec.*, 901 F.2d 1327 (6th Cir. 1990) (dissent case), the respondent said explicitly that a Ninth Circuit decision "does conflict with" the ruling of the court below. Brief in Opposition at 9-10.

⁶¹ *E.g.*, Brief for the United States at 14-17, *B & H Indus. of Southwest Florida v. Dieter*, 111 S. Ct. 369 (1990), *denying cert. to* 880 F.2d 322 (11th Cir. 1989).

⁶² *See, e.g.*, *Independent Fed. of Flight Attendants v. Trans World Airlines*, 1990 WL 52969, at *4 (W.D. Mo. 1990) (noting "implicit rejection" of D.C. Circuit decision by panel in *Delta Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) (dissent case)).

⁶³ For example, *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir. 1989), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990) (dissent case), was cited as manifesting "active judicial review of expert testimony," while the allegedly conflicting decision, *Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir.), *cert. denied*, 479 U.S. 950 (1986), was cited as illustrating the "passive approach." *Recent Developments*, 64 TUL. L. REV. 1263, 1265, 1267 (1990).

⁶⁴ *E.g.*, *United States v. Hatchett*, 918 F.2d 631, 646 (6th Cir. 1990) (Jones, J., dissenting), *cert. denied*, 111 S. Ct. 2839 (1991) (dissent case).

⁶⁵ 691 F.2d 199 (4th Cir. 1982). This case was relied on by the Michigan court in *People v. Brower*, 416 N.W.2d 397 (Mich.App. 1987), *cert. denied*, 488 U.S. 933 (1988) (dissent case).

Columbia Circuit held that jeopardy does not attach until the court actually hears evidence.⁶⁶

In the remaining 23 cases, the conflict was not obvious on the face of the opinions, and we could find no support elsewhere for the petitioner's claim. None of the court of appeals decisions cited by the petitioner expressed disagreement of any kind with another circuit. The respondent did not concede the existence of a conflict. A computer search of court and periodical databases, often supplemented by examination of relevant treatises, uncovered no hint of intercircuit discord.

It might be argued that in the situation just described, any conflict that might be identified through independent analysis would be so close to invisible that none of the consequences that Congress feared could possibly materialize. Yet the fact remains that, notwithstanding the absence of cross-citation, recognition by other participants, or plain inconsistency in the holdings, petitioner's counsel had found the earlier decision and concluded -- admittedly from the special perspective of an advocate petitioning for certiorari -- that a conflict had been created. What one lawyer could find, so could others.⁶⁷ Moreover, some of the cases were quite recent; some involved relatively narrow points of law. In both situations, the lack of recognition in the writings of commentators and other courts had only minimal probative value.

For all of these reasons, it seemed desirable to undertake independent analysis of the remaining claims of conflict in the Dissent Group. The object was to determine whether there was a sufficiently strong appearance of inconsistency to implicate the four Congressional factors. To give concreteness to the inquiry, I

⁶⁶ *United States v. Newman*, 410 F.2d 259 (D.C. Cir. 1969).

⁶⁷ The published notation of dissent by Justice White, although unexplicated, might itself encourage lawyers to look for evidence of conflict.

focused on a hypothetical lawsuit, simultaneously litigated in each of the circuits, in which both precedents could reasonably be invoked. The test I used was this: placing the allegedly inconsistent decisions side by side, was the similarity in legal setting and formulation of the issue great enough that the difference in outcome would likely be seen as shifting the burden of persuasion in the district courts? By "shifting the burden of persuasion" I mean that in each circuit the litigant relying on the other circuit's precedent would be put in the position of arguing for an exception to his own circuit's rule.⁶⁸ If this test was met, the claim of inconsistency had sufficient plausibility to warrant the classification "apparent conflict."

In 6 of the remaining cases, I concluded that the classification was justified. For example, in *Barnes v. Gencorp Inc.*,⁶⁹ the Court of Appeals for the Sixth Circuit affirmed the grant of summary judgment in a disparate-treatment age discrimination case. The court's rejection of the plaintiff's attempt to prove pretext through statistics contrasted with a First Circuit decision that allowed the plaintiff to go to the jury on the basis of similar statistical evidence.⁷⁰ In *In re Busenlehner*,⁷¹ the Court of Appeals for the Eleventh Circuit followed state law in determining whether a loan had been timely perfected for purposes of avoiding a preferential transfer. This

⁶⁸ The underlying assumption here is that in a hierarchical system, especially one beset by caseload pressures, the need to argue for an exception involves (and will be seen to involve) effort and risk that are not present if there is no circuit precedent to be overcome. That effort and risk would certainly be of concern to a lawyer counseling a multi-circuit actor or considering where to bring suit when "venue [is available] in different fora."

⁶⁹ 896 F.2d 1457 (6th Cir.), *cert. denied*, 111 S. Ct. 211 (1990) (dissent case).

⁷⁰ See *Freeman v. Package Mach. Co.*, 865 F.2d 1331 (1st Cir. 1988).

⁷¹ 918 F.2d 928 (11th Cir. 1990), *cert. denied sub nom. Moister v. General Motors Acceptance Corp.*, 111 S. Ct. 2251 (1991) (dissent case).

decision suggested a different approach from a Fifth Circuit ruling emphasizing the importance of a uniform grace period controlled by federal law.⁷²

The classification "apparent conflict" does not necessarily mean that the results of the competing decisions could not be reconciled. Very likely they could. But from the practical perspective suggested by the tolerability factors of section 302(b), that is not the question. The question is whether there is a "conflict[] . . . in interpreting the law" that has the potential to affect the behavior of lawyers and clients. I believe that these cases meet that standard, albeit only marginally.

Four other cases seemed to me to fall on the other side of the line. These have been categorized as the "possible conflicts." Two cases were put aside because the decision below was unpublished and the petitioner did not point to any published decisions on the same side of the alleged conflict. That left 11 cases that, to my mind, clearly were not conflict cases.⁷³

The upshot is that in the three Terms of the study we found 166 substantiated claims of conflict among Justice White's 237 dissents: 38 in the 1988 Term, 59 in 1989, and 69 in 1990. The bases of classification are given in Table 1. The table also summarizes the analysis of all cases in the Dissent Group.

⁷² See *In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990).

⁷³ Justice White would not necessarily disagree with my classification of these cases. Petitions often presented more than one argument in support of Supreme Court review, and Justice White might well have been persuaded by one of those other reasons rather than the claim of conflict.

Table 1
Analysis of Dissent Group Cases

	<i>1988 Term</i>	<i>1989 Term</i>	<i>1990 Term</i>	<i>All Terms</i>
Total cases analyzed	66	74	97	237
Cases not asserting conflicts	21	15	17	53
Assertions of conflict (including duplications)	46	68	88	202
Conflicts duplicated in same Term	3	3	4	10⁴
Conflicts duplicated from previous Term	0	1	7	8
Total conflicts asserted	43	64	77	184
Acknowledged conflicts	26	43	45	114
Equivocally acknowledged conflicts	4	3	2	9
Recognized conflicts	6	10	16	32
Unmistakable conflicts	1	1	1	3
Apparent conflicts	1	2	5	8
Total conflicts	38	59	69	166
Possible conflicts	2	0	2	4
Unpublished decisions without acknowledgment	0	2	0	2
Unsubstantiated claims	3	3	6	12

B. An estimate for the 1989 Term: analysis of the Random Group

Moving from the Dissent Group to the Random Group was like being transported from the neat, well-ordered streets of a city to the uncharted wilderness of the countryside. The experience could be disconcerting, but the contrast helped to illuminate the character of both environments.

As explained in Chapter 3, the Random Group actually consisted of two sets of cases, one selected from the Court's paid docket, the other from the IFP (5000 series) docket. The findings in this report are based primarily on the sample of paid cases, though I shall also present some analysis of the denials in the 5000 series.

The paid cases. Not surprisingly, the proportion of petitions asserting conflicts was much lower in the Random Group than in the Dissent Group. Of the 252 paid cases, 133 did not claim intercircuit conflict as a reason for the grant of certiorari. Another 14 petitions invoked the language of conflict, but supported the assertion in such a vague or generalized way that followup work would have been impossible. These two sets of cases, which together made up nearly 60 percent of the paid segment of the Random Group, were excluded from further study.

As with the Dissent Group, some petitions pointed to conflicts on more than one issue. Thus, after the initial exclusions, 114 claims of intercircuit inconsistency remained to be analyzed. The Random Group, however, revealed some patterns that were absent or de minimis in the Dissent Group.

Two petitions presented acknowledged conflicts, but not conflicts that "remain[ed] unresolved." These were cases that the Court set aside to await the disposition of a case in which certiorari had been granted to resolve the same issue. When the plenary decision was announced, the Court denied review, presumably after determining that the lower court's ruling was sufficiently in accord with the new

precedent that there was no reason to require reconsideration.⁷⁴ On that premise, "held cases" were not subjected to further study.

For very different reasons, we could also forego extensive analysis of cases in which the conflict was not acknowledged, the decision below was unpublished, and nothing in the certiorari materials called attention to any published court of appeals opinions that came out on the same side of the issue. While the lower court's ruling might have created a conflict in some theoretical sense, the inconsistency could not have influenced behavior in any of the ways that concerned Congress. And even on a theoretical level, the assertion of conflict was generally quite attenuated. Ten claims fell into this category. Two other cases presented a variation on the pattern: the opinion below was published, but it did not address the issue that was asserted to be the subject of a conflict.

Two petitions pointed to conflicts that were acknowledged or recognized by lower courts, but the manner in which the study group cases had been litigated would have prevented the Court from reaching the conflict issues. In one, an essential factual predicate had been eliminated by stipulation;⁷⁵ in the other, the issue had never been raised at all.⁷⁶

⁷⁴ For discussion of this aspect of the Court's practice, see Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5 (1983).

⁷⁵ Compare *Chathas v. Smith*, 884 F.2d 980, 986 n.4 (7th Cir. 1989) (parties stipulated that defendant was the Village attorney), *cert. denied*, 110 S. Ct. 1169 (1990) (sample case), with Petition for Certiorari at 15 (citing conflict on immunities that may be asserted by a private individual in a section 1983 suit).

⁷⁶ Compare *Glover v. Eastern Nebraska Community Office of Retardation*, 867 F.2d 461, 464 (8th Cir.) (holding that mandatory AIDS testing violates fourth amendment rights of government employees), *cert. denied*, 493 U.S. 932 (1989) (sample case), with Petition for Certiorari at 16 & n. 14 (citing conflict on whether Constitution establishes right of privacy in information concerning medical conditions). For judicial recognition of the conflict, see *Plowman v. United States Dep't of the Army*, 698 F. Supp. 627, 633 (E.D. Va. 1988).

This brings us to the cases in which the petitioner asserted a "live" reviewable conflict between published decisions of two or more courts of appeals. Taking the multiple-claim petitions into account, the paid segment of the Random Group yielded a total of 98 asserted conflicts that were subjected to further study. We followed the same method as we had with the Dissent Group: we looked first for acknowledgment by the courts that decided the cases; we then asked whether the asserted inconsistency was recognized by other participants in the legal system.

In 30 of the paid cases in the Random Group, the conflict was acknowledged either by the court below or by another court of appeals that had decided the issue. Equivocal acknowledgments of conflict were called to the Justices' attention in 3 petitions. For reasons given in Chapter 4, all of these cases were included without further analysis in the tally of conflicts denied review.

As was true of the Dissent Group, intercircuit disagreement took many forms. The following extracts from court of appeals decisions provide a sampling:

- Other circuits have interpreted the effect of subsection (h) [of Rule 11 of the Federal Rules of Criminal Procedure] differently. . . . We note these varying interpretations of Rule 11 only to avoid further confusion in this area. They have no effect upon our decision here.⁷⁷
- Although other courts of appeals have adopted the more restrictive "culpable participation" requirement, which requires a showing that the lender actually participated in the alleged violation . . . , we reject this more stringent standard [for "controlling person" liability under the federal securities laws] for reasons announced by the Fifth Circuit⁷⁸

⁷⁷ *United States v. Bernal*, 861 F.2d 434, 436 (5th Cir. 1988), *cert. denied*, 493 U.S. 872 (1989) (sample case).

⁷⁸ *Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir. 1985), *cert. denied*, 474 U.S. 1072 (1986). *Metge* was treated as controlling authority in *Barnes v. McPherson*, 889 F.2d 1091 (8th Cir. 1989) (table) (text in Petition for Certiorari at 116), *cert. denied*, 493 U.S. 1077 (1990) (sample case).

- [The Ninth Circuit] concluded that the diving injuries sustained in that case were not "wholly unrelated" to Congress' flood control efforts. . . . For our part, we cannot agree that Congress intended to stretch the shield of flood control immunity to the limits contemplated by the "wholly unrelated" standard.⁷⁹
- We also agree with [the Fifth Circuit] that plaintiffs lack standing [under RICO] because they are not the victims or targets of the mail fraud. . . . We are not unmindful of contrary authority [citing Eighth Circuit decision].⁸⁰

Often the acknowledgment of conflict was reinforced by recognition in the writings of other courts and commentators. For example:

- [From a district court opinion:] Defendants request that the Court depart from . . . the analysis set forth in [a Third Circuit decision] and instead follow a more recent Eighth Circuit case in which a divided court held that retroactive money damages are not available to blind vendors under the Randolph-Sheppard Act. . . . This Court declines to follow the [Eighth Circuit case]. The Court adheres to . . . the exhaustive analysis of the Third Circuit . . . and [the dissent in the Eighth Circuit].⁸¹
- [From a district court opinion:] The Seventh Circuit holds that Title VII does not permit an award even of *nominal* damages for sexual harassment unless that harassment results in discharge. . . . In this holding the Seventh Circuit frankly acknowledges its disagreement with the First Circuit, the Fourth Circuit, the Fifth Circuit and the Eleventh Circuit. . . . In fact, in [another case] the Eleventh Circuit further distanced itself from the Seventh Circuit . . .⁸²

⁷⁹ *Boyd v. United States*, 881 F.2d 895, 900 (10th Cir. 1989). The Ninth Circuit decision rejected by the Tenth Circuit was relied on by the Eighth Circuit in *Dewitt Bank v. United States*, 878 F.2d 246, 247 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1318 (1990) (sample case).

⁸⁰ *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2620 (1990) (sample case).

⁸¹ *Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. 292, 308 (D.D.C. 1990). The Eighth Circuit case which the district court declined to follow was *McNabb v. United States Dep't of Educ.*, 862 F.2d 681 (8th Cir. 1988), *cert. denied sub nom. McNabb v. Cavazos*, 493 U.S. 811 (1989) (sample case).

