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## Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment

Wayne A. Logan

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# Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment

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Wayne A. Logan

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*Despite their many differences, Americans have long been bound by a shared sense of constitutional commonality. Federal constitutional rights, however, can and do often vary based on geographic location, and a chief source of this variation stems from an unexpected origin: the nation's federal circuit courts of appeals. While a rich literature exists on federal circuit splits in general, this Article provides the first empirical study of federal constitutional law circuit splits. Focusing on Fourth Amendment doctrine in particular, the Article highlights the existence of over three dozen current circuit splits, which result in the unequal allocation of liberty and privacy rights throughout the land by courts of the same sovereign.*

*The variability presents an array of normative and practical difficulties distinct from that presented by nonconstitutional splits. Worse yet, as the Article also demonstrates, the difficulties often go unmediated by the Supreme Court, even though the Court now decides fewer cases than it has in decades and operates under the expectation that splits should bear special weight in its certiorari decisions. To remedy matters, the Article urges resuscitation and modification of the long-ignored authority of circuit courts to certify questions to the Court, compelling the Court to fulfill its role as ultimate expositor of federal constitutional law. Doing so will not only help cure the many difficulties created by splits. It will also help restore a valuable interactive relationship between the circuits and the Court and ensure continued attention to federal rights variability, a troubling phenomenon too long ignored by the Court, Congress, and commentators.*



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## Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment

*Wayne A. Logan\**

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In late November 2011, the U.S. Supreme Court denied certiorari in *United States v. Faulkner*,<sup>1</sup> an outcome that, in the larger scheme of things, should not warrant attention; the Court denies thousands of such petitions every year.<sup>2</sup> By deciding not to reexamine *Faulkner*, however, the Court failed to settle a matter dividing the federal courts: whether discovery by police of an arrest warrant during an illegal seizure constitutes an intervening circumstance sufficient to purge the taint of the seizure, allowing use of evidence secured by an attendant search. As a consequence of the Court’s certiorari denial, criminal defendants can be prosecuted in the Eighth Circuit on the basis of such evidence,<sup>3</sup> as can defendants in the Seventh Circuit,<sup>4</sup> yet those in the Sixth,<sup>5</sup> Ninth,<sup>6</sup> and Tenth Circuits<sup>7</sup> cannot.

That Fourth Amendment doctrine differs based on geographic happenstance would likely come as a surprise to most Americans, who believe—as John Jay put it in the *Federalist Papers*—that “we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, protection.”<sup>8</sup> However,

1. 636 F.3d 1009 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011).

2. See *The Supreme Court—The Statistics*, 125 HARV. L. REV. 362, 369 (2011) (noting that the Court granted only 1.1% of 7,868 petitions filed in its 2010 Term).

3. *Faulkner*, 636 F.3d at 1015–17.

4. See *United States v. Green*, 111 F.3d 515, 521–23 (7th Cir. 1997), *cert. denied*, 522 U.S. 973 (1997).

5. See *United States v. Gross*, 662 F.3d 393, 405–06 (6th Cir. 2011).

6. See *United States v. Lockett*, 484 F.2d 89, 90–91 (9th Cir. 1973).

7. See *United States v. Lopez*, 443 F.3d 1280, 1286 (10th Cir. 2006).

8. THE FEDERALIST NO. 2, at 38–39 (John Jay) (Clinton Rossiter ed., 1961); see also, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 130 (2001) (“[O]ur sense of national identity as a people literally constituted by the Constitution is linked indissolubly with ideals of common constitutional rights . . . . [N]ational ideals require national enforcement as an

the outcome in *Faulkner*, and many other instances in which intermediate federal courts differ on constitutional questions, belies this understanding. On questions not yet squarely resolved by the Supreme Court, the nation's twelve general jurisdiction federal courts of appeals decide as they see fit,<sup>9</sup> subject only to a norm of intracircuit *stare decisis*.<sup>10</sup> And because the Court agrees to hear only a fraction of cases in which circuit courts differ,<sup>11</sup> the decisions of federal appellate courts irreducibly "set the legal ground rules for citizens."<sup>12</sup>

While circuit splits have been the subject of frequent scholarly attention, research and debate has focused on federal civil (typically statutory) law, not constitutional doctrine.<sup>13</sup> So conceived, splits garnering the Court's certiorari attention have been characterized as often "trivial" in nature,<sup>14</sup> and prompted the view that associated "problems of disuniformity are very much overstated."<sup>15</sup> This Article redresses this empirical deficit relative to constitutional law and reaches the opposite conclusions. Focusing in particular on Fourth Amendment doctrine, with its significant everyday impact on the

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affirmation of our shared nationhood."); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 762, 824 (1992) ("Our constitutional language and culture hold the U.S. Constitution to be the repository of the fundamental values of the national community, a community to which every citizen belongs.").

9. See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 3, at 11 (7th ed. 2011) (noting existence of eleven numbered circuit courts of appeals, encompassing states and territories, and the court of appeals for the District of Columbia). In addition to the twelve geographically arrayed courts of general jurisdiction, the Federal Circuit Court of Appeals hears specialized federal appeals such as those concerning patents and cases decided by the Court of Federal Claims. *Id.*

10. See *infra* notes 38–39 and accompanying text.

11. See Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1449 (2009) (recognizing that the Court addresses less than half of the circuit splits identified by litigants).

12. FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 2 (2007); see also *id.* ("[I]n large measure, it is the circuit courts that create U.S. law. They represent the iceberg, of which the Supreme Court is but the most basic visible tip. The circuit courts play by far the greatest legal policymaking role in the U.S. judicial system."); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1273 (2005) ("Entire fields of law are left mainly to the courts of appeals to shape.").

13. See, e.g., Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 608 (2003); Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 549 (2010); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008).

14. Frost, *supra* note 13, at 1634–35; J. Harvie Wilkinson III, *If It Ain't Broke...*, 119 YALE L.J. ONLINE 67, 69 (2010).

15. Wilkinson, *supra* note 14, at 69; see also Frost, *supra* note 13, at 1569 ("It appears the Supreme Court selected these issues for review solely because the lower courts were divided, not because the issues were of great significance for the nation.").

nation's populace,<sup>16</sup> the Article highlights the existence of over three dozen extant circuit splits. Moreover, as the results reported on here make clear, splits do not, as Court of Appeals Judge Harvie Wilkinson has posited, get resolved because "the Court can be counted upon to weigh in."<sup>17</sup> As a consequence, the rights of individuals, and the authority of law enforcement to conduct searches and seizures, vary in nature and scope throughout the land, often for extended periods of time.

The Article proceeds as follows. Part I provides an overview of the empirical work conducted to date on circuit splits. Most notable among these efforts are the landmark studies undertaken by Professor Arthur Hellman, who examined splits in terms of their effect ("intolerability") and longevity ("persistence"). Like others, Professor Hellman focused on civil law and concluded that splits discerned in his study sample were not problematic under either measure. While alluding to the fact that variant circuit positions on constitutional criminal procedure matters could be outcome determinative, and thus raise equal treatment concerns, the study ignored the splits because, unlike areas such as federal tax and labor law, they did not affect "multicircuit actors."<sup>18</sup>

Part II discusses the results of a study that examines the nature and extent of Fourth Amendment circuit splits. Drawing on a variety of sources, including a Westlaw database search covering a ten-year period, the study reveals the existence of more than three dozen issues on which federal circuits currently differ (in several instances reflecting more than two positions). The issues pertain to a broad range of matters that commonly arise in federal criminal cases, concerning police search and seizure practices, the application and reach of the exclusionary rule, and appellate standards of review. Furthermore, despite the Supreme Court's averred concern over disuniformity,<sup>19</sup> and the expectation that splits bear special weight in

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16. See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* xix (2008) (observing that the Fourth Amendment "is the most commonly implicated and litigated part of our Constitution" and that it serves as "the foundation upon which other freedoms rest").

17. Wilkinson, *supra* note 14, at 71-72.

18. See *infra* notes 51-65 and accompanying text.

19. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415-16 (1821) (Marshall, C.J.) (asserting "the necessity of uniformity" and that "nothing but contradiction and confusion can proceed" from the Court's failure to resolve constitutional conflict); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.) (emphasizing "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution" and condemning disuniformity as "truly deplorable"). For a more



its certiorari process,<sup>20</sup> the Court regularly fails to reconcile the conflicts, ensuring that the divergent outcomes endure and multiply with the passage of time. Part II closes with a discussion of how and why the splits arise and persist, a phenomenon that is itself curious given the increasingly conservative ideological tenor of the federal judiciary, a majority of Supreme Court Justices typically unenamored of Fourth Amendment protections, and the Court's purported desire for clarity in Fourth Amendment doctrine.

Part III examines the normative and practical implications of the splits. For some time, a spirited debate has existed over whether intercircuit conflict in general is problematic. Indeed, those dubious of whether concern is warranted often maintain that splits actually have salutary effect: first, allowing for the geographically based circuits to experiment, much as federalism permits states to serve as Brandeisian laboratories;<sup>21</sup> and second, permitting views to "percolate" over time, enhancing the jurisprudential quality of eventual Supreme Court outcomes.<sup>22</sup> Neither contention enjoys support, however. Not only are constitutional rights not the proper subject of experimentation, as the Court itself has insisted, but the circuits themselves can scarcely be thought regionally cohesive or representative (for instance the Sixth Circuit encompasses both Tennessee and Michigan), and judges on circuit panels need not even hail from within the circuit on which they sit. Likewise, based on the study's findings, the avowed benefits of percolation do not significantly manifest in the Fourth Amendment decisions ultimately rendered by the Court.<sup>23</sup>

Part III then surveys the broader consequences of the splits uncovered. Perhaps most fundamentally, the splits undermine the nation's sense of shared constitutional culture, highlighting the

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recent pronouncement to this same effect, see *Justices in Their Own Words: Granting Certiorari* (C-SPAN television broadcast June 19, 2009), available at <http://supremecourt.c-span.org/Video/JusticeOwnWords.aspx> (Chief Justice John Roberts) ("Our main job is to try to make sure [that] federal law is uniform across the country.").

20. See SUP. CT. R. 10(a) (specifying as a "compelling reason" to grant a certiorari petition that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1685, 1697-98 (2000) (noting testimony of Chief Justice Taft and Justice Van Devanter before Congress on how the expansion of the Court's certiorari prerogative and discretionary docket, with adoption of the Judges' Bill of 1925, would promote uniformity in federal law).

21. See *infra* notes 156-58 and accompanying text.

22. See *infra* notes 182-84 and accompanying text.

23. See *infra* notes 187-95 and accompanying text.

inability of the courts of a single sovereign—the U.S. Government, perceived by most Americans as the prime expositor of national constitutional law<sup>24</sup>—to render consistent constitutional outcomes.<sup>25</sup> Splits also create a variety of practical difficulties: they present difficult choice of law questions when federal prosecutions entail police work crossing circuit boundaries; complicate whether a right is “clearly established” in constitutional tort litigation or “settled” for purposes of the “good faith” exception to the exclusionary rule; and contribute to possible federal forum shopping.<sup>26</sup>

Part IV considers how best to redress these difficulties. As the results reported on here make clear, the mechanism now used to resolve splits—discretionary certiorari—is not up to the task. Even though the Court’s plenary docket is now smaller than at any time in its recent history,<sup>27</sup> splits persist on numerous Fourth Amendment issues, many of which can figure critically in federal criminal prosecutions. Any solution, moreover, is complicated by the relative lack of institutional options available: while Congress can clarify, amend, or repeal a federal statute variously interpreted by circuits, only the Court can definitively resolve a constitutional conflict.<sup>28</sup> As repeated failed reform efforts over the past several decades make clear, however, the Court is remarkably successful in neutralizing changes perceived as undercutting its discretionary docket authority and supremacy. Mindful of this reality, Part IV urges resuscitation by Congress of the federal certification statute, which has long empowered circuit courts to certify legal questions to the Court for authoritative determination, and proposes several ways in which the law can be modified to ensure that the Court fulfills its

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24. See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* 23 (2005) (“When Americans speak of ‘constitutional law,’ they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it.”). Of course, state courts also enjoy authority to interpret the Federal Constitution and their decisions can engender disuniformity. However, the discussion here is limited to intrafederal judicial disagreement, involving the varied judgments of a single sovereign’s courts, which raises a distinct array of concerns. In future work, I plan to address the contributing role of state courts.

25. See *infra* Part 3.B.1

26. See *infra* Part 3.B.2.

27. See, e.g., Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2006) (noting that we are witnessing the “great disappearing merits docket”); David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 152 (2010) (characterizing recent decline in the Court’s plenary docket as “extraordinary”); Linda Greenhouse, *On the Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008, at A1 (noting that the 2008 Term resulted in the fewest number of opinions of any since 1953).

28. See *infra* notes 311–12 and accompanying text.

superintendent role. Doing so, it is hoped, will at once cure the difficulties created by splits and reinvigorate a now-decayed but once-meaningful interactive relationship between the intermediate federal courts and the Supreme Court that oversees them.

### I. BACKGROUND AND PRIOR EMPIRICAL WORK

Federal judicial power, as Article III provides, is vested in “one supreme Court” and such “inferior Courts as the Congress may from time to time ordain and establish.”<sup>29</sup> Acting on its prerogative, Congress in 1789 created a network of thirteen district courts to preside over trials and three circuit courts (Eastern, Southern, and Middle) to handle a hybrid docket of trial and appellate matters.<sup>30</sup> Congress refrained from designating judges for the circuit courts, instead directing that they be staffed by “any two justices of the Supreme Court, and the district judge of such districts.”<sup>31</sup> In 1802, the number of circuits was expanded to six, each again consisting of Justices and district court judges.<sup>32</sup> Later, in 1869, a circuit judge was assigned to each circuit, with the two other judges on the three-member panels drawn from among the district court judges and Supreme Court Justices.<sup>33</sup> With the change and concomitant stabilization of the previously shifting geographic boundaries of circuits, as Erwin Surrency has noted, “[T]he circuits took on a new significance.”<sup>34</sup>

Not until 1891, however, with the enactment of the Circuit Courts of Appeals Act (Evarts Act),<sup>35</sup> did the modern federal judicial system take shape. The two-tier system was modified to include a third, intermediate tier of courts designated to hear appeals, replicating the geographic regions of then-extant circuits.<sup>36</sup> The circuits, for the first time assuming distinct, formalized status, were looked upon as a mechanism to relieve the heavy appellate burden of the Supreme Court and lend reasoned consistency to federal law in the growing nation. Yet, from the outset, creation of an intermediate tier

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29. U.S. CONST. art. III, § 1.

30. Act of Sept. 24, 1789, ch. 20, § 3, 1 Stat. 73, 74–75; see also ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 21–27 (1987).

31. § 4, 1 Stat. at 74.

32. Act of Apr. 29, 1802, ch. 21, § 4, 2 Stat. 156, 157–58.

33. Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44, 44–45.

34. SURRENCY, *supra* note 30, at 40.

35. The Circuit Courts of Appeals Act of 1891, ch. 517, 26 Stat. 826.

36. *Id.* § 2.

of federal appellate courts prompted worry, including from the bill's sponsor, New York Senator William Evarts, that "diverse tribunals in geographical distribution" would sow confusion in "all that we had secured heretofore by a uniformity of conclusions."<sup>37</sup>

Subsequent experience amply supported Senator Evart's concern. While expected to seek intracircuit uniformity,<sup>38</sup> federal intermediate courts were not required to respect or defer to positions taken by other circuits.<sup>39</sup> As a result, independently derived "law of the circuit"—largely insulated from reconciliation due to what was seen as the Supreme Court's excessive docket<sup>40</sup>—prompted concern.<sup>41</sup>

In time, decisional disuniformity among the federal circuits prompted creation of several high-profile study groups and commissions comprised of prominent jurists, policymakers, practitioners, and academics.<sup>42</sup> Of the major initiatives, two in

37. 21 CONG. REC. S10221 (Sept. 19, 1890) (statement of Sen. Evarts); *see also, e.g.*, 21 CONG. REC. 3407-08 (1890) (comment of Rep. Breckenridge) (expressing concern over "diversities of judgment").

38. *See, e.g.*, *United States v. Guzman*, 419 F.3d 27, 31 (1st Cir. 2005) (noting that later panels are "firmly bound" by decisions of earlier panels and referring to the requirement as the "law-of-the-circuit" doctrine); *see also* Stephen L. Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343, 1344 (1979).

39. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900); *see also* Laurie R. Wallach, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 YALE L.J. 1500, 1500 (1986) ("Circuits lack the executive and legislative attributes of sovereignty that make jurisdictional boundaries meaningful; yet, though they are merely arms of a single sovereign, they enjoy independence from one another when interpreting federal law . . . . [C]ircuits [are] something 'less' sovereign than states but 'more' than mere coordinate courts . . . .").

40. *See* Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 445-46 (1983) (contending that a "clear majority" of Justices felt that "something must be done" about Court's caseload); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 580 (1969) ("The 'law of the circuit' has emerged as a response to the Supreme Court's incapacity to resolve inter-circuit conflicts."). At least one commentator, however, offered that the Court's docket selection choices, including unimportant cases, and penchant for plurality opinions, belied assertions of excessive caseload. *See* Arthur D. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28, 32-34 (1983).

41. *See, e.g.*, Carrington, *supra* note 40, at 596 (condemning "the instability of inter-circuit conflicts produced by the balkanized system of separate circuits"); Erwin Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 342 (1974) (observing that "sharply rationed review" by the Supreme Court means "it is hard to say that there is any national law on many subjects"); Shirley Hufstedter, *Courtship and Other Legal Arts*, 60 A.B.A. J. 545, 546-47 (1974) (lamenting the "lack of certitude" in national law due to insufficient "ironing out" of "wrinkles").

42. *See* ADVISORY COUNCIL FOR APPELLATE JUSTICE, 4 APPELLATE JUSTICE: 1975 (Paul Carrington et al. eds., 1975); AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968); COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS.,

particular stand out. The first, headed by Senator Roman Hruska of Nebraska, issued its final report in 1975 and drew attention to the “multiplicity” of federal circuits generating “intercircuit conflict” and “disharmony.”<sup>43</sup> Focusing on a sample of Supreme Court certiorari petitions in the 1971 and 1972 terms, the Commission found that at least five percent of the cases in which review was denied involved a “direct” conflict, a volume equivalent to one-half the total number of cases to which the Court actually afforded plenary consideration at the time.<sup>44</sup>

The Hruska Commission deemed the volume of unresolved conflicts “impressive,”<sup>45</sup> and expressed its concern that “differences in legal rules applied by the same circuits result in unequal treatment of citizens . . . solely because of differences in geography.”<sup>46</sup> In the face of this variability, the Commission urged “creation of a new national court of appeals, designed to increase the capacity of the judicial system for definitive adjudication of issues of national law.”<sup>47</sup> The suggestion, however, subjected to sharp criticism by those fearing diminished Supreme Court institutional authority and prestige, failed to get beyond the stage of congressional hearings.<sup>48</sup>

Fifteen years later, a second major congressionally sponsored initiative, spearheaded by the Federal Courts Study Committee in 1990, also addressed circuit conflicts.<sup>49</sup> While disavowing the need for a national court of appeals, the Study Committee, like the Hruska Commission before it, expressed alarm, urging that the Federal Judicial Center “study the number and frequency of unresolved conflicts” to learn how many were “intolerable,” defined as those:

“[I]mpos[ing] economic costs or other harm to multi-circuit actors”;

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STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195 (1975) [hereinafter HRUSKA COMMISSION REPORT]; REPORT OF THE STUDY GROUP OF THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573 (1972) [hereinafter FREUND COMMITTEE REPORT]. For a helpful overview of the extended series of reform efforts, see Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395 (2000).

43. HRUSKA COMMISSION REPORT, *supra* note 42, at 206–07.

44. *Id.* at 221–22.

45. *Id.* at 206–07.

46. *Id.* at 206–07, 222.

47. *Id.* at 208.

48. See AM. ENTER. INST., PROPOSALS FOR A NATIONAL COURT OF APPEALS 27–36 (1977) (discussing failure of the Hruska Commission, as well as similar prior effort of the Freund Committee); Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 474–81 (1984).

49. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990).

“encourag[ing] forum shopping among circuits”;

“creat[ing] unfairness to litigants in different circuits—for example by allowing federal benefits in one circuit that are denied elsewhere”; or

“encourag[ing] ‘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.”<sup>50</sup>

Accepting the challenge, the Federal Judicial Center appointed Professor Arthur Hellman to assess the extent and nature of circuit splits.

Professor Hellman’s study, published in 1995,<sup>51</sup> focused on two groups of cases in which the Supreme Court denied certiorari<sup>52</sup> and concluded that the number of unresolved conflicts was larger than that suggested by prior research.<sup>53</sup> Professor Hellman concluded, however, that the splits deemed “intolerable” or “persistent,” based on the Federal Judicial Center’s criteria, did not present a problem of “serious magnitude.”<sup>54</sup> While noting the existence of constitutional criminal procedure conflicts,<sup>55</sup> and alluding to the “unfairness” of varied results,<sup>56</sup> the study failed to elaborate on their precise nature or ramifications.<sup>57</sup> Symptomatic of this, when focusing on a split’s “effect on outcome,” a key measure of intolerability,<sup>58</sup> Professor Hellman omitted discussion of criminal procedure cases.<sup>59</sup> He felt free to do so because the conflicts would not affect private “multicircuit actors,” who would need to adjust their behavior to “different holdings . . . in

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50. *Id.* at 124–27.

51. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 697 (1995).

52. One group consisted of all cases in which Justice Byron White (well known for his concern over unresolved circuit disuniformity) dissented from a denial of certiorari during the 1988–1990 Terms. *Id.* at 705. The other group contained a random selection of non-*in forma pauperis* cases in which certiorari was denied during the 1989 Term. *Id.* at 706.

53. *Id.* at 772. Professor Hellman acknowledged that focus on Justice White’s dissents likely undercounted conflicts because White did not always dissent when certiorari was denied in the face of a conflict. *Id.* at 724.

54. *Id.* at 797.

55. *Id.* at 728–29.

56. *Id.* at 756–57; *see also id.* at 759–60 (noting that “few of the rules are party neutral” and that “because liberty is at stake, concerns about equal treatment will be implicated even when the rules regulate only mediate steps in the adjudicative process”).

57. *See id.* at 749 (noting that some forty percent of the conflicts in the random group and more than half of the White dissent group concerned “the constitutional rights of criminal defendants or the elements of federal crimes”).

58. *Id.* at 785 (“[T]he key to tolerability is effect on outcomes. Unless the choice between the competing rules leads courts to reach divergent results in similar cases, none of the consequences that concerned the Study Committee are likely to materialize.”).

59. *Id.* at 759–60.

different regions.”<sup>60</sup> Ignoring the effect that circuit disagreement has on individual criminal defendants, Professor Hellman observed that the federal government—which pursues jurisdiction-specific prosecutions—would not be adversely affected.<sup>61</sup>

A follow-up study by Professor Hellman, tracking the subsequent history of unresolved circuit conflicts in his initial study, likewise largely failed to focus on conflicts concerning constitutional criminal procedure rights. The study, like that of the Hruska Commission,<sup>62</sup> singled out as potentially problematic only circuit disagreements pertaining to labor and tax law.<sup>63</sup> When the study did fleetingly focus on criminal procedure disagreements, it similarly downplayed their effect on defendants,<sup>64</sup> dismissing their importance again because the federal government (unlike a business) is not a private “multicircuit” actor.<sup>65</sup>

## II. THE PRESENT STUDY

As the foregoing suggests, federal circuit splits on constitutional doctrine, including criminal procedure, have not gone wholly undetected. Nevertheless, researchers, while noting the existence of such splits and alluding to the unique problems they

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60. *Id.* at 749.

61. *Id.*

62. HRUSKA COMMISSION REPORT, *supra* note 42, at 145–51 (singling out tax as a problem area); *id.* at 154–57 (singling out labor law); *see also* Carrington, *supra* note 40, at 611 (labor); Todd Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228, 228–29 (1975) (tax).

63. Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 123–24 (2001) (identifying as the “paradigm of the outcome-determinative conflict” varied views on how mutual fund shares in a decedent’s estate should be valued for federal tax purposes). Professor Hellman did briefly advert to Fourth Amendment conflict but dismissed the significance of the conflict as lacking in practical effect. *See id.* at 125 (noting cases in which “[t]he circuits disagreed over whether a warrantless search of an automobile requires exigent circumstances as well as probable cause, but the standard for exigency was so undemanding that no search was held unlawful because the requirement was not satisfied”).

64. *See* Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247, 253 (stating that unresolved circuit splits would have little impact on criminal defendants); *see also id.* at 263–64 (noting split regarding jury exposure to extrinsic material and right to a new trial but concluding that it was not “the dispositive factor in determining case outcomes”). Emblematic of the common research emphasis on civil law, Professor Hellman augmented his study with field surveys to get the views of practitioners on the practical difficulties and challenges presented by conflicts, singling out for attention antitrust, ERISA, labor and employment, and maritime law. *Id.* at 273–74.

65. Hellman, *supra* note 63, at 121 n.154.

present,<sup>66</sup> have failed to systematically chronicle their nature and extent. This Part discusses the results of a study intended to remedy this empirical deficit, focusing on Fourth Amendment doctrine in particular, a domain where circuit splits can have a particularly direct effect on individual liberty and privacy.

### A. Findings

A variety of data sources were consulted. In contrast to prior work, which assessed splits in a “top down” fashion by focusing on certiorari grants or denials by the Court, the present study adopted a “bottom up” approach, focusing on splits that arose among the courts of appeals themselves. This strategy allowed for a fuller illumination of the splits for several reasons. First, focus on certiorari outcomes alone risks underinclusiveness, due to the possibility that certiorari was not actually sought or because the split preceded or followed the study period. Moreover, and more important, focusing on certiorari petitions, which number in the tens of thousands, necessitates resort to sampling, which fails to reflect the nature and extent of splits. Finally, certiorari-focused studies typically have omitted coverage of *in forma pauperis* petitions, which, while perhaps a sensible means of reducing the enormous volume of cases, can adversely skew results in the criminal justice context, where impecunious defendants predominate and often lack a right to appointed counsel in the certiorari process.<sup>67</sup>

Here, a Westlaw search was conducted of federal court of appeals decisions rendered over a ten-year period (September 1, 2001 to December 1, 2011),<sup>68</sup> augmented by review of the “Split Circuits” blog<sup>69</sup> and the “Circuit Splits” service of *U.S. Law Week*,<sup>70</sup> as well as

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66. See, e.g., Dragich, *supra* note 13, at 549 n.77 (disclaiming focus on circuit constitutional disuniformity and stating that “[o]f course, individual rights ought to be protected uniformly throughout the country”); Frost, *supra* note 13, at 1569 n.5 (acknowledging that “varied interpretation of federal constitutional law raises different, and arguably more troubling, questions”).

67. See, e.g., *Kyllo v. United States*, 530 U.S. 1305 (2000) (simultaneously granting petitioner motion to proceed *in forma pauperis* and petition for writ of certiorari). See generally STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 849–51 (9th ed. 2010) (surveying post-trial limits on availability of government-appointed counsel).

68. The following query was used in the “cta” database (containing all intermediate federal court cases): division divide! conflict! split inconsisten! differ! disagree! uncertain! /p “court of appeal” circuit “federal court” & fourth “4th amendment” “amend. 4” search seiz!.

69. See A. Benjamin Spencer, *SPLIT CIRCUITS*, <http://splitcircuits.blogspot.com> (last visited Dec. 10, 2011).



the author's monitoring of Fourth Amendment circuit splits more generally. The strategy was designed to yield the fullest, most comprehensive picture of splits during the study period.

The study employed a conservative definition of a split, only identifying instances when a court of appeals explicitly acknowledged one to be in existence.<sup>71</sup> As a result, the study avoided counting instances when courts disregarded or engaged in superficial distinction of conflicting extracircuit precedent, a not uncommon occurrence,<sup>72</sup> which if counted would introduce an unhelpful definitional uncertainty.<sup>73</sup> The study revealed that—at this time<sup>74</sup>—more than three dozen splits exist on Fourth Amendment matters in the courts of appeals. Appendix A indicates the issues on which the courts are split and the dates on which the splits emerged.

The splits, organized in terms of those relating to general search and seizure practices, the applicability and reach of the exclusionary rule, and appellate review, concern an array of Fourth Amendment issues that regularly arise in federal criminal cases. For instance, in terms of search and seizure practices, circuit variation can determine whether police can:

- “sweep” a residence when no one is arrested on the premises;
- extend the duration of a seizure by asking questions unrelated to the basis for the seizure;

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70. See *Split Circuits*, USLAW, [http://www.uslaw.com/law\\_blogs/Split+Circuits?blog=47](http://www.uslaw.com/law_blogs/Split+Circuits?blog=47) (last visited Dec. 10, 2011).

71. An approach like that recently used by Professors George and Solimine. See Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 188 (2001) (classifying “a case as involving an intercircuit split only if any member of the panel explicitly stated that another circuit or circuits had reached a different decision in analogous circumstances and if the conflict was express and direct rather than merely a matter of general or logical inconsistency”); see also Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 922–41 (1991) (adopting a similar approach).

72. See, e.g., *United States v. Poe*, 556 F.3d 1113, 1123–24 (10th Cir. 2009) (adopting a narrow view of whether private actors qualify as government agents, ignoring a contrary position adopted by Fourth Circuit in *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir. 1987)).

73. At the same time, the study excluded federal circuit splits acknowledged by non-circuit courts. See, e.g., *Commonwealth v. Narcisse*, 927 N.E.2d 439, 446–47 (Mass. 2010) (noting federal circuit variation on whether police can conduct a protective *Terry* frisk of an individual subject to a consensual encounter, absent reasonable suspicion that the individual is or was involved in criminal activity).

74. The study also did not take into account aged but still extant splits that that did not manifest during the study period. See *infra* note 114.

- illegally seize an individual and use identity-related evidence secured to prosecute the detainee for an unrelated crime;
- search an area incident to arrest after the arrestee has left the area;
- enter a home without a warrant based on the “community caretaking” doctrine;
- seize an individual based on a mistaken understanding of substantive law; and
- rely on information that has not been communicated to the arresting officer by another officer to justify a search or seizure.<sup>75</sup>

Exclusionary rule variations are no less significant. They can also have an outcome-determinative effect—such as in *United States v. Faulkner*, noted at the outset, when police unlawfully detain an individual, learn that he is subject to an outstanding arrest warrant, and then arrest and search him, resulting in discovery of evidence leading to an unrelated criminal prosecution.<sup>76</sup> Likewise, circuit-level disagreement can affect whether a defendant has standing to challenge police action, such as when a rental car is searched and the driver is operating the car with the renter’s permission but does not appear on the rental agreement.<sup>77</sup> Finally, circuit disagreement on appellate standards of review can have significant impact. It can, for instance, determine how much deference is owed lower court assessments of protectable curtilage around a home and the scope of consent provided by a defendant in a search.<sup>78</sup>

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75. See *infra* Appendix A.

76. See *infra* Appendix A.

77. See *infra* Appendix A.

78. See *infra* Appendix A.

### B. Assessing Intolerability and Persistence

The intercircuit variation highlighted here is problematic in terms of both measures employed by prior research: intolerability and persistence.<sup>79</sup>

#### 1. Intolerability

As a consequence of the variation, the “right of the people to be secure in their persons, houses, papers, and effects”<sup>80</sup> is allowed to hinge on geographic happenstance,<sup>81</sup> resulting in varied protection against infringements on individuals’ privacy and physical liberty (both immediate, as the result of a particular seizure, and long term, as a result of imprisonment).<sup>82</sup> Two examples of the many instances of circuit disuniformity uncovered here highlight the impact of this variability.

A first example concerns the authority of police to search incident to a lawful arrest, one of the most commonly invoked exceptions to the default expectation that police secure a warrant before searching a person or property.<sup>83</sup> Police have long possessed

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79. See *supra* notes 50–54 and accompanying text.

80. See U.S. CONST. amend. IV.

81. Whether the Fourth Amendment ensures a collective or individual right of privacy and bodily security has long been the source of debate. See, e.g., Donald L. Dorenberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 282–83 (1983) (noting contrast between the Court’s view of the exclusionary rule as serving the collective interest in deterring police misconduct (versus vindicating individual rights), and its approach to standing, which is conditioned on whether an individual has a right to contest a search or seizure). The circuit splits identified here, however, implicate the distinct question of rights being available to some but not other “people,” based not on personal circumstance but rather on specific geographic location within the larger national political community. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[T]he people’ seems to have been a term of art employed in select parts of the Constitution . . . . [Its use] suggests that ‘the people’ protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community . . .”).

82. The doctrinal variation, moreover, is not always dichotomous in form. While circuits most often divide into two jurisprudential camps, they can also reflect three or more approaches to a particular issue, magnifying the nature and scope of variation. Multicircuit splits exist, for example, on the issue of the definition of “reason to believe” sufficient to justify entering the home of the target of an arrest warrant, see *United States v. Hill*, 649 F.3d 258, 262–63 (4th Cir. 2011); the standard used to assess whether police would have inevitably discovered challenged evidence in the absence of an unlawful search, see *United States v. Marrocco*, 578 F.3d 627, 640 n.24 (7th Cir. 2009); and whether an unauthorized driver of a rental vehicle, driving with the permission of the renter, has standing to challenge a vehicle search, see *United States v. Thomas*, 447 F.3d 1191, 1196–99 (9th Cir. 2006).

83. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(b) (4th ed. 2004) (noting that only consensual searches exceed in volume searches incident to arrest).

search incident authority,<sup>84</sup> allowing them to remove any weapons or evidence possessed by the arrestee.<sup>85</sup> Over time, however, the parameters of the authority have been disputed. In its seminal 1969 decision *Chimel v. California*, the Supreme Court held in the context of an in-house arrest that police can search an arrestee's area of "immediate control," including the "area into which the arrestee might reach."<sup>86</sup> Twelve years later, in *Belton v. New York*, a case involving the arrest of a motorist, the Court expanded the right in an important way, while professing to merely apply *Chimel* to the "particular and problematic context" of auto searches.<sup>87</sup> The *Belton* Court afforded police a per se right to search an auto's passenger compartment and any containers found therein,<sup>88</sup> expanding police search authority to areas often beyond the actual physical reach of arrestees.<sup>89</sup>

Notwithstanding *Belton's* limiting language, several circuits—including the Fourth,<sup>90</sup> Fifth,<sup>91</sup> Seventh,<sup>92</sup> Eighth,<sup>93</sup> and D.C. Circuits<sup>94</sup>—have applied *Belton* beyond the auto search context, while others—such as the Third<sup>95</sup>—adhere to *Chimel's* focus on whether an area searched was actually within the "grab area" of an arrestee. As a result, whether police can search an area depends on the circuit in which an arrest occurs. If an arrest occurs in a circuit affording police greater authority, a search is permitted even if the arrestee is handcuffed, or otherwise safely constrained by police, and can extend

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84. See Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 385–90 (2001).

85. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

86. *Id.* at 763.

87. 453 U.S. 454, 460 n.3 (1981).

88. *Id.* at 460.

89. See *id.* at 466 (Brennan, J., dissenting) (asserting that the majority "adopt[ed] a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car").

90. *United States v. Silva*, 745 F.2d 840, 847 (4th Cir. 1984).

91. *United States v. Johnson*, 846 F.2d 279, 281–82 (5th Cir. 1988).

92. *United States v. Tejada*, 524 F.3d 809, 812 (7th Cir. 2008).

93. *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984).

94. *United States v. Abdul-Saboor*, 85 F.3d 664, 668 (D.C. Cir. 1996).

95. *United States v. Myers*, 308 F.3d 251, 268–74 (3d Cir. 2002).

to areas from which the arrestee has been removed.<sup>96</sup> If not in such a circuit, a search will be deemed invalid as beyond *Chimel's* scope.<sup>97</sup>

To make matters worse, search incident to arrest doctrine has been further muddied as a result of the Court's 2009 decision in *Arizona v. Gant*.<sup>98</sup> An auto search case, *Gant* held that *Chimel* "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."<sup>99</sup> In the wake of *Gant*, the circuits have disagreed over whether the *Gant* majority's more circumscribed view of police authority applies beyond the auto context, with the Supreme Court failing to resolve the uncertainty.<sup>100</sup>

Another illustration of the troubling impact of circuit disuniformity concerns whether police should be permitted to make reasonable mistakes as to the scope and meaning of the laws they invoke when they seize individuals. While historically such mistakes were uniformly condemned, triggering first tort liability and later application of the exclusionary rule, based on the finding that any such seizure was unreasonable for Fourth Amendment purposes,<sup>101</sup> recent years have witnessed a weakening of the strict rule. Indeed, today in the Eighth Circuit<sup>102</sup> police are forgiven for their "objectively reasonable" mistakes of substantive law, a position at direct odds with every other circuit addressing the issue.<sup>103</sup>

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96. See, e.g., *United States v. Currence*, 446 F.3d 554, 557 (4th Cir. 2006) ("[O]fficers may separate the suspect from the item to be searched . . . before they conduct the search."); *Abdul-Saboor*, 85 F.3d at 670–71 (determining that search of apartment was a lawful search incident to arrest when the suspect was handcuffed during the search).

97. See, e.g., *Myers*, 308 F.3d at 267 (invalidating search when arrestee was handcuffed, lying face down on the floor, and monitored by two police officers); LAFAVE, *supra* note 83, § 6.3 n.40 (citing *Myers* and similar cases).

98. 556 U.S. 332 (2009).

99. *Id.* at 343. The *Gant* majority also identified an alternate basis to justify a search incident to arrest, expressly limited (for reasons that remain obscure) to the auto context: when it is "reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 346.

100. See Jamie L. Starbuck, Comment, *Redefining Searches Incident to Arrest: Gant's Effect on Chimel*, 116 PENN. ST. L. REV. 1253, 1263 (2012) ("Parties in seventeen different search incident to arrest cases over time have filed for certiorari; the Supreme Court has denied each petition.").

101. Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 70 (2011).

102. *E.g.*, *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005).

103. See, e.g., *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) ("Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional."); *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) ("A stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable."); *United States v. Tibbets*, 396 F.3d 1132, 1138 (10th Cir. 2005)

As a consequence, individuals within the boundaries of the Eighth Circuit can be detained by police on the mistaken belief that their behavior is unlawful, and not only will the seizure be condoned, but any evidence or information secured by police as a result of the seizure can be used because the exclusionary rule is not at play.<sup>104</sup> Thus, police in the Eighth Circuit, as in the other circuits, not only can make reasonable mistakes of fact, giving rise to probable cause and reasonable suspicion resulting in a seizure.<sup>105</sup> They can also, unlike police in other circuits, engage in lawless seizures (and hence searches) with impunity. Affording law enforcement such latitude not only raises obvious rule of law concerns.<sup>106</sup> It also has major practical implications given the predisposition of modern police to use minor offenses, often of a highly technical, *malum prohibitum* nature, as bases to seize individuals and secure evidence in support of more serious reasons for prosecution.<sup>107</sup>

The foregoing examples, just two of the many splits unearthed here, fail, however, to convey the broader impact of disuniformity. This is because the interests receiving variable protection are intended to protect the innocent and guilty alike.<sup>108</sup> Because the exclusionary rule dominates attention and discourse, it is often overlooked that police authority governs situations when individuals attracting law enforcement attention are doing nothing whatsoever wrong.<sup>109</sup> Moreover, while it seems unlikely that individuals will often conduct their lives based on the availability or nonavailability of Fourth Amendment rights, the possibility exists. For example, *ex ante* personal behavior might be affected by a circuit position on the right

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("[F]ailure to understand the law by the very person charged with enforcing it is *not* objectively reasonable."); *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) ("[An officer's] belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop.").

104. See, e.g., *Martin*, 411 F.3d at 1000–02 (upholding admission of evidence seized as a result of an auto stop based on officer's misunderstanding of traffic law).

