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JUDICIAL INTERPRETIVE DISPUTES AND THE ADJUDICATION OF ASYLUM CLAIMS
IN U.S. FEDERAL COURTS

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“In most matters it is more important that the applicable rule of law be settled than that it be settled right”

—Supreme Court Justice Louis Brandeis, dissenting
Burnet v. Coronado Oil & Gas Co., S.Ct. 1932

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Abstract

With empirical reference to asylum law, this dissertation poses the question, “why do some legal interpretive questions remain in dispute in the judiciary, while others become settled or pass uncontested through the courts?” Chapter 1 motivates the question with reference to literature in the sociology of knowledge and law and society. Chapter 2 outlines my search procedures for identifying cases, my interview procedures and my methodological reliance on network models to describe and analyze interpretive disputes as ties linking cases.

Chapters 3–6 contain my empirical analysis. Chapter 3 examines organization-level variation in the judicial tendency to dispute across the several Courts of Appeals. Differences in organizational rules and norms help to explain why the Ninth Circuit is highly disputatious while the Second Circuit, which hears a large and roughly equal number of asylum cases, is involved in few interpretive disputes either internally or in relation to other courts. Chapter 4 examines the Supreme Court’s asylum jurisprudence. My argument focuses on an unintended consequence of Supreme Court decision making: ambiguously worded Supreme Court decisions in asylum law have exerted a repelling force on lower courts deciding similar questions, rerouting conceptual ambiguities and interpretive disputes to other areas. I refer to this phenomenon as the creation of “ersatz clarity” in the law. Chapter 5 is a close textual analysis of one set of interpretive disputes: disputes over the meaning of the statutory phrase “membership in a particular social group,” which is one of the five grounds for legal protection under the asylum statute. I argue that the judicial tendency to make generalizing claims without clear empirical referents in written opinions perpetuates interpretive dispute over this core statutory question. I also find strong evidence that the disputes over this core statutory question reflect real conceptual differences among judges: they cannot be explained away as expressions of political interest or as

epiphenomenal to some other conflict of interests. Chapter 6 poses the question, “how do judges frame legal questions from cases in the first place?” Whereas my first three empirical chapters address questions of how judges settle or fail to settle interpretive questions in practice, my final empirical chapter addresses the conceptually prior question of how judges establish the grounds of interpretive contestation in cases. I rely on the pragmatist theory of action to describe the contingent framing work that judges do in one empirically complex case, using the oral argument recording and interview vignettes as data. I identify several contextual factors that influence the judicial framing of questions out of cases, including strategic action by judges to frame cases in ways that support the conclusions they want to reach from the beginning.

This dissertation identifies several social determinants of settled versus unsettled law, some of which have hitherto been little discussed by judges, legal scholars or the existing social scientific literature on judicial behavior. The main factors I discuss are: the rules and norms of courts that structure engagement with some questions and not others; the small group dynamics of judges working together within panels and in repeated interactions over time; the textual and temporal dynamics of how unsettled legal principles are contested in precedent-setting courts; and the creative framing work of judges to define the questions presented in cases. The overarching theme of my empirical findings is that law tends to become and remain unsettled around questions where judges focus their time and attention, whether their attention is being focused by their own conscious action or by broader social forces. In the conclusion (chapter 7) I review my empirical findings and then discuss how they can be tested and generalized in future research in other domains of law.

Chapter 1. Introduction

1.1. Judicial Interpretive Disputes as an Object of Study

In 2003, the United States Court of Appeals for the Sixth Circuit decided the case of *Castellano-Chacon v. INS*. The petitioner, Ronaldo Augustine Castellano-Chacon, was an asylum seeker and a native of Honduras who claimed a well-founded fear of persecution in his home country on the basis of his membership in a particular social group. Over the dissent of one judge, the court ruled against Castellano-Chacon, denying him the right to stay in the United States. Specifically, the court held that:

“Particular social group,” as used in [the] statute providing for withholding of removal, is [a] group composed of individuals sharing [a] common, immutable characteristic; tattooed youth did not constitute such [a] social group (341 F.3d 533).

The *Castellano-Chacon* ruling was delicately balanced within the existing case law. Part of the argumentative agenda of the decision was to make sense of the several Courts of Appeals decisions that had attempted to clarify the meaning of “particular social group” since a 1985 decision by the Board of Immigration Appeals (BIA), *Matter of Acosta*, which concluded that a particular social group was one that possessed some immutable characteristic in common. This was not an easy task. The Ninth Circuit in *Sanchez-Trujillo v. INS* (1986, 801 F.2d 1571) had proposed that a “voluntary associational relationship” could be “of central concern” in the recognition of a particular social group, without referencing the *Acosta* “immutable characteristic” test. This prompted repudiations of the voluntary associational relationship standard by differently constituted Ninth Circuit panels in later cases, as well as repudiations by other Circuits. The Second Circuit in *Gomez v. INS* (1991, 947 F.2d 660) attempted to split the difference by maintaining that there existed a single, coherent standard governing the interpretation of particular social group in the BIA and the federal courts. The Sixth Circuit in

Castellano-Chacon read the Second Circuit holding in *Gomez* to have read *Sanchez-Trujillo* favorably, which in turn prompted a second-order dispute between the Second and Sixth Circuits (see *Koudriachova v. Gonzales*, 2nd Cir. 2007, 490 F.3d 255). The Second Circuit demurred from the Sixth Circuit’s characterization, in *Castellano-Chacon*, of the Second Circuit’s position in *Gomez*.