⁸² *Walton v. Cowin Equipment Co.*, 733 F. Supp. 327, 336 (N.D. Ala. 1990) (emphasis in original). The Seventh Circuit position was stated in *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990) (sample case).

- [From a court of appeals opinion:] We are not fully persuaded by [the Third Circuit's] attempt to distinguish [a Sixth Circuit decision], which opines that ERISA *should* be an expressly authorized exception to the Anti-Injunction Act. The Third Circuit distinguished [the case] on its facts, but the factual differences cited do not appear to be controlling, as both cases govern § 1132 fiduciaries.⁸³
- [From a law review article:] Part III [of this Comment] examines three recent cases in which the federal courts have disagreed over whether arbitral reinstatement of employees discharged for endangering the public contravenes public policy. . . . Courts applying [a Supreme Court precedent] have viewed the public policy exception in two ways, neither of which is completely satisfactory.⁸⁴
- [From a treatise:] It is uncertain whether malicious prosecution by state and local officials is a constitutional wrong actionable under § 1983. The Supreme Court has yet to resolve the issue. . . . There are conflicts not only among the circuits but, in some instances, within the circuits as well.⁸⁵

Fifteen other claims of conflict, although not acknowledged by the courts of decision, had some support in comments by judges, scholars, and other participants

also in Dissent Group). The conflict has also been noted by commentators. *See, e.g.,* CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 16.2 (2d ed. Supp. 1990).

⁸³ Total Plan Servs., Inc. v. Texas Retailers Ass'n, 925 F.2d 142, 145 n.3 (5th Cir. 1991) (emphasis in original). The Third Circuit case was United States Steel Corp. Plan v. Musisko, 885 F.2d 1170 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990) (sample case). In addition to distinguishing the Sixth Circuit precedent, the Third Circuit unequivocally rejected a Second Circuit ruling. *See Musisko*, 885 F.2d at 1178.

⁸⁴ Comment, *Judicial Review of Labor Arbitration Awards Reinstating Dangerous Employees*, 1990 U. CHI. LEG. FORUM 625, 627, 634. To exemplify one side of the conflict, the author cited *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 2205 (1990) (sample case). *See also Interstate Brands Corp. v. Teamsters Local No. 135*, 909 F.2d 885, 894 n.11 (6th Cir. 1990) (noting "schism" between *Stead Motors* and the other two decisions discussed in the comment).

⁸⁵ 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES 167 (2d ed. 1991) (footnotes omitted). Among the cases discussed in a seven-page review of court of appeals decisions is *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied sub nom. Maxwell v. Goodwin*, 110 S. Ct. 1812 (1990) (sample case).

in the legal system. For 3 of these there was also contrary evidence, but the affirmations of conflict had sufficient prominence to create a substantial possibility of triggering one or more of the consequences that concerned Congress. Under these circumstances, I concluded that the characterization "recognized conflict" was warranted. On the other hand, in 7 of the cases, the evidence taken as a whole did not justify that conclusion. The characterizations supporting the claim were oblique or ambiguous, or they were counterbalanced by other authorities that appeared to view the decisions as consistent. Thus the number of recognized conflicts was 8.

Perceptions of conflict were manifested in a variety of ways. For example, in *Owen v. Commissioner*,⁸⁶ the petitioner asserted a disagreement between the Second and Ninth Circuits over the tax consequences of transfers of property to a controlled corporation. Discussions in treatises and journals lent strong support to the claim of inconsistency.⁸⁷ In a section 1983 suit against members of a state's board of medical examiners,⁸⁸ the petitioner argued that the Sixth and Tenth Circuits had taken opposing positions on the availability of absolute immunity.⁸⁹ Several courts seemed

⁸⁶ 493 U.S. 1070 (1990), *denying cert. to* 881 F.2d 832 (9th Cir. 1989) (sample case).

⁸⁷ See, e.g., JACOB MERTENS, *THE LAW OF FEDERAL INCOME TAXATION*, Comm. § 43A.85 at 141 n. 94 (rev. ed. 1991) ("On similar facts, the court in [*Owen*] reached the opposite conclusion" from the Second Circuit); Lee A. Sheppard, *Reading Section 357(c) Out of the Code*, 47 TAX NOTES 1556, 1556 (1990) ("An example of conflict [with the Second Circuit decision] is *Owen*").

⁸⁸ *Robertson v. State Board of Medical Examiners*, 493 U.S. 993 (1989), *denying cert. to* No. 88-1129 (10th Cir. June 22, 1989) (unpublished opinion; text in Petition for Certiorari).

⁸⁹ The Tenth Circuit in *Robertson* relied on its prior decision in *Horwitz v. Board of Medical Examiners*, 822 F.2d 1508 (10th Cir. 1987). The allegedly conflicting decision was *Manion v. Michigan Bd. of Medicine*, 765 F.2d 590 (6th Cir. 1985).

to share that view.⁹⁰ The petitioner in an ERISA case⁹¹ asserted a conflict on the permissibility of amendments to a pension fund plan that allow reversion of surplus assets to the company.⁹² A leading treatise concurred, describing "two different approaches" to the problem.⁹³ A cross-petition from the same judgment pointed to a conflict on the standard for awarding attorneys fees in ERISA suits.⁹⁴ Here the principal support came from a law review article.⁹⁵

At the other end of the spectrum were the cases in which the claim of conflict had no support anywhere.⁹⁶ That is, no inconsistency was acknowledged by any of

⁹⁰ See, e.g., *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 772, 784 (1st Cir. 1990) (agreeing with *Horwitz*; citing *Manion* with "But see"); *Schopler v. Bliss*, 903 F.2d 1373, 1380 (11th Cir. 1990) (stating holding of *Horwitz*; citing *Manion* with "but see").

⁹¹ *Davis Iron Works v. Rosenbaum*, 493 U.S. 890, *denying cert. to* 871 F.2d 1088 (6th Cir. 1989) (table) (text in Westlaw), *aff'g* 669 F. Supp. 813 (E.D. Mich. 1987).

⁹² The unpublished opinion of the Sixth Circuit relied on the court's earlier decision in *Bryant v. International Fruit Prods. Co.*, 793 F.2d 118 (6th Cir. 1986). The court distinguished *Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987), which had in turn distinguished *Bryant*, albeit over a dissent which perceived "a questionable attempt to mix oil and water." *Id.* at 467 (Hall, J., dissenting).

⁹³ EDWARD T. VEAL AND EDWARD R. MACKIEWICZ, PENSION PLAN TERMINATIONS 228 (1989). This view was not universally held, however. See, e.g., *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1185-96 (S.D. Tex. 1991) (suggesting that different results in the cases can be attributed to different language in the pension plan documents).

⁹⁴ *Rosenbaum v. Davis Iron Works*, 493 U.S. 890, *denying cert. to* 871 F.2d 1088 (6th Cir. 1989) (table) (text in Westlaw).

⁹⁵ Comment, *Attorney's Fees Under ERISA: When Is an Award Appropriate?*, 71 CORNELL L. REV. 1037, 1037 (1986) (federal courts have "formulated divergent standards" for ERISA fee awards).

⁹⁶ In one case a conflict that existed when the certiorari petition was filed had been eliminated by the time the Court considered the request for review. Compare *Eggleston v. Colorado*, 873 F.2d 242, 246 (10th Cir. 1989) (rejecting Eighth Circuit decision), *cert. denied sub nom.* *Colorado Dep't of Rev. v. United States*, 110 S. Ct. 1112 (1990) (sample case), with *United States v. Trotter*, 889 F.2d 153 (8th Cir. 1989) (acknowledging statute that superseded precedent rejected by Tenth Circuit), *modified on other grounds*, 912 F.2d 964 (8th Cir. 1990) (en banc).

the courts of decision; none was perceived by any of the authorities available on Lexis or Westlaw, or by any of the treatises we examined; and none was apparent on the face of the decisions.⁹⁷ Nearly half of the "live" assertions of conflict in the Random Paid Group -- 42 in all -- fell into this category.

The cases not accounted for thus far are those in which the claim of inconsistency received no direct support from courts or commentators, but a reading of the opinions, alone or against the background of other materials, gave the contention at least a surface plausibility. Ultimately I concluded that for 2 of the assertions the evidence was sufficient to warrant the classification "apparent conflict." One of the claims involved the first amendment rights of government employees;⁹⁸ the other, the retroactive application of a Supreme Court decision.⁹⁹ In the remaining cases (6 in number), the appearance of inconsistency was so attenuated

⁹⁷ In at least one instance a conflict developed after the denial of review. Compare *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989) (sample case), with *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (en banc). The petitioner in *Grider* asserted a conflict with cases that did not involve the same issue.

⁹⁸ Compare *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1576-78 (5th Cir. 1989) (public employee's testimony at hearing on discipline of coworker constitutes speech on matter of public concern), *cert. denied*, 493 U.S. 1019 (1990) (sample case), with *Arvinger v. Mayor of Baltimore*, 862 F.2d 75 (4th Cir. 1988) (public employee's testimony at hearing on allegations of discrimination by coworker is not protected). The respondent in *Johnston* came close to conceding the existence of the conflict. See Brief in Opposition at 25 ("To the extent that these two cases must be said to create inconsistent legal principles, *Johnston* must prevail.").

⁹⁹ Compare *Chathas v. Smith*, 884 F.2d 980 (7th Cir. 1989) (declining to apply "objective reasonableness" standard to allegations of excess force antedating Supreme Court decision in *Graham v. Connor*, 490 U.S. 386 (1989)), *cert. denied*, 493 U.S. 1095 (1990) (sample case), with *Miller v. Lovett*, 879 F.2d 1066 (2d Cir. 1989) (applying *Graham* standard to pre-*Graham* conduct); and *Reed v. Hoy*, 891 F.2d 1421, 1424-26 (9th Cir. 1989) (applying *Graham* retroactively), *modified on other grounds*, 909 F.2d 324 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991). It appears that the certiorari petition in *Reed* was held to await the decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) (giving retroactive effect to ruling invalidating state tax scheme).

that it was hard to imagine that lawyers would take action in reliance on a perception of intercircuit disagreement.

As this description indicates, when classification depended primarily on my own assessment of the two opinions, I generally excluded the borderline cases from the tally of conflicts. Admittedly, this approach runs some risk of undercounting. But from the perspective of section 302 the risk is very small indeed. Almost invariably, marginal conflicts will present one or more features that would cause them to be classified as "tolerable." To include them at the first stage of analysis -- especially when the actual number will be multiplied fivefold -- would distort the overall picture of conflicts denied review in the 1989 Term.

In short, applying the same criteria that we used to evaluate the cases in the Dissent Group, we found that the Random Group of paid cases contained 41 acknowledged or recognized intercircuit conflicts and 2 that would have been classified as "apparent conflicts." And since the sample represented a one-in-five "cut" of the paid cases that were not heard by the Court, we could multiply by five to get an estimate of the total number of conflicts on the paid docket in which review was denied in the 1989 Term.¹⁰⁰ That number is thus 215.¹⁰¹

The *in forma pauperis* cases. The IFP segment of the Random Group presented a very different picture. Of the 93 petitions in the sample, 69 -- nearly three-quarters -- made no assertion of intercircuit conflict. Among the cases that did claim conflicts, 7 could be put aside for reasons similar to those described in

¹⁰⁰ As explained in Chapter 3, we did not actually examine a one-in-five sample of all paid cases in which review was denied, but rather a sample of paid cases in which review was denied after the filing of a brief in opposition. It is thus possible that the numbers in the text slightly understate the number of conflicts that were not heard by the Court.

¹⁰¹ At a confidence level of 95 percent (correcting for the finite population), the range is between 163 and 268.

connection with the paid petitions: the conflict was resolved by the end of the Term in another case presenting the same issue (2 cases); the decision below was unpublished and the petitioner cited no published opinions on the same side of the alleged conflict (2 cases); the case did not present the conflict issue (1 case); or the conflict duplicated one already recorded in the IFP segment of the Study Group (2 cases).

After taking account of multiple claims, I was left with 19 alleged conflicts that were subjected to further analysis. Of these, 11 were acknowledged by at least one court of decision or recognized by other participants in the legal system.

At this point I expected to multiply by ten to get an estimate of the number of conflicts denied review in the IFP segment of the docket in the 1989 Term. With such a small sample, however, and with fewer than a dozen substantiated assertions of conflict, any estimate would carry a large margin of error. Moreover, although I did not undertake a comprehensive analysis of tolerability, I proceeded far enough to be confident that most of the conflicts would not significantly implicate any of the four factors delineated in section 302.

Overall, then, our research indicates that the number of conflicts denied review in cases in the 5000 series is more than de minimis. But any attempt to quantify the extent of unresolved conflicts on the basis of the available data would be misleading. When quality as well as quantity are taken into account, I have little difficulty in concluding that it would not be worthwhile to expend more of our limited resources to further refine the data on the *in forma pauperis* segment of the docket. Thus the analysis that follows will be based on the paid cases alone.

C. Initial implications of the findings

In the remainder of this report, and also in Phase II of the study, I shall present additional data that will provide context for the raw numbers reported in this chapter. However, it is not too early to note one conclusion and, with greater emphasis, two limitations on the significance of the data.

What has been established beyond doubt is that Justice White does not invariably dissent in every case in which certiorari is denied despite the presence of a conflict. On the contrary, he is quite selective in choosing cases for public notation of certworthiness. An interesting question is whether it will be possible to identify systemic differences between the acknowledged or recognized conflicts that are flagged by Justice White and those that are not. Certainly it is not difficult to find important and recurring issues among the conflict cases in which Justice White remained silent.¹⁰²

More important are the limitations of the data reported thus far. First, at this writing, less than two years has elapsed since the denial of review in many of the cases in the Random Group. In none of the cases did the Court act before October 1989. We know from prior research that conflicts denied review in one Term will often be resolved when they are brought to the Court by another petitioner in a subsequent Term.¹⁰³ Thus, to determine the number of conflicts that *remain*

¹⁰² See, e.g., *O'Malley v. O'Neill*, 110 S. Ct. 2620 (1990), *denying cert. to* 887 F.2d 1557 (11th Cir. 1989) (indirect injury as basis for civil RICO suit); *Dewitt Bank v. United States*, 110 S. Ct. 1318 (1990), *denying cert. to* 878 F.2d 246 (8th Cir. 1989) (immunity of United States under Flood Control Act); *McPherson v. Barnes*, 493 U.S. 1077 (1990), *denying cert. to* 889 F.2d 1091 (8th Cir. 1989) (table) (scope of "controlling person" liability under federal securities laws); *CBS Inc. v. Berda*, 493 U.S. 1062 (1990), *denying cert. to* 881 F.2d 20 (3rd Cir. 1989) ("circuit-splitting question" involving preemption by § 301 of Labor Management Relations Act); *McNabb v. Cavazos*, 493 U.S. 811, *denying cert. to* 862 F.2d 681 (8th Cir. 1989) (immunity of states under Randolph-Sheppard Act).