105. See, e.g., *United States v. Chanthasouvat*, 342 F.3d 1271, 1277 (11th Cir. 2003) ("[A]n officer's mistaken assessment of facts need not render his actions unreasonable because what is reasonable will be completely dependent on the specific and usually unique circumstances presented by each case.").

106. See Logan, *supra* note 101, at 90–95.

107. See Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1247–48 (2010) (discussing use of traffic stops to secure evidence in support of more serious prosecutions).

108. See generally Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229–31 (1983).

109. A prime example is found in recent data from New York City where the overwhelming majority of persons stopped, questioned, and frisked by police in 2006 were not ultimately arrested. See Logan, *supra* note 101, at 103 n.228.

of a rental car driver to contest a search; the right of a nonpresent resident to rely on a prior denial of consent to prevent entry of her home by police; or the privacy expectation of a prisoner in his mail.<sup>110</sup> In the face of such legal uncertainty, individuals cannot “know the scope of [their] constitutional protection.”<sup>111</sup>

In short, whatever the merit of other researchers’ tendency to dismiss the significance of splits in the civil nonconstitutional realm,<sup>112</sup> the consequences of the doctrinal variation highlighted here—accounting for what one circuit judge called an “appreciable entropy among the circuits”<sup>113</sup>—warrant the opposite conclusion.

## 2. Persistence

The persistence of Fourth Amendment circuit splits uncovered here raises additional concern. As noted in Appendix A, while most splits are of relatively recent vintage, many have endured for years, with eight splits dating back to the 1990s, and one to the 1980s,<sup>114</sup> betraying the Court’s purported preference to act when faced with “deep splits.”<sup>115</sup> The varied circuit positions not only result in

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110. For discussion of how Fourth Amendment doctrine can affect the daily life and behaviors of individuals more generally, see L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1521–26 (2011).

111. See *New York v. Belton*, 453 U.S. 454, 459–60 (1981). While such uncertainty is most acute in instances involving police-citizen interactions at circuit borders, splits also affect outcomes in other instances, such as when a circuit lacks precedent on an issue. See *infra* Part 3.A.2.

112. See *supra* notes 14–15 and accompanying text.

113. *United States v. Taylor*, 600 F.3d 678, 686 (6th Cir. 2010) (Kethledge, J., dissenting).

114. Again, the conservative methodology used here offers a mere snapshot of extant splits, excluding, for instance, consideration of splits that did not manifest in the study period. For example, a split exists over whether police have a per se right to frisk the companion of an arrestee. See *United States v. Bell*, 762 F.2d 495, 498 (6th Cir. 1985) (noting disagreement with *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971)). While recent decisions such as *Arizona v. Johnson*, 555 U.S. 323 (2009), emphasize the need for individualized suspicion of a weapon being present to justify a *Terry* frisk, the “automatic companion” split continues to be recognized. E.g., *Glantz v. Ren*, No. CV 09-149-M-DWM-JCL, 2010 WL 4286234, at \*8 n.7 (D. Mont. Sept. 16, 2010). A split also exists on whether one has an expectation of privacy regarding packages addressed to an alias. *United States v. Lozano*, 623 F.3d 1055, 1062–64 (9th Cir. 2010) (O’Scannlain, J., concurring) (citing *United States v. Lewis*, 738 F.2d 916, 920 (8th Cir. 1984) (denying expectation) and *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992) (allowing expectation)).

115. See Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 517 (2003) (“For the most part, the Supreme Court will consider for review only cases presenting what we call deep splits—questions on which other courts . . . have strongly disagreed.”); *id.* at 521 (“[W]e take cases . . . to resolve strong disagreements—splits not likely to heal . . . [A]bout 70 percent of the cases we agree to hear involve deep divisions of opinion among federal courts of appeals or state high courts.”).

accumulated individual-level differences in search and seizure outcomes over time.<sup>116</sup> They also have negative systemic effects, including relative to resources, as courts and litigants are required to address unsettled questions of law.<sup>117</sup>

With respect to persistence, it should not go unacknowledged that the Court did see fit to resolve several splits arising during the study period,<sup>118</sup> and agreed to address several others in its October 2011 Term.<sup>119</sup> However, as noted earlier and more fully set forth in Appendix A, multiple splits persist, along with their negative consequences.

### C. The Data in Context

The findings presented here cannot be decoupled from the broader context in which they arise. Indeed, some degree of variation can be thought inevitable given the nation's network of circuit courts,<sup>120</sup> which Judge Posner has aptly characterized as constituting

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116. Moreover, the negative impact of the variability is exacerbated by the existence of multiple circuit positions on particular Fourth Amendment issues. *See supra* note 82.

117. For a discussion of the costs associated with such uncertainty by a Senior Second Circuit Judge, see Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 JUDICATURE 104, 106–07 (1993) (“Where the Supreme Court has not spoken on an issue, but some circuits have resolved the question in one way and some in another, litigation is encouraged in those circuits that have not yet spoken.”); *id.* at 107 (“Aside from the fact that fairness is lost and justice is not seen to be done, the lower courts become clogged with cases that would not be brought if the law was clearly stated.”).

118. *See, e.g.*, *United States v. Davis*, 131 S. Ct. 2419, 2423–25 (2011) (addressing whether the “good faith” exception to the exclusionary rule applies to officer reliance on settled case law); *Muehler v. Mena*, 544 U.S. 93, 95 (2005) (determining whether police can ask a detainee questions unrelated to the basis for detention, not resulting in seizure delay); *Devenpeck v. Alford*, 543 U.S. 146, 148, 155–56 (2004) (addressing whether, when police arrest on a legally invalid basis, an alternate legal (yet unarticulated) basis must be “closely related”).

119. *See Huff v. City of Burbank*, 632 F.3d 539, 548–49 (9th Cir. 2011) (noting and rejecting position of other circuits that emergency and exigency doctrines for warrantless police entries of residences are not distinct), *cert. granted sub nom.* *Ryburn v. Huff*, 132 S. Ct. 987 (2012); *United States v. Maynard*, 615 F.3d 544, 556, 563–64 (D.C. Cir. 2010) (noting split on whether attaching global positioning device to car and tracking it for extended period implicates Fourth Amendment, and determining that they do), *cert. granted sub nom.* *United States v. Jones*, 131 S. Ct. 3064 (2011); *Florence v. Bd. of Chosen Freeholders of Burlington*, 621 F.3d 296, 298–99, 311 (3d Cir. 2010) (noting split on permissibility of suspicionless strip searches of minor offense arrestees and determining that they are permissible), *cert. granted*, 131 S. Ct. 1816 (2011). The Court also agreed to resolve a split in its coming October 2012 Term, dating back to the early 1990s, concerning whether police executing a search warrant can lawfully detain a person located some distance away from the targeted search premises. *See United States v. Bailey*, 652 F.3d 197, 204 (2d Cir. 2011) (noting split among five other circuits on the question), *cert. granted* *Bailey v. United States*, 132 S. Ct. 2710 (2012).

120. *See Tafflin v. Levitt*, 493 U.S. 455, 465 (1990) (noting the “inconsistency . . . which a multimembered, multi-tiered federal judicial system . . . creates”).



“at best a loose confederacy.”<sup>121</sup> Circuit panels, as noted earlier, need only decide in a manner ensuring intracircuit jurisprudential uniformity.<sup>122</sup> At the same time, consistent with Supreme Court license,<sup>123</sup> circuit judges do not view creation of a conflict as a paramount detriment in their decisionmaking<sup>124</sup> and as a general matter act autonomously, not as agents of the Supreme Court relative to unsettled issues.<sup>125</sup>

Certainly no less important, the splits must be conceived in terms of the judicial process from which they emanate and their legal subject matter. With respect to the former, as *Marbury* teaches, judicial interpretation, even of constitutional text, unavoidably affords some intellectual rein.<sup>126</sup> So too does the interpretation of frequently opaque and open-ended Supreme Court precedent,<sup>127</sup> complemented by the modern Court’s preference for narrower, minimalist holdings.<sup>128</sup> The upshot, as political scientist David Klein has found, is that “[c]ircuit judges are given numerous chances to make law unimpeded by the Supreme Court, and they seem to take advantage of these opportunities. . . . [M]uch of the federal law in any circuit looks as it does because court of appeals judges think it should look that way.”<sup>129</sup>

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121. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 380 (1996).

122. See *supra* notes 38–39 and accompanying text.

123. See *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (“Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy . . . . But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle.”); see also *id.* (averring that judges should do what they think is “right”).

124. See DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 22–25 (2002) (discussing results of circuit judge survey identifying intercircuit uniformity as being of least importance among several goals in decisionmaking). But see Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 123–24, 129 (2002) (concluding, based on a study of Ninth Circuit case files, that “appellate judges take seriously the charge to reduce or minimize . . . conflicts before they reach the Supreme Court”).

125. E.g., KLEIN, *supra* note 124, at 126–27, 134; Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 512 (2008).

126. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

127. See Evan H. Caminiker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 10–11 (1994) (“Deciding what a precedent means will frequently depend on the particular normative values and assumptions each judge brings to the interpretive enterprise.”).

128. See Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 1041–42 (2010) (“The Justices understand that they are setting rules for a diverse nation . . . and that it is normally better not to decide more than is necessary for the satisfactory disposition of the case at hand.”). On the purported virtues of the shift, see CASS R. SUNSTEIN, *ONE CASE AT A TIME* (2001).

129. KLEIN, *supra* note 124, at 135.

Fourth Amendment doctrine amply lends itself to such interstitial judicial lawmaking. The Amendment's text broadly proscribes "unreasonable" searches and seizures<sup>130</sup> and contains two clauses that the Supreme Court has long failed to clarify whether and how are related to one another.<sup>131</sup> And even though the Court has often announced its fealty to "bright-line" Fourth Amendment rules, the multifarious circumstances of law enforcement make consistent rulemaking and application difficult.<sup>132</sup>

The foregoing observations, however, lack explanatory force here. The splits documented do not turn on idiosyncratic, often nonrecurrent particular factual scenarios, such as whether police use of force was excessive<sup>133</sup> or the existence of reasonable suspicion or probable cause.<sup>134</sup> Rather, they reflect basic doctrinal differences among the circuits on matters concerning the search and seizure authority of police, applicability of the exclusionary rule, and appellate standards of review.

At the same time, the splits, in their nature and extent, are surprising given what we know about the current federal judiciary. From trial courts up through the Supreme Court, the federal bench is more conservative than in preceding decades, bearing the predominant imprint of appointees of Republican Presidents Ronald Reagan, George H.W. Bush, and George W. Bush.<sup>135</sup> Given that conservatives (at least those of nonlibertarian ilk) have long disfavored generous readings of the Fourth Amendment and the

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130. See *Scott v. United States*, 436 U.S. 128, 139 (1978) ("Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case."); cf. Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441 (1990) (discussing constitutional indeterminacy more generally).

131. See SALTZBURG & CAPRA, *supra* note 67, at 32 (noting Court's varied treatment of the Amendment's reasonableness and warrant clauses).

132. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 15 (1968) (acknowledging the "protean variety of the street encounter").

133. See, e.g., *Scott v. Harris*, 550 U.S. 372, 383 (2007) (recognizing the common need for courts to "slosh [their] way through the factbound morass of 'reasonableness'" in such claims).

134. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273-76 (2002) (noting the need for courts in assessing reasonable suspicion to consider the "totality of the circumstances," based on particular facts of situations and officers' specialized training).

135. See Corey R. Yung, *Judged By the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1181-82 (2010).

exclusionary rule,<sup>136</sup> one would think that the disputes demonstrated here would not regularly arise.<sup>137</sup>

At least a partial explanation perhaps lies in the microcomposition of panels deciding cases. Under current rules, a three-judge panel in a given circuit, perhaps composed of two or more civil rights-generous judges<sup>138</sup> voting “first in time” can create the law of the circuit.<sup>139</sup> Moreover, given the rarity of en banc reconsideration,<sup>140</sup> even in the acknowledged face of a split,<sup>141</sup> such outcomes can enjoy staying power.<sup>142</sup>

Whatever the etiology of the splits, we are still left with the curious failure of the Supreme Court to resolve them. In light of the increasing conservatism of the Court, which has all but done away with the Fourth Amendment exclusionary rule,<sup>143</sup> logic would suggest

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136. See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 111 (2003) (“To conservatives, [the exclusionary rule] is an absurd rule through which manifestly dangerous criminals are let out because the courts prefer technicalities to truth.”).

137. Indeed, Justice Souter, in seeking to explain the Court’s modest modern-day caseload, reasoned that the circuits have become more politically homogeneous as a result of presidential appointments, resulting in fewer splits for the Court to resolve. See Hellman, *supra* note 63, at 146.

138. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (“[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.”); see also Arthur D. Hellman, “*The Law of the Circuit*” Revisited: *What Role for Majority Rule?*, 32 S. ILL. U. L.J. 625, 625 (2008) (noting that “binding circuit law can be established by a panel whose views do not represent the views of a majority of the circuit’s active judges”).

139. As Professor Frank Cross has observed, this is so even though, as a technical matter, circuits enjoy the power to reverse earlier precedent. See CROSS, *supra* note 12, at 203–04.

140. See Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1338 n.71 (2009) (citing studies showing that the likelihood of a court hearing a case en banc is considerably less than one percent); see also CROSS, *supra* note 12, at 108–09 (noting deterrents (including added decisionmaking burdens) and the negative impact on collegiality associated with reviewing and reversing one’s colleagues). In addition, it appears that rates of en banc review are even lower in the criminal litigation context. Amy E. Sloan, *The Dog That Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 754–55 (2009).

141. While Federal Rule of Appellate Procedure 35(b)(1)(B) suggests that a split may warrant attention in considering a petition for en banc hearing, such hearings do not appear to occur in significant part due to splits. See Tracey E. George, *The Dynamics and Determinants of the Decision To Grant En Banc Review*, 74 WASH. L. REV. 213, 219–20 (1999).

142. See Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 1019 (2012) (“[Stare decisis] doctrine is severe indeed. It prohibits reexamination of the first panel’s precedent even in light of subsequent insights from other circuits.”).

143. See Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 200–07 (2010) (discussing an array of limits imposed on the exclusionary rule during the Rehnquist and Roberts Courts); see also Frank Cross et al., *A Positive Political Theory of Rules and Standards*, 2012 ILL. L. REV. 1, 37–38 (noting pre-

that it would eagerly seize opportunities to reexamine and reject any prodefendant outcomes from inferior courts.<sup>144</sup> While in past decades the Justices perhaps could be expected to resolve splits,<sup>145</sup> the results reported on here make clear that this is not the case today.<sup>146</sup> And when the Court does get around to deciding a contested issue, many years can pass first, with negative consequences continuing to accrue in the interim.<sup>147</sup>

### III. QUESTIONING CONFORMITY: NORMATIVE AND PRACTICAL IMPLICATIONS

Whether circuit-level variation on federal law in general is problematic has been the subject of lively debate over the years. In 1983, for instance, Ninth Circuit Court of Appeals Judge Clifford

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appointment memoranda of Chief Justice Roberts and Justice Alito expressing their desire to abolish the exclusionary rule).

144. "Aggressive grants," in political science parlance. H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 207–12 (1991); *see also* JEFFREY SEGAL & HOWARD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 319 (2002) (showing a close association between Justices' ideologies and their exclusionary rule votes).

145. *See* RICHARD F. WOLFSON & PHILIP B. KURLAND, ROBERTSON & KIRKHAM JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 322 (2d ed. 1951) ("Where the decision of the Court of Appeals sought to be reviewed by certiorari directly conflicts . . . with the decision of another Court of Appeals on the same question, the Supreme Court grants certiorari as matter of course, and irrespective of the importance of the question of law involved."). *But see* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 470–72 (1953) (stating that the Court did not automatically reconcile splits at the time but that one would "usually be sufficient" for certiorari to be granted).

146. The Court's institutional inertia, it is important to note, goes unremedied by the Office of the Solicitor General, an entity theoretically (yet arguably, given its executive branch status) capable of serving as a superintendent of clarity in national law. *See generally* Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105 (1988); David R. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165 (1998). As recent work has shown, however, the Office has aligned itself with the Court's abstemious preferences and significantly reduced the volume of its certiorari recommendations, which have enjoyed a historically high rate of success. *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1333–34, 1338–39 (2010); *see also* Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 395–96 (2000) (arguing that the selectivity of the Office significantly alters the Court's plenary docket relative to circuit cases lost by the government). For argument favoring more zealous advocacy on the part of the Office at the petition stage, *see* Adam H. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725 (2011).

147. *See* *United States v. Johnson*, 457 U.S. 537, 560 (1982) (noting, in an era when the Court heard many more cases, that "years may pass before the Court finally invalidates a police practice of dubious constitutionality").

Wallace, while noting that “[i]deally” interpretations of federal law would be uniform, wrote that it was “not clear that there is anything intrinsically unacceptable about conflicts.”<sup>148</sup> “Indeed,” Judge Wallace continued, “if conflicts were by their very nature unacceptable, the traditional rule denying precedential status to out-of-circuit decisions probably would not have enjoyed its long history.”<sup>149</sup> More recently, Fourth Circuit Court of Appeals Judge Harvie Wilkinson downplayed the impact of intercircuit conflict, asserting that the “problems of disuniformity are very much overstated”<sup>150</sup> and that the “world will not end because a few circuit splits are left unresolved.”<sup>151</sup> Along these same lines, Professor Amanda Frost, reflecting on varied circuit court interpretations of federal civil statutes and regulations, has concluded that uniformity is often “overvalu[ed]”<sup>152</sup> and that disuniformity can even be beneficial.<sup>153</sup>

This Part considers whether the foregoing views are warranted in light of the findings highlighted here regarding federal constitutional doctrine. Earlier the point was made that on the “intolerability” measure Fourth Amendment splits have distinct and more troublesome outcomes than those encountered in the civil, nonconstitutional law context.<sup>154</sup> The splits also “persist,” resulting in continued disparate outcomes.<sup>155</sup> The following discussion examines the unique difficulties presented by Fourth Amendment splits, first by situating the study’s findings in the more general debate over whether splits are problematic, and then by assessing several distinct normative and practical problems that the splits present.

### *A. Reasons Traditionally Advanced in Favor of Tolerating Splits*

#### 1. Laboratories of Regional Experimentation

Commentators have advanced a variety of arguments in support of the view that circuit splits are not only unproblematic but can actually have salutary effect. Perhaps most significant has been the argument that splits allow for experimentation, providing a

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148. J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 923, 929 (1983).

149. *Id.* at 929.

150. Wilkinson, *supra* note 14, at 69.

151. *Id.*

152. Frost, *supra* note 13, at 1639.

153. *Id.* at 1571, 1606.

154. *See supra* Part II.B.1.

155. *See supra* Part II.B.2.

benefit akin to that famously envisioned by Justice Brandeis vis-à-vis state policy preferences.<sup>156</sup> According to Judge Wallace, circuit-level variation permits courts to experiment in ways aligned with the needs and preferences of their geographic domains. “[T]he very diversity of our vast country, with its many regional differences and local needs,” Judge Wallace asserted, “logically supports a flexible system that can benefit, when appropriate, from federal law which takes account of these regional variations (e.g., in fields such as water rights).”<sup>157</sup> Along these same lines, political scientist Jennifer Luse and her colleagues contend that such variations reflect and lend normative significance to the nation’s federalist structure. The geographical organization of the circuits is:

[N]o mere artifact of history but reflects the tension between advocates of increased national power and those who favored devolution of authority to the state and local level. Although these courts may seek to contribute to uniformity in federal law, “The task to which the courts of appeals have called themselves is that of making the national law *as applied to their geographic territories*.” That is, they attempt to balance uniformity with necessary regional adaptation, which is reflected (albeit imperfectly) in the decisions they issue.<sup>158</sup>

Whatever their merit more generally, such arguments lack persuasive force here for several reasons. First and foremost, constitutional rights differ from the typical subject of Brandeisian experimentation, the “fields of social and economic science.”<sup>159</sup> As the Court itself has insisted, rights are not the proper subject of experimentation.<sup>160</sup> And even if they were, the *modus operandi* of the

156. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

157. Wallace, *supra* note 148, at 930; see also J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 81 (1981) (“[T]he quest for uniformity contains room for regional experimentation and adaptation of national law to continental diversity.”).