The interpretive puzzle presented by *Castellano-Chacon* and related cases does not end with the legal question of what constitutes a particular social group for the purposes of asylum determination. Even taking as given the BIA’s proposed immutable characteristic standard, it is not immediately clear why tattoos should *not* count as an immutable characteristic—particularly the facial tattoos that *Castellano-Chacon* claimed signified gang membership and would put him at risk of persecution if he were returned to Honduras. With petitioners usually not physically present in court once their claims reach the federal appellate courts, it is unclear if the judges had an accurate understanding of how the tattoos looked. Nor can it be taken for granted that the court was bound to consider “tattooed youth” as the sole “particular social group” that might be deserving of protection. Judge Danny Boggs, the author of the opinion, explained it thus:

While it is possible to conceive of the members of [the gang] MS 13 as a particular social group under the INA [Immigration and Nationality Act], sharing for example the common immutable characteristic of their past experiences together, their initiation rites, and their status as Spanish-speaking immigrants in the United States, when one examines the evidence in this case, *Castellano* is not arguing that he will be persecuted on the basis of his membership in MS 13. Instead, the evidence he has presented establishes, at best, that “tattooed youth” are targeted and prosecuted. As a result, we can only rule in *Castellano*’s favor if we hold that “tattooed youth” constitute a social group, which we decline to do (341 F.3d 533, 549).

The court’s authority to review the case was not quite as constrained as this passage implies.

Courts of Appeals judges are permitted to consider legal questions not raised explicitly by the petitioners’ briefs, and in refugee status determination cases in particular, there are occasional

examples of the Courts of Appeals reframing the basis on which the petitioner’s brief claims protection in order to reach a favorable outcome for the petitioner.¹ In the case of *Castellano-Chacon*, “people with gang tattoos” or “former members of a street gang” could have been considered as potential particular social groups that would provide a basis for Castellano-Chacon’s claim of targeted persecution.

Refugee status determination proceedings like Castellano-Chacon’s appeal before the Sixth Circuit Court of Appeals are complex social processes. No single point of analytic leverage announces itself when we approach these stories wanting to understand why the answer in refugee status determination cases is sometimes “yes” and sometimes “no”—why, through the process, some are offered protection while others are faced with continued suffering or even death.

From the perspective of the asylum applicant, the procedure is complex but clearly defined. Under international law and the statutory law of many nations, a person is recognized as a refugee when she or he can show a “well-founded fear of persecution” on the basis of one of five protected grounds: race, religion, nationality, political opinion or membership in a particular

¹ See *Mohammed v. Gonzales* (9th Cir. 2005, 400 F.3d 785): “In this case, there are at least two ways in which the agency could define the social group to which Mohamed belongs. First, it could determine that she was persecuted because of her membership in the social group of young girls in the Benadiri clan...Alternatively, because the practice of female genital mutilation in Somalia is not clan specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females, the agency could define the social group as that of Somalian females” (400 F.3d 786–787).

In *Perdomo v. Holder* (9th Cir. 2010, 611 F.3d 662) there is slippage between the particular social group “young women in Guatemala” (petitioner’s claim) and “women in Guatemala” (basis of the court’s decision).

In *Cece v. Holder* (7th Cir. 2013, 733 F.3d 662) the petitioner claimed protection as a member of the group “young Albanian women in danger of being trafficked as prostitutes.” The en banc court found in her favor over the dissents of two judges, who protested that “[the petitioner] isn’t in [the proposed social group]. Her own expert defined ‘young’ as 16 to 26 or 27. Cece is 34” (733 F.3d 678).