¹⁰³ See, e.g., Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375, 396 n.100 (1984).

unresolved because the Supreme Court does not hear them, it will be necessary to examine the Court's handling of conflict cases over a longer period of time. That inquiry will be pursued in Phase II. For now, I can report that, as of September 1, 1991, one conflict in the Random Group of paid cases had been resolved by the Supreme Court,¹⁰⁴ and one had been eliminated by amendments to the statute.¹⁰⁵ A third issue will be mooted by the Civil Rights Act of 1991.¹⁰⁶ In addition, Court decisions and legislation may have cast some of the other conflicts in a new light.¹⁰⁷

Second, it is quite possible that research methods chosen to maximize objectivity have produced raw numbers that, viewed in isolation, convey an exaggerated picture of the *problem* of unresolved conflicts. In particular, by giying

¹⁰⁴ Compare *Gilbert v. City of Little Rock*, 867 F.2d 1063 (8th Cir.), *cert. denied*, 493 U.S. 812 (1989) (sample case), with *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138 (1991) (attorneys fee awards for expert witnesses in civil rights cases). The Court's decision will be nullified prospectively by the Civil Rights Act of 1991. See 137 CONG. REC. S 15477-78 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

¹⁰⁵ Compare *Environmental Defense Fund v. Thomas*, 870 F.2d 892 (2d Cir.), *cert. denied sub nom. Alabama Power Co. v. Environmental Defense Fund*, 493 U.S. 991 (1989) (sample case), with S. Rep. No. 228, 101st Cong., 2d Sess. 374 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3757 (describing amendments to Clean Air Act; stating that "availability of judicial review of a failure to act has been unclear" and that new law will clarify the point).

¹⁰⁶ The new law explicitly provides for damages in Title VII suits, thus making irrelevant the question presented in *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990) (sample case also in Dissent Group), discussed *supra* note 82 and accompanying text. See 137 CONG. REC. S 15483-84 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth) (interpretative memorandum on damages in intentional discrimination cases).

¹⁰⁷ For example, the issue of retroactivity presented in *Chathas v. Smith*, 884 F.2d 980 (7th Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990) (sample case), discussed *supra* note 99, would have to be reassessed after the decisions in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). Although *Beam* did not produce a majority opinion and the *Lampf, Pleva* majority did not address the issue, the two rulings in combination can be read as requiring retroactive application of new precedents in civil cases. See *Cipriano v. Board of Educ.*, 772 F. Supp. 1346 (W.D.N.Y. 1991).

dispositive weight to acknowledgments of intercircuit disagreement and treating separately the question whether those disagreements are likely to change outcomes, I have undoubtedly counted some conflicts that would not have been identified as such through a mode of analysis that integrated all of the various factors that bear on tolerability. To have proceeded otherwise, however, not only would have taken away some of the objectivity that Congress sought; it would also have substantially diminished the value of the research to the debate over national appellate capacity. Section 302 lists four nonexclusive factors as relevant to intolerability, but neither the statute nor its legislative history gives any indication of how those factors might be weighed, much less how they would be applied in particular cases. Thus, from the perspective of policymaking, one of the most useful contributions that scholarship can make is to focus attention on identifying precisely what makes a conflict "intolerable" rather than merely "undesirable," or "undesirable" rather than "insignificant."¹⁰⁸ By starting with a relatively inclusive number and making the winnowing process transparent, I hope that this study will illuminate these questions as well as providing data that will help to ascertain the extent of the problem. The tradeoff is that at this point in the research, I am reporting some numbers that will not become fully meaningful until placed in context. That context will be provided by the remainder of this report and the research to be conducted in Phase II.

D. The significance of "vehicle" problems

Even excluding the IFP cases, the estimate of unresolved conflicts in the 1989 Term is substantially higher than would have been expected on the basis of previous studies. In part, as already explained, this is because the classifications do not reflect

¹⁰⁸ These are the terms used by the chairman of the Federal Courts Study Committee. See Weis Statement, *supra* note 7, at 14.

considerations relating to tolerability. Another reason may be that the tally does not take into account any of the circumstances that might have made the sample case an inappropriate vehicle for resolving the conflict. With that factor in mind, I looked once again at the 43 substantiated conflicts in the paid segment of the Random Group.

In just under half the cases, the respondent did not call the Court's attention to any kind of vehicle problem. Most often, the brief in opposition argued that the decision below was correct and did not conflict with the decision of any other court of appeals. A few respondents urged the Court to await further consideration of the issue in the lower courts.

At the other extreme, some of the strongest claims of conflict were brought to the Court in procedural settings that at least raised doubts about the suitability of the vehicle. For example, in the realm of antitrust, the decisions of the various circuits have manifested "fundamental disagreement over the test" for measuring the "sham" exception to the *Noerr-Pennington* doctrine.¹⁰⁹ In *South Dakota v. Kansas City Southern Ry. Co.*,¹¹⁰ the petitioner, joined by nine other states as amici, asked the Supreme Court to resolve the conflict. The respondent countered that the court below had rejected liability on alternate grounds, one of which involved a fact-bound ruling on a state law claim.¹¹¹ Although the situation was somewhat more complicated than the respondent's argument suggested, the procedural posture did

¹⁰⁹ Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANITRUST L.J. 327, 333 (1988); see also James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 106 n.188 (1986) ("circuits are split").

¹¹⁰ 493 U.S. 1023, *denying cert. to* 880 F.2d 40 (8th Cir. 1989).

¹¹¹ See *South Dakota*, 880 F.2d at 52-53 (alternate holding on absence of causal relationship to plaintiffs' injuries).

mean that in all likelihood the Justices could have reached the *Noerr* issue only by a roundabout route.¹¹²

Stead Motors, the case involving the public policy exception to the enforcement of arbitration awards,¹¹³ presented a variation on this theme. The respondent argued that the judgment below rested on a narrow, uncertworthy ground (albeit one based on federal law), and that, in addition, the Ninth Circuit's rejection of other circuits' precedents was contained in an opinion endorsed only by a plurality of the en banc court. Yet the plurality opinion did not treat the different rationales as discrete and self-contained, nor would the absence of majority support for a single line of reasoning necessarily have precluded the Supreme Court from considering the case.¹¹⁴

The asserted existence of alternate grounds for the decision below is closely related to the vehicle problem most often invoked by respondents: the likelihood that resolution of the conflict would not change the result in the particular case. This preeminence is not surprising. In a judicial system shaped by the case and controversy requirement of Article III, an argument that focuses on "judgments, not opinions"¹¹⁵ carries great weight. But application of the principle will not always be

¹¹² Petitioner and its amici were also asking the Court to review and reverse the Eighth Circuit's holding that the state lacked standing to pursue its antitrust claims. (In the district court, the state had prevailed upon those claims as well as its state-law tort theories.) If the Court had followed that course, the *Noerr* issue would have been presented independently of the state law claim.

¹¹³ See *supra* note 84 and accompanying text.

¹¹⁴ See *Zinermon v. Burch*, 494 U.S. 113, 116 (1990).

¹¹⁵ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

self-evident.¹¹⁶ In resolving an issue on which the lower courts have disagreed, the Supreme Court is not limited to choosing between the views that have given rise to the conflict.¹¹⁷ Nor will the Justices necessarily know, at the time of granting review, whether the choice of rule will actually be outcome-determinative.¹¹⁸

Uncertainties of this kind are pervasive in the study of vehicle problems. To be sure, some barriers cannot be overcome. But as explained in Chapter 4, I attempted to exclude from the tally of substantiated conflicts the cases in which the Court clearly could not have reached the conflict issue. Thus, almost by definition, the remaining cases are those in which the existence and effect of any asserted barriers were subject to disputation.

I have gone into these matters in the hope of shedding light on the extent to which vehicle problems may account for the conflicts that "remain unresolved because they are not heard by the Supreme Court." The analysis thus far leads to the conclusion that this study alone cannot provide the answer. We know that, at least on occasion, cases have received plenary consideration even though some Justices

¹¹⁶ It has been further suggested that if the legal issue is not relevant to the petitioner's claim, the litigant "will not advocate the claim to its fullest." Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents From Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 620 (1987). While the proposition is no doubt sound in the abstract, it is of dubious value in assessing the suitability of a case as a vehicle for resolving an inter-circuit conflict. When a litigant goes to the expense and effort of seeking Supreme Court review, this will be because he or she is convinced that resolution of the issue *can* make a difference in the case. There is thus no reason to expect anything but the most zealous advocacy on the petitioner's behalf. Nor does it seem likely that, if certiorari were granted, the respondent would take a chance on forfeiting, through indifferent advocacy, the victory won in the lower courts.

¹¹⁷ See, e.g., *Scindia Steam Nav. v. De Los Santos*, 451 U.S. 156 (1981); *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983).

¹¹⁸ See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (resolving inter-circuit conflict; rejecting standard endorsed by court below but affirming its judgment).

found significant procedural obstacles to stand in the way.¹¹⁹ Thus, to pursue the inquiry, it would be necessary to examine the cases that the Court did hear and compare them with those in which review was denied. As an impressionistic matter, my sense is that I could probably find counterparts on the plenary docket for most of the cases in the Random Group in which vehicle problems were invoked as a barrier to resolution of a conflict.¹²⁰ In any event, I am confident that with only 43 cases to be studied, further attempts to secure a quantitative answer would not be worthwhile.

E. Extrapolations for the 1988 and 1990 Terms

Analysis of the Random Group has now given us what I would characterize as a solid estimate of the total number of conflicts denied review in the 1989 Term. But from our examination of the Dissent Group we know that the minimum number of unresolved conflicts differed in the three Terms, and, what is more important, that the number increased in each succeeding Term. Is it possible to get a sense of the total number of conflicts denied review in the other two Terms of the study? I think it is, though the figures will obviously be substantially less solid than those presented thus far.

To undertake this extrapolation, we must make two assumptions: (a) that the overall patterns in the nature of the petitions filed with the Court remained constant over the three Terms; and (b) that Justice White applied similar standards in deciding which conflict cases warranted a notation of dissent. On the basis of our

¹¹⁹ See, e.g., *New York v. Uplinger*, 467 U.S. 246, 249 (1984) (Stevens, J., concurring).

¹²⁰ For example, in *Monsanto Corp. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the respondent correctly anticipated that the choice of rule would not change the result, arguing that "the conspiracy evidence in this case . . . meets and exceeds the standards enunciated by all [the] circuits" cited by the petitioner as being in conflict. Brief in Opposition at 24.

work thus far, both assumptions seem reasonable. But the enterprise is sufficiently speculative that I shall proceed with great caution.

As one element of that conservative approach, the extrapolation will be limited to paid cases. Moreover, I shall consider only conflicts that were acknowledged by the courts of decision or recognized by other participants in the legal system. The number of conflicts in the 1989 Term Dissent Group that fit that description is 44.¹²¹ The number estimated from the Random Group (excluding the "apparent conflicts") is 205. This means that the ratio of conflicts "flagged" to conflicts denied is 1 to 4.7.

The next step is to apply that ratio to the equivalent numbers for the 1988 and 1990 Terms. In the 1988 Term the paid petitions in the Dissent Group included 27 acknowledged or recognized conflicts. Multiplying by 4.7, we get an estimate of the total number of unresolved conflicts on the paid docket: 127.

Applying this method to the 1990 Term poses one additional difficulty. Among the acknowledged or recognized conflicts asserted by the paid petitions in the Dissent Group were 7 that had been flagged by Justice White in the 1988 or 1989 Terms. Should these be included in the number to be multiplied by the 1989 ratio? It seems to me that they should, for the object is to look at each Term individually.¹²² Nevertheless, for those who see the matter otherwise, I shall give both figures.¹²³

¹²¹ This figure includes one conflict that was duplicated from the 1988 Term. *See infra* note 122.

¹²² Indeed, to omit conflicts flagged in prior Terms would create some distortion, for the prior Terms' dissents included some conflicts that had been the subject of still-earlier dissents.

¹²³ A further complication arises from the fact that a few of the cases in the 1990 Term Dissent Group involved conflicts that appeared in the Random Group but did not generate a dissent from Justice White. It did not seem worthwhile to attempt to adjust for this overlap, if indeed that would have been desirable. However, the pattern does suggest that in making

Without excluding the issues that generated dissents in the preceding Terms, the number of unresolved conflicts in the paid petitions would be estimated at 240.¹²⁴ If the duplicate issues are excluded, the number is 207, almost identical to the estimate for 1989.¹²⁵

F. The data in context: the frequency of unresolved conflicts

Section 302 calls for data not only on the number of unresolved conflicts, but also on their frequency. While the latter term is perhaps somewhat ambiguous, the juxtaposition of the two words suggests that what Congress wanted was not simply raw numbers, but numbers in context. The context, moreover, should be one that sheds light on the ultimate question raised by the Federal Courts Study Committee and earlier by the Hruska Commission: the adequacy of the national appellate capacity.

We need not look far for a point of reference. To give perspective to the number of conflicts the Court did not hear, the logical comparison is with the number of conflicts that did reach the plenary docket. The relevant data are found in my Supreme Court files. Specifically, I identified all cases in which the Court stated or strongly implied that it granted certiorari to resolve a conflict, along with cases in

his own determination of which conflicts are certworthy, Justice White takes account of the persistence of the disagreement. For further discussion of persistence, see Chapter 8.

¹²⁴ Including duplications from previous Terms, the number of conflicts in paid cases in the Dissent Group was 51.

¹²⁵ Near-identical estimates for the 1989 and 1990 Terms may appear inconsistent with the earlier finding that the number of conflicts in the Dissent Group was larger in 1990 than in 1989. The explanation lies in the fact that the increase was concentrated in the IFP cases, including four substantiated conflicts on Sentencing Guidelines issues.

which conflicts were acknowledged by one or more of the courts below.¹²⁶ Because the work was not undertaken systematically, I might have missed a few cases that belonged in the group; on the other hand, the data do not distinguish between intercircuit and other kinds of conflicts, so that the number might be slightly on the high side.

In the three Terms of the study, the Court issued a total of 393 plenary decisions. Of these, approximately 145 involved intercircuit conflicts, for an average of about 50 per Term. Thus, if Congress were to conclude that all intercircuit conflicts should be resolved, it might have to double the capacity of the present system.

Of course, there is no reason to think that Congress has embraced the proposition that all intercircuit conflicts should be resolved. On the contrary, the sponsors of section 302 took care to differentiate between conflicts that are "intolerable" and those that are not.¹²⁷ More recently, the chairman of the Federal Courts Study Committee has suggested three levels of seriousness, distinguishing the "intolerable" from the merely "undesirable" and the "undesirable" from the "insignificant."¹²⁸ The next step, therefore, is to analyze the tolerability of the unresolved conflicts in the study.