158. Jennifer K. Luse et al., “*Such Inferior Courts...: Compliance by Circuits with Jurisprudential Regimes*,” 37 AM. POL. RES. 75, 77–78 (2009) (citation omitted).

159. *New State Ice Co.*, 285 U.S. at 310–11 (Brandeis, J., dissenting).

160. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 338 (1921) (“The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual.”). A similar view was voiced by Justice Goldberg several decades later:

While I quite agree with Mr. Justice Brandeis that a “State may . . . serve as a laboratory; and try novel social and economic experiments,” I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (citations omitted); see also *Smith v. United States*, 431 U.S. 291, 312 n.5 (1977) (Stevens, J., dissenting)

experimentation differs from the Brandeisian model. With the latter, the effects of policy choices are cabined to single states;<sup>161</sup> circuit positions, on the other hand, by definition influence rights across several states, affecting far more individuals.<sup>162</sup>

It is also difficult to imagine any attendant sorting benefit, championed by devolutionary federalism proponents more generally, who posit based on Charles Tiebout's influential thesis<sup>163</sup> that citizens will "vote with their feet" and allow identification of optimal policy.<sup>164</sup> Even assuming, as Tiebout did relative to local public goods, that individuals are fully informed of variant policies,<sup>165</sup> Fourth Amendment rights are ill-suited to the analysis. It is highly unlikely that a circuit's position on a particular Fourth Amendment question, whether restrictive or generous, would drive the major life-affecting decision to move, even among the most law-and-order or civil liberty-oriented individuals.<sup>166</sup> Exit likelihood, moreover, is further diminished given that U.S. mobility is overwhelmingly intrastate in

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("Communities vary . . . in many respects . . . and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution . . . . It is, after all, a national Constitution we are expounding." (citations omitted)).

161. See *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) (lauding "experiments" undertaken "without risk to the rest of the country"). At the same time, serious question remains over whether varied state policies and practices actually function as anything like experiments. See Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 947 (2011) ("The difficulties that social scientists and especially policymakers face in assessing the results of state innovations contribute to the inaptness of the states-as-laboratories metaphor."); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923–26 (1994) (questioning whether states can actually serve as laboratories of experimentation).

162. Circuit precedent can also affect outcomes in unexpected contexts. For instance, the Board of Immigration Appeals generally applies the law of the circuit in which a case arises. See Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 86 (2010). In state courts, federal rights claims can be controlled or at least influenced by the law of the circuit in which they are located. See Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 761 (2010). Finally, as discussed later, the practical effect of a circuit adopting a position can extend well beyond that circuit, affecting rights of individuals who find themselves criminally prosecuted in another circuit. See *infra* Part III.B.2.

163. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956) (discussing a model that "yields a solution for the level of expenditures for local public goods which reflects the preferences of the population more adequately than they can be reflected at the national level").

164. See generally ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 127–29 (2000). On exit more generally, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 21–29 (1970).

165. Tiebout, *supra* note 163, at 419.

166. For examples of the expansive literature critiquing Tiebout's model on similar grounds, see, for example, Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 515–17 (1991).

nature.<sup>167</sup> One would need to change state residence and perhaps even cross several states' boundaries to satisfy a doctrinal preference.<sup>168</sup>

Furthermore, there is reason to question whether the varied Fourth Amendment positions noted here reflect distinct geographic preferences worthy of deference. Most obvious, purported geographic representativeness is significantly undercut by the common occurrence of judges (whether trial or appellate) from other circuits sitting by designation on three-judge panels with precedential authority.<sup>169</sup> Moreover, while something might be said in favor of the geographic voice of federal trial courts,<sup>170</sup> many circuits can scarcely be characterized as region based. For example, the Sixth Circuit contains states from the upper Midwest (Michigan) and the South (Tennessee); the First Circuit contains New England states (Massachusetts and Maine) and Puerto Rico. And, even if circuits were comprised of more cohesive sociocultural regions, it is not clear that they would manifest distinctiveness, given the nation's ongoing homogenization.<sup>171</sup> Indeed, to the extent geographic differences exist, they would most likely be evident at the more granular level of urban versus rural jurisdictions, a distinction operative in all circuits.

Findings of political scientists on the federal appellate process itself further undercut the premise of regionalism. A rich literature exists on factors found to influence judicial decisionmaking—including ideology,<sup>172</sup> legal formalism,<sup>173</sup> strategic institutional goals (e.g., career

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167. See Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 489–90 (2004).

168. *Id.* at 502 (noting personal factors militating against interstate moves and commenting that “our lives are too multi-dimensional to suppose that our regulatory preferences always will play a decisive role”); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1606–07 (2005) (discussing why smaller polities have smaller exit costs). That Fourth Amendment rights might be thought to disproportionately affect the poor, lacking in relative mobility wherewithal yet the common focus of street-level policing, further undercuts reason to think that foot-voting will be operative. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420–21 (1990) (noting that mobility “is constrained by a variety of economic factors that tend to affect poorer people more than affluent ones”).

169. See Daniel J. Meador, *A Challenge to the Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeal*, 56 U. CHI. L. REV. 603, 605 (1989) (“In the [Courts of Appeals], there are numerous judges sitting in constantly shifting panels of three to which cases are routed on a random basis. The active judges in each circuit are frequently joined by senior judges, visiting judges from other circuits, and district judges sitting by designation . . .”).

170. See Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. DAVIS L. REV. 721, 726 (2003) (discussing the likelihood that federal trial judges have greater familiarity with local norms and practice).

171. See Rubin & Feeley, *supra* note 161, at 944–45 (disputing premise of state and regional heterogeneity and asserting that “the United States has one political community, and that political community is the United States”).

172. See, e.g., SEGAL & SPAETH, *supra* note 144.



advancement),<sup>174</sup> and party affiliation. Focusing on the latter, Donald Songer and his coauthors found that “[a]lthough the courts of appeals may have originally been conceived as regional appellate courts, they have evolved into a modern-day institution staffed by men and women whose decisions are frequently shaped by policy views that mirror the beliefs of the president responsible for their appointment.”<sup>175</sup> If anything accounts for circuit judicial orientation, it is the concentration of liberals and conservatives in a circuit (based on the number of appointments available to a President),<sup>176</sup> and related “panel effects” (outcomes affected by the preponderance of like-minded judges on given three-judge panels),<sup>177</sup> not the effects of region.<sup>178</sup>

Finally, the model fails because circuits are not like states, whose sovereign “dignity” is thought worthy of respect.<sup>179</sup> Circuit court decisions are rendered by life-tenured Article III judges, not subfederal democratic polities deserving of deference.<sup>180</sup> Indeed,

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173. See, e.g., Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003).

174. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 29–31 (2008).

175. DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 143 (2000); see also *id.* at 142 (finding “greater variation among circuits within regions than between circuits from different regions” and stating that “in issue areas where we found virtually no variation among regions in a particular time period, we found substantial variation among circuits during the same time period”).

176. See Yung, *supra* note 135, at 1162–63.

177. On “panel effects” more generally, see Kim, *supra* note 140.

178. Yung, *supra* note 135, at 1183–85.

179. *Alden v. Maine*, 527 U.S. 706, 714 (1999); see also Frank Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 18–19 (2002) (noting common emphasis on state sovereignty in federalism discourse).

180. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) (observing that federalism is “meant to preserve the regulatory authority of state and local institutions to legislate policy choices”). By the same token, the varied Fourth Amendment doctrinal tapestry resulting from circuit splits lacks the justification operative in the First Amendment-obscenity context, a notable exception to the general aversion for localization of constitutional rights. See Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 995 (2002) (discussing community standards doctrine). Under *Miller v. California*, 413 U.S. 15 (1973), obscenity determinations are fact-based, case-by-case determinations often made by juries and based on local standards. See *id.* at 30. The Fourth Amendment doctrinal decisions at issue here, by contrast, are made by Article III judges alone and serve as governing rules for entire circuits. The contexts also vary in the terms of their applicable scope. With obscenity, those facing the risk of rights limitation (self-censorship), typically commercial creators and distributors of potentially obscene materials (possession in the home of obscene materials is protected by *Stanley v. Georgia*, 394 U.S. 557 (1969)), can mitigate their risk by keeping materials away from a less tolerant jurisdiction. With Fourth Amendment rights, the populace at large—itsself not likely attuned to the rule particularities at play—faces a variable-rights regime, with unequal deprivations of physical liberty and privacy in the balance. Finally, even with obscenity, a shift is now seemingly taking place in favor of a national standard, owing to the

perversely, state interests can actually be undermined by circuit court decisions. Such is the case, for instance, when a criminal prosecution, susceptible of being initiated in state or federal court, “goes federal.” In such a situation, if a circuit embraces a more restrictive position on a Fourth Amendment issue, that position prevails, regardless of whether a state court, interpreting its own constitution, would extend a more expansive right.<sup>181</sup>

## 2. Percolation

A related yet distinct argument advanced in the debate over splits is that varied circuit positions on contested matters should be left to develop and percolate for a period of time. On this view, delay not only comports with institutional interests associated with Bickelsian “passive virtues,”<sup>182</sup> but can also result in superior Supreme Court outcomes,<sup>183</sup> including on constitutional questions. Indeed, according to Professor Dan Meador, percolation is especially welcome with federal constitutional law:

[Percolation] has its greatest force in relation to constitutional questions. The Supreme Court’s decision on the meaning of a constitutional provision is difficult, if not virtually impossible as a practical matter, to change; it can only be changed through the cumbersome [amendment process]. Thus it is important that the Supreme Court have

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Internet. See Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit’s Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 73–79 (2010).

181. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Moreover, as earlier noted, a circuit position can influence state court interpretations of federal constitutional law in state court litigation. See *supra* note 162.

182. See Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (asserting that a key feature of the Court’s perceived legitimacy is its prudential restraint in deciding when to address an issue).

183. See SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT’S ROLE* 48 (1986) (“The Supreme Court, when it decides a fully percolated issue, thus has the benefit of the experience of those lower courts, often yielding concrete information about how a particular rule will ‘write,’ its capacity for dealing with varying fact patterns, and the merits of alternate approaches.”); Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898 (1974) (“[Splits] can be endured and sometimes ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules, particularly where the question of law is a close one, to which confident answer will in any case be impossible.”); Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1155 (1990) (“Intercircuit dialogue not only benefits the quality of adjudication by the courts of appeals, but also aids the Supreme Court’s adjudication of cases involving conflicts among the circuits.”); Wallace, *supra* note 148, at 927 n.66 (“[I]ntercircuit conflicts add to the quality of federal justice by providing differing perspectives on the law to the Supreme Court, which therefore can make clearer and better reasoned judgments.”).

the benefit of as much thinking on the question as is feasible before it makes this final resolution.<sup>184</sup>

The arguments in favor of percolation, however, fail to persuade for several reasons. First, despite occasional Court mention of its benefits,<sup>185</sup> scant evidence of percolation actually exists. To test the percolation thesis, all Fourth Amendment-related cases decided by the Court from its 1981 through 2010 Terms were examined.<sup>186</sup> The effort yielded several interesting results.

Perhaps most notably, federal circuit splits explicitly figured in only a few opinions during the thirty-year study period. While analysis of the Court's certiorari process is notoriously difficult given the lack of any requirement that the Court specify why a petition is granted or denied,<sup>187</sup> evidence of circuit influence conceivably lies in the actual content of the Court's opinions. Of the 138 Fourth Amendment merits opinions from the period, in only seventeen (in a majority, dissent, or concurrence) was there express acknowledgment of the existence of a federal circuit split. This paucity, while of course not definitive evidence of the low materiality of splits,<sup>188</sup> at least calls into question their salient value and importance.

More damning of percolation, however, is the lack of evident utility of splits when they are actually mentioned. Typically, when the

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184. Meador, *supra* note 169, at 633. Justice Ginsburg and Peter Huber offered this analysis:

Under the grandly general mandates of the Bill of Rights . . . judges quite properly build the law through a process of accretion, erosion, and correction. This dynamic, too, operates in both space and time. The common law is forged in fifty states and in thirteen federal circuits. Variability in such areas of the law, both geographic and temporal, is not only permissible; it is what gives the law contemporary coherence and vitality. Variability in the interpretation of minutely particular federal statutes is another matter.

Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1425 (1987).

185. See, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (positing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

186. The cases were collected and reviewed on the basis of a search of the HeinOnline database, containing digitized versions of U.S. Reports decisions.

187. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 402 (2004).

188. See Hellman, *supra* note 63, at 149 ("Whether the Court refers to a conflict—or gives any reason for hearing the case—may depend on how the opinion is written and which Justice writes it."); Eric Hansford, Note, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1162 n.90 (2011) ("[T]he Justices may have incentives to present a split in a certain light, or inclinations toward not including the full split (or not including the split at all).").

Court does acknowledge a split, it merely notes its existence, usually but not always advertent to its role as a certiorari catalyst.<sup>189</sup> In other instances, the Court merely describes how the circuits line up on an issue, and mentions the need to clarify the constitutionality of the matter in question.<sup>190</sup>

In lieu of analyzing the merits of respective circuit positions, the Court usually bases its jurisprudential outcomes on prior decisions or opinions of individual Justices. *United States v. Hensley*, which resolved a circuit split on whether police can stop an individual based on reasonable suspicion of committing a past (as opposed to transpiring) felony,<sup>191</sup> represents perhaps the best example of circuit percolation.<sup>192</sup> Yet even there the Court merely articulated the position of the Ninth Circuit, with which it ultimately agreed, without significant analysis.<sup>193</sup> More representative is the duo of landmark cases of the early 1980s concerning the “good faith” exception to the exclusionary rule. Despite extensive briefing by the parties on the divergence of opinion on the doctrinally rich question,<sup>194</sup> the Court’s chief decision in *United States v. Leon* failed to even acknowledge the

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189. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 695, 695 n.4 (1996) (noting circuit split and stating that certiorari was granted to resolve the conflict); *United States v. Padilla*, 508 U.S. 77, 81, 81 n.3 (1993) (same); *Hudson v. Palmer*, 468 U.S. 517, 522, 522 n.5 (1984) (noting split in a footnote without mention that the split motivated grant of certiorari).

190. See, e.g., *Immigration & Nationalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984) (stating that certiorari was granted because of split and because issue “has serious implications for the enforcement of immigration laws”); *United States v. Jacobsen*, 466 U.S. 109, 112–13 (1984) (stating that certiorari was granted because of split and “because [drug] field tests play an important role in the enforcement of the narcotics laws”).

191. 469 U.S. 221, 225–26 (1985). *Hensley*, its warrants mention, did not address the question of whether a stop can be based on an officer’s belief that the detainee committed a past misdemeanor, an issue on which a split now exists. See *United States v. Grigg*, 498 F.3d 1070, 1076 n.4, 1081 (9th Cir. 2007) (adopting position in conflict with *Gaddis v. Redford*, 364 F.3d 763 (6th Cir. 2007), on whether a stop can be based on suspicion of a completed misdemeanor).

192. *Kentucky v. King*, 131 S. Ct. 1849 (2011), not part of this study because it reviewed an opinion by the Kentucky Supreme Court, provides perhaps the optimal example of the idealized percolation process more generally. In *King*, the Court methodically identified and evaluated various approaches taken by state and federal courts on when police, faced with possible destruction of evidence, impermissibly “create” such an exigency, invalidating entry of a home without a search warrant. See *id.* at 1858–60.

193. See *Hensley*, 469 U.S. at 231–32 (citing *United States v. Robinson*, 536 F.2d 1298, 1300 (9th Cir. 1976)). The Court disavowed the contrary position of the Sixth Circuit, see *Hensley v. United States*, 713 F.2d 220, 225 (6th Cir. 1983), with no explicit mention of the existence of a circuit split.

194. See, e.g., *Petition for Writ of Certiorari, Massachusetts v. Shepherd*, 468 U.S. 981 (1984) (No. 82-963), 1982 U.S. S. Ct. Briefs LEXIS 97.

split, instead relying on its own teachings and the views of commentators.<sup>195</sup>

Again, the absence of overt critical examination of competing circuit positions does not conclusively prove that circuit splits lack influence on the Court's substantive decisionmaking. It could certainly be the case that a once-contested issue, having been fully "percolated," presents an easier case for the Court to resolve. Nevertheless, the failure to identify splits and articulate their intellectual underpinnings at a minimum undermines the posited informed deliberateness associated with percolation and justifies long-held skepticism regarding the theory among scholars<sup>196</sup> and judges.<sup>197</sup>

Yet, even if the empirical record were more persuasive, strong reason exists to reject the percolation rationale. Constitutional rights, as noted earlier, are not the proper subject of experimentation.<sup>198</sup>

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195. *United States v. Leon*, 468 U.S. 897, 922–26 (1983). Yet another example arose in the October 2011 Term when the Court, while presumably granting certiorari to address a split acknowledged by the Ninth Circuit and the parties, issued a brief per curiam opinion granting certiorari and containing no reference whatsoever to the split. See *Ryburn v. Huff*, 132 S. Ct. 987, 990–92 (2012) (implicitly declining to distinguish exigency and emergency exceptions to the warrant requirement, and failing to directly address whether the exigency exception also requires probable cause of wrongdoing inside residence), *rev'g Huff v. City of Burbank*, 632 F.3d 539, 548 n.3 (9th Cir. 2011) (rejecting the position of the Sixth and Tenth Circuits merging the two exceptions, not requiring "both probable cause and exigent circumstances, including safety, for a warrantless entry into the home").

196. See, e.g., Caminiker, *supra* note 127, at 57 ("I doubt that the strength of an inferior court's conviction that a particular interpretation provides the best reading will—or should—influence the Supreme Court's independent judgment. It is difficult to see what expertise the inferior court might bring to the problem that would outweigh the general presumption of greater proficiency in the Supreme Court."); cf. Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 879–81, 889 (1993) (finding that, of thirty-six "percolated" decisions concerning splits on statutory meaning, the Court cited lower courts for propositions important to its holding in only thirteen cases, and that delay in resolving conflicts did not improve the quality of decisions rendered, based on several measures). But see Pamela C. Corley et al., *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31, 37 (2011) (using plagiarism software to discern common overlap between language in court of appeals opinions and Supreme Court majority opinions, but failing to differentiate instances of factual recitations or "arguments relating to the substance of the legal questions facing the courts").

197. Second Circuit Judge Henry Friendly, for example, offered the following view:

If a case involves questions of federal law of such importance to be reviewed by the Supreme Court, the views of the courts of appeals count, and should count, for little. I am unable to share the view, expressed on occasion by some polite Justices and entertained by some of my colleagues, that we have much to contribute in such cases; I doubt whether many of the Justices even read our opinions, at least on constitutional issues, except as these are filtered through the briefs of counsel or the memoranda of law clerks.

Henry J. Friendly, *Second Circuit Note, 1970 Term*, 46 ST. JOHN'S L. REV. 406, 407 (1972).

198. See *supra* notes 160–62 and accompanying text; see also Thomas E. Baker & Douglas E. McFarland, *The Need for a New National Supreme Court*, 100 HARV. L. REV. 1400, 1408 (1987)

Disputes over the nature and reach of rights present basic normative questions for judicial resolution, and delay simply allows for their continued unequal distribution.<sup>199</sup> As Chief Justice Rehnquist recognized twenty-five years ago:

[T]o . . . suggest that it is actually desirable to allow important questions of federal law to 'percolate' in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion. . . . We are not engaged in a scientific experiment or in an effort to square the circle . . . [T]here is no obviously 'correct' solution. . . . What we need is not the 'correct' answer in the philosophical or mathematical sense, but the 'definitive' answer, and the definitive answer can be given under our system only by the court of last resort. It is of little solace to the litigant who lost years ago in a court of appeals decision to learn that his case was part of the 'percolation' process which ultimately allowed the Supreme Court to vindicate his position.<sup>200</sup>

Finally, to the extent benefit accrues, it reaches a point of diminishing returns once the diverse position(s) materialize.<sup>201</sup> Splits do not necessarily disappear as a result of the "patient resolution of the conflict" within circuits, as Judge Wallace asserted.<sup>202</sup> Rather, "law of the circuit" doctrine ensures the continued vitality of splits, which persist when the Supreme Court fails to intercede. Nor is delay justified because it affords another government branch an opportunity to act, as is the case with splits over the meaning or reach of a federal statute. Again, the constitutional conflicts at issue here can be definitively resolved only by the nation's "one supreme Court,"<sup>203</sup> which "is supreme in the exposition of the law of the Constitution."<sup>204</sup>

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("We cannot accept the underlying logic behind percolation—the notion that somehow a better reasoned Supreme Court decision will result from subjecting citizens in different parts of the country to differing interpretations of the same national law, either constitutional or statutory."); Caminiker, *supra* note 127, at 59 (stating that circuit splits are not "real-world experiments that can help the Supreme Court Justices determine the workability and desirability of various legal rules governing a particular issue").