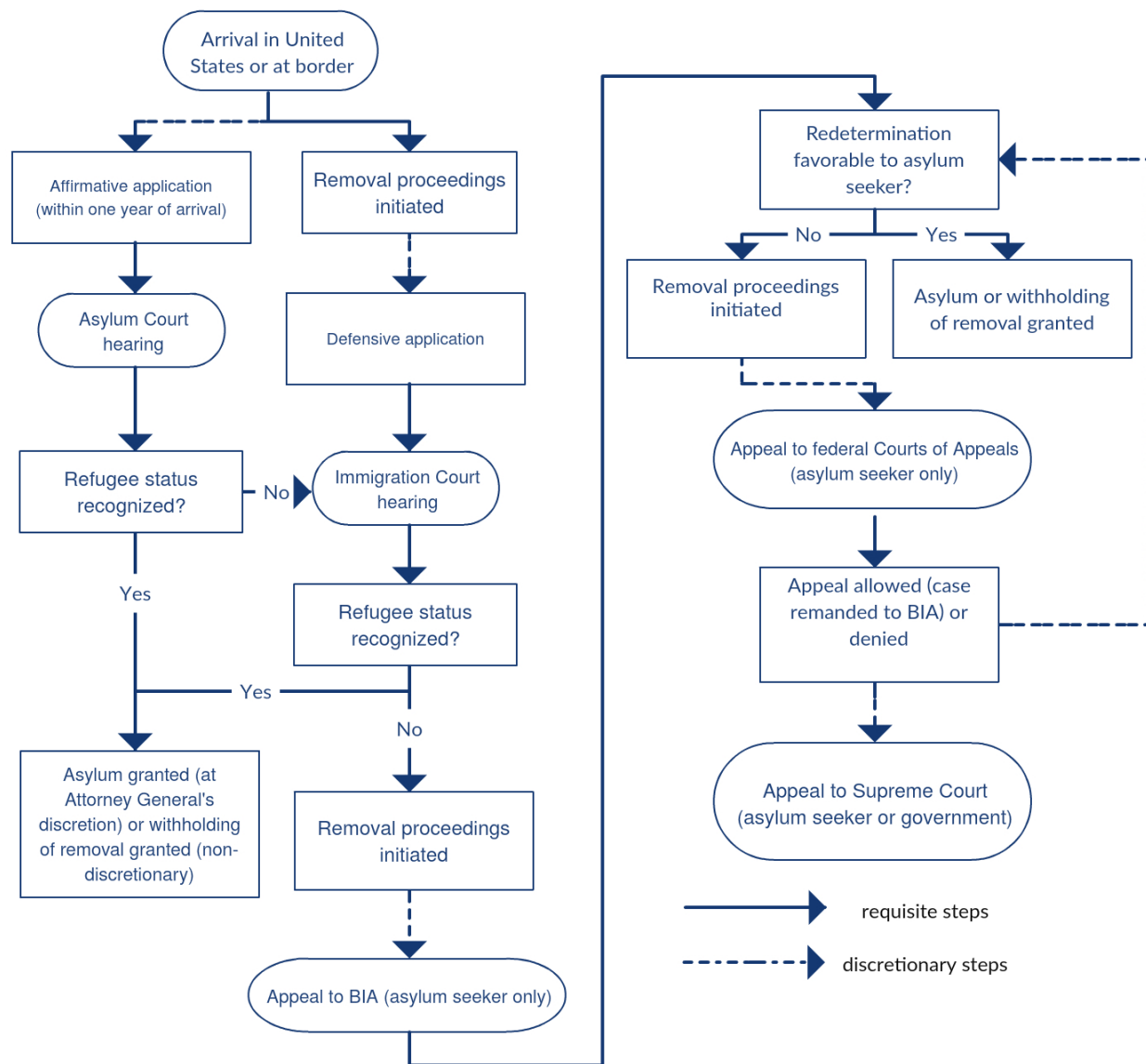
social group. A claim may be made only when the appellant is outside of their country of citizenship. In the United States, a claim can be made affirmatively, on the appellant's own initiative within a year of entering the country, or defensively, whereby an appellant who has overstayed a visa or entered illegally can claim asylum or withholding of removal² before he or she is deported. An affirmative claim first goes to the Asylum Office in the Department of Homeland Security, which holds a non-adversarial initial hearing. If asylum is not granted, the case is referred to the Immigration Courts overseen by the Executive Office of Immigration Review within the Department of Justice.

An Immigration Judge (IJ) in the Immigration Courts is the first to hear a defensive claim. Following the Immigration Court hearing, the asylum seeker can appeal an adverse decision to the BIA. At the BIA, a single judge or a panel of judges reviews IJ decisions for errors of fact and of law. The asylum seeker may again appeal an adverse decision, and a small percentage of the BIA cases (less than 1% in some years; as many as 8% in 2008) are reheard at the U.S. Courts of Appeals. Both Immigration Court and BIA hearings are adversarial, but because the Immigration Courts and the BIA act under the authority of the Attorney General, the government does not appeal adverse decisions by either body (Ramji-Nogales et al. 2007, 310 fn. 30). Therefore appeals to the Courts of Appeals come *only* from asylum seekers. The Courts of Appeals can reverse BIA decisions when the evidence in the existing record compels a different conclusion and can remand cases for redetermination by the BIA. A tiny fraction of Courts of

² Once a petitioner has been officially recognized as a refugee, grants of asylum are made at the discretion of the Attorney General. An asylum seeker can, however, make a separate claim for "withholding of removal," invoking the legal right not to be removed/deported to a country where it is "more likely than not" that one will face persecution or torture (a higher standard than the burden of proof to be recognized as a refugee). Recognition of the right to withholding of removal is not subject to the Attorney General's discretion, but it also does not include the guarantee that one will not eventually be removed to another country where the threat of persecution or torture does not exist.

Appeals asylum cases (just over 0.1% across all years) are appealed again, by either the asylum seeker or the government, and are heard by the Supreme Court of the United States.

Figure 1.1. Asylum claim procedure in the United States



In the final stages of this process, the federal appellate courts (the Courts of Appeals and the Supreme Court) play a functional role in the legal system that extends beyond their responsibility to resolve individual asylum claims. These courts issue holdings on particular questions of law to settle interpretive questions about the meaning and application of the law. Their functional role in this respect is, however, disrupted whenever two panels of judges or

judges within a single panel hearing a case provide different answers to some clearly defined question of law. This happens regularly, and while the disruption is usually minimal, in exceptional circumstances such judicial disagreements over interpretive questions can raise fundamental questions about the coherence and the democratic legitimacy of the court system. The clearest examples of legitimacy-challenging interpretive disagreements in the federal courts come from outside the asylum context in the Supreme Court's landmark cases that have moved the law on divisive cultural, economic or political questions. Such decisions often provoke strong dissents within the Court in their own time and/or prompt explicit repudiations by a majority of a later Court (see generally Urofsky 2015).