¹²⁶ For description of the research methods and illustrations of the categories, see Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1014-20 (1985).

¹²⁷ See 136 Cong. Rec. S 17578 (daily ed. Oct. 27, 1990) (remarks of Sen. Grassley) (section-by-section analysis of Title III of the Judicial Improvements Act of 1990).

¹²⁸ See note 108 *supra* and accompanying text.

VI. Assessing Tolerability: The Analytical Approach

There are two ways in which one might attempt to assess the tolerability of unresolved conflicts. The first is empirical: asking lawyers, through interviews and surveys, whether particular conflicts have actually engendered one or more of the four behavioral consequences specified by Congress. The second approach is analytical: identifying objectively defined characteristics of a conflict that are likely to correlate with intolerability as defined in the statute and its legislative history. In the limited time available for Phase I, it seemed preferable to concentrate on the analytical approach. Methods and procedures for empirical research are outlined in Chapter 7.

A. Indicia of intolerability

In looking for characteristics that might correlate with tolerability, the starting point is the behavioral perspective that underlies section 302 and the Federal Courts Study Committee proposal that led to its enactment. We must ask: what kinds of circumstances will determine whether a conflict will influence the behavior of lawyers and their clients?

Preliminarily, I note that the four factors that Congress sees as contributing to intolerability are not limited in their effects to the circuits that have taken part in the conflict. For example, whenever forum shopping is a possibility, it would tempt anyone who, in the ordinary course, would be subject to an unfavorable rule. If one of the alternative forums has actually rejected the law of the "home" circuit, so much the better; but even if the issue is undecided, the other court must choose, and the litigant will have the hope of persuading it to adopt the opposing view. The point can be made even more strongly in the context of harm to multi-circuit actors. Once

conflicting decisions are on the books, any entity whose operations cross circuit boundaries will have to take account of the fact that its transactions may have different legal consequences depending on where litigation takes place. Whether or not the particular circuit has yet taken sides, the uncertainty remains.

Against that background, I suggest that the behavioral consequences of a conflict will depend on four considerations: the field of law in which the conflict arises; the extent to which the issue is substantive rather than procedural; the dynamics of the conflict; and the nature of the competing rules. In this chapter I shall briefly elaborate on the significance of these criteria and report the first results of applying the analytical approach to the conflicts in the sample.

The field of law. In classifying conflicts, it is natural to begin by identifying the area of law in which the conflict has developed -- antitrust, criminal law, habeas corpus, and so forth. Table 2 presents the data on the conflicts in the Dissent Group.¹²⁹

Subject matter classifications give us clues as to which of the four behavioral consequences are most likely to be triggered by a conflict. For example, conflicts involving issues under the Social Security Act would tend to implicate concerns about unfairness and nonacquiescence, but generally would not lead to forum shopping or cause harm to multi-circuit actors.¹³⁰ Antitrust issues would probably follow the reverse pattern.

¹²⁹ The category sequences are based on the rank-ordering principles developed in my studies of the Supreme Court's plenary docket. See Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709 (1978).

¹³⁰ Only 2 conflicts in the Dissent Group involved issues under the Social Security Act, and one of these arose in the context of delineating state obligations under the Aid to Families with Dependent Children program. In another case growing out of Social Security litigation, the subject of the controversy was the Equal Access to Justice Act.

Table 2
Issues Giving Rise to Conflicts: Dissent Group

TYPE OF ISSUE	NUMBER OF CONFLICTS
<i>Criminal Law Issues</i>	
Constitutional limitations	22
Elements of federal crimes (excluding RICO)	7
Sentencing Guidelines and other penalty issues	8
Nonconstitutional federal criminal procedure	9
Federal habeas corpus for state prisoners	4
Other	3
<i>Other Issues</i>	
Civil liberties (includes section 1983 issues)	10
State obligations under federal programs	3
Antitrust	8
Other business regulation	7
Employment discrimination	7
Labor (includes pensions and benefits)	12
Federal taxation	3
RICO (civil and criminal)	7
Bankruptcy	9
Admiralty and maritime	6
Other Federal Government litigation	6
Other private civil litigation	9
Federal jurisdiction and procedure (civil)	19
Standards of appellate review	7

What subject matter classifications cannot do is to tell us whether a conflict is likely to influence behavior at all. Some conflicts over the interpretation of the Social Security Act will arouse concerns about unfairness or nonacquiescence, but some will not. Some antitrust conflicts will encourage forum shopping or cause harm to multi-circuit actors; some will not. To analyze intolerability from the perspective of section 302, more refined tools are necessary. I turn now to the task of constructing them.

Substance or procedure? By linking "intolerability" to behavioral consequences, Congress has implicitly recognized that conflicts generally will *not* be intolerable if they do not influence conduct in such matters as the choice of forum or planning by multi-circuit actors. The focus, then, is on decisionmaking by lawyers. And what lawyers want is favorable results for their clients. If application of one circuit's rule rather than another's probably would not change the result of a litigation, the existence of a conflict will carry little weight. In short, a conflict will usually be tolerable when the choice of rule is not outcome-determinative.

The echo of the *Erie* line of cases is not coincidental. Indeed, two of the factors specified by Congress (unfairness and forum shopping) parallel the "twin aims" of the test adopted by the Supreme Court for unguided *Erie* choices.¹³¹ This convergence suggests (and the legislative history confirms) that here too the distinction between substance and procedure will be relevant. Unfortunately, as first year law students soon learn, these two terms do not "define[] a great divide cutting across the whole domain of law;" rather, "[e]ach implies different variables depending upon the particular problem for which it is used."¹³² The task here is to

¹³¹ See *Hanna v. Plumer*, 380 U.S. 460, 468 n.9 (1965).

¹³² *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

identify variables that relate to the tolerability of intercircuit conflicts from the perspective suggested by section 302.

At one extreme are conflicts involving rules that directly regulate primary conduct. Under the Superfund Act (CERCLA), is a parent corporation liable as an "owner or operator" for environmental clean-up costs incurred by its wholly owned subsidiary?¹³³ Does ERISA apply where an application for pension benefits is made and denied after the effective date of ERISA, but at least some of the underlying acts occurred earlier?¹³⁴ To establish "controlling person" liability under the 1934 Securities Act, must the plaintiff establish "culpable participation," or is it sufficient to show control over the transaction?¹³⁵ These are matters of substance in any context; here, the likelihood is strong that a difference of views among the circuits would generate one or more of the consequences that concerned Congress.

The other end of the spectrum is not so easily defined. In common parlance, procedural rules are those which govern "the manner and the means by which [substantive rights are] enforced."¹³⁶ But this description might well encompass rules that govern access to federal courts, rules that would bear directly on the choice of forum if the law in one circuit differed from that of another. Moreover, even if the underlying rule is procedural by *Erie* or other standards, the way in which a particular point of interpretation is resolved may, in practice, tend to favor one class of litigants

¹³³ Compare *Joslyn Mfg. Co. v. T.L. James, Inc.*, 893 F.2d 80 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 1017 (1991) (dissent case), with *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

¹³⁴ This was the issue in *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989) (dissent case).

¹³⁵ This issue was presented in *McPherson v. Barnes*, 493 U.S. 1077, *denying cert to* 889 F.2d 1091 (8th Cir. 1989) (table), discussed *supra* note 78 and accompanying text.

¹³⁶ *Guaranty Trust*, 326 U.S. at 109.

rather than another. A good example is the current controversy over whether the Federal Rules of Evidence allow the trial judge to exclude expert testimony that a product caused injury on the ground that the overwhelming weight of scientific opinion is contrary to the expert's conclusions.¹³⁷ In this situation too, a conflict might well "encourage[] forum shopping among circuits."¹³⁸ Indeed, in discussing an evidentiary issue of lesser import, a Practicing Law Institute lecturer explicitly advised his audience that "the possible effects [of] conflicting rules of admissibility should be considered in the choice of forum."¹³⁹

This analysis suggests that the "procedural" end of the spectrum should be limited to conflicts over rules that regulate the process of adjudication in contexts where the resolution will not control access to federal courts and will not tend to favor one class of litigants over another. I shall refer to these as party-neutral procedural conflicts. The paradigm would be a conflict over the standard of appellate review.¹⁴⁰ Such a conflict would not cause harm to multi-circuit actors;

¹³⁷ Compare *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir.), *cert. denied*, 111 S. Ct. 370 (1990) (dissent case), with *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990).

¹³⁸ See Richard J. Sapp, *Pre-Trial Challenges to Expert Testimony in Toxic Tort Cases*, FOR THE DEFENSE, June 1989, at 22, 28 ("If successful, [a ruling excluding plaintiff's expert testimony] may be dispositive of the case.").

¹³⁹ John M. Kobayashi, *Subsequent Remedial Measures and Recall Measures and Notices*, in *PRODUCT LIABILITY* 1989 at 503, 506 (Kenneth Ross & Barbara Wrubel eds., 1989). As the title indicates, the author was discussing the admissibility of evidence of subsequent remedial measures. One aspect of the "conflicting rules" in this area was presented in a *Random Group* case. Compare *In re Aircrash in Bali*, 871 F.2d 812, 817 (9th Cir.) ("The purpose of Rule 407 is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate."), *cert. denied*, 493 U.S. 917 (1989) (sample case), with *Werner v. Upjohn Co.*, 628 F.2d 848, 859 (4th Cir. 1980) (rejecting argument that evidence of warning falls outside Rule 407 because the warning was required by a government agency).

¹⁴⁰ Disagreements over the standard of appellate review accounted for 7 of the conflicts in the Dissent Group. See Table 2, *supra*.

would not lead to forum shopping; and could not encourage non-acquiescence by federal administrative agencies. That leaves only the possibility of "creat[ing] unfairness to litigants in different circuits." Perceptions of unfairness will vary with the beholder, but standards of appellate review are so far removed from section 302's example of "allowing federal benefits in one circuit that are denied elsewhere" that I feel confident in saying that the conflict would be excluded from the statute's reach.

Between the two extremes lie conflicts over such matters as burdens of proof, limitations on remedies, and procedure in criminal prosecutions. No doubt it would be possible to analyze individual cases and assign them to points along the spectrum, but a more useful endeavor would be to attempt to identify classes of rules that would or would not tend to influence behavior in the ways contemplated by section 302. I shall pursue that inquiry in Phase II.

Dynamics of the conflict. When the Supreme Court denies review in a case that appears to present a square conflict, a reading of the respondent's brief usually discloses one of three arguments: the conflict is not yet ripe for definitive resolution; the case is not an appropriate vehicle for deciding the question; or the issue is not one of continuing importance. Ripeness is one aspect of what has been called "percolation." Although percolation is relevant to tolerability in the larger sense, it will not directly influence the behavioral consequences listed in section 302. For that reason it will be discussed separately.¹⁴¹ "Vehicle" problems have already been discussed; their connection to tolerability is even more attenuated.

"Continuing importance," on the other hand, bears directly on tolerability. The respondent's argument, in essence, is that the conflict will not influence behavior in the future and is unlikely to generate further litigation. The grounds for the

¹⁴¹ See Chapter 8.

argument may be intrinsic to the issue, as when courts have disagreed over the retroactivity of a Supreme Court decision. More commonly, the respondent will invoke extrinsic circumstances. In particular, the Solicitor General will often concede the existence of a conflict but point out that the statute in question has been repealed or the disputed provision amended.

Lack of continuing importance, whether for intrinsic or extrinsic reasons, goes far to explain the denial of review in several of the cases in which Justice White dissented from denial of certiorari. For example, in the 1990 Term the Court declined to hear *Varca v. United States*¹⁴² notwithstanding the presence of an issue that had been addressed by nine circuits, with five coming out on one side and four on the other. A more direct, mature, and deep-seated conflict could hardly be imagined. But the Solicitor General noted that the subject of the conflict was a statute that had been repealed effective November 1, 1987, by the Sentencing Reform Act of 1984. "The issue therefore," he continued, "affects only the rapidly diminishing and closed set of cases involving prosecutions for criminal conduct completed before November 1, 1987."¹⁴³ This argument did not persuade Justice White, but apparently it carried the day with at least six other members of the Court. Similar features can be seen in conflict cases that did not prompt Justice White to dissent.

When a statute has been amended, or when the issue turns, by definition, on the legal consequences of events that took place long ago, it is easy to understand why the Justices might deny review in the face of acknowledged disagreement among courts of appeals. But these circumstances are only extreme examples of a broader

¹⁴² 111 S. Ct. 209, *denying cert. to* 896 F.2d 900 (5th Cir. 1990) (dissent case).

¹⁴³ Brief in Opposition at 10.

aspect of tolerability: the dynamics of a conflict. This concept embraces such considerations as the number of circuits that have passed on the issue, the age of the decisions, the trend in the more recent cases, and the possible effect of intervening Supreme Court decisions on closely related issues.

For some lawyers, no doubt, these subtleties will be irrelevant. To them, a conflict is a conflict, and as long as the issue remains alive, no more need be said. I suspect, however, that for lawyers who counsel multi-circuit actors or litigants who have opportunities to forum-shop, the dynamics of the conflict will loom large. Examples from both ends of the spectrum will illustrate the point.

Suppose, first, that the new decision, although a minority of one, has cogently criticized the majority view; has pointed out that none of the other circuits have thoroughly analyzed the issue; and has called attention to an inconsistency between the majority view and a recent Supreme Court decision. In that circumstance, it can be predicted that more litigation is in store, and lawyers would see a real possibility of different results in different circuits.

On the other hand, suppose that the petitioner invokes a decades-old ruling that has never been followed even in its own circuit and that has been widely rejected elsewhere. A prudent lawyer might or might not take the new decision as authoritative, but the lawyer would give little weight to the fact that another circuit decided the question differently many years ago.

For the initial phase of this research, I have not attempted to do more than identify examples at the two ends of the spectrum -- what might be called "waxing" and "waning" conflicts. Quite possibly, it will not be worthwhile to go much further. The reason is that to describe the evolution of a conflict, one must first specify an "issue" that defines the universe of relevant decisions. That poses no difficulty when, for example, the courts of appeals disagree over whether mutual fund shares in a

decedent's estate are to be valued at the "bid" or the "asked" price for purposes of the federal estate tax.¹⁴⁴ But not all conflicts fit that simple pattern, as will be seen in the next section.

The nature of the competing rules. The discussion thus far suggests that conflicts will influence behavior when lawyers believe that application of one circuit's law rather than another's has a good chance of changing the outcome of a litigation. The nature of the issue and the dynamics of the conflict will each play a part in that assessment, but so will the nature of the competing rules.