199. See Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983) ("[N]owhere does the Constitution give the Supreme Court the authority to experiment with the legal rights of citizens. The common denominator of these rationalizations is a kind of institutional myopia that focuses on abstractions and ignores the impact of the law on real people.").

200. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986).

201. See Thompson, *supra* note 48, at 469 ("After a few circuits have had some time to explore an issue, the costs of conflict will soon outweigh the marginal value of further experimentation."); see also Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 690 n.2 (asserting that percolation theory merely accords a "false legitimacy" for the Supreme Court's "deferring decisions on difficult issues").

202. Wallace, *supra* note 148, at 931.

203. U.S. CONST. art. III, § 1.

204. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (quoting *Miller v. Johnson*, 515 U.S. 900, 922–23 (1995)); see also William J. Brennan, Jr., *The National Court of Appeals*:

Thus, contrary to the contention of Professor Meador,<sup>205</sup> it is precisely in the realm of federal constitutional law, not statutory law, that percolation (and delay) is most problematic.

### B. Concerns

In addition to lacking discernible instrumental benefit, the splits highlighted here have an array of broader negative effects, of both a theoretical and practical nature.

#### 1. National Constitutional Culture

Americans, as manifest in the “We the People” prefacing their Constitution,<sup>206</sup> have long been tied by a sense of shared constitutional norms.<sup>207</sup> The question thus naturally arises whether varied circuit positions on Fourth Amendment rights are problematic because they undermine an important sense of shared constitutionalism.

Before answering, it should not go unacknowledged that history provides no ironclad evidence of preordained constitutional consistency. The Framers failed to insert in Article III any requirement of uniformity<sup>208</sup> and a similar omission marked subsequent congressional creation of the lower federal courts.<sup>209</sup> However, such observations qualify only as starting points. They not only neglect powerful Founding Era counterevidence favoring decisional uniformity—including the Supremacy Clause,<sup>210</sup> designation of “one supreme Court” dedicated to ultimate resolution of federal law,<sup>211</sup> and the circuit riding of the Court’s Justices.<sup>212</sup> They

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*Another Dissent*, 40 U. CHI. L. REV. 473, 482 (1973) (identifying Court’s role in part as being “to define the rights guaranteed by the Constitution”); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 911 (1984) (recognizing the need for an “ultimately authoritative court at the apex of the judicial hierarchy”).

205. See *supra* note 184 and accompanying text.

206. U.S. CONST. pmbi.

207. See *supra* note 8 and accompanying text.

208. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 356 (2006).

209. Amar, *supra* note 208, at 208.

210. See U.S. CONST. art. VI, cl. 2 (stating that the “Judges in every State shall be bound” by the “Constitution, and the Laws of the United States”).

211. U.S. CONST. art. III, § 1.

212. See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1218 (2004).

also ignore the nation's critically important post-Framing Era experience.

Notably, federal criminal appeals were not even allowed until 1879,<sup>213</sup> and constitutional law came to figure significantly in national life only after the Civil War.<sup>214</sup> The Fourth Amendment itself was scarcely mentioned by the Court until 1886,<sup>215</sup> and significant litigation over its interpretation did not come until several decades later.<sup>216</sup> One can also point to an array of other developments occurring over time that evidence the broader institutional desire for uniformity. Included in this list would be adoption of Supreme Court Rule 10 (specifying circuit conflict as a reason to grant certiorari)<sup>217</sup> and the creation of specialized subject-matter courts such as the Federal Circuit.<sup>218</sup>

Nor does it suffice to assert that disuniformity is somehow justified by federalist tradition. It is one thing to allow courts of sovereign states to interpret their own constitutions, and even to interpret rights contained in the Federal Constitution, subject to U.S. Supreme Court review.<sup>219</sup> It is yet another to permit the courts of a single sovereign—the U.S. Government—to variously interpret and apply that sovereign's law,<sup>220</sup> creating what has rightfully been called a federal “judicial Tower of Babel.”<sup>221</sup> Doing so allows the rule of law—and not that concerning just any subtype, but rather that concerning

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213. SURRENCY, *supra* note 30, at 312. Until then, only in instances of certification—when a circuit court was divided on a legal question and sought Supreme Court guidance—and habeas corpus proceedings did the Court review criminal cases. *Id.* at 310–11.

214. See Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 170 (2009) (discussing nationalizing effect of Fourteenth Amendment in particular).

215. See CLANCY, *supra* note 16, § 2.4, at 42 (noting same and citing *Boyd v. United States*, 116 U.S. 616 (1886)).

216. See Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 (1982) (discussing history of selective incorporation); see also David M. O'Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 669 (1985) (noting a marked increase in the filing of federal constitutional criminal procedure claims in the post–World War II period).

217. See *supra* note 20.

218. See Dragich, *supra* note 13, at 545–46 (noting the same and identifying other factors suggesting a structural desire for decisional uniformity).

219. See generally MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 87–104 (1999).

220. Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1984) (“[A] single sovereign's laws should be applied equally to all . . .”).

221. Meador, *supra* note 169, at 640 (condemning a “judicial Tower of Babel produced by an appellate system with overreliance on regionally organized courts with ever growing numbers of judges deciding an ever swelling number of cases, through constantly shifting three-judge panels with randomly assigned dockets, subject only to the remote possibility of Supreme Court review”).



constitutional rights ostensibly applicable nationwide—to vary in accord with the inclinations of intermediate-level judicial tribunals.<sup>222</sup>

Allowing such variation is a recipe for public disillusionment over the authoritativeness of national institutions. The federal bench enjoys a “franchise” on federal questions<sup>223</sup> based on its posited expertise and experience,<sup>224</sup> which federal horizontal inconsistency undermines.<sup>225</sup> As Dean Caminiker recognized:

[U]niform interpretation of federal law helps to secure popular respect for judicial authority. Federal courts depend on the perceived legitimacy of their enterprise for their authority over other government actors and the general public. This perception rests, in turn, on widespread acceptance and appreciation of the courts’ work product; perceived legitimacy endures so long as the judiciary is seen as laboring to ground its decisions in legal principle. Uniform interpretation of federal law throughout the land helps preserve this perception.<sup>226</sup>

Ultimately, such a legitimacy deficit risks corrosion of respect for the Supreme Court itself. The Court’s failure to settle conflicts—by its own admission often due to its failure to offer guidance<sup>227</sup>—when it

222. *See id.* (“One of the most basic features of law is that it embodies a set of rules and principles applicable to everyone in like manner throughout the jurisdiction it purports to govern. A judicial system that produces legal doctrine differing because of the happenstance of the place of litigation and of the particular judges sitting on the case is hostile to the reign of law.”); *see also* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1249 (1999) (“A central feature of the rule of law is its horizontal consistency of application.”); *id.* at 1253 (“In addition to undermining the substance of the rule of law, circuit splits also undermine respect for the rule of law.”).

223. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 97 (2009) (“[F]ederal courts are thought better able than state courts to supply uniform application of federal law . . . .”); *see also* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 85 (suggesting that the “availability of a federal forum significantly advances th[e] goal” of uniform interpretation of federal law).

224. Seinfeld, *supra* note 223, at 109.

225. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 312 (2005) (stating that federal question jurisdiction promotes uniform interpretation of federal law); ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 5.2.1, at 272 (5th ed. 2007) (“Another frequently offered justification for federal question jurisdiction is the need to ensure uniformity in the interpretation of federal law.”).

226. Caminiker, *supra* note 127, at 40; *see also id.*:

If federal law means X in the First Circuit and Y in the Second Circuit, then the public might presume that one or both circuit courts are (1) unprincipled in their interpretive process, (2) in error due to their incompetence, or (3) in error due to the indeterminate nature of legal reasoning. Each of these alternatives subverts the courts’ efforts to be seen as oracles of exogenous, objective, and determinant legal principles.

227. *See* Carey v. Musladin, 549 U.S. 70, 76 (2006) (recognizing that lower court conflicts “reflect[] [a] lack of guidance from th[e] Court”); *see also* Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 134 (2009) (noting that “it is almost commonplace for the Court to issue holdings that raise as many questions as are answered”).

has docket capacity to do so<sup>228</sup> undercuts public faith in the Court's institutional legitimacy as the nation's ultimate arbiter of constitutional law.<sup>229</sup>

Importantly, moreover, the Court's failure to mediate circuit conflicts produces a different kind of deficit—one concerning constitutional norms. When the Court fails to resolve uncertainties such as those discussed here, it fails at something more than its “constitutional housekeeping” mission (as when one provision properly might be formalistically favored over another in rationalizing an outcome).<sup>230</sup> Rather, it abdicates its core responsibility to clarify the meaning of a right,<sup>231</sup> implicitly signaling to the public at large that it is not sufficiently important to warrant the Court's attention.<sup>232</sup>

While problematic in general, the failure raises particular concern given the judiciary's increasing latitude to avoid articulation of constitutional norms. This is especially apparent in civil rights litigation regarding qualified immunity, where Fourth Amendment claims are commonly raised. After *Pearson v. Callahan*,<sup>233</sup> courts can avoid deciding whether a particular Fourth Amendment right was violated by police and can resolve a claim solely on the basis of whether the right was “clearly established.”<sup>234</sup> Fourth Amendment

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228. See Ryan J. Owens & Donald A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1260 (2012) (suggesting that the Court's shrinking docket might engender public belief that the Court “does not work sufficiently hard or is not sufficiently fair, and, thereby, diminish the Court's legitimacy”).

229. Suffice it to say, while to some degree unavoidable given the hierarchal nature of the federal system, the situation presents a zero-sum risk scenario. As Professor Robert Mikos helpfully pointed out to me in conversation, the Court's repudiation of a circuit's position on a question could diminish popular respect for that court.

230. See Barry Friedman & Daniel Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1937 (2011) (discussing ongoing disagreement over textual source of dormant commerce clause doctrine despite its undisputed historic functional role).

231. See FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573, 578 (1973) (describing the core roles of Supreme Court as being “to define and vindicate rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union”).

232. See Brennan, *supra* note 204, at 483 (“The choice of issues for decision largely determines the image that the American people have of their Supreme Court.”); Cordray & Cordray, *supra* note 187, at 452 (noting that the Court's docket selection “decisions about what to decide, and what not to decide, can raise or depress the salience of issues throughout American politics and society”).

233. 555 U.S. 223 (2009).

234. See generally Jack M. Beerman, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139. Indeed, such was the case in *Pearson* itself, regarding the “consent once

norms, moreover, often go underdeveloped as a result of other factors. For instance, courts regularly avoid specifying police search and seizure wrongs by invoking exceptions to the exclusionary rule (particularly inevitable discovery and officer “good faith”),<sup>235</sup> and federal courts have long lacked the opportunity to unify federal doctrine due to an absence of habeas authority over state prisoner Fourth Amendment claims.<sup>236</sup>

## 2. Practical Ramifications

In addition to the foregoing normative concerns, the circuit splits uncovered here have a variety of subtle yet noteworthy practical ramifications.

### *a. “Intercircuit” Cases*

As an initial matter, varied circuit positions can have impact well beyond circuits’ geographic borders. One context in which this occurs is when a motion to suppress is filed in one circuit, based on charges pending there, which challenges the use of evidence or information secured by state, local, or federal law enforcement in another circuit. As one federal trial court framed the issue:

Like intrastate divisions, the division of the nation into circuits is an intrafederal jurisdictional scheme. To the extent that each circuit has its own body of binding precedent (uniformly regarded as binding only within defined jurisdictional limits) then, in the absence of authoritative Supreme Court disposition of the particular issue in question, differences among the circuits give rise to intrafederal disputes and thus genuine conflicts within the meaning of conflict of laws analysis, and require a choice to be made where the interests of the nonforum jurisdiction are significant.<sup>237</sup>

In such instances, federal courts typically address Fourth Amendment claims on the basis of a choice of law construct, adopting

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removed” doctrine, resulting in the continued tolerance of a split identified here. *See infra* Appendix A.

235. Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 733–42 (2011).

236. *See id.* at 711–17 (discussing *Stone v. Powell*, 428 U.S. 465 (1976), and limits in federal habeas provisions that limit state prisoners’ ability to seek federal habeas relief based on alleged Fourth Amendment violations).

237. *United States v. Gerena*, 667 F. Supp. 911, 927 (D. Conn. 1987). It warrants mention that the question of which legal framework to apply remains a vexing one for state courts as well. *See State v. Torres*, 262 P.3d 1006 (Haw. 2011) (surveying various choice of law approaches adopted by state courts). In general, the area remains vastly underexamined and undertheorized, which is both odd and troublesome given the increasing state-state and state-federal cooperative efforts of law enforcement. *See Logan, supra* note 107, at 1247–48 (noting widespread cooperative efforts undertaken by modern law enforcement).

a *lex loci* (“law of the place”) approach,<sup>238</sup> which applies the law of the circuit in which the allegedly unlawful search or seizure occurred. According to this view, because officers cannot be expected to know the law of another circuit, where a case might ultimately be filed,<sup>239</sup> the exclusionary rule should not be applied because its deterrent purpose would not be served.<sup>240</sup>

Whatever its wisdom,<sup>241</sup> the approach functions to ensure the extrajurisdictional influence of circuit doctrinal preferences. Federal courts must ascertain and apply the law of the search or seizure situs, not the forum in which they sit, in a fashion akin to that required by *Erie Railroad Company v. Tompkins*<sup>242</sup> with state substantive law determinations. When this occurs, until such time as the Supreme Court conclusively states otherwise, a circuit position, even if embodying a distinct minority (indeed, solitary) view, can influence federal prosecutions beyond its bounds. Whether the external effect of these spillovers is seen as positive or negative of course depends on one’s doctrinal perspective. Regardless, while as a general rule the

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238. See, e.g., *United States v. Gates*, Crim. No. 08-42-P-H, 2008 WL 5382285 (D. Me. Dec. 19, 2008) (applying Fourth Circuit law on illegal seizures); *United States v. Longo*, 70 F. Supp. 2d 225 (W.D.N.Y. 1999) (applying Sixth Circuit law of consent in motion to suppress wiretap); *United States v. Restrepo*, 890 F. Supp. 180 (E.D.N.Y. 1995) (applying Sixth Circuit law on illegal seizures); cf. *United States v. Ferrara*, 771 F. Supp. 1266 (D. Mass. 1991) (opining that federal prosecution in Connecticut would apply First Circuit law on wiretap permissibility).

239. See *Restrepo*, 890 F. Supp. at 191 (“The Memphis officers should have been able to rely on their understanding of the law in the Sixth Circuit and could not have been expected to know the law in circuits other than the one in which they were operating.”).

240. The *Restrepo* court continued:

[S]uppression of evidence inadmissible in [the Second Circuit] but admissible in the Sixth Circuit would not deter misconduct of officers based [in the Sixth Circuit]; rather, it would penalize officers’ good faith efforts to comply with the law. Correlatively, suppressing evidence in [the Second Circuit] based on illegality in the Sixth Circuit, irrespective of its admissibility in [the Second Circuit], makes sense since it ensures that the proper level of deterrence is maintained in the locale where the violation occurred.

*Id.* Extracircuit effect also appears possible when courts assess whether other crimes, wrongs, or acts, occurring elsewhere, are admissible under Federal Rule of Evidence 404(b). See *United States v. Ozuna*, 129 F. Supp. 2d 1345, 1352 (S.D. Fla. 2001) (noting “choice of law conundrum” presented by consideration of prior Maryland arrest for drugs, based on varied Fourth and Eleventh Circuit doctrine, but deciding that arrest would have been permissible under Eleventh Circuit’s more demanding standard), *aff’d*, 48 F. App’x 739 (11th Cir. 2002).

241. One could argue, for instance, that admitting evidence not otherwise admissible in the forum circuit undermines judicial integrity—that the forum is diminished by allowing consideration of evidence illegally secured under the forum’s precedent. The judicial integrity rationale of the exclusionary rule, however, has been superseded by exclusive concern over whether exclusion holds deterrence promise. See *Herring v. United States*, 555 U.S. 135, 141 n.2 (2009) (dismissing dissenting Justice Ginsburg’s “majestic conception” of the exclusionary rule as it relates to judicial integrity, stating that “[m]ajestic or not, our cases reject this conception”).

242. 304 U.S. 64 (1938).

effects of constitutional rights are not externalized,<sup>243</sup> this is one context in which they are.

*b. “Clearly Established” Rights and Civil Rights Litigation*

Federal circuit disuniformity can also affect civil rights litigation.<sup>244</sup> To avoid a successful qualified immunity defense by an individual government actor, and to secure monetary relief, a plaintiff must prove that (1) the actor violated a constitutional right that is (2) “clearly established” at the time of the challenged conduct.<sup>245</sup> Today, as mentioned earlier, after *Pearson v. Callahan*<sup>246</sup> reviewing courts can dispose of cases solely on the basis of the second prong of the test, avoiding a right-merits determination.<sup>247</sup>

Application of the “clearly established” standard is unremarkable when the constitutionality of the government behavior in question has been resolved by the Supreme Court or the forum circuit.<sup>248</sup> However, circuit splits complicate matters in two contexts.

The first is when the constitutionality of the alleged misconduct has not been definitively addressed by the Court or the forum circuit. In such an instance, splits can serve as a basis to extend qualified immunity because no “robust ‘consensus of persuasive

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243. See Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1485–86 (2005) (citing Judge Richard Posner in support of that argument).

244. See 42 U.S.C. § 1983 (2006) (allowing suit against state and local government actors); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (suit against federal government actors). Indeed, although beyond the ambit of the instant study, it warrants mention that the circuits are divided on basic questions concerning the litigation of civil rights suits. See, e.g., Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1290–91 (2012) (noting, *inter alia*, a circuit split on whether courts can consider policies and regulations as sources of clearly established law); Adrienne Lewis, Note, *The Fourth Amendment—The Burden of Proof for Exigent Circumstances in a Warrantless Search Civil Action*, 65 SMU L. REV. 221 (2012) (discussing circuit split on whether defendant or government has burden of proof regarding existence of exigent circumstances in instances of warrantless home entry by police).

245. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The expectation is that “every ‘reasonable official would understand what he is doing violates [the law].’” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that qualified immunity shields government actors “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

246. 555 U.S. 223, 236 (2009).

247. *Id.* at 242 (making it a matter of discretion what “order of decision making will best facilitate the fair and efficient disposition of each case”).

248. See MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* § 3.7 (2011) (noting same).

authority' ” exists.<sup>249</sup> As the Fifth Circuit, sitting *en banc*, recently stated, “Where no controlling authority specifically prohibits a defendant’s conduct and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established.”<sup>250</sup> Under such a circumstance, circuit court disuniformity on a Fourth Amendment issue can serve as a shield for government actors, based on a successful qualified immunity defense.<sup>251</sup> At the same time, it possibly allows for continued existence of a split (as occurred in *Pearson* itself)<sup>252</sup> and underenforcement of an ostensibly national right.<sup>253</sup>

The Supreme Court’s recent decision in *Ashcroft v. al-Kidd*<sup>254</sup> suggests another way in which disuniformity can function to shield governmental actors—“national officeholders” in particular. In *al-Kidd*, an individual filed a federal civil rights action against former Attorney General John Ashcroft,<sup>255</sup> alleging that Ashcroft detained him as a material witness as a preventive detention measure, without any actual intent to use him as a witness and without sufficient evidence to charge him with any crime.<sup>256</sup> The Ninth Circuit agreed,<sup>257</sup> but the Supreme Court reversed. Justice Scalia, writing for the Court, concluded that al-Kidd’s Fourth Amendment rights were not violated because he was held on a valid warrant issued by a magistrate and that the government’s motive in detaining him, even if pretextual, was irrelevant.<sup>258</sup> More important to the present discussion was the

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249. *al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

250. *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (*en banc*).