This dissertation examines the judicial interpretive disputes that arise in asylum law and gives an account of the social conditions under which they arise, why they are sometimes perpetuated over years and across multiple cases, how they are settled and how organizational rules and norms sometimes prevent them from arising in the first place. I consider dissents within panels as well as interpretive disputes over time and between courts as different empirical manifestations of the same phenomenon, broadly defined: *functional failures of the appellate courts to unanimously settle explicit questions of law*. I use the terms “interpretive dispute,” “judicial interpretive dispute” and sometimes just “dispute” interchangeably to describe the empirical phenomenon at the heart of this dissertation.³

Interpretive disputes arise in case law between dyads of two opinions, and there are many isolated dyadic disputes in the case record. Sometimes, however, a single dispute will implicate

³ “Dispute” is also a central descriptive term in law and sociology of law to describe conflicts between parties mediated by courts. My use of the term is unrelated, and while I regret the potential it creates for confusion, I have not found a better alternative term to use. I wish to convey the sense of narrowly focused interpretive differences, and “interpretive conflict” seems too broad. “Dissensus” seems too broad and too unwieldy, and “disagreement” too unwieldy, for frequently repeated use.

more than one opinion on one or both sides. Figures 1.2–1.3 provide two examples drawn from my data. Figure 1.2 is reproduced as Figure 5.3 in chapter 5, where I analyze it in detail. All of these dyads and chains of disputes are embedded in the much larger network of the total case law record. Judicial decisions often cite prolifically, and only a small percentage of the direct citations across all political asylum cases represent interpretive disputes as I have defined them (compare Figures 2.8 and 2.9, chapter 2; my case identification and coding procedures are explained in detail in chapter 2 and appendix A).

Figure 1.2. A model case law dispute chain

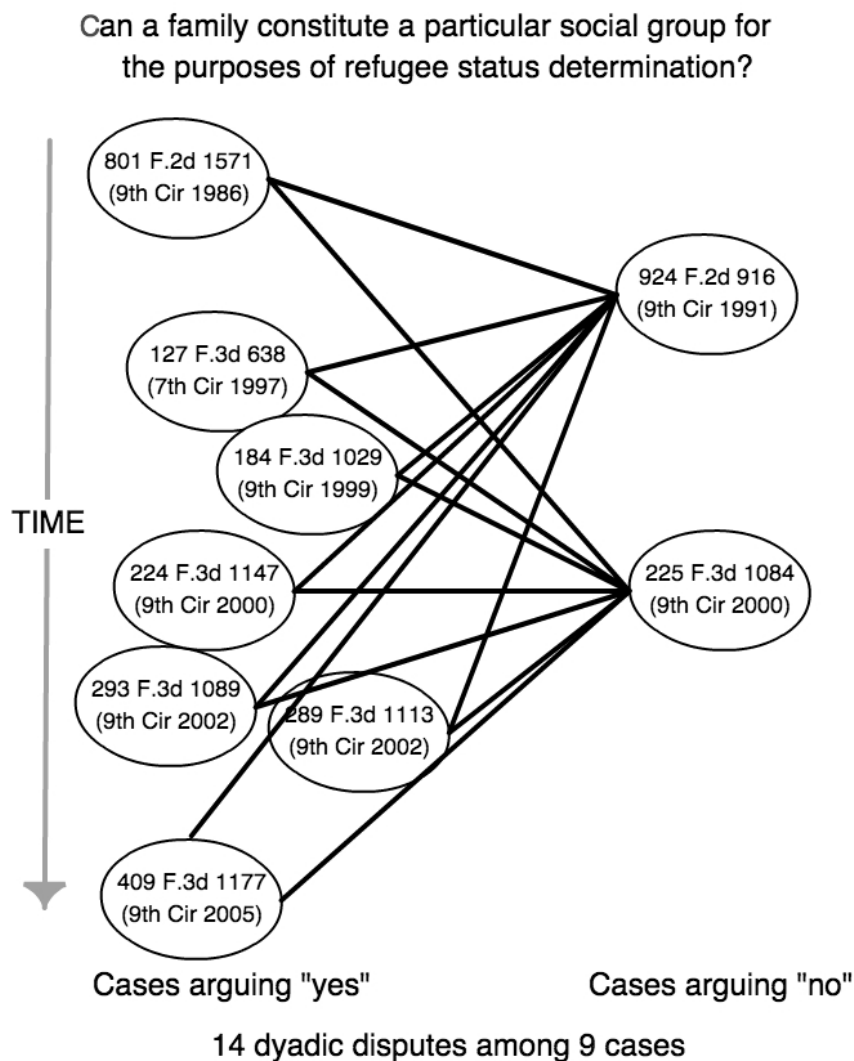
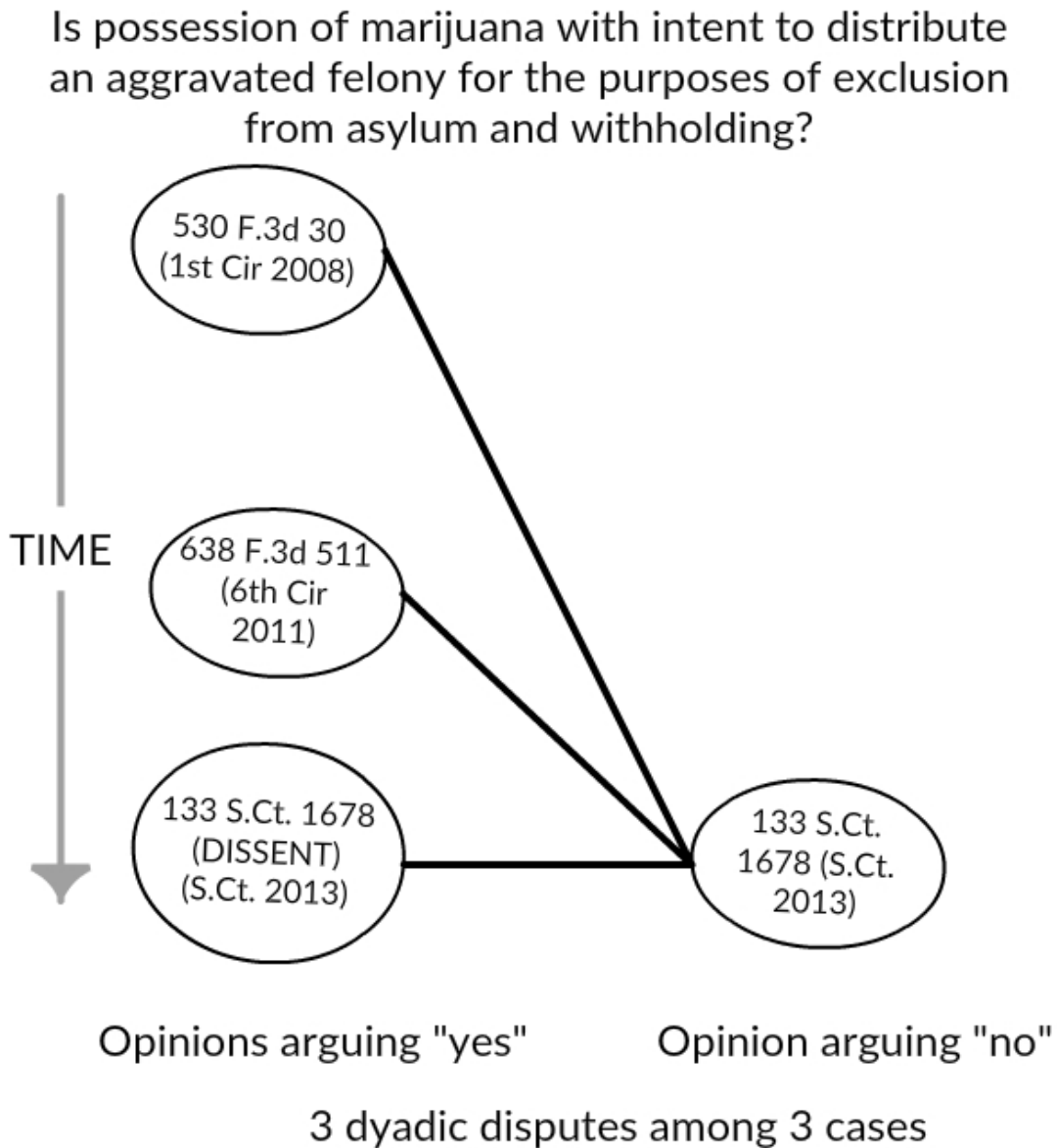