First, a conflict is most likely to affect outcomes when each circuit has adopted what scholars would call a "perfected" rule -- one that depends for its application solely on a finding of historical fact -- rather than a rule that contains one or more indeterminate elements.¹⁴⁵ The nature of the rule is important in part because of the structure of the federal appellate system. The less determinate the rule, the more likely it is that variations within a circuit will cancel out variations between circuits. For example, the circuits have long disagreed over whether a federal agency's decision not to prepare an environmental impact statement is to be reviewed for reasonableness or under an "arbitrary and capricious" standard.¹⁴⁶ But both standards leave so much room for case-by-case evaluation that most lawyers would probably assume that the result in any given case will depend on the facts and the predilections of the particular panel rather than on the articulated rule. That

¹⁴⁴ This was the issue in the much-cited case of *United States v. Cartwright*, 411 U.S. 546 (1973). See Hruska Commission Report, *supra* note 2, at 229, 289-90.

¹⁴⁵ The classic discussion of the different types of legal precepts is HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 155-60 (tentative ed. 1958).

¹⁴⁶ See Hruska Commission Report, *supra* note 2, at 331-32; *River Road Alliance, Inc. v. Corps of Eng'rs*, 475 U.S. 1055-56 (1986) (White, J., dissenting from denial of certiorari).

being so, the existence of the conflicting "rules" would be almost irrelevant to lawyers' decisionmaking.¹⁴⁷

Another aspect of the law that may be relevant is the extent to which the rules are self-contained in operation. The point is illustrated by a case in the Random Group. In *Kiesel Co. v. Householder*,¹⁴⁸ the petitioner asserted a conflict over whether a claimant seeking a hearing on a motion for the return of property seized by the government must show, not only that the seizure was illegal, but "that the government acted in callous disregard of . . . fourth amendment rights."¹⁴⁹ The Eighth Circuit, the court below, had imposed the requirement; the Tenth Circuit had explicitly rejected it.¹⁵⁰ In the same opinion, however, the Tenth Circuit had continued to insist that the claimant show irreparable harm and an inadequate remedy at law. With so many hurdles to be overcome, it seems unlikely that a lawyer would view the one point on which the circuits disagreed as creating a real probability of different results on a given set of facts.¹⁵¹

¹⁴⁷ Justice White views the matter differently. See *River Road Alliance*, 475 U.S. at 1056 ("the issue is not merely one of semantics").

¹⁴⁸ 110 S. Ct. 1470 (1990), *denying cert. to In re Search of 4801 Fyler Ave.*, 879 F.2d 385 (8th Cir. 1989).

¹⁴⁹ *4801 Fyler Ave.*, 879 F.2d at 388.

¹⁵⁰ See *Floyd v. United States*, 860 F.2d 999, 1003 (10th Cir. 1988). The conflict was recognized by other courts. See, e.g., *United States v. A Building Housing a Business Known as Machine Prods. Co.*, 1990 WL 304855, *8 n.7 (W.D. Wis. 1990).

¹⁵¹ Indeed, in the case cited by the petitioner, the Tenth Circuit reversed the exercise of jurisdiction by the district court, which had ordered the return of the property without requiring a showing of irreparable harm. See *Floyd*, 860 F.2d at 1003, 1005. The issue takes a somewhat different form today because the Federal Rules of Criminal Procedure have been amended, and "the movant need only allege a 'deprivation of property' by the government," not an "unlawful search and seizure." *Kitty's East v. United States (In re Search of Kitty's East)*, 905 F.2d 1367, 1371 (10th Cir. 1990). The "callous disregard" requirement has not disappeared from the scene, however. See, e.g., *Averhart v. United States (In re Sixty Seven Thousand Four Hundred Seventy Dollars)*, 901 F.2d 1540, 1545 (11th Cir. 1990).

The last point suggests a broader one. Indeterminacy in language and complexity in rationale are not isolated phenomena. Rather, they are manifestations of the approach to adjudication that has evolved in our common law system. One of the defining qualities of that system is its reluctance to read an appellate decision as establishing a single rule of fixed and certain meaning. Thus, even when one court of appeals disagrees with another or otherwise acknowledges an intercircuit conflict, later panels of the court can legitimately consider the totality of the opinion in deciding "how much [there is in the] case that cannot be got around."¹⁵² That process might well lead to an outcome no different from the one that would have been anticipated in the other circuit. Conversely, a later panel of that court can use the leeways of precedent to reach the result that would have been expected from routine application of the competing rule.

Up to this point, I have been positing a conflict created by a pair of decisions, one from each of two circuits. But those decisions will not necessarily stand in isolation. Within each circuit, there may be other precedents, later or earlier, that bear upon the issue. The larger and more varied the body of decisions that constitute the relevant "law of the circuit," the less likely it is that the choice between circuits will be perceived as having a strong prospect of changing the outcome of any given dispute.

It would be unrealistic to assume that lawyers, when counselling clients or planning litigation, invariably take into account all aspects of circuit law that have the potential for diluting the effect of an acknowledged or recognized conflict. But it would be equally unrealistic, in considering the likely consequences of the conflict, to assume that lawyers trained in the common law system will see only the rejection of

¹⁵² LLEWELLYN, *supra* note 30, at 75.

another circuit's decision and ignore everything else in the case. Nor would it make sense to posit that lawyers would regard a single ruling as establishing "the law of the circuit" in the face of precedents that look the other way.

I do not contemplate elaborate classifications for the precedents that underlie the conflicts in the study. Rather, I will ask whether one or both of the competing rules contain indeterminate elements and whether, viewing the rival decisions in their totality, the disagreement is one that a lawyer would be likely to regard as outcome-determinative. I will also note whether other circuit precedents significantly diminish the strength of the conflict.

B. Tolerability and the Random Group

Comprehensive analysis of the tolerability of the unresolved conflicts in the Random Group will require further refinement of the criteria as well as field research. But tolerability is a relative concept. And we need not await the results of Phase II to identify conflicts which, on the basis of at least one of the criteria, appear highly unlikely to generate any of the consequences specified in section 302.¹⁵³

From a behavioral perspective, the strongest reason for regarding a conflict as tolerable is that, almost to a certainty, the conflict will not influence conduct in the future. This prediction could be made with confidence for 3 conflicts in the Random Group. In *Garcia v. United States*,¹⁵⁴ the circuits disagreed over the interpretation of a statute that had been repealed.¹⁵⁵ The statute litigated in *Castiglia v. United*

¹⁵³ In the tripartite classification scheme suggested recently by the chairman of the Federal Courts Study Committee, these conflicts would probably be deemed "insignificant." See *supra* note 108.

¹⁵⁴ 493 U.S. 963, *denying cert. to* 875 F.2d 316 (6th Cir. 1989) (table) (text in Westlaw) (sample case).

¹⁵⁵ The statute was the same one involved in *Varca v. United States*, 111 S. Ct. 209, *denying cert. to* 896 F.2d 900 (5th Cir. 1990) (dissent case), discussed *supra* text accompanying

*States*¹⁵⁶ was still good law, but the issue raised by the petitioner had been mooted, for the future, by the enactment of more comprehensive legislation.¹⁵⁷ A question of retroactivity was involved in *Chathas v. Smith*;¹⁵⁸ by definition, the issue could not affect future behavior.¹⁵⁹

Almost as high on the tolerability scale would be conflicts over party-neutral rules of civil procedure that do not govern access to the courts. Two conflicts in the Random Group fell into this category. In one, the question was whether a trial court abuses its discretion when it informs a jury of the legal effect of the jury's answers to special verdict interrogatories under Rule 49(a).¹⁶⁰ In the other, circuits disagreed over whether a party waives its right to seek a new trial on the ground of inconsistencies in jury responses to Rule 49(b) special interrogatories by failing to object before the jury is released.¹⁶¹

notes 142-43. There is no obvious reason why Justice White noted a dissent in *Varca* but not in *Garcia*.

¹⁵⁶ 110 S. Ct. 3238, *denying cert. to* 894 F.2d 533 (2d Cir. 1990) (sample case).

¹⁵⁷ See 9 THE DEPARTMENT OF JUSTICE MANUAL § 9-40.410, at 9-1125 (Prentice-Hall 1988).

¹⁵⁸ *Chathas v. Smith*, 493 U.S. 1095 (1990), *denying cert. to* 884 F.2d 980 (7th Cir. 1989) (sample case). Petitioner argued that the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), should have been applied to his excess force claim. See discussion *supra* note 99.

¹⁵⁹ This is not to say that the issue has been put to rest. See *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (applying *Graham* retroactively), *petition for cert. filed*, 60 U.S.L.W. 3154 (U.S. Aug. 12, 1991) (No. 91-270) (raising issue of retroactive application of *Graham*). See also *supra* note 107.

¹⁶⁰ See *In re Aircrash in Bali*, 871 F.2d 812 (9th Cir.), *cert. denied sub nom. Pan American World Airways v. Causey*, 493 U.S. 917 (1989).

¹⁶¹ *White v. Celotex Corp.*, 878 F.2d 144 (4th Cir.), *cert. denied*, 493 U.S. 964 (1989).

A conflict is also unlikely to influence behavior when the earlier decision, although never overruled, has been so widely rejected or so consistently ignored that a lawyer would have little hope of invoking it successfully. Two conflicts in the Random Paid Group fit this pattern. One involved the evidentiary standards for determining the obscenity of sexual material aimed at a particular "deviant" group;¹⁶² the other dealt with attempts to enforce alleged oral modifications of a trust fund agreement under the labor laws.¹⁶³ In both instances, the precedent cited by the petitioner had been so thoroughly discredited that a Supreme Court decision would have added nothing to predictability in the law.

These cases account for only one-sixth of the substantiated conflicts in the Random Paid Group. We should not make too much of this fact, however. The objective mode of analysis can tell us when a conflict is unlikely to generate any of the consequences listed in section 302. Rarely will it enable us to say that a conflict is *not* tolerable. The reason is that even if all of the objective criteria point to intolerability -- the issue is plainly substantive; the choice of rule is likely to determine the outcome; and no legislation or Supreme Court decision has mitigated the force of the conflict -- the behavioral consequences may be deflected by circumstances that are not revealed by library research. For example, the individuals subject to the regulation may be able to modify their behavior so as to accomplish

¹⁶² The petitioner in *Pendergrass v. Tennessee*, 110 S. Ct. 3215, *denying cert. to* 795 S.W.2d 150 (Tenn. Crim. App. 1990), relied on *United States v. Treatman*, 524 F.2d 320 (8th Cir. 1975), and cited the rejection by the Fourth Circuit in *United States v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987).

¹⁶³ In *Laborers' Health & Welfare Fund v. Meekins, Inc.*, 869 F.2d 1497 (9th Cir.) (table) (text in Westlaw), *cert. denied*, 493 U.S. 811 (1989) (sample case), the Ninth Circuit relied on its prior decision in *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981), which declined to follow the Fourth Circuit decision in *Lewis v. Lowry*, 295 F.2d 197 (4th Cir. 1961).

their goals irrespective of how the conflict is resolved. Or other doctrines may come into play and make irrelevant the point on which circuits disagree. The only way to find out is to talk to lawyers and ask them how the conflicts have affected their practice and the activities of their clients. That inquiry is the subject of the next chapter.

VII. Assessing Tolerability: Field Research

The most novel aspect of this project is the attempt to devise and carry out a program of field research to determine the tolerability of the unresolved conflicts. As the preceding discussion makes clear, tolerability is a complex, many-dimensional concept. Thus, before going out into the field, it will be necessary to refine and focus the questions to be asked. Once that is done, it will be possible to conduct surveys and interviews with a much greater prospect of obtaining useful answers.

A. Refining the questions

In assessing intolerability through analysis of court decisions and other library materials, I have looked for characteristics that would correlate with the four nonexclusive factors set forth in the Federal Courts Study Committee report and repeated in section 302 of the Judicial Improvements Act. For purposes of the field research, however, I did not want to assume that the four factors fully reflect the ways in which intercircuit conflicts would affect lawyers' behavior. Rethinking was in order, and that rethinking has led to some modification of the Study Committee framework. One threshold question and one new factor have come to the fore, and the considerations listed by the Study Committee have taken on a somewhat different cast.

Awareness of circuit law. The Study Committee seems to assume that, as a general matter, lawyers are aware of "the law of the circuit" and take account of circuit differences in planning litigation and advising clients. But the idea of a "law of the circuit" stands on shaky ground, both in theory and in practice. In theory, "[t]he federal courts comprise a single system applying a single body of law."¹⁶⁴ More

¹⁶⁴ H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962).

broadly, in a common law system the assumption is that "all the cases everywhere can stand together."¹⁶⁵ While no one would accept either of these propositions as a description of reality in the federal courts, they do reflect a tradition, and that tradition may be strong enough to affect the way lawyers think about the law, at least in the absence of an acknowledged intercircuit conflict. Moreover, it remains the exception rather than the rule for treatises and practice manuals to focus on individual circuits as espousing particular rules or doctrines.

None of these considerations necessarily negate the premise that lawyers take account of the law of the circuit. Indeed, when a conflict is acknowledged by one or more of the courts or recognized by other authorities, there is every reason to think that the premise is correct. Nevertheless, from an empirical perspective it is necessary to investigate, rather than to take as a given, lawyers' attitudes toward intercircuit differences. Thus, I would want to ask questions such as: In the absence of contrary evidence, do lawyers generally treat federal decisional law as a single body of rules, or do they focus on the law of a particular forum, as a lawyer would do today for matters controlled by state law? How much evidence of conflict does it take to arouse suspicion that the choice of circuit may be outcome-determinative? Does the practice vary depending on the nature of the issue? Are procedural questions treated differently from substantive questions, constitutional issues differently from those governed by statutes? What other variables are taken into account?

Effect on litigation in other circuits. Review of the literature suggests one additional consequence of intercircuit conflict, not mentioned in the statute or the Federal Courts Study Committee report (though it was discussed recently by the

¹⁶⁵ LLEWELLYN, *supra* note 30, at 50.

chairman of the Study Committee),¹⁶⁶ that warrants investigation as part of the field research. The subject of inquiry will be the effect on litigation and motions practice in circuits where the court of appeals has not ruled on the issue. Specifically, other things being equal, would a lawyer pursue a point (or pursue it with more vigor) when there is a court of appeals decision on his side than if the only circuit precedent were against him? Would a district judge or magistrate take more time and trouble over a ruling when circuit precedents were in conflict than when there was only one decision on point? How does the conflict situation compare with the situation where no circuit has ruled on the issue? In short, does the existence of a conflict encourage *relitigation* of issues that might otherwise be regarded as not worth litigating? These questions will be pursued in addition to those suggested by section 302.