251. Of course, a uniform stance among other circuits on the constitutionality of challenged government conduct can likewise serve as a shield when neither the Court nor the forum circuit has addressed the issue. See, e.g., *Pearson*, 555 U.S. at 244 (attaching importance to uniform circuit approval of “consent-once-removed” doctrine regarding undercover officers).

252. See *id.* at 244–45 (failing to address the merits of the Tenth Circuit’s conclusion that the “consent-once-removed” doctrine covers confidential informants, splitting from view of the Sixth and Seventh Circuits).

253. See John C. Jeffries, *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 131 (observing that costs of avoidance “are not measured solely, even chiefly, in the persistence of uncertainty in the law. The greater problem is the underenforcement of constitutional rights while such uncertainty continues.”).

254. 131 S. Ct. 2074 (2011).

255. The statute allows a federal judge to “order the arrest of [a] person” whose testimony is “material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena.” 18 U.S.C. § 3144 (2006). The witness must be released if his or her testimony “can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.” *Id.*

256. *al-Kidd*, 131 S. Ct. at 2079.

257. See *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).

258. *al-Kidd*, 131 S. Ct. at 2083.

Court's analysis of the qualified immunity question. In a pointed rebuke to the Ninth Circuit, Justice Scalia condemned the latter court's conclusion that a federal trial court decision (from another circuit) condemning Ashcroft's behavior qualified as clearly established law.<sup>259</sup>

Justice Kennedy, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred and elaborated on the clearly established question, emphasizing that a defendant's status as a national officer "must inform what law is clearly established."<sup>260</sup> Unlike government defendants acting within a single jurisdiction, an official such as the Attorney General "sets policies implemented in many jurisdictions throughout the country" and hence may be subject to varied circuit positions on particular legal matters.<sup>261</sup> Such conflicts, Justice Kennedy wrote, oblige greater solicitude on the issue of qualified immunity:

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding rule. If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from the full use of their legal authority. . . . Furthermore, too expansive a view of "clearly established law" would risk giving local judicial determinations the effect of rules with de facto national significance, contrary to the normal process of ordered appellate review.<sup>262</sup>

At least to four members of the Court, it thus appears that circuit splits have additional special consequence for "national officeholder[s]," a matter of particular significance given the increasing involvement of such officeholders in law enforcement operations,<sup>263</sup> including relative to national security matters.<sup>264</sup>

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259. *Id.* at 2083–84 (citing *United States v. Awadallah*, 202 F. Supp. 55, 57 n.28 (S.D.N.Y. 2002)).

260. *Id.* at 2086 (Kennedy, J., concurring).

261. *See id.* ("The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one Court of Appeals may have approved a certain course of conduct, other Courts of Appeals may have disapproved it, or at least reserved the issue.").

262. *Id.* at 2087.

263. *See Logan*, *supra* note 107, at 1247–48 (noting increased state-federal cooperation in law enforcement activities).

264. *See al-Kidd*, 131 S. Ct. at 1278 (noting that "[t]he consequences of [over] deterrence must counsel caution by the Judicial Branch, particularly in the area of national security").

c. "Good Faith" Reliance on "Settled" Case Law and the Exclusionary Rule

Circuit disuniformity could well also influence application of the exclusionary rule. Since *United States v. Leon*<sup>265</sup> law enforcement agents have been forgiven their "good faith" mistakes over the constitutionality of their actions. While to date the Court has not expressly applied the exception beyond specified circumstances, such as when police act pursuant to an invalid warrant,<sup>266</sup> statutory authority,<sup>267</sup> or a defective database,<sup>268</sup> lower courts have extended the exception to other contexts.<sup>269</sup> More important, six Justices seemingly backed an expansive orientation in the Court's recent opinion in *Davis v. United States*,<sup>270</sup> which addressed whether the exclusionary rule should apply when police satisfy binding constitutional precedent that is later reversed.

In *Davis*, Alabama police, relying on the expansive authority afforded by *New York v. Belton*,<sup>271</sup> arrested Davis for driving while intoxicated, secured him in a patrol car, and upon searching his vehicle discovered an illegal handgun inside.<sup>272</sup> While Davis was convicted of the federal firearms charge, he preserved his Fourth Amendment claim that the auto search was impermissible, based on the Supreme Court's intervening grant of certiorari in *Arizona v. Gant*, which challenged the continued validity of *Belton*'s per se rule.

In due course, the *Gant* Court significantly limited police authority to search vehicles incident to arrest, allowing a search only if an "arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."<sup>273</sup> With his case on direct appeal before the Eleventh Circuit, Davis argued that neither requirement prescribed by *Gant*—announced two years after police searched his vehicle—was satisfied, requiring suppression of the

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265. 468 U.S. 897, 909 (1984) (withholding application of the exclusionary rule when police act with objectively "reasonable good-faith belief" that their conduct is lawful).

266. *Id.* at 926.

267. *Illinois v. Krull*, 480 U.S. 340 (1987).

268. *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1 (1995).

269. *See, e.g., United States v. Grote*, 629 F. Supp. 2d 1201, 1206 (E.D. Wash. 2009) (surveying cases extending good faith exception to situations not expressly addressed by the Court).

270. 131 S. Ct. 2419 (2011).

271. 453 U.S. 454, 458–59 (1981).

272. *Davis*, 131 S. Ct. at 2428.

273. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).



firearm discovered and reversal of his conviction.<sup>274</sup> The Eleventh Circuit disagreed, holding that while traditional retroactivity law obliged that the new rule announced in *Gant* apply to Davis's case, as it was on direct appeal,<sup>275</sup> the exclusionary rule did not apply because its deterrent function would not be served when police acted in objectively reasonable reliance on settled precedent, "even when that precedent is subsequently overturned."<sup>276</sup>

In an opinion authored by Justice Alito, joined by five other Justices, the Court agreed. Because the vehicle search complied with *Belton* and settled Eleventh Circuit precedent,<sup>277</sup> the requisite officer "culpability" sufficient to serve the deterrence rationale of the exclusionary rule was lacking.<sup>278</sup> "[W]hen binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public safety responsibilities."<sup>279</sup> *Leon's* good faith exception applies when police, as in *Davis*, act in "objectively reasonable reliance on binding appellate precedent."<sup>280</sup>

*Davis*, while surely important for its diminution of retroactivity doctrine and emphasis on the need for police "culpability" in good faith analysis, also has the potential to elevate the practical importance of circuit splits. This much was evident in the concurrence of Justice Sotomayor and the dissent of Justice Breyer (joined by Justice Ginsburg). Justice Sotomayor, who at oral argument voiced concern over the effect of circuit splits,<sup>281</sup> agreed that deterrence would not be appreciably served by holding police responsible for binding appellate precedent that is later overruled.<sup>282</sup> However, she was at pains to emphasize that the majority's holding did not concern an instance

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274. 598 F.3d 1259, 1262 (11th Cir. 2010).

275. *See id.* at 1263 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

276. *Id.* at 1264.

277. *See Davis*, 131 S. Ct. at 2428 (citing *New York v. Belton*, 453 U.S. 454 (1981), and *United States v. Gonzalez*, 71 F.3d 819, 822 (11th Cir. 1996)).

278. *Id.*

279. *Id.* at 2429.

280. *Id.* at 2434; *see also id.* at 2429 ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

281. *See* Transcript of Oral Argument, *Davis v. United States*, 131 S. Ct. 2419 (2011) (No. 09-11328), 2011 WL 972573 at \*33:

JUSTICE SOTOMAYOR: Well, if there's a circuit split, how do we encourage police officers to be careful about the Fourth Amendment? . . . If there's a circuit split and a police officer knows that other circuits are saying this is unconstitutional, why are we taking away the deterrent effect of having thoughts occur to the officer about thinking through whether there's a better way and a legal way to do things?

282. *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring).

when the constitutionality of a challenged police practice “is unsettled.”<sup>283</sup> Justice Breyer’s dissent inferred just such a broader view of the *Davis* majority. If police culpability is a prerequisite, Justice Breyer reasoned, the good faith exception will also cover situations when an officer conducts a search thought constitutional “but which, it turns out, falls just outside the Fourth Amendment’s bounds,” or when clear circuit precedent “just does not exist” on the constitutionality of the conduct in question.<sup>284</sup>

Given the undisguised hostility that many of the Court’s members have for the exclusionary rule, it would come as no surprise to soon see what Justice Breyer called the majority’s “new ‘good faith’ exception” for police reliance on unsettled case law assume a more concrete form. Indeed, the Eleventh Circuit in *Davis* itself noted a judicial tendency to extend good faith to a situation when “intercircuit caselaw” is “unclear” as a result of circuit disuniformity.<sup>285</sup> It certainly could be argued that an officer, working in a circuit lacking a definitive decision on the constitutionality of a search or seizure practice, and mindful of varied circuit positions on the practice,<sup>286</sup> lacks the kind of “deliberate, reckless or grossly negligent” conduct now seemingly required.<sup>287</sup> If so, much as in the qualified immunity context, which shares the same standard of objective reasonableness,<sup>288</sup> circuit disuniformity could serve as a defensive shield for government actors and the underenforcement of a constitutional norm.

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283. *Id.*; see also *id.* (“Whether exclusion would deter Fourth Amendment violations where appellate precedent does not specifically authorize a certain practice and, if so, whether the benefits of exclusion would outweigh its costs are questions unanswered by our previous decisions.”).

284. *Id.* at 2439 (Breyer, J., dissenting).

285. *United States v. Davis*, 598 F.3d 1259, 1264 n.3 (citing *United States v. Brunette*, 256 F.3d 14, 19–20 (1st Cir. 2001)).

286. As Professor LaFave notes in his treatise, the Court’s heavy emphasis on the reasonable reliance of the officer in *Davis* amounted to either “fantasized reliance or conclusively-presumed reliance” given the absence of any record evidence of the officer’s actual awareness of Eleventh Circuit precedent allowing the challenged conduct. 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 1.3 (4th ed. 2011).

287. *Davis*, 131 S. Ct. at 2408; *Herring v. United States*, 555 U.S. 135, 144 (2009).

288. See *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (stating that the “same standard of objective reasonableness” applies in *Leon* suppression hearings and qualified immunity hearings).

*d. Federal Forum Shopping*

One final practical ramification of circuit disuniformity relates to possible forum shopping. As noted earlier, enablement of “forum shopping among circuits” was one of the four concerns singled out by the Federal Courts Study Committee in 1990 when assessing if a circuit split was “intolerable.”<sup>289</sup>

The federal government enjoys expansive authority to bring criminal charges by virtue of its flexible venue rules,<sup>290</sup> especially when prosecuting child pornography and obscenity,<sup>291</sup> mail/wire fraud,<sup>292</sup> and conspiracy cases.<sup>293</sup> More generally, multidistrict offenses, such as those involving cybercrime,<sup>294</sup> may be prosecuted “in any district in which [an] offense was begun, continued, or completed.”<sup>295</sup>

Forum shopping is a recognized feature of modern criminal justice. The most well-known instance occurs when concurrent state and federal jurisdiction exists over misconduct and cases “go federal,” due to what are seen as more prosecution-friendly federal law and punishment options.<sup>296</sup> Yet forum shopping also occurs intrafederally. The phenomenon was in evidence when the U.S. government decided to prosecute Zacarias Moussaoui in the Eastern District of Virginia, not New York, because the former was viewed as more conducive to

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289. See *supra* note 50 and accompanying text.

290. See, e.g., *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (“[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.”); *United States v. Bowens*, 224 F.3d 302, 314 (4th Cir. 2002) (“Venue [for a criminal case] will lie wherever . . . essential conduct elements [of the charged offense] have occurred. Venue will also lie where the effects of the defendant’s conduct are felt . . .”).

291. See U.S. ATTORNEYS’ MANUAL § 9-75.400 (2011), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/) (stating that prosecution can occur where material is mailed, deposited, or received or an intermediate through which the material passes).

292. U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 967, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00000.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm) (stating that prosecutions “may be instituted in any district in which an interstate or foreign transmission was issued or terminated”).

293. See *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999) (“In a conspiracy prosecution, ‘venue is proper in any district in which an overt act . . . was committed by any of the coconspirators.’” (quoting *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994))).

294. See COMPUTER CRIME & INTELLECTUAL PROP. SECTION, U.S. DEP’T OF JUSTICE, PROSECUTING COMPUTER CRIMES 118, available at <http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf> (classifying cybercrime as an offense controlled by 18 U.S.C. § 3237(a) governing multidistrict offenses).

295. 18 U.S.C. § 3237(a) (2006).

296. See Logan, *supra* note 107, at 1248–49.

prosecutorial interests.<sup>297</sup> Federal rules also permit strategic filing in less high-profile cases. The *United States Attorneys' Manual*, for instance, expressly allows for consideration of “legal or evidentiary problems that might attend prosecution” when venue permits filing in more than one district.<sup>298</sup> While interoffice competition among U.S. Attorney offices perhaps makes it unlikely for a case to be channeled to another circuit, one with a more attractive (i.e., less demanding) Fourth Amendment position, the possibility nonetheless exists.<sup>299</sup> Moreover, as Professor Dan Richman has noted, prosecutors are not the sole deciders of federal criminal filings. Law enforcement officials “are primarily responsible for case selection and choice of investigative tactics,”<sup>300</sup> and influence choice over the “best” district to which to channel cases.<sup>301</sup>

Federal courts typically condone forum shopping,<sup>302</sup> albeit not always happily.<sup>303</sup> Professor Amanda Frost, in assessing federal circuit splits in the area of federal civil statutes and regulations, has offered that forum shopping can be “entirely benign”:

As long as both parties have the latitude to argue for their favored forum . . . there is nothing wrong with each attempting to have the case heard where they prefer—whether because it is more convenient, the jury or judges seem more sympathetic, or the law in the circuit is more favorable.<sup>304</sup>

With federal criminal litigation, however, forum selection discretion is entirely one sided—the government makes the call.<sup>305</sup> This offers potential strategic advantage to a single party. Furthermore, physical

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297. See Paul Bradley, *Terrorism Trial Is First Major Test*, RICHMOND TIMES-DISPATCH, Dec. 27, 2011, at A1.

298. U.S. ATTORNEYS' MANUAL, *supra* note 291, § 9-27.240(B), (B)(2); see also *id.* § 9-75.100 (specifying that “[i]n deciding in which district(s) to initiate charges” the “applicable law” should be among the factors considered).

299. Indeed, Professor Hellman's study of circuit splits highlighted the consciousness of and effect on the practice of the Army Corps of Engineers, a federal executive actor like the Department of Justice, relative to varied circuit positions on the interpretation of federal statutory requirements. See Hellman, *supra* note 50, at 747–48.

300. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751 (2003).

301. *Id.* at 759–60, 783–84.

302. See, e.g., *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982) (holding that venue was proper in the district in which materials were received, notwithstanding forum-shopping allegation).

303. See, e.g., *United States v. Coleman*, 162 F. Supp. 2d 582, 589 (N.D. Tex. 2001) (noting occurrence of forum-shopping and encouraging the Fifth Circuit to assess whether it qualifies as the kind of “abuse and/or collusion” that warrants further scrutiny).

304. Frost, *supra* note 13, at 1602.

305. See *Allen v. McCurry*, 449 U.S. 90, 116 (1980) (Blackmun, J., dissenting) (observing that “[t]he criminal defendant is an involuntary litigant”).

liberty, not civil monetary damages or injunctive relief, hangs in the balance, accentuating the consequences of the government monopoly.

#### IV. A PROPOSED SOLUTION

If one accepts that the disuniformity highlighted here is problematic, and that more clarity and consistency in national constitutional law is desirable, the question arises over how best to proceed. While splits figure centrally in the Court's current docket,<sup>306</sup> which is now smaller than at any time in recent history,<sup>307</sup> the matters subject to plenary review have been characterized as often being "close to trivial" in nature.<sup>308</sup> Meanwhile, dozens of constitutional conflicts, such as those involving the Fourth Amendment matters noted here, go unresolved.

Any solution, it must be noted, is complicated by the limited range of institutional options available. When federal courts differ on the meaning of a statute, potential recourse lies in legislative action: Congress can amend the statute<sup>309</sup> or provide clarification based on a question certified by a federal court.<sup>310</sup> Questions concerning the meaning and application of constitutional provisions, however, are within the sole purview of the judiciary,<sup>311</sup> with the Supreme Court having ultimate say.<sup>312</sup> Given this reality, focus must remain on the

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306. See Frost, *supra* note 13, at 1569 (noting that up to seventy percent of the Court's docket concerns a judicial split of some sort); see also Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) ("A lower court split . . . is a major part of what I look for when I review the stack of [certiorari recommendation] memos of law clerks.").

307. See *supra* note 27 and accompanying text.

308. Frost, *supra* note 13, at 1659. The menial quality of the Court's plenary docket would thus appear to defy the intent of at least one sitting Justice. See Breyer, *supra* note 306, at 96 (noting that the Court is "not particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative").

309. See Stephanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Decisions*, 85 JUDICATURE 61, 66–67 (2001) (noting that between 1990 and 1998 Congress sought to amend existing statutes or enact new laws to resolve at least nineteen federal circuit splits). The practice would appear to align with a proposal advanced by then-Judge Ruth Ginsburg under which "Congress would take a second look at a law once a court opinion or two highlighted the measure's infirmities." Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 996 (1987).

310. See generally Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 11–13 (2007).

311. See *supra* notes 203–04 and accompanying text.

312. What Professor Monaghan has referred to as the "constitutional common law," not "subject to amendment, modification or even reversal by Congress." Henry P. Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3, 31 (1975); see also Tara Leigh Grove, *The Structural Role for Vertical Maximalism*, 95 CORNELL L.

Court, a daunting specter given its impressive ability to evade successive reform efforts that seek to modify or limit its agenda-setting prerogative and authority.<sup>313</sup>

Yet an option remains, one with necessary institution-forcing effect: certification. Although certification is now largely ignored, federal courts of appeals have long had the power to certify legal questions to the Supreme Court for authoritative determination when disagreement exists. The practice of certification dates back to 1802 when Congress, concerned that the six two-member circuit courts then in existence would create *intracircuit* splits, instructed that the Court upon certification “shall . . . finally decide . . . any question . . . before a circuit court upon which the opinions of the judges shall be opposed.”<sup>314</sup> Indeed, a circuit “division of opinion” was the only way that a criminal case could reach the Court until 1889,<sup>315</sup> and

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REV. 1, 9 (2009) (noting that the Court has always played the “leading role in defining the content of federal law for the judiciary”); Henry P. Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 681 n.79 (2012) [hereinafter Monaghan, *Avoiding Avoidance*] (referring to the Supreme Court as “the priestly interpreter of our Constitution”).

313. See *supra* notes 40–42 and accompanying text. For examples of more recent proposals see, for example, Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009) (urging creation of a certiorari division of appellate judges to select cases for the Court to decide); George & Guthrie, *supra* note 11 (advocating an increase in the size of the Court’s membership, authorizing panel decisions of the Court, and retaining en banc procedure for select cases); David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779 (2011) (urging adoption of a National Court of Appeals, first proposed by the Freund Committee).

One option could involve creation of a specialized court for constitutional criminal appeals, akin to that created for intellectual property law matters (the Federal Circuit). However, such a court, in addition to its political vulnerability to attacks from those desiring to maintain the status quo, would be problematic. Concern over judicial bias or capture, even involving life-tenure judges not subject to politically mortal sound bites of “pro-defendant” outcomes, would be a constant. See POSNER, *supra* note 121, at 254–56 (asserting that outcomes of specialized courts can be controlled by membership appointments); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1149–53 (1990) (discussing how special interest groups are more likely to capture specialized courts than courts of general jurisdiction). Perhaps more important, channeling constitutional criminal matters away from the Supreme Court would have negative structural effects. As Paul Carrington long ago observed: “Whatever may be said about specialization of courts dealing with esoteric, highly technical subjects, there is little to be said for narrowing specialization in a field so dominated by basic human values as is the criminal law.” Carrington, *supra* note 40, at 576–77.

314. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159; see also *United States v. Daniel*, 19 U.S. (6 Wheat.) 542, 548 (1821) (Marshall, C.J.) (offering that in the absence of certification a “division of opinion” might “remain and the question would continue unsettled”).

315. See *United States v. Rider*, 163 U.S. 132, 138 (1896) (noting that with criminal cases “a certificate of division was the only mode in which alleged errors could be reviewed”).

certification was a mainstay in nineteenth-century criminal cases.<sup>316</sup> Later, certification played a central role in the Evarts Act in 1891, creating the modern courts of appeals, providing a means to “guard against diversity of judgment” by “send[ing] up” divisive legal questions.<sup>317</sup> Availability of certification also paved the way in the Judiciary Act of 1925 for approval of increased certiorari authority of the Court, assuring Congress that the Justices would not unilaterally control their plenary docket, but would rather share control with the courts of appeals.<sup>318</sup>

While in subsequent decades certification remained a prime vehicle to the Supreme Court in civil and criminal cases alike,<sup>319</sup> it has enjoyed scant use in recent years. Even though both the U.S. Code<sup>320</sup> and Supreme Court Rule 19<sup>321</sup> allow certification and it technically remains a vestige of the Court’s mandatory appellate jurisdiction,<sup>322</sup> the Court has only rarely accepted certified questions since 1940, and not a single instance of certification has been recorded since 1981.<sup>323</sup> Writing in 1949, Professors Moore and Vestal offered an explanation for the aversion that likely still obtains: that the Court fears that certification will “frustrate [its] proper functioning as a policy-

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316. See Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 196 (1960) (“Certification of questions occurred frequently in criminal cases. A persistent conflict in lower court decisions could be expected to result, sooner or later, in a divergence of opinion among the judges of one of the circuit courts, permitting the question to be certified to the Supreme Court for resolution.”).

317. See 21 CONG. REC. 10,222 (1890) (statement of Sen. William Evarts).

318. See Hartnett, *supra* note 20, at 1710 (“In the hearings on the Judges’ Bill, it was repeatedly noted that the Supreme Court would not alone control its jurisdiction, but that the courts of appeals, by use of certification, would share in that control.”).

319. See *id.* at 1656 (discussing frequent resort to certification).

320. See 28 U.S.C. § 1254(2) (2006) (“Cases in the court of appeals may be reviewed by the Supreme Court . . . [b]y certification at any time by a court of appeals of any question in any civil or criminal case as to which instructions are desired . . .”).

321. See SUP. CT. R. 19(1) (“A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case.”).

322. See 17 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4038, at 62–64 (3d ed. 2006) (stating that “in form and history . . . certified question jurisdiction is mandatory”); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 36 (1930) (“Petitions for *certiorari* the Court can deny, but questions certified must be answered.”). Consistent with this status, when the Court refuses to hear a certified question the matter is “dismissed,” whereas a petition for a writ of certiorari is “denied.” See, e.g., *United States v. Seale*, 130 S. Ct. 12, 12 (2009) (“The question certified by the United States Court of Appeals for the Fifth Circuit is dismissed.”).

323. *Id.* at 13 (Stevens, J., dissenting from dismissal of certified question).

determining body by greatly restricting the time available for the discretionary side of its docket.”<sup>324</sup>

This Article joins a handful of other recent commentaries urging rejuvenation of the well-established practice of certification.<sup>325</sup> Plainly, something more is needed to oblige the Court to resolve the circuit splits discussed here, which number among what Justice Story called the “jarring and discordant judgments” that only the Court can “harmonize . . . into uniformity.”<sup>326</sup> While scholars continue to debate the reasons behind the Court’s shrinking plenary docket—ranging from risk-averse law clerks whose recommendations dominate the “cert. pool” used by Justices,<sup>327</sup> to the retirement of Justice Byron White, an outspoken advocate of the view that the Court should resolve circuit splits<sup>328</sup>—unresolved splits on constitutional questions endure and proliferate with each Court term.

The certification statute, now codified at 28 United States Code Section 1254,<sup>329</sup> should be retooled by Congress<sup>330</sup> to explicitly require

324. James W. Moore & Alan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 25 (1949); see also EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 597 (9th ed. 2007) (noting that the Court disfavors broadened use of certification because it “would frustrate the Court’s discretionary power to limit its review to cases it deems worthy” and afford lower courts power to dictate its docket).

325. See George & Guthrie, *supra* note 11, at 1449–51 (urging greater use of certification more generally in resolving circuit splits); Aaron Nielson, *The Death of the Supreme Court’s Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 492 (2010); Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1313 (2010); Kevin G. Crennan, Note, *The Viability of Certification in Federal Appellate Procedure*, 52 WM. & MARY L. REV. 2025 (2011).

326. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

327. See Owens & Simon, *supra* note 228, at 1234–37.

328. *Id.* at 1241–42.

329. The statute notes specific circumstances under which certification is appropriate:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1254 (2006). A parallel provision is contained in the Court’s rules. See SUP. CT. R. 19 (“A United States court of appeals may certify to [the Supreme Court] a question or proposition of law on which it seeks instruction for the proper decision of a case.”).

330. Ideally, the change advocated here would emanate from the Court itself. However, the Court’s dismissive treatment of certification in recent decades belies faith that the Court would undertake on its own a change making certification explicitly nondiscretionary in nature. Congress would enjoy authority to make such a change under Article III, which expressly affords Congress power to impose “regulations” regarding the Court’s appellate jurisdiction. See U.S. CONST. art. III, § 2.



that the Court accept a certified question of constitutional law on which the circuits have split.<sup>331</sup> How and when such certification can be sought and must be granted, however, presents a potentially confounding empirical question. Under the current discretionary certiorari regime, as discussed, circuits lack compelling basis to heed one another's positions on issues, and the Supreme Court can and does avoid resolving conflicts that arise. With mandatory jurisdiction, a circuit court could in effect dictate Court jurisdiction by adopting a discordant stance (as apparently occurred in the circuit-riding era).<sup>332</sup> While research suggests that fear of reversal by the Supreme Court in itself does not drive circuit case outcomes,<sup>333</sup> the negative reputational and other professional and institutional consequences of reversal make it doubtful that a court would manufacture a split, and adopt a position that it otherwise would not, merely to get an issue docketed.<sup>334</sup> Indeed, experience in Florida, where intermediate appellate courts for more than thirty years have been afforded power to certify conflict matters to the state supreme court for discretionary review (which it typically grants), provides no reason to conclude that circuit courts would conduct themselves in this manner.<sup>335</sup> However, if experience proves otherwise, certification could be limited to instances

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331. Consistent with custom, the questions themselves must be distinct and definite. See WRIGHT & KANE, *supra* note 9, § 106, at 779:

Certification is limited to questions of law, and the questions must be distinct and definite. The Court will dismiss a certification in which the questions are so broad that they in effect bring up the whole case, although when a case has been certified the Court itself may require that the entire record be sent up for decision of the entire matter in controversy.

332. See *id.* (noting that judges on early era two-judge panels would frequently “disagree deliberately in order to bring a question to the Supreme Court”).

333. See David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003) (examining a sample of circuit search and seizure cases over a thirty-year period and emphasizing the importance of the low possibility of Supreme Court review).

334. See *id.* at 581–82 (discussing factors accounting for judges' desire to avoid reversal by superior courts).

335. Harry L. Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 529–31 (2005); see also WRIGHT & KANE, *supra* note 9, § 106, at 779 (stating that former practice of manufacturing jurisdiction on basis of dissent is “no longer considered proper. The courts of appeals recognize that certificates should be granted only when they actually are in doubt on a question.”).

when a third circuit court weighs in on a disputed matter,<sup>336</sup> removing the incentive for a second circuit court to engage in gamesmanship.<sup>337</sup>

Finally, the Court should be afforded a modest degree of latitude to avoid certification, such as when a case appears to be a poor vehicle to resolve the contested question, perhaps due to concern over jurisdiction or justiciability.<sup>338</sup> Consistent with transparency interests, however, the Court should be obliged to specify why it did not take the case.<sup>339</sup>

Such a change would have several benefits. First, it would allow for the accelerated, authoritative resolution of splits.<sup>340</sup> This would lessen the many problems generated by disparate circuit positions discussed earlier,<sup>341</sup> and allow the Court to fulfill its institutional promise to ensure constitutional uniformity, made decades ago when it convinced Congress to allow it near-total discretionary control (via certiorari) over its docket.<sup>342</sup> Second, it would permit creation of a framework for a more dialogic relationship between the Supreme Court and lower federal courts, enabling “lower court judges themselves to inform the Court—directly and formally—that an issue is important” and warrants immediate resolution.<sup>343</sup> The change would thus rehabilitate an important institutional relationship

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336. See ESTREICHER & SEXTON, *supra* note 183, at 58 (deeming a circuit conflict “intolerable” and deserving of Supreme Court review when “at least three courts have passed on the question”).

337. Adopting the alternate approach would, however, have the obvious downside of allowing the difficulties noted earlier to persist until a third court gets around to deciding the disputed issue.

338. I am indebted to Arthur Hellman for this very helpful suggestion.

339. Similar reason-giving has long been urged in the certiorari denial context where, unlike here, the enormous volume of petitions significantly undercuts the practicality of such a requirement. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 46–47 (2011).

340. See *Chicago, Burlington & Quincy Ry. v. Williams*, 214 U.S. 492, 495 (1909) (Holmes, J., dissenting) (stating that “[certified] questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most meritorious way”).

341. See *supra* Part III.

342. See Hartnett, *supra* note 20, at 1705 (noting Justices’ assurance to Congress, when contemplating passage of the “Judges’ Bill” of 1925, “that certiorari is always granted when there is a conflict between courts of appeals and would always be granted when there was an arguable constitutional claim”); see also William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916) (publishing May 23, 1914 remarks that “questions of constitutional construction” are of such critical importance that they should comprise the Court’s mandatory appellate jurisdiction).

343. Tyler, *supra* note 325, at 1326.

within the federal judiciary,<sup>344</sup> a relationship that the earlier discussion of percolation makes clear is now in a state of major disrepair.<sup>345</sup> Finally, enhanced certification would infuse the Court's docket-assemblage process with a welcome measure of transparency and consistency, lacking in the current idiosyncratic<sup>346</sup> and inscrutable certiorari apparatus.<sup>347</sup>

Notwithstanding certification's historic pedigree,<sup>348</sup> such a change would inevitably garner opposition. For instance, those revering Bickelsian "passive virtues" and judicial restraint<sup>349</sup> would not rush to embrace increased jurisdictional reach of the Court. Nor, for that matter, will the results ultimately reached by the Court, imposed nationwide, be to everyone's liking.<sup>350</sup> However, disuniformity itself presents significant problems, lending credence to the wisdom of one of Professor Bickel's near-contemporaries, Justice Brandeis, who observed that ultimately "it is more important that the applicable rule of law be settled than that it be settled right."<sup>351</sup> Concern might also

344. See Hartnett, *supra* note 20, at 1710 (noting that "[i]n hearings on the Judges' Bill [of 1925], it was repeatedly noted that the Supreme Court would not alone control its jurisdiction, but that the courts of appeals, by use of certification, would share in that control").

345. See *supra* notes 185–205 and accompanying text; see also Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 436–37 (condemning the tendency of the Court to "recurrently ignore[] the efforts of lower-court judges to address issues on its docket, while remaining aloof from the day-to-day operation of the rules it lays down"); cf. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 986 (2000) (noting the isolation of the Supreme Court from the lower federal courts that it supervises).

346. See, e.g., WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 175–76 (1980) (referring to certiorari selection process as "highly personal"); WILLIAM H. REHNQUIST, *THE SUPREME COURT, HOW IT WAS, HOW IT IS* 265 (1987) (referring to certiorari as a "rather subjective decision"); Brennan, *supra* note 204, at 478 (referring to certiorari decisionmaking process as a matter of "feel").

347. See Watts, *supra* note 339, at 14–21 (discussing various concerns over the certiorari-dominated process by which the Court's plenary docket takes shape).

348. See *supra* notes 314–18 and accompanying text.

349. Bickel, *supra* note 182. For a critical view of the approach, calling into question its motivational principles, see Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) (asserting that "Bickel's 'virtues' are 'passive' in name and appearance only; a virulent variety of free-wheeling interventionism lies at the core of his devices of restraint").

350. With Fourth Amendment doctrine in particular, general cause for pessimism among civil libertarians has been mitigated by a few recent cases limiting police search and seizure authority. See, e.g., *Arizona v. Gant*, 556 U.S. 332 (2009) (limiting authority of police to search auto interiors incident to lawful arrest of recent occupant); *Kyllo v. United States*, 530 U.S. 1305 (2000) (deeming police scanning of home with thermal imaging equipment a search).

351. *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see also Sanford Levinson, *Assessing the Supreme Court's Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 100 (2010) (stating that it need not be the case that "the Court's own

be raised, especially by the powerful Supreme Court Bar, that an infusion of certified cases will crowd out cases the Court might otherwise select as a result of its certiorari process.<sup>352</sup> To the extent this proves well founded,<sup>353</sup> the outcome should be received as a welcome opening of the constitutional playing field, one consistent with a less “Olympian” Supreme Court, more helpful to the daily work of lower federal courts charged with handling the detailed realities of federal constitutional litigation.<sup>354</sup>

### CONCLUSION

Federal appellate judicial disagreement on issues of federal law, applicable to the nation as a whole, has long prompted concern. Curiously, however, to date research and debate have concentrated on civil, nonconstitutional law, and failed to systematically examine the actual consequences of splits.<sup>355</sup> This Article reports the results of a first-of-its-kind study of federal constitutional law circuit splits. Focusing on the Fourth Amendment in particular, the study highlights the existence of over three dozen current conflicts, including many that have persisted for years.

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decision will exhibit any particularly great wisdom or serve the country well. Rather, it is an almost Hobbesian argument that there *must* be a sovereign to resolve controversies, and that such a role should be played . . . by the Supreme Court.”).

352. See Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 89–90 (2009) (noting influence of “an elite group of expert Supreme Court advocates, dominated by those in the private bar,” and voicing concern over its “undesirable skewing in the content of the Court’s docket”); *id.* at 91 (“[T]he Court regularly grants cases at the urging of leading members of the private sector Supreme Court bar that are marginally certiorari worthy at best, at a time when the rates of certiorari are rapidly declining.”); Watts, *supra* note 339, at 62–63 (discussing powerful role of “expert Supreme Court bar” and the capture risks it creates).

353. As for the accumulated backlog of splits, they could be resolved in any number of ways, including, at least relative to the Fourth Amendment splits highlighted here, during a single Term by the Court (added to the roughly eighty cases now annually heard, resulting in a Term docket of under 120 cases, eminently sustainable by historical standards).

354. See Hellman, *supra* note 345, at 433 (“The Justices seldom engage in the process of developing the law through a succession of cases in the common-law tradition. Rather, Court decisions tend to be singular events, largely unconnected to other cases on the docket and even more detached from the work of lower [federal] courts.”); see also Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 408 (2004) (urging that the Court take “a larger number of Fourth Amendment cases, in patterns that enable ongoing oversight of what is, for better or worse, an important body of judge-made law”).

355. See Wilkinson, *supra* note 14, at 89 (“The argument that circuit splits should lead to more prolific Supreme Court review may seem appealing in the abstract, but it breaks down when proponents are asked to inventory the actual burdens of such splits on litigants and the public.”).

The existence of so much variation is surprising given the Court's avowed aversion for constitutional disuniformity,<sup>356</sup> penchant for defending its constitutional turf,<sup>357</sup> and worry over variable outcomes relative to federal substantive criminal law.<sup>358</sup> It also raises an array of troubling normative and practical concerns.

While other work has suggested that circuit conflicts consume an undue amount of attention on the Court's current docket, this Article reaches the opposite conclusion. Splits on multiple important Fourth Amendment issues now warrant resolution by the Court, and delay or failure is not justified by the instrumental arguments advanced by those untroubled by disuniformity, such as percolation or regional experimentation. Furthermore, splits will likely only continue to increase in number given ever-growing circuit court caseloads and the modest size of the Court's certiorari-based plenary docket.

To remedy this institutional deficiency, the Article recommends resuscitation of a long-dormant vestige of the Court's mandatory appellate jurisdiction: certification, modified to ensure that the Court fulfills its role as the paramount *locus vivendi* of federal constitutional law. While the focus here has been on the Fourth Amendment, circuits disagree on other constitutional criminal procedure matters affecting physical liberty (if not privacy),<sup>359</sup> which certification will ameliorate.<sup>360</sup> Moreover, the enhanced certainty afforded will

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356. See *supra* note 19 and accompanying text.

357. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300–19 (2002) (surveying decline of Court's deference to congressional constitutional judgments); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1172–82 (2011) (noting various arenas in which the modern Court has expanded its constitutional interpretive authority). At the same time, as Professor Monaghan recently observed, the Court has been steadfast in its refusal to cede any measure of its interpretative authority to other judicial actors. See Monaghan, *Avoiding Avoidance*, *supra* note 312, at 688 (noting that Court is “reluctant to leave important propositions of federal law for final disposition in the hands of judicial actors other than itself”).

358. See, e.g., *United States v. Lanier*, 520 U.S. 259, 269 (1997) (“[D]isparate decisions in various Circuits might leave [federal criminal law] insufficiently certain . . . [and] such a circumstance may be taken into account in deciding whether the warning is fair enough.”).

359. For instance, whether a *Terry* stop constitutes “custody” under *Miranda* doctrine. Compare *United States v. Leshuk*, 65 F.3d 1105, 1110 (4th Cir. 1995) (holding that a suspect is not in custody based on lawful *Terry* stop), with *United States v. Newton*, 369 F.3d 659, 673 (2d Cir. 2004) (deeming reasonableness of *Terry* stop irrelevant, and instead examining whether the circumstances of stop qualify as custody); see also, e.g., *United States v. Ashley*, 664 F.3d 602, 604 (5th Cir. 2011) (noting existence of a split on whether the use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment).

360. Although beyond the scope of the current study, compelling reason exists to extend certification beyond the constitutional criminal procedure realm, where, while deprivations of physical liberty might not be implicated, important Bill of Rights and Fourteenth Amendment

positively affect constitutional litigation concerning federal civil rights more generally, where circuit disuniformity can influence whether police violated a “clearly established” right.<sup>361</sup>

Constitutional consistency has been prized since the nation’s origin. Nevertheless, scant attention has been paid to the actual variability of national constitutional law resulting from the decisions of intermediate federal appellate courts. Except for a few fleeting references offered decades ago,<sup>362</sup> focus on circuit constitutional law splits, including those that affect criminal procedure rights,<sup>363</sup> has been lacking. This Article has helped redress this empirical deficit and highlighted the negative consequences associated with Fourth Amendment circuit splits in particular, hopefully setting the stage for increased attention to this critically important yet ignored aspect of American constitutionalism.

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civil liberties can be subject to variable circuit treatment, resulting in inconsistent rights allocation.

361. *See supra* Part III.B.2.

362. Most notably, the congressional testimony of Justice Byron White, who while condemning “federal law being enforced differently in different parts of the country,” singled out for concern varied views on what qualifies as an illegal search. *See Intercircuit Panel of the United States Act: Hearings on S. 704 Before the Subcomm. on Courts of the S. Judiciary Comm.*, 99th Cong., 1st Sess. 147 (1985) (testimony of Justice Byron White).

363. *See supra* notes 42–65 and accompanying text.

## APPENDIX A

<u>Issue</u>	<u>Date Split Emerged</u> <sup>364</sup>
<b><i>Search and Seizure Practices</i></b>	
Whether police can safety “sweep” a residence, under <i>Maryland v. Buie</i> (1990), without first arresting an occupant <sup>365</sup>	2001 <sup>366</sup>
Whether refusal to provide consent to search home by nonpresent resident trumps consent later provided by a resident who is present <sup>367</sup>	2008 <sup>368</sup>
Whether police can engage in warrantless search of a container that is so distinctive that its contents are a foregone conclusion, allowing for plain view search (“single purpose container” doctrine) <sup>369</sup>	2005 <sup>370</sup>
Whether retention of identification for period longer than needed to verify identity constitutes a seizure <sup>371</sup>	2002 <sup>372</sup>

364. The issues indicated in the Appendix concern “live” splits that continue to exist, at the time of this writing, based on conflicts manifest during the study period.