Figure 1.3. A model case law dispute chain



My analytic focus on interpretive disputes in case law is atypical. Empirical legal studies tend to focus either on a small sample of especially important cases (e.g., “the Supreme Court’s jurisprudence on economic regulation in the New Deal era”) or on case outcomes across a large set of cases (e.g., “the win-loss record of corporations in suits against the federal government”). Empirical studies of asylum law have focused on differential remand rates by court and by

petitioner country of origin (Ramjj-Nogales 2007; 2009), on the strategic decisions of Ninth Circuit judges to publish or not publish cases (Law 2005) and on administrative structures that produce differential outcomes for petitioners in the BIA, the federal courts and internationally (Hamlin 2014). Where empirical legal studies do focus on disputes between judges in case law, it has usually been with respect to the dynamics of disagreement within panels (i.e., the dynamics of judges dissenting or concurring separately), and scholars have usually taken disputes to be manifestations of fixed underlying preferences (e.g., Epstein, Landes and Posner 2013, 255–303; Corley, Steigerwalt and Ward 2013). The explanandum for these scholars is, “under what conditions will judges express their disagreements?” rather than, “how do social contextual conditions and the judicial style of reasoning contribute to the emergence and persistence of interpretive disputes over particular, narrowly defined legal questions?” The latter question, which focuses on the knowledge work that judges do rather than their strategic interests, is the motivating question behind this dissertation.

Judges themselves and other legal experts do *not* typically think of dissents within panels and disputes within and between courts as manifestations of the same phenomenon. By adopting that analytic frame, I am simplifying and abstracting away from the way that judges describe their own social world. The basic similarity of these several varieties of interpretive dispute is, from the perspective of a judge, outweighed by differences in institutional significance: dissents and Supreme Court reversals are less threatening to the legal order than intra- and intercircuit splits, because in the former cases there are clear institutional guides as to which position is authoritative, whereas in the latter cases the waters are muddier.

However, the simplification involved in my analytic framing is not necessarily a distortion. Judges do sometimes speak in general about “settled law”—see, for example, the

epigraph to this dissertation, Brandeis's famous line from *Burnet v. Coronado Oil & Gas Co.* On close inspection there is notably little consensus among judges about how pernicious the various forms of unsettled law are, which means that drawing sharp distinctions at the outset between the different varieties of interpretive dispute could at best match some judges' worldviews at the expense of others'. This is one reason to proceed, as I have, by collecting data on all forms of interpretive dispute among judges and remaining agnostic at the outset as to the meaning and significance of different manifestations of dispute. John Roberts, the current Chief Justice of the Supreme Court, has spoken strongly against Supreme Court dissent as a symptom of dysfunction, even to the point of staking his reputation as Chief Justice on his ability to cultivate consensus in the Court. Other Supreme Court Justices have seen dissent as a positive good, cultivating and revealing to the public the deliberative nature of the judicial process (Henderson 2007, 1). The latter group includes Brandeis, who wrote his celebratory line about the importance of settled law in a dissenting opinion.⁴ As we shall see in chapter 3, there are differences of opinion, patterned across courts, as to how undesirable intra- and intercircuit splits are. By taking my basic unit of analysis as "interpretive dispute," I have abstracted away from how judges tend to think and write about those phenomena, in order to be able to study the settling of legal interpretation without being beholden to any particular theory of dissent or any judge's theory of the institutional order of the court system. At the same time, I have tried hard to

⁴ It is also worth noting that Brandeis's line in *Burnet* was honoring the principle of stare decisis only in the breach: his dissent argued that the applicable precedent in the case "was wrongly decided and should now be frankly overruled" (285 U.S. 405). There are several layers of complexity in this apparently simple articulation of an apparently simple principle. Brandeis's quote (and its subsequent popularity) conveys how centrally important the issue of "settling" is for judges and others in the legal system. The context in which the line appears is a useful indicator of how unsystematic the pursuit of settled law sometimes is.

construct an account that neither ignores nor distorts beyond recognition the perspectives of actors within the legal system.