Forum shopping. Of the four factors listed in section 302, the most straightforward to investigate probably will be the second: encouragement of forum shopping. Choosing a forum after the decision has been made to pursue litigation will generally be a discrete, one-time event that lawyers will be able to describe with relative ease. Focusing on specific conflicts, we would ask question such as: Had the lawyer encountered the conflict in his or her practice? Under what circumstances, if any, would the different rules lead the lawyer to file suit in one circuit rather than another? In disputes growing out of continuing relationships, would the lawyer initiate a "preemptive strike" to assure litigation in a circuit with a favorable rule? How much weight would the lawyer give to the presence of an intercircuit conflict in comparison with other factors that bear upon the choice of forum?

¹⁶⁶ Weis Statement, *supra* note 7, at 14-15.

In this connection, I note that the Judicial Improvements Act of 1990 substantially broadened the venue options in federal-question cases.¹⁶⁷ Venue is now available in any district "in which a substantial part of the events or omissions giving rise to the claim occurred." As a result, it is possible that lawyers today would be more easily able to choose a circuit with a favorable precedent than they would have been in the past. Where appropriate, I would direct the respondents' attention to the amended statute and ask them to consider forum choices in light of the new venue rules.

Harm to multi-circuit actors. Although the statute does not elaborate on what is meant by "harm to multi-circuit actors," the explanation is obvious enough. If a particular franchise arrangement is a lawful practice in one circuit but an antitrust violation in another, the national corporation will be frustrated in its efforts to manage its business in a uniform and efficient way. Disagreement over the interpretation of federal pension laws will "impede[] the ability of a plan administrator or fiduciary to apply . . . plan provisions in a consistent and nondiscriminatory manner as mandated by ERISA."¹⁶⁸ Articulation of varying standards for determining owner-operator liability under environmental laws will "make[] financial forecasting and planning difficult for potentially liable parent corporations."¹⁶⁹

¹⁶⁷ See David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 74 (1991).

¹⁶⁸ Brief for the National Roofing Indus. Pension Fund as Amicus Curiae at 2, *National Shopmen Pension Fund v. McDaniel*, 110 S. Ct. 1839 (1990), *denying cert. to* 889 F.2d 804 (9th Cir. 1989) (dissent case also included in Random Group).

¹⁶⁹ Comment, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 PAC. L.J. 854, 856 (1991). Among the cases discussed is *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 1017 (1991) (dissent case).

The problem for us will be to isolate uncertainty deriving from intercircuit conflict from other sources and forms of uncertainty. For example, the Guide to Antitrust Compliance prepared by a food company observes that "there is no consensus among courts as to what constitutes unlawful predatory pricing."¹⁷⁰ That sounds like a reference to intercircuit conflict. But the writer might also be using "courts" in a less technical sense that encompasses different panels of the same court. After all, perceptions of conflict *within* circuits on that particular issue are not unknown.¹⁷¹

To minimize this ambiguity, I plan to ask the respondents about specific conflicts identified in Phase I. But that approach, of itself, will not suffice in situations where the conflict coexists with other sources of uncertainty. I have in mind a recurring pattern in the cases in the Random Group: the conflict is acknowledged or recognized, but the issue is not binary and within at least some of the circuits there are multiple precedents that point in different directions. These conditions make it unlikely that the choice of circuit would be outcome-determinative; thus, from the perspective of the section 302 factors, the conflict probably would be deemed tolerable. Yet these same circumstances might well mean that multi-circuit actors will have difficulty in ordering their affairs in a way that would yield predictable outcomes if disputes were to go court. Careful formulation of the questions will be required in order to focus the respondents' attention on the intercircuit conflict and its effects.

¹⁷⁰ AMERICAN BAR ASS'N SEC. OF ANTITRUST LAW, COMPLIANCE MANUALS FOR THE NEW ANTITRUST ERA 201 (1990).

¹⁷¹ See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1060 (9th Cir. 1981) (Wallace, J., dissenting from denial of rehearing en banc).

Nonacquiescence by federal administrative agencies. Only two of the substantiated claims of conflict in the Random Group gave rise to any real likelihood that an agency would be "forc[ed] to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions." And in one of the cases the agency had not yet considered the issue in light of an intervening Supreme Court decision.¹⁷²

Upon reflection, the paucity of nonacquiescence cases is not surprising. When an intercircuit conflict exists over the validity of a federal agency's policy and the most recent decision is adverse to the Government's position, the Solicitor General is likely to seek Supreme Court review. If the Government is relying on the earlier of the conflicting decisions, the Solicitor General will probably support a petition filed by the opposing party. In either situation, the Court is likely to grant the application. The cases thus do not turn up in a study of unresolved conflicts.

Indeed, the point can be made more strongly: the specter of nonacquiescence looms largest when no conflict exists. This situation is illustrated by one of the cases in the Dissent Group. In *Leslie Salt Co. v. United States*,¹⁷³ the petitioner argued that the decision below, by the Ninth Circuit Court of Appeals, conflicted with a ruling by the Fourth Circuit.¹⁷⁴ The assertion found no support in any published materials --

¹⁷² See Brief for the United States at 10, *American Fed. of Gov't Employees v. Department of HHS*, 493 U.S. 1055 (1990), *denying cert. to* 884 F.2d 1446 (D.C. Cir. 1989) (sample case). Upon reconsideration, the agency adhered to its prior position. See *FLRA v. U.S. Dep't of the Navy*, 941 F.2d 49, 54 (1st Cir. 1991). The other case was *Owen v. Commissioner*, 493 U.S. 1070 (1990), *denying cert. to* 881 F.2d 832 (9th Cir. 1989), discussed *supra* text accompanying notes 86-87.

¹⁷³ 111 S. Ct. 1089 (1991), *denying cert. to* 896 F.2d 354 (9th Cir. 1990).

¹⁷⁴ Petition for Certiorari at 21. The Fourth Circuit ruling was an unpublished affirmance of a published district court decision. *Tabb Lakes, Ltd., v. United States*, 885 F.2d 866 (4th Cir. 1989) (table) (text in Westlaw), *aff'g* 715 F. Supp. 726 (E.D. Va. 1988).

understandably so, since the two decisions addressed very different legal issues.¹⁷⁵

But the certiorari file included a revealing memorandum. In it, officials of the Army Corps Engineers and the Environmental Protection Agency stated:

The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit. . . . Within the Fourth Circuit, we will follow the holding of *Tabb Lakes*, which was limited to [a] procedural notice-and-comment issue¹⁷⁶

The fact that an agency of the United States Government has announced its disagreement with a court of appeals decision when the Government has not sought Supreme Court review directly implicates concerns about "nonacquiescence." But whatever harm or unfairness might flow from this situation is not a consequence of an unresolved conflict. Indeed, it is quite possible that the Army Corps of Engineers asked the Solicitor General to file a certiorari petition but that he declined to do so on the very ground that no conflict existed.

For all of these reasons, it is unlikely that the field research will shed much light on nonacquiescence. Nevertheless, I shall raise the issue in interviews and surveys where the field of law is one in which the practice may exist.

Unfairness to litigants in different circuits. For very different reasons, I doubt that it would be profitable to pursue field research on the third of the statutory factors, "unfairness to litigants in different circuits." Congress gave only one illustration of unfairness: "allowing Federal benefits in one circuit that are denied in other circuits." Prior writing (notably Justice White's dissents from denial of

¹⁷⁵ See Brief for the Federal Respondents in Opposition at 19 n.15.

¹⁷⁶ Joint Memorandum of Army Corps of Engineers and Environmental Protection Agency (Jan. 24, 1990), reprinted in Petitioner's Appendix at 46-49.

certiorari) suggests several other situations in which intercircuit differences would be widely regarded as giving rise to unfairness:

- One court of appeals holds that people have a constitutional right to engage in a particular activity, while another court of appeals holds that the same conduct is not protected.
- One court holds that particular conduct violates a federal criminal statute; another court holds that it does not.
- One court holds that federal law provides a cause of action for a particular class of claimants; another holds that it does not.

In each of these situations, the competing rules define the rights and duties that provide the basis for civil suits and criminal prosecutions. This, of course, corresponds roughly to "substance" as distinguished from "procedure." As between specific issues, however, the unfairness of having different rules in different circuits will depend, as I have already suggested, on the values and assumptions of the observer. It is difficult to see how field research could add to our fund of knowledge on this aspect of tolerability.

B. Methods

In seeking to learn the actual impact of conflicts on lawyers and citizens, we would use a mix of surveys, interviews, and group discussions. I remain skeptical about the utility of mail surveys, however. Our goal is not to get lawyers' opinions of the prevalence of conflict, but to learn whether, in their experience, specific conflicts create specific burdens or problems. For example, with respect to the conflicts we have identified, we would want to ask such questions as: Were the lawyers aware of the conflict before we called it to their attention? Does it offer any opportunity for forum shopping? If so, would the lawyers take advantage of the opportunity? What economic costs, if any, would the inconsistent rules impose on clients operating in

more than one circuit? A questionnaire alone is not likely to extract this kind of information.

On the other hand, we may be able to use mail surveys to test the validity of the assumptions that underlie our library research. For example, do lawyers agree that conflicts on procedural issues are not likely to lead to forum shopping? To what extent would lawyers go behind acknowledgments of conflict in court of appeals decisions and look for possible grounds of reconciliation? (This inquiry would be especially important in situations where the probable forum is a circuit where the question remains open.)

In-person and telephone interviews hold greater promise of giving us responses focused on specific conflicts. Because no one lawyer is likely to have encountered more than one or two of the conflicts we have identified, I would probably concentrate on those areas of law that have given rise to half a dozen or more conflicts in the Study Group. Our research thus far points to three prime areas for investigation: antitrust, ERISA, and maritime law.¹⁷⁷

The idea of using field research to explore the effect of intercircuit conflicts is so new that our work will necessarily be exploratory. I believe, however, that the idea has great promise, and to encourage future researchers, I note two somewhat more elaborate approaches that might be pursued.

Advisory groups. In the early planning for this project, we discussed the possibility of constituting one or more small advisory committees to help us to learn what makes conflicts intolerable. Limitations of time will probably preclude us from

¹⁷⁷ The preliminary report of the Federal Courts Study Committee made explicit mention of conflicts on maritime issues. Federal Courts Study Committee, Tentative Recommendations for Public Comment 119 (Dec. 22, 1989). The reference was not included in the Study Committee's final report.

pursuing that approach except perhaps as an experiment, but with an eye to the future, I shall sketch the outlines of the plan.

Each group would be composed of attorneys specializing in one of the major areas of federal law. The groups would include counsellors as well as litigators, for we want to know not only how conflicts affect those disputes that go to court, but also, as the "economic costs" factor suggests, how they influence planning and the structuring of transactions.

These committees would serve three functions. They would help the researcher to evaluate the tolerability of specific conflicts in the particular subject-matter areas. They would provide assistance in describing and assessing the consequences of conflicts for the practice of law. And they would give insight into the role of intercircuit conflict as compared with other ways in which caselaw may develop in our two-level federal appellate system.

Research of this kind could not be undertaken within the likely budget constraints if the expense of travel to Washington (or even some more central location) had to be borne by the project. However, it should be possible to arrange meetings of the advisory groups to coincide with other professional meetings. For example, the antitrust advisory committee would meet at the time and place of meetings of the Antitrust Section of the American Bar Association; the maritime advisory committee would convene in conjunction with the meetings of the Maritime Law Association.

Although the surveys, interviews, and advisory groups would be designed primarily to shed light on the impact of conflicts, I would also attempt to use them to answer more fundamental questions about how "conflict" ought to be defined. Our experience in assessing claims of conflict in Phase I suggests one line of inquiry that has particular importance. If "conflict" is limited to situations where one court of

appeals discusses (disapprovingly or otherwise) a precedent from another circuit, the number of unresolved conflicts will be limited, though still perhaps substantial. To the extent that lawyers perceive conflict when the later decision does not mention the earlier one, the potential magnitude of the problem grows. Only through intensive discussions drawing upon particular examples could we shed light on how lawyers, in practice, treat such situations.

Prospective surveys. In investigating tolerability in Phase II, we will be asking lawyers to discuss their experience with conflicts identified through our research on denials of certiorari. There are two difficulties with this approach. First, in the ordinary course of work a lawyer would not necessarily focus his or her attention on the existence of a conflict. We would thus be calling upon the respondents to discuss their cases from a perspective quite different from the one that shaped their research and thinking on the issues. Second, lawyers understandably concentrate on the matters currently on their calendars. Yesterday's cases are displaced by today's, and last month's will often be seen as ancient history.

One way to overcome these obstacles would be to use what might be called prospective surveying. Lawyers in the survey group would be asked to keep a record of conflicts they encountered during, say, a two-month period. Blank forms would be provided to minimize the burden. At the conclusion of the period, the researcher would conduct telephone interviews with the participants, requesting details (to the extent consistent with maintaining client confidentiality) about the consequences of the conflicts. This approach would have a much better chance of eliciting specific information; it would also give us a rough quantitative sense of the extent to which conflicts affect the practice of law.

VIII. Directions for Further Research

This project has been directed toward answering, at the highest level of detail and confidence possible in the time available, the question posed by Congress in section 302 of the Judicial Improvements Act of 1990. With the completion of Phase I, two conclusions have emerged.

First, the number of intercircuit conflicts that are not heard by the Supreme Court is large enough that the existence of a problem of "inadequate national capacity" is not negated by the numbers alone.

Second, the significance of the numbers cannot be assessed without more extensive examination of the nature of the conflicts, the considerations bearing upon their tolerability, and the extent to which conflicts persist after the Supreme Court has denied review.

The preceding chapters have pointed the way to three lines of research that can help to answer the questions raised by the raw numbers. These inquiries will be pursued in Phase II of this project. First, I shall undertake, through refinement and application of the objective criteria described in Chapter 6, a comprehensive analysis of the tolerability of the unresolved conflicts identified in Phase I. Second, making use of interviews and surveys, I shall determine the perceived impact of unresolved conflicts on the work of a sample of attorneys in various fields of federal practice. Finally, I will attempt to shed light on the persistence of unresolved conflicts by tracing the later history of conflicts that the Supreme Court declined to review in its 1984 Term. A report will be submitted by October 1, 1992.

The dual approaches to tolerability -- case analysis and field research -- have been described in Chapters 6 and 7, respectively. This chapter outlines the approach I expect to take to the factor of persistence. It also offers suggestions --

some quite tentative -- for research beyond Phase II. That research would have three broad purposes: obtaining more and better data on the number of unresolved conflicts; securing information about other aspects of tolerability; and exploring the significance of conflicts for the study of appellate structural alternatives. The concluding section of the chapter draws attention to the possible interaction between intercircuit conflict research and judicial education.