365. *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) (disagreeing with, *inter alia*, *United States v. Martins*, 413 F.3d 139, 150 (1st Cir.), *cert. denied*, 546 U.S. 1011 (2005)).

366. *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir.) (disagreeing with *United States v. Reid*, 226 F.3d 1020, 1028 (9th Cir. 2000)), *cert. denied*, 534 U.S. 981 (2001).

367. *United States v. Henderson*, 536 F.3d 776, 781–82 (7th Cir. 2008) (disagreeing with *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008)), *cert. denied*, 130 S. Ct. 59 (2009).

368. *United States v. Hudspeth*, 518 F.3d 954, 963 (8th Cir. 2008) (en banc) (Melloy, J., dissenting) (noting variant approach of *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008)).

369. *United States v. Gust*, 405 F.3d 797, 804 (9th Cir. 2005) (disagreeing with, *inter alia*, *United States v. Williams*, 41 F.3d 192, 196 (4th Cir. 1994)).

370. *Id.*; see also Allison M. Lucifer, Comment, *You Can Judge a Container by Its Cover: The Single-Purpose Container Exception and the Fourth Amendment*, 76 U. CHI. L. REV. 1809 (2009) (discussing ongoing split).

371. *United States v. Weaver*, 282 F.3d 302, 310 (4th Cir.) (disagreeing with, *inter alia*, *United States v. Jordan*, 958 F.2d 1085, 1086 (D.C. Cir. 1992)), *cert. denied*, 537 U.S. 847 (2002).

372. *Id.*

Whether police seizure, supported by reasonable suspicion, can be prolonged by asking questions unrelated to seizure basis <sup>373</sup>	2011 <sup>374</sup>
Whether police seizure, supported by probable cause, can be prolonged by asking questions unrelated to seizure basis <sup>375</sup>	2011 <sup>376</sup>
Whether identity of person discovered as a result of unlawful seizure by police, resulting in person's arrest on unrelated basis, is suppressible <sup>377</sup>	2001 <sup>378</sup>
Whether police can seize an individual without a warrant based on reasonable suspicion of a completed misdemeanor (versus felony) <sup>379</sup>	2007 <sup>380</sup>
Whether a stop for a minor traffic violation can be based on reasonable suspicion (not probable cause) <sup>381</sup>	2008 <sup>382</sup>

373. *United States v. Guijon-Ortiz*, 660 F.3d 757, 767–68 (4th Cir. 2011) (noting disagreement with *United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002)).

374. *Id.* The *Guijon-Ortiz* court emphasized that the issue differed from that resolved in *Arizona v. Johnson*, 555 U.S. 323 (2009), which held that unrelated questioning that does not prolong a stop is permissible. *Id.* at 766.

375. *Id.* at 768 n.9 (noting disagreement with *United States v. Childs*, 277 F.3d 947, 952 (7th Cir.), *cert. denied*, 537 U.S. 829 (2002)).

376. *Id.*

377. *United States v. Scroggins*, 599 F.3d 433, 449–50 (5th Cir.) (noting disagreement with, *inter alia*, *United States v. Olivares-Rangel*, 458 F.3d 1104, 1109 (10th Cir. 2006)), *cert. denied*, 131 S. Ct. 158 (2010).

378. *United States v. Guevera*, 262 F.3d 751 (8th Cir. 2001) (noting disagreement with, *inter alia*, *United States v. Guzman-Bruno*, 27 F.3d 420, 421 (9th Cir.), *cert. denied*, 513 U.S. 975 (1994)).

379. *United States v. Moran*, 503 F.3d 1135, 1142 n.5 (10th Cir. 2007) (noting disagreement with *Gaddis v. Redford*, 364 F.3d 763, 771 (6th Cir. 2007)), *cert. denied*, 553 U.S. 1035 (2008).

380. *United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir. 2007) (noting disagreement with *Gaddis v. Redford*, 364 F.3d 763, 771 (6th Cir. 2007)); *see also* Cecilia R. Byrne, Comment, *To Stop or Not to Stop: The Application or Misapplication of Hensley to Completed Misdemeanors*, 12 U. PA. J. CONST. L. 1191 (2010) (discussing split).

381. *United States v. Simpson*, 520 F.3d 531, 539–40 (6th Cir. 2008) (noting disagreement with, *inter alia*, *United States v. Callarman*, 273 F.3d 1284, 1287 (10th Cir. 2001), *cert. denied*, 535 U.S. 1072 (2002)).

382. *Id.*



Whether police violate <i>Payton v. New York</i> (1980), which requires an arrest warrant for an in-home arrest, when, lacking a warrant, they announce their presence and arrest resident who voluntarily opens door <sup>383</sup>	2004 <sup>384</sup>
How to define “reason to believe” resident is at home, standard established in <i>Payton v. New York</i> (1980), in justifying home entry with arrest warrant <sup>385</sup>	1999 <sup>386</sup>
Whether “grab area” of arrestee, under <i>United States v. Chimel</i> (1969), is determined at time of the arrest or when search is conducted (nonautomobile context) <sup>387</sup>	2002 <sup>388</sup>
Whether police, acting on the basis of apparent authority to give consent to search, can search a closed container when faced with ambiguity over container’s ownership <sup>389</sup>	2010 <sup>390</sup>

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383. *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (noting disagreement with, *inter alia*, *United States v. Gori*, 230 F.3d 44, 53 (2d Cir. 2000), *cert. denied*, 534 U.S. 824 (2001)).

384. *Id.*

385. *United States v. Barrera*, 464 F.3d 501 (5th Cir. 2006) (noting disagreement with, *inter alia*, *Valdez v. McPheters*, 172 F.3d 1220, 1224 (10th Cir. 1999)), *cert. denied*, 550 U.S. 937 (2007).

386. *United States v. Valdez*, 172 F.3d 1220, 1224 (10th Cir. 1999) (noting disagreement with *United States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991)).

387. *United States v. Myers*, 308 F.3d 251, 267 (3d Cir. 2002) (noting disagreement with, *inter alia*, *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir.), *cert. denied*, 469 U.S. 934 (1984)).

388. *Id.*

389. *United States v. Taylor*, 600 F.3d 678, 686 (6th Cir. 2010) (Kethledge, J., dissenting) (noting majority’s split with *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006)).

390. *Id.* The split, which actually entails three doctrinal positions, arguably dates back to 2006, when the Second Circuit in *Snype sub silentio* differed with the Seventh Circuit’s position in *United States v. Melgar*, 227 F.3d 1038, 1039 (7th Cir. 2000). *See also* Brian Jones, Note, *Keep Closed Containers Closed: Resolving the Circuit Split in Favor of Individual Privacy*, 97 IOWA L. REV. 303 (2011) (discussing split more generally).

Whether suspicionless collection of DNA sample is governed by “special needs” or “totality of the circumstances” analysis <sup>391</sup>	1999 <sup>392</sup>
Whether a protective “frisk” of an auto interior, based on <i>Michigan v. Long</i> (1983), is justified by officers’ subjective or objective fear for their personal safety <sup>393</sup>	2000 <sup>394</sup>
Whether the “community caretaking” doctrine, traditionally applicable in the auto context, permits warrantless entry of home <sup>395</sup>	2010 <sup>396</sup>
Whether impoundment of auto per “community caretaking” doctrine, resulting in inventory, must be based on standardized procedure <sup>397</sup>	2006 <sup>398</sup>
Whether “special needs” exception justifies warrantless strip search of juvenile <sup>399</sup>	1990 <sup>400</sup>

391. *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (noting disagreement with, *inter alia*, *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004)), *cert. denied*, 548 U.S. 919 (2006).

392. *Roe v. Marcotte*, 193 F.3d 72, 78–79 (2d Cir. 1999) (noting disagreement with *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992)).

393. *United States v. McGregor*, 650 F.3d 813, 822 (1st Cir. 2011) (noting disagreement with, *inter alia*, *United States v. Brown*, 188 F.3d 860, 866 (7th Cir. 1999)).

394. *United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000); *see also* Brian Puchalsky, Note, *Weapon on Board? A Proposal to Solve the Riddle of the Nonprotective Search*, 107 COLUM. L. REV. 706 (2007) (discussing split more generally).

395. *Ray v. Warren*, 626 F.3d 170, 176–77 (3d Cir. 2010) (noting disagreement with, *inter alia*, *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996)).

396. *Id.* Here, as elsewhere, the split can be said to actually have arisen much earlier, *sub silentio*, without explicit recognition by the circuits. Compare, e.g., *United States v. Rohrig*, 98 F.3d 1506, 1511 (6th Cir. 1996) (extending community caretaking doctrine to justify warrantless home entry), with *United States v. Pichany*, 687 F.2d 204, 208–09 (7th Cir. 1982) (rejecting extension of the doctrine). *See generally* Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. C.R. L.J. 249 (2012).

397. *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006) (noting disagreement with, *inter alia*, *United States v. Duguay*, 93 F.3d 346, 351 (7th Cir. 1996), *cert. denied*, 526 U.S. 1029 (1999)), *cert. denied*, 549 U.S. 1149 (2007).

398. *Id.*

399. *Doe v. Tex. Dep’t of Prot. & Regulatory Servs.*, 299 F.3d 395, 407–08 (5th Cir. 2002).

400. *Landstron v. Ill. Dep’t of Children & Family Servs.*, 892 F.2d 670, 676 (9th Cir. 1990) (noting disagreement with *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989)).

Whether prior child sex-molestation conviction can serve as probable cause to get child pornography search warrant <sup>401</sup>	2010 <sup>402</sup>
Whether brief submission to officer's show of authority, as suggested in <i>California v. Hodari D.</i> (1991), constitutes seizure <sup>403</sup>	1994 <sup>404</sup>
Whether a search warrant lacking in requisite particularity can be cured by mere reference to warrant attachment, when the attachment was not appended to the warrant at the time of execution <sup>405</sup>	1988 <sup>406</sup>
Whether police can seize an individual based on a reasonable mistake of substantive law <sup>407</sup>	1999 <sup>408</sup>

401. *United States v. Colbert*, 605 F.3d 573, 577 (8th Cir. 2010) (noting disagreement with, *inter alia*, *United States v. Falso*, 544 F.3d 110, 124 (2d Cir. 2008), *cert. denied*, 130 S. Ct. 154 (2009)), *cert. denied*, 131 S. Ct. 1469 (2011).

402. *Id.*

403. *United States v. Baldwin*, 496 F.3d 215 (2d Cir. 2007) (noting disagreement with *United States v. Morgan*, 936 F.3d 1561, 1567 (10th Cir. 1991)), *cert. denied*, 552 U.S. 1222 (2008).

404. *United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994) (noting disagreement with *United States v. Morgan*, 936 F.2d 1561, 1566 (10th Cir. 1991), *cert. denied*, 502 U.S. 1102 (1992)), *cert. denied*, 513 U.S. 1171 (1995); *see also* Darby G. Sullivan, Note, *Continuing Seizure and the Fourth Amendment: Conceptual Discord and Evidentiary Uncertainty in United States v. Dupree*, 55 VILL. L. REV. 235 (2010) (discussing split more generally).

405. *United States v. Hurwitz*, 459 F.3d 463, 471 (4th Cir. 2006) (noting disagreement with, *inter alia*, *United States v. McGrew*, 122 F.3d 847, 849 (9th Cir. 1997)). The *Hurwitz* court was at pains to emphasize that *Groh v. Ramirez*, 540 U.S. 551 (2004), did not resolve the question because in *Groh* the supporting document at issue was neither incorporated by reference nor attached to the warrant. *Id.* at 471.

406. *United States v. Leary*, 846 F.2d 592, 603 n.20 (10th Cir. 1988) (noting disagreement with *United States v. Wuagneux*, 683 F.2d 1343, 1351 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983)).

407. *United States v. Washington*, 455 F.3d 824, 827 n.1 (8th Cir. 2006) (noting disagreement with, *inter alia*, *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000)).

408. *United States v. Smart*, 393 F.3d 767, 770 (8th Cir.) (noting that Circuit's reasonable mistake of law exception was recognized in *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999)), *cert. denied*, 545 U.S. 1121 (2005).

Whether “plain view” exception in digital evidence searches allows use of discovered evidence that relates to other crimes <sup>409</sup>	2010 <sup>410</sup>
Whether <i>Terry</i> frisk vitiates voluntariness of subsequent consent to search <sup>411</sup>	2011 <sup>412</sup>
Whether facts known by fellow officers, but not communicated to officers executing search/seizure (“collective knowledge” doctrine), can be used to justify same <sup>413</sup>	1996 <sup>414</sup>
Whether consent given by resident to confidential informant justifies warrantless home entry by police (“consent once removed” doctrine) <sup>415</sup>	2007 <sup>416</sup>
Whether prisoners have reasonable privacy expectation in attorney mail <sup>417</sup>	1995 <sup>418</sup>

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409. *United States v. Mann*, 592 F.3d 779, 785 (7th Cir. 2010) (noting disagreement with *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 993 (9th Cir. 2009), *rev'd on other grounds*, 621 F.3d 1162 (9th Cir.) (en banc), *cert. denied*, 130 S. Ct. 3525 (2010)).

410. *Id.*

411. *United States v. Beauchamp*, 659 F.3d 560, 578 (6th Cir. 2011) (Kethledge, J., dissenting) (noting disagreement with, *inter alia*, *United States v. Dupree*, 202 F.3d 1046, 1050 (8th Cir. 2000)).

412. *Id.*

413. *United States v. Massenburg*, 654 F.3d 480, 493–94 (4th Cir. 2011) (noting disagreement with, *inter alia*, *United States v. Ramirez*, 473 F.3d 1026, 1032 (9th Cir. 2007)).

414. *United States v. Shareef*, 100 F.3d 1491, 1503–04 (10th Cir. 1996) (noting disagreement with, *inter alia*, *United States v. Edwards*, 885 F.2d 377, 383 (7th Cir. 1989)).

415. *United States v. Callahan*, 494 F.3d 891, 897 (10th Cir. 2007) (noting disagreement with, *inter alia*, *United States v. Yoon*, 398 F.3d 802, 807 (6th Cir. 2005)), *rev'd on other grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

416. *Id.*

417. *Al-Amin v. Smith*, 511 F.3d 1317, 1328 (11th Cir.) (noting disagreement with *Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994)), *cert. denied*, 555 U.S. 820 (2008).

418. *Biergu v. Reno*, 59 F.3d 1445, 1458 (3d Cir. 1995) (noting disagreement with *Brewer*), *abrogated on other grounds* by *Lewis v. Casey*, 518 U.S. 343 (1996).

<b><i>Exclusionary Rule Reach and Applicability</i></b>	
Standing: whether driver of rental vehicle, lacking formal approval on rental agreement, can challenge validity of the vehicle's search, when renter has given driver permission to operate vehicle <sup>419</sup>	2001 <sup>420</sup>
Standing: whether defendant, in addition to having standing to challenge primary police illegality, must also have possessory or proprietary interest in fruit he or she seeks to suppress <sup>421</sup>	2006 <sup>422</sup>
"Inevitable discovery": level of certitude required in assessing if, presuming absence of illegality, challenged evidence would have ultimately been discovered, thus allowing for admissibility <sup>423</sup>	2006 <sup>424</sup>
"Inevitable discovery": whether an independent line of lawful investigation must be underway at the time of illegal discovery of evidence <sup>425</sup>	1992 <sup>426</sup>

419. *United States v. Kennedy*, 638 F.3d 159, 166–69 (3d Cir. 2011) (noting disagreement with, *inter alia*, *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006)), *cert. denied*, 132 S. Ct. 997 (2012).

420. *United States v. Smith*, 263 F.3d 571, 582–86 (6th Cir. 2001) (noting disagreement with, *inter alia*, *United States v. Obregon*, 748 F.2d 1371 (10th Cir. 1984); *see also* Darren M. Goldman, Comment, *Resolving a Three-Way Circuit Split: Why Unauthorized Rental Drivers Should Be Denied Fourth Amendment Standing*, 89 B.U. L. REV. 1687 (2009) (discussing split more generally).

421. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1118 (10th Cir. 2006) (noting disagreement with, *inter alia*, *United States v. Bowley*, 453 F.3d 426, 431 (3d Cir. 2006)).

422. *Id.*

423. *United States v. Heath*, 455 F.3d 52, 61 (2d Cir. 2006) (noting disagreement with, *inter alia*, *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir. 2004), *cert. denied*, 545 U.S. 1105 (2005)).

424. *Id.*

425. *United States v. D'Andrea*, 648 F.3d 1, 12 (1st Cir. 2011) (noting disagreement with, *inter alia*, *United States v. Cherry*, 759 F.2d 1196, 1205 (5th Cir. 1985)).

426. *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992) (noting disagreement with, *inter alia*, *United States v. Cherry*, 759 F.2d 1196, 1205 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987)), *cert. denied*, 513 U.S. 828 (1994).

“Attenuation”: whether discovery of lawful outstanding arrest warrant attenuates taint of initial unlawful seizure, allowing for admission of evidence <sup>427</sup>	2010 <sup>428</sup>
“Good faith”: whether exception applies when affidavit supporting search warrant is tainted by mention of evidence illegally secured <sup>429</sup>	2005 <sup>430</sup>
<b><i>Appellate Review</i></b>	
Standard for assessing trial court denial of defense motion for evidentiary hearing under <i>Franks v. Delaware</i> (1978) <sup>431</sup>	2002 <sup>432</sup>
Standard for reviewing trial determination of what constitutes curtilage <sup>433</sup>	2002 <sup>434</sup>
Standard for reviewing trial court determination of the scope of defendant’s consent to search <sup>435</sup>	2002 <sup>436</sup>

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427. *United States v. Gross*, 624 F.3d 309, 321 (6th Cir. 2010) (noting disagreement with *United States v. Johnson*, 383 F.3d 538, 546 (7th Cir. 2004)), *amended on other grounds*, 662 F.3d 393, 404 (6th Cir. 2011).

428. *Id.*

429. *United States v. McClain*, 444 F.3d 556, 565 (6th Cir. 2005) (noting disagreement with, *inter alia*, *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987)), *cert. denied*, 549 U.S. 1030 (2006).

430. *Id.*

431. *United States v. Gamory*, 635 F.3d 480, 490 (11th Cir.) (noting several-circuit split), *cert. denied*, 132 S. Ct. 826 (2011).

432. *United States v. Dale*, 991 F.2d 819, 843 n.44 (D.C. Cir.) (noting disagreement with, *inter alia*, *United States v. Hadfield*, 918 F.2d 987, 992 (1st Cir. 1990), *cert. denied*, 500 U.S. 936 (1991)), *cert. denied*, 510 U.S. 1030 (1993).

433. *United States v. Breza*, 308 F.3d 430, 435 (4th Cir. 2002) (noting disagreement with *United States v. Benish*, 5 F.3d 20, 23 (3d Cir. 1993)).

434. *Id.*

435. *United States v. Melendez*, 301 F.3d 27, 32 (1st Cir. 2002) (noting disagreement with *United States v. Stewart*, 93 F.3d 189, 192 (5th Cir. 1996)).

436. *Id.*

Standard for reviewing trial court determination of when a seizure occurs <sup>437</sup>	2003 <sup>438</sup>

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437. *United States v. Mask*, 330 F.3d 330, 335 (5th Cir. 2003) (noting disagreement with, *inter alia*, *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir. 1991)).

438. *Id.* The *Mask* court emphasized that *Ornelas v. United States*, 517 U.S. 690 (1996), holding that the legality of an acknowledged seizure is subject to de novo appellate review, did not change the Fifth Circuit's longstanding position that whether a seizure occurred is a factual determination subject to clear error/abuse of discretion appellate review. *Id.* at 335 (citing *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1098 n.1 (5th Cir. 1991), *cert. denied*, 508 U.S. 921 (1993)).

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