By studying the social production of judicial decisions through a systematic analysis of judicial interpretive disputes, I aim to generate new insights for two scholarly communities: the sociology of knowledge and law and society. For the sociology of knowledge, I point out a new source of data (judicial decisions) that is little studied in the field but has the potential to solve some of its problems. For law and society, I model an interpretive and realist approach to understanding the social production of judicial decisions, something that is largely absent from contemporary law and society scholarship. I focus on asylum law because it is an area of law where a relatively simple central statute has been in place for decades and has generated many substantively important, divergent judgments on identical questions of law. It is also an area of law where judges by necessity base their legal arguments on substantive social theoretical propositions: what is a “particular social group,” what conditions will ground a “well-founded fear” and so on. Sociologists are well positioned to provide an informed and critical interpretation of what judges are doing at a theoretical level when they answer these questions. Within the U.S. federal courts, judges’ interpretive disputes over asylum law questions occur in every dimension in which dispute is possible: within panels, within courts over time (“intracircuit splits”), across the Courts of Appeals with equal jurisprudential authority (“Circuit Court splits” or “intercircuit splits”) and in Courts of Appeals opinions overturned by the Supreme Court. The high level of consistency of statutory asylum protections in international law and across many different national court systems also makes cross-national comparison possible, although that dimension of potential dispute is mostly left aside in this dissertation.

1.2. Data for sociology of knowledge, analytic tools for law and society

The legal system relies on a variety of well-established mechanisms to minimize the functional failures that arise from judges' interpretive disputes. These mechanisms are formal rules and strongly shared norms that for the most part work very effectively to support the legitimacy and stability of the legal system in the face of minor breakdowns of its internal intellectual consistency. Supreme Court precedent is binding on all the Courts of Appeals. Within a panel, a majority vote for an outcome is controlling, no matter how compelling or damning the dissenting opinion may be. When Circuit Court splits arise, the legal system will tolerate federal law being applied differently, in limited ways, in the different geographic regions of the country that constitute different Courts of Appeals jurisdictions. At the same time, a Circuit Court split on a major question of law is often a strong motivator for the Supreme Court to intervene in a case and settle the question by dint of its superior institutional authority.

Notwithstanding these normative and formal fixes that the legal system deploys, interpretive disputes in every dimension in the judiciary persist, and they constitute valuable data for sociologists of knowledge. A persistent and somewhat discouraging feature of sociology of knowledge as a disciplinary endeavor has been that individual scholars faced with that same basic question have pitched their responses at quite different levels of analysis, which has hindered the ability of the field to make collective progress. Scholars have treated knowledge production as the product of competition within an ecology or field (Abbott 1988; Bourdieu 1988; Medvetz 2012), as the product of national culture (Fourcade 2009), local culture and micro-level interaction (Collins 1998), personal biography and self-understanding (Gross 2008) or position within a communication network (Knorr Cetina and Bruegger 2002; Knorr Cetina and Preda 2005). These authors sometimes seem to talk past one another. We might hope, for

example, that Collins writing about the development of philosophy and Fourcade writing about the discipline of economics would generate highly commensurable theoretical findings. But Collins's key concepts are all at the interactional level (emotional energy, cultural capital, interaction ritual chains), while Fourcade makes the methodological choice to treat "*nations as culturally constituted (and constitutive) sets of institutional arrangements*" (2009, 15, my emphasis). Collins's study ranges widely over different national cultural settings, but his interaction maps cut across them.⁵ Fourcade's competing vision is that "*different societies create different types of individuals*" such that "not even the category of 'economist' [or, presumably, philosopher] can be taken for granted" from one country to another (Fourcade 2009, 13–14, emphasis in the original). Judicial decisions as data are especially well suited to support adjudication between social effects on knowledge production that exist at such different levels of analysis (interaction, formal organization, ecology, nation, etc.).

Appellate court judicial decisions in the U.S. respond to narrow and clearly defined questions of law, they are strongly bounded in time (i.e., it is clear what is part of the decision and what is not, and it is clear when a decision has been finally determined), and in substantively difficult and highly active areas of law they are repeated over and over again under only slightly variant conditions as new appeals raising the same formal questions of law come to the courts. The social identity of the judge is clear, and professional judiciaries in modern states have in general been extremely successful in maintaining jurisdictional control over their key social function—namely, producing interpretations of law that carry the authority of the state. These

⁵ See, for example, network maps on Collins's pp. 710–711 of "British Philosophers and Mathematicians, 1800–1935," within which he includes figures from the United States (Royce, Santayana, James), Austria (Waismann, Frege), France (St. Simon, Comte) and Italy (Peano).

key features of judges and judicial decisions are a gift to scholars who seek to identify the social factors that condition decision making and separate potential confounding factors.