A. Persistence of unresolved conflicts

In describing the problem of inadequate appellate capacity, the Federal Courts Study Committee emphasized that where uniformity is required, a nationally binding interpretation should be provided "within a reasonable time." From this we may infer that conflicts need not necessarily be resolved on the first occasion they are brought to the Supreme Court's attention; what is important is that resolution not be delayed unreasonably. Thus it is necessary to ask: what happens to the conflicts that "are not heard by the Supreme Court"? Do they "remain unresolved" for long periods of time? Or does the Court step in when the same issue is presented in another case?

The answers to these questions are embraced within the factor of persistence. Indeed, given that the overarching issue is the adequacy of the national appellate capacity, it might be said that without taking persistence into account, we could not even provide reliable information about "the number and frequency" of conflicts that the Supreme Court does not hear. In effect we would be counting some issues twice, once when review was denied and again when it was granted.

But resolution by the Supreme Court is not the only way in which uniformity may be restored after a conflict has developed. Congress, rulemaking bodies, or federal agencies may take action that clarifies the ambiguity that gave rise to the

conflict. New laws or rules may supersede the disputed provisions, making the conflict irrelevant to future behavior. Changes in business practices, governmental policies, or even social mores may put an end to litigation over the disputed issue. Nonconforming circuits may overrule their precedents and reestablish uniformity.

In a literal sense, developments like these do not necessarily "resolve" the conflict. What happens, rather, is that the issue that gave rise to intercircuit disagreement ceases to be of any importance, or the disagreement itself vanishes. From the perspective of appellate capacity, however, the effect is the same whether a conflict is resolved or mooted: there is no longer any need for the Supreme Court to consider the issue.¹⁷⁸ Thus, in investigating the factor of persistence, it will be necessary to take account of all of these eventualities rather than simply asking whether the conflict "remains unresolved."¹⁷⁹

As noted in Chapter 5, the cases studied in Phase I could provide only limited insights into the persistence of unresolved conflicts because the denials of certiorari were so recent. Thus, to pursue this line of inquiry, we will have to determine the fate of conflicts denied review in earlier years. To that end, I plan to use cases identified by Leland Beck in his study of the 1984 Term of the Supreme Court.¹⁸⁰ If

¹⁷⁸ Circuit overruling that eliminates a conflict does not quite fit this analysis, for, in theory, it does not preclude the possibility that another court will break ranks and recreate the conflict. This sequence seems highly implausible, however.

¹⁷⁹ I do not suggest that it will necessarily be easy to determine whether a conflict has been mooted. The scope of superseding legislation or other changed circumstances may itself give rise to disagreement within the legal community.

¹⁸⁰ The Beck study was not published, but the Federal Courts Study Committee made use of it in estimating the extent of unresolved conflicts in later Terms. Should the list of conflicts from the Beck study not be available, I would substitute a compilation of previously identified conflicts from Terms prior to 1988.

time permits, I would also do followup work on conflicts flagged by Justice White in dissents from denial of certiorari in the 1986 and 1987 Terms.

In designing the "persistence" study, it will be necessary to take account of one possible complication. To permit useful comparison between the followup results and our data on the three most recent Terms, we will have to use similar criteria for identifying the earlier conflicts. That means that we will have to subject those conflicts to the same kind of analysis, including scrutiny of the certiorari materials, that we have undertaken for the cases in Phase I.

Although it will require some additional work, I think that we can turn this apparent obstacle to our advantage. By determining (preliminarily or otherwise) which of the earlier conflicts meet our criteria and which do not, we could assess the persistence factor from multiple perspectives. For example, if, as appears to be the case, Justice White perceives conflicts where others would not, we would attempt to determine whether the broader spectrum of conflicts that he has identified generates problems to the same degree as those that meet a more rigorous definition. Similarly, we would seek to learn whether the various categories of conflicts described in Chapter 5 prove equally troublesome in later years.

To the extent possible, I plan to integrate the study of persistence into the inquiry into tolerability.¹⁸¹ By early summer of 1992, I expect to have a complete list of the cases upon which we would be doing followup work. The cases would be classified by issue, so that we could use the lists as part of the materials that we would share with the lawyers whom we would be interviewing. In that way we would get

¹⁸¹ In fact, persistence in the broad sense can be viewed as an element of tolerability. However, the question here is the extent to which conflicts persist after the denial of review by the Supreme Court. From the perspective of appellate capacity, it makes sense to treat that circumstance as a variable independent of the consequences of a conflict while it exists.

their perspective on the significance of conflicts that were denied review in the recent past.

B. Quantifying conflicts: more and better data

In the initial planning for Phase II of this project, there was some discussion of seeking further data on the "number and frequency" of unresolved conflicts. The principal argument for doing so was that the number of conflicts identified in Phase I would shrink considerably when factors relating to tolerability and to the appropriateness of the "vehicle" were taken into account. As a result, patterns which, on the basis of previous work, warranted detailed study might be represented by a tiny group of cases.

With unlimited resources, I would certainly want to augment the sample of conflict cases to be analyzed. But from the standpoint of deepening our understanding of the nature and scope of the problem of unresolved conflicts, I have been persuaded that looking at more cases would not contribute as much as the inquiry into tolerability.

I hope, however, that other scholars will take up where this study leaves off. There are several ways in which the body of material available for analysis might be enlarged. For example, assuming that Justice White continues his practice of noting frequent dissents from denial of certiorari, the researcher might examine the dissent cases in one or more additional Terms. A second possibility would be to select another large random sample of cases denied review. For what they are worth, I shall sketch two approaches that depart more radically from the methods pursued in this study.

A more concentrated sample of review-denied cases. In formulating the research design for Phase I, we gave high priority to avoiding reliance on arguably

subjective *a priori* exclusions. This made sense, because otherwise our findings could have been attacked on the ground that we had assumed some of the hypotheses to be tested. But the inevitable effect was to increase the amount of time devoted to nonconflict petitions and, correspondingly, to reduce the number of cases available to us for in-depth analysis focusing on impact and tolerability.

With Phase I now complete, the position is very different. We do not have to rely on *a priori* exclusions; rather, we can draw upon our data to identify with some confidence classes of cases that are highly unlikely to present intercourt conflicts. For example, cases decided by unpublished opinions account for less than one-quarter of the substantiated claims of conflict. The yield from cases litigated in the state courts is larger, but well below the yield from published opinions of the federal courts of appeals.

These findings suggest a means of securing a sample that would furnish a much higher proportion of cases with plausible assertions of conflict. Rather than starting with cases in which certiorari was denied during a single Term of the Supreme Court, the researcher would select from cases decided by the courts of appeals in a single year. This approach would have the added advantage of giving a better sense of the role of unresolved conflicts in the work of the federal appellate system as a whole.

This is not the place to go into detail about the research design, but there would be some advantage in using a sample that would overlap with the cases from Justice White's dissents in the 1990 Term that have already been studied. To that end, calendar year 1990 (roughly corresponding to volumes 892 through 922 of the *Federal Reporter*) would work well as the base. One way to proceed would be to use the Cumulative Table of Dispositions in the front of the West Publishing Co. advance sheets as the starting point. This single listing gives two key facts about the cases in

each recent volume of the Federal Reporter: whether the Supreme Court has granted or denied review; and (by inference from the presence or absence of a superscript number) whether the case was decided by published opinion. I believe that, with a sample no more than half the size of the sample for Phase I, it would be possible to learn a great deal more about the number and frequency of conflicts that remain unresolved because the Supreme Court does not hear them.

Exploring the hidden docket. As noted in Chapter 2, concerns have been expressed about the possible existence of a "hidden docket": conflicts that remain unresolved, not because the Supreme Court denies review, but because the Court is not given the opportunity to hear the cases. The approach described in the preceding section could be modified to allow testing of this hypothesis.

Specifically, rather than examining a sample of published opinions listed in the Cumulative Table of Dispositions, the researcher would analyze a sample that included cases in which no certiorari petition was filed. Comparisons between the two groups of court of appeals decisions would give some sense of the extent to which conflicts are present in cases that are not brought to the Supreme Court.

C. Other dimensions of "intolerability"

As we continue to analyze the cases in the Phase I study groups, it becomes apparent that "tolerability" is a phenomenon of many dimensions. Some are mentioned in section 302 and its legislative history; some are not. But all must be taken into account if Congress is to make an informed judgment about the need for additional appellate capacity. In addition to the aspects of tolerability that will be examined in Phase II, two others may warrant exploration by scholars.

Consequences for federal trial judges. The brief discussion of tolerability in the legislative history of section 302 focuses primarily on the effect of conflict on

lawyers and their clients. That is understandable, but there is another place where the impact may be felt: in the trial courts of the federal judicial system. I think it would be possible, and desirable, to explore those consequences in future research. The most straightforward approach would be to conduct a survey of district judges and other judicial officers. The survey would ask, for example, whether a motion becomes more complex and time-consuming when, in the absence of a controlling precedent from the judge's own circuit, lawyers call attention to a conflict between two other circuits on the issue presented. Other questions would address the magnitude of perceived problems and the issues on which out-of-circuit precedents are most often invoked.

The study would also seek to determine whether perceptions are affected by the size of the circuit. In a circuit like the Ninth, with an enormous volume of published decisions, do lawyers cite out-of-circuit precedents less frequently than in circuits like the First and the Third?

Percolation. As recognized in the legislative history of section 302, "[s]ome conflicts . . . may have the redeeming feature, especially in the constitutional area, of helping to develop legal doctrine and insight." The reference here is to the phenomenon known as "percolation." From the earliest days of the debate over appellate capacity, percolation has aroused great controversy. Advocates of increased capacity view the benefits of percolation as speculative at best. Others believe that even on issues of statutory construction, different approaches should be fully ventilated before the courts reach an authoritative resolution.

Percolation might not look like a phenomenon that could be investigated empirically. Nevertheless, I can see two possible avenues of research that might shed light on the extent to which percolation achieves the benefits claimed for it.

First, it would be possible to interview sitting and retired Justices to probe their experiences, anticipated and actual, with percolation. Have they seen insights or approaches in the later decisions that were not present in the earlier ones? How often does it occur that the first court to address an issue does so in a perfunctory way? One or more retired Justices might even be willing to review specific cases with the researcher to look for insights that were articulated between the earliest decisions and the Supreme Court's ultimate resolution.

The question could also be approached more systematically. In Phase II of this project we will identify a number of conflicts that were denied review by the Supreme Court in one case but resolved in another case months or years later. It would be possible to examine the opinions and briefs in the later case and look for relevant materials -- theories, rationales, ideas, arguments from experience -- that were not available in published form at the time of the initial denial.

To be sure, finding such material would not fully resolve the controversy. The fact that an idea is in print does not necessarily mean that its implications have been absorbed or its ramifications probed. Indeed, one of the benefits of percolation may be to give the Justices, the legal community, and perhaps the public at large the opportunity to come to terms with novel theories. An idea that sounds radical when first articulated may come to seem tame and even inevitable through repetition and acceptance in different forums. Still, the absence of new material in the later decision would cast at least some doubt on the value of percolation. To the extent that the study finds mention of arguments or experiences that contributed to the ultimate decision but were not available at the time of the earlier case, one could conclude that percolation did serve its purpose.

D. Conflicts in context

When Congress asked the Federal Judicial Center to study the number and frequency of unresolved intercircuit conflicts, it did not do so out of mere curiosity or an abstract interest in consistency. On the contrary, the same statute also requested a study of appellate structural alternatives, and it is that request that provides the context for the conflicts study. Thus, the next step would be to look at the problem of intercircuit conflict in a way that more directly advances the broader inquiry. While this is potentially a very large task, I shall focus here on three more specific lines of investigation that might be pursued in future studies.

Intercircuit and intracircuit conflicts. Predictability and consistency in federal law are important values in our legal system. Intercircuit conflicts threaten those values in a direct and visible way. Thus it is understandable that Congress has sought to learn whether such conflicts have proliferated in numbers that exceed the capacity of the Supreme Court to resolve them. But as the Federal Courts Study Committee implicitly recognized, intercircuit conflicts represent only one manifestation of a larger problem: "the voluminous and increasingly disparate case law likely to be generated by [hundreds of] co-equal circuit judges, governed only by a distant Supreme Court."¹⁸² In short, the underlying concern is with the operation of precedent in the federal system.

By definition, analysis of intercircuit conflicts focuses on one aspect of precedent: the effect of existing geographical divisions in a two-tier appellate structure. The analysis takes as a given the formal arrangements under which *stare decisis* operates within a circuit, but not across circuit boundaries. In studying structural alternatives, on the other hand, the whole point is to hypothesize a system that differs in one or more respects from the present arrangements -- including,

¹⁸² STUDY COMMITTEE REPORT, *supra* note 3, at 120.

notably, the operation of stare decisis. How, then, might a study of intercircuit conflict help to shed light on the possible consequences of adopting new structures such as those described in the Federal Courts Study Committee report?

The answer, I believe, lies in focusing on the distinction between precedents that are binding and those that are not. The various structural alternatives considered by the Study Committee would all change, in different ways, the number and scope of the precedents that constitute binding law for individual federal courts -- not just appellate courts but, more significantly, district and bankruptcy courts as well. Only by understanding the distinction in actual operation between binding precedents and those that are merely persuasive can we even begin to assess the workability of any of the possible reforms.

For the last several years, I have been studying the operation of precedent in the Ninth Circuit, with particular attention to intracircuit conflicts and the sense of disarray that comes from the proliferation of precedents addressing a single issue. When Phase II is completed, I would like to build upon the work already done to study the relationship between intercircuit and intracircuit conflicts. Do the kinds of issues that tend to generate conflicts between circuits also generate conflict or disarray within a circuit? If not, what differences can be observed in (a) subject matter; (b) the nature of the underlying legal rules; (c) the extent to which the Supreme Court is active; or (d) other variables to which attention is drawn in Phase I? Answers to questions such as these should give us a sense of the likely consequences of changes in the hierarchy of precedent that would result from restructuring of the appellate system.¹⁸³

¹⁸³ On the basis of my work thus far, I suspect we would find little overlap between intercircuit and intracircuit conflicts. As explained in Chapter 6, intercircuit conflicts generally result from relatively well defined rules within each circuit. Almost by definition, such rules leave little leeway for maneuvering by later panels; as a result, they are unlikely to generate even the appearance of intracircuit conflict. Contrariwise, the more muddled the

There may, perhaps, be a tendency to view intercircuit conflicts and precedential hierarchies as matters of interest only to appellate courts and appellate advocates. Nothing could be further from the truth. For a graphic demonstration of the point, one need only look at the diagrams included in the Federal Courts Study Committee's discussion of appellate structural alternatives.¹⁸⁴ At the bottom of each diagram we find "United States District Courts." Not mentioned at all, but present in spirit, are the thousands of lawyers and citizens who will look to federal caselaw as a measure of rights and obligations. For all of these "consumers," adoption of any of the Study Committee models would introduce new hierarchical relationships that would dramatically change the precedential status of the judicial decisions that constitute the law. An empirical study of the distinction between binding and persuasive authority would assist these consumers in evaluating the desirability of any reforms that may be proposed.