Approximately 11,000 refugee status determination cases—over half the total caseload under the modern statutory law—have been disposed of in very cursory opinions. The courts themselves identify such opinions as minimally important, and before the days of near-zero cost electronic publishing, they often went unpublished.⁶ Other cases prompt deep engagement with the facts, with case law, statutory law, procedural concerns or dissenting panelists. Sometimes judges seem to be authentically wrestling with the difficulties of legal interpretation and hoping to persuade readers of some viewpoint they believe to be correct but not self-evident. Judicial knowledge work—that is, judgment and decision making that is neither purely mechanical nor purely strategic and instrumental—can be located and isolated in analysis when we focus on the occasions when judges explicitly raise interpretive challenges to the existing case law. Mary Blair-Loy has observed, “human agency is shaped by at least two axes: the amount of resources and the level of social and cultural constraints. Agency may be most visible to the analyst in cases in which highly resourceful agents face pronounced structural and cultural constraints” (Blair-Loy 2001, 691). This observation captures well my rationale for treating judges as actors whose knowledge production activity offers major insights into knowledge production in general. They operate under extremely strong constraints, yet they have immense intellectual and social capital and the power, under constraint, to pursue highly differentiated agendas.

Judicial interpretive disputes are particularly worthy of focused attention because they frequently offer a clearer view of the knowledge work that lies behind the social production of

⁶ There are different conventions for naming these opinions in different courts: in the Second Circuit these are called summary orders, while in the Ninth Circuit they are called memorandum dispositions. Confusingly, they are also sometimes still referred to as “unpublished” opinions, but many of them are now available online.

judicial decisions than do case outcomes. The rhetorical content of judicial decisions in political asylum law varies widely. Opinions can be one paragraph or 30 pages long. While judges are required to reach a decision in all the cases that come before them, only in rare instances do professional ethics demand that they position their argument in relation to some other specific judicial opinion in the case record. Such an exposition is expected when an opinion departs from established precedent, for example, or when the Courts of Appeals hear cases en banc,⁷ but for the most part, case law disputes are the formally unconstrained work of social actors (judges) and small groups (judicial panels and judges working in collaboration with their clerks). When and where these disputes appear in the case record is underdetermined by both the judicial professional obligation to decide cases and the distribution of any political preferences that judges may have for particular outcomes.

For the reasons outlined above, the sociology of knowledge could greatly benefit from an engagement with judicial decisions as data. At present there is no such engagement. To the extent that the sociology of knowledge has a clear substantive focus, it is on knowledge production in the natural sciences (e.g., Merton 1973; Latour and Woolgar 1986; Latour 1987; Knorr Cetina 1999; Evans 2013) and the social sciences (Camic 1992; Abbott 1999; Fourcade 2009; Camic, Gross and Lamont 2011). There exist, too, small clusters of recent studies on the functioning of financial markets (Knorr Cetina and Bruegger 2002; Knorr Cetina and Preda 2005; Preda 2009) and on political ideologies as knowledge systems (Medvetz 2012; Gross 2013). These contributions notwithstanding, relatively little has been written about knowledge

⁷ The entire bench of one of the Courts of Appeals (ranging in size from six judges (1st Cir.) to 29 (9th Cir.)) can vote to rehear a case en banc after an initial ruling (usually by a panel of three judges) if they deem the case to be especially important, difficult or controversial. In rare cases the initial hearing of a case will be made en banc. In every Circuit save the 9th Cir., an en banc rehearing typically includes all members of the bench. An en banc hearing in the 9th Cir. involves eleven of the 29 judges, the serving chief judge and 10 others randomly selected.

production in professional or commercial settings outside of the academy, and sociologists of knowledge have in particular neglected judge-made law.

Nor, strikingly, is there much analysis in law and society literature on the internal logic of judicial decision making and its relation to the social context in which judicial decisions are made. Much of law and society scholarship is dedicated to the interpretation of legal text—this competency is exemplified in recent studies in empirical domains ranging from international nuclear nonproliferation treaties (Mallard 2014) to the historical development of affirmative action policies (Skrentny 1996) to the enforcement of hate crime law (Phillips and Grattet 2000; Grattet and Jenness 2005; 2008). There is also an active research agenda within law and society on how legal norms become settled, which involves primarily the analysis of institutional dynamics but also some significant analysis of legal language and texts (Halliday and Shaffer 2015; see also Halliday and Carruthers 2007; Halliday 2009 on the “recursive” development of law; Rajah 2015 discusses settling with particular attention to language). But within this discursive world there is not much systematic attention to appellate court judicial decisions, despite the expressly interpretive character of judicial decisions and their strong hold on the public interest. Phillips and Grattet’s (2000) close reading of 38 appellate court decisions on the constitutionality of hate crime law is a notable exception. There have also been recent calls for a renewed attention in law and society to “paying attention to what judges say” (Bybee 2012; Owens 2016; Hitt 2016).

Law and society scholars interested in meaning in legal text have de facto ceded the ground of explaining the social production of judicial decisions to the “behaviorist” approach taken by many political scientists and economists. The behaviorist literature on judicial decision making is voluminous but relatively narrow in its methodological and theoretical commitments.

It typically eschews any attention to judicial self-understanding or self-presentation on the grounds that it tends to conceal more than it reveals about the true bases of decision making.⁸ A compelling case can be made for this approach on practical as well as theoretical grounds: empirical data on observable behavior are much clearer and more accessible than any data we can gather or inferences we can draw on judicial self-understanding or phenomenological experience from interviews, text interpretation or ethnography. The approach fails to exhaust, however, everything interesting that might be said about the social production of judicial decisions. As Brian Tamanaha points out, one of its most serious limitations is that its standard methodology does not provide the most stringent possible test of its hypotheses (Tamanaha 2009, 7). It is no longer surprising, and no longer very informative, that we can almost always identify *some* correlation between imputed political interests and judicial voting patterns. Taking seriously the self-understandings and experiences of judges as social actors—as law and society and sociology of knowledge scholars are well positioned to do—promises to provide a new interpretive perspective that will enrich purely descriptive, behaviorist accounts even if the data introduce new problems.