Soundness of focus on conflicts. In one of the earliest discussions of appellate capacity, Dean Erwin N. Griswold warned against placing too much emphasis on unresolved conflicts. "[I]t takes at least two decisions to make a conflict," he observed, "and the law of the country remains uncertain until the conflict is finally made and then eventually resolved."¹⁸⁵ Professors Carrington, Meador, and Rosenberg have echoed this theme, saying: "[T]he problem of inter-circuit conflict is merely a manifestation of the problem . . . , and should not be mistaken for the problem itself. . . . What the system lacks is an adequate means of forestalling

law within the circuit, the more difficult it will be to say that the law in another circuit is distinctively different.

¹⁸⁴ STUDY COMMITTEE REPORT, *supra* note 3, at 118-22.

¹⁸⁵ Erwin N. Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615, 630.

conflict."¹⁸⁶ More recently, Professor Bator took the point one step further, arguing that "the problem of unresolved conflicts, while significant, is not the central issue [The rigorous concept of conflict applied by the Supreme Court in the certiorari process] does not exhaust all the cases in which there is a serious need for supervision, clarification and uniformity."¹⁸⁷

Little effort is required to imagine cases that would fit Professor Bator's description. Suppose, for example, that only one court of appeals has passed upon an issue, but one or more district courts have rejected its analysis. Or that a conflict exists among district courts alone. Or that the courts of appeals addressing the issue have all reached the same result, but dissents have been filed in one or more of the cases. In each of these situations, the expression of conflicting views by members of the judiciary may contribute to uncertainty and encourage relitigation. From the perspective of lawyers and judges in circuits where the court of appeals has not decided the issue, the consequences may be no different from those of an actual intercircuit conflict.

This would be a difficult matter to investigate empirically, but a recent news story suggests one possible approach. Stephen Bokat, general counsel for the United States Chamber of Commerce, was quoted as saying that "We [the business community] have trouble getting some important cases heard" by the Supreme Court.¹⁸⁸ It would be useful to ask Mr. Bokat and others in similar positions to identify some of those cases and to indicate whether or not the presence of a conflict contributed to the desire to have the issues resolved. More generally, advisory

¹⁸⁶ PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 212-13 (1976).

¹⁸⁷ Bator, *supra* note 1, at 692.

¹⁸⁸ New York Times, July 11, 1991, at D2, col.1.

groups organized along the lines suggested in Chapter 7 may be able to shed light on the extent to which the lack of a nationally binding decision creates problems even in the absence of conflict.

Effect of resolving conflicts. In this project, and in the preceding suggestions for future research, the focus has been on determining the extent to which unresolved conflicts present a problem. It would also be worthwhile to explore the reciprocal question: to what extent does the resolution of conflicts provide a solution?

The answer to that question might seem self-evident. But we need not look far to find instances in which the Supreme Court's resolution of an intercircuit disagreement, rather than yielding a "single, unified construction" of the law,¹⁸⁹ has resulted in the creation of new uncertainties and conflicts. For example, in *Firestone Tire and Rubber Co. v. Bruch*,¹⁹⁰ the Court granted certiorari "to resolve [a conflict] among the Courts of Appeals as to the appropriate standard of review in actions under" the civil suit provision of ERISA.¹⁹¹ Two years later, courts and commentators reported a new split among the circuits on the scope and application of the standard the Court had articulated.¹⁹² In *Berkovitz v. United States*,¹⁹³ the Court granted review to settle a seemingly narrow issue: "the effect of the

¹⁸⁹ STUDY COMMITTEE REPORT, *supra* note 3, at 125.

¹⁹⁰ 489 U.S. 101 (1989).

¹⁹¹ *Id.* at 108.

¹⁹² See *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1182 (3d Cir. 1991); Ralph C. Losey, *Bruch Creates Split in Circuits On Standard of Appellate Review*, National L.J., Nov. 4, 1991, at 20. The conflict was also noted by Justice White. *Pierre v. Connecticut Gen. Life Ins. Co.*, 60 U.S.L.W. 3374 (U.S. Nov. 18, 1991) (White, J., dissenting from denial of certiorari).

¹⁹³ 486 U.S. 531 (1988).

discretionary function exception [to the Federal Tort Claims Act] on claims arising from the Government's regulation of polio vaccines."¹⁹⁴ Within a short time, courts were expressing inconsistent views as to the effect of the new decision on existing precedent.¹⁹⁵ In *Lingle v. Norge Division of Magic Chef, Inc.*,¹⁹⁶ the Court resolved a conflict over the preemption of state-law claims by section 301 of the Labor Management Relations Act.¹⁹⁷ Together with three other plenary decisions addressing section 301 preemption, *Lingle* might have been expected to "eliminate[] confusion in the courts below."¹⁹⁸ Instead, judges and commentators have perceived continuing conflict,¹⁹⁹ increased uncertainty,²⁰⁰ and a proliferation of appellate opinions.²⁰¹ Black lung litigation may provide another illustration.²⁰²

¹⁹⁴ *Id.* at 534-35.

¹⁹⁵ Compare *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1024 (9th Cir. 1989), with *Gaubert v. United States*, 885 F.2d 1284, 1289 (5th Cir. 1989), *rev'd*, 111 S. Ct. 1267 (1991). See also Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 737 ("But if *Berkovitz* clarifies, it also obscures.").

¹⁹⁶ 486 U.S. 399 (1988).

¹⁹⁷ See *id.* at 402-03 & n.1.

¹⁹⁸ Rebecca H. White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 378 (1990).

¹⁹⁹ See *McCormick v. AT & T Technologies, Inc.*, 934 F.2d 531, 539 (4th Cir. 1991) (Phillips, J., dissenting), *petition for cert. filed*, 60 U.S.L.W. 3294 (U.S. Sept. 25, 1991) (No. 91-515).

²⁰⁰ White, *supra* note 198, at 378.

²⁰¹ One survey found that between June 6, 1988, the day *Lingle* was decided, and December 1990, the courts of appeals issued 56 published decisions involving section 301 preemption. Cynthia Jackson & Suzanne Metzger, *Section 301 Preemption: Simplicity Has Its Price* (remarks at ABA meeting), *reprinted in* Daily Labor Report (BNA), Mar. 8, 1991, at E-1.

²⁰² See Regina C. McGranery, *Random Justice: Shorting the Circuits*, 37 FED. BAR NEWS & JOURNAL 358, 360 (1990).

Perhaps these outcomes are aberrations. But from an empirical perspective, it is necessary to test, rather than to assume, the correctness of the premise that resolution of conflicts generally will bring greater certainty and uniformity to the law. The inquiry can be pursued largely through library research; the task would be to identify the characteristics of a conflict that correlate with Supreme Court decisions that do or do not contribute significantly to decisional consistency.

On the basis of my prior work, I suspect that conflict resolution is most likely to prove effective when courts on both sides have adopted "perfected" rules that are largely self-contained.²⁰³ But the inquiry implicates basic aspects of adjudication in a common law system, and I would not expect any simple answers.

E. Judicial education

As the apex of the judicial pyramid becomes ever smaller in relation to the base, it seems inevitable that the time will come when some form of appellate structural reform can no longer be avoided. For most participants in the legal system, the longer that day can be put off, the better. Thus it is worth raising the possibility of using our research on intercircuit conflicts as part of a judicial education program designed to improve the operation of the present system and perhaps delay the time when structural reform is needed. One need not dig far into assertions of conflict to get a sense that greater clarity in the writing of the opinions or greater explicitness in the treatment of precedent might have avoided even the appearance of inconsistency.

Obviously, no one would tell an Article III judge how to decide a case or what rationale to adopt. But as evidenced by the Federal Judicial Center's recent publication on opinion writing, there is room for judicial education on the style and

²⁰³ See Chapter 6.

format of opinions. Somewhere beyond style, but stopping short of the substance of the law, it may be possible to design a program that would focus on the systemic consequences of different ways of treating precedent. To the extent that judges can craft their decisions in a way that minimizes the impression of a "voluminous and increasingly disparate case law," they may be able to postpone the day when new tiers or divisions are added to the federal judicial system.

Appendix A

**Judicial Improvements Act of 1990,
P.L. 101-650, 104 Stat 5089
Section 302**

**STUDY OF INTERCIRCUIT CONFLICTS AND STRUCTURAL
ALTERNATIVES FOR THE COURTS OF APPEALS BY
FEDERAL JUDICIAL CENTER.**

(a) **INTERCIRCUIT CONFLICTS.**--The Board of the Federal Judicial Center is requested to conduct a study and submit to the Congress a report by January 1, 1992, on the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court.

(b) **FACTORS TO CONSIDER IN STUDY.**--In conducting such a study, the Center should consider, to the extent feasible, all relevant factors, such as whether the conflict--

(1) imposes economic costs or other harm on persons engaging in interstate commerce;

(2) encourages forum shopping among circuits;

(3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or

(4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for different circuits, but is unlikely to be resolved by the Supreme Court.

(c) **STRUCTURAL ALTERNATIVES FOR THE COURTS OF APPEALS.**--The Board of the Federal Judicial Center is requested to study the full range of structural alternatives for the Federal Courts of Appeals and submit a report on the study to the Congress and the Judicial Conference of the United States, no later than 2 years after the date of the enactment of this Act.

Appendix B

Legislative History of Section 302

Section 302 of the Judicial Improvements Act of 1990 originated in the House as section 102 of H.R. 5381, the Federal Courts Study Committee Implementation Act of 1990. That bill was introduced on July 26, 1990, and hearings were held on September 6, 1990.¹ The Judiciary Committee endorsed the bill in a report dated September 10. The report states:

[Section 102] implements a recommendation of the Federal Courts Study Committee found on page 125 of the Study Committee Report, which called for a study of the number and frequency of unresolved intercircuit conflicts. The purpose of the study is to determine objectively those conflicts that are "intolerable" and yet, for whatever reason, are unlikely to be resolved by the Supreme Court. The Study Committee Report provides some useful elaboration on how "intolerable conflicts" might be identified, and the Federal Judicial Center is encouraged to refer to that Report for guidance. In light of a suggestion made by Judge Weis at the Subcommittee hearing, [the legislation] further requests the Federal Judicial Center to conduct a study of the structural alternatives for the court of appeals for a period of two years. Such a study may include, but need not be limited to, the five structural alternatives outlined in the Report of the Federal Courts Study Committee.

Although the Federal Judicial Center could undertake these studies without legislation, it was thought[t] that legislation was appropriate to underscore the importance that Congress places on such studies.²

H.R. 5381, as amended, became Title III of the Judicial Improvements Act. There is no Senate report on that portion of the legislation, but Senator Charles Grassley, a member of the Federal Courts Study Committee, introduced into the Congressional Record a section-by-section analysis of Title III. The discussion of section 302 is as follows:

¹ *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990). The principal discussion of the proposed intercircuit conflict study will be found at 771-83 (statement of Judge Schwarzer).

² H.R. REP. NO. 734, 101st Cong., 2d Sess. 17 (1990), reprinted in 1990 U.S.C.A.N. 6860, 6863. The "useful elaboration on how 'intolerable conflicts' might be identified" is quoted in full, with minor changes in language, in the statement of Senator Grassley set forth in the text immediately below.

Section 302 requests that the Federal Judicial Center study and report back to Congress by 1992 on the number and frequency of unresolved intercourt conflicts.

As the Federal Courts Study Committee pointed out in its report,

"As recently as 1960, the Supreme Court reviewed approximately 3 percent of all federal appeals. That proportion has dropped precipitously to less than 1 percent, and will continue to drop as the total number of appeals rises. The Supreme Court handles roughly 150 or fewer cases annually (and that number may be dropping); approximately 75 percent come from the federal courts of appeals. This figures has remained constant for some time, with little prospect for expansion. We are not persuaded that the Court could increase its output, given the difficulty of the cases that the Court hears.

"Although the Court sits at the apex of the state and federal systems, theoretically to harmonize the federal law coming from both, the Court has long since given up granting certiorari in every case involving an intercourt conflict. Thus, a federal statute may mean one thing in one area of the country and something quite different elsewhere -- and this difference may never be settled. Some conflicts, of course, may have the redeeming feature, especially in the constitutional area, of helping to develop legal doctrine and insight. Other conflicts need rapid resolution. Conflicts over some procedural rules and law affecting actors in only one circuit at a time may have a negligible effect. A federal judicial system, however, must be able within a reasonable time to provide a nationally binding construction of these acts of Congress needing a single, unified construction in order to serve their purpose.

"It appears from academic analyses that the Supreme Court in 1988 refused review to roughly sixty to eighty 'direct' intercourt conflicts presented to it by petitions for certiorari. This number does not include cases involving less direct conflicts (e.g., fundamentally inconsistent approaches to the same issue). Not all these sixty to eighty conflicts, however, are necessarily 'intolerable,' to use a commonly applied adjective."

The Federal Courts Study Committee recommended that these conflicts be analyzed to determine, as objectively as we can, those that are intolerable and yet, for whatever reason, are unlikely to be resolved by the Supreme Court.

Commentators have suggested various criteria for identifying "intolerable" conflicts. For example, does the conflict:

Impose economic costs or other harm to multi-circuit actors, such as firms engaged in maritime and interstate commerce?

Encourage forum shopping among circuits, especially since venue is frequently available to litigants in different fora?

Create unfairness to litigants in different circuits--for example, by allowing federal benefits in one circuit that are denied elsewhere?

Encourage "non-acquiescence" by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions?

Section 302 is not intended to prescribe a rigid research scheme for the FJC to follow. Indeed, the details of the study are intended to be left to the sound discretion of the Board of the FJC. Nor does Section 302 anticipate any particular result from the FJC's analysis.

Section 302, in subsection (c), also seeks the FJC's analysis and report to Congress within two years on a range of structural alternatives for the Federal Courts of Appeals. The Federal Courts Study Committee studied various structural alternatives, without endorsing any particular approach. As with subsection (a), this provision is not intended to suggest that the FJC will need to undertake massive, original research. Rather, it contemplates that, for example, the existing literature on structural alternatives will be canvassed and analyzed for the benefit of Congress.³

³ 136 CONG. REC. S 17,577-78 (daily ed. Oct. 27, 1990).