Law and society scholarship does not have a well-developed approach to the analysis of appellate court judicial decisions that could provide an alternative to the behaviorist model that is dominant in law and economics. This is a missed opportunity, given the limitations of the

⁸ Epstein, Landes and Posner (2013) provides a thorough empirical overview, and Posner (2008) elaborates the theoretical understandings on which Epstein et al. build their analyses. Posner is not necessarily representative of behaviorist scholars of judicial decision making in general, but he is a clarifying example of the theoretical framework both because of his influence in the field and his commitment, over many diverse empirical studies, to a “thoroughgoing and unapologetic application of economic theory” (Posner 1980, 3, writing with reference to the development of an economic theory to the law and institutions of primitive society).

While the scholars I refer to as “behaviorist” do not consistently embrace this label for themselves, they do consistently refer to their field of research as “judicial behavior.”

behaviorist explanatory mandate and the high political and social salience of judicial decision making. This dissertation develops such an alternative analytic approach with empirical reference to one specific area of law. In the following section I outline the arguments of my several empirical chapters to follow and so elaborate on how, in practice, I rely on existing work in law and society and in sociology of knowledge to inform my approach.

1.3. Plan of the dissertation

In this section I sketch out this dissertation's several subsequent chapters and the overarching theoretical argument that links them together. In section 1.4 below, I discuss the alternative disciplinary approaches to explaining judicial decision making that exist alongside, and sometimes intersect, my own argument.

Chapter 2 outlines my search procedures for identifying cases, my coding procedures for identifying interpretive disputes within and between cases and my interview procedures. In chapter 2 I also outline my methodological reliance on network models to describe and analyze interpretive disputes as ties linking cases—a methodological approach that I have already relied on in the construction of Figures 1.2 and 1.3 above.

My empirical analysis is contained in chapters 3 through 6. Each of these four chapters focuses on a different subset of the interpretive disputes from my database of cases. My first empirical chapter looks at organization-level variation in judges' tendency to dispute (or, to put it differently, judges' ability to settle interpretive questions of law) across the several Courts of Appeals. The central puzzle here is the difference between the Ninth Circuit and the Second Circuit. These two Circuits hear far more asylum cases than any of the other Courts of Appeals: the Ninth hears appeals on claims that originate in California, Arizona and several other western states, Alaska and Hawaii; the Second hears appeals on claims that originate in New York,

Connecticut and Vermont. The Ninth Circuit is highly disputatious while the Second Circuit, which hears a roughly equal number of asylum cases, is involved in very few interpretive disputes either internally or in relation to other courts. Drawing on interview data and published organizational studies, I point to several features of organizational variation that help to explain that result. All of the Courts of Appeals have, in the last few decades, had to introduce measures to increase the efficiency of their case processing procedures as the caseload of the Courts of Appeals has spiked. The Second Circuit has, uniquely, concentrated its efficiency reforms on immigration law alone by instituting a local rule whereby immigration cases, including asylum claims, are presumptively not scheduled for oral argument. Such cases are instead usually decided by summary order written by a staff attorney and approved by a panel of judges. This has sharply limited the role that the Circuit has played in elaborating legal responses to the difficult conceptual questions raised by asylum claims. Meanwhile, the Ninth Circuit has been less ready than the other Circuit Courts to embrace measures to increase procedural efficiency within the court.

In this chapter I also discuss the significant role that individual judges can have in these small group settings. The most instructive contrast is between Judge Alex Kozinski (Ninth Circuit) and Judge Richard Posner (Seventh Circuit). These two are both highly regarded and prolific judges who are scored as ideologically very similar in studies of judicial behavior. Yet they have adopted very different approaches to asylum jurisprudence and have “moved the law” in correspondingly different directions within their respective Circuits. I describe this divergence between the two judges as an example of the effects of *relational jurisprudence*. The contrast emerges from the interactions of Posner and Kozinski with their colleagues in their respective Circuits. There is a reciprocal relationship between the jurisprudential interests of these two

influential judges and the court settings from which they have developed their positions.

Meanwhile, I find no evidence that challenges of communication and coordination across the larger Circuits or status ambiguity in the courts have any direct effect on the settledness or unsettledness of asylum jurisprudence.

In chapter 3, I rely on Marion Fourcade's (2009) comparative analysis of the discipline of economics in the United Kingdom, France and the United States as a model of a successful organization-focused, comparative sociology of knowledge. Fourcade convincingly argues that formal and normative differences between organizational settings (i.e., the different primary homes of the economics profession in three different countries—universities, the civil service and public administration) have translated into differences in knowledge production practices, notwithstanding that the economists generally understand themselves to be involved in a unified, international and scientific project of discovery. Similarly, in my chapter 3 I identify formal and normative differences between organizations (courts) that have consequences for their knowledge production practices, notwithstanding that the judges profess strongly overlapping normative commitments and understand themselves to be applying the same rule-bound system of federal law. There are, unsurprisingly, some significant differences between Fourcade's substantive findings from economics and my substantive findings from law—for example, individual actors play a larger role in my story.

In my second empirical chapter (chapter 4), I examine the Supreme Court's asylum jurisprudence. The Supreme Court is very different from the Courts of Appeals in both functional and formal organizational terms, so comparative analysis in the style of Fourcade's cross national study is less useful here. My argument in this chapter rests primarily on the substantial volume of secondary literature on the Supreme Court and accords with the

widespread view that Supreme Court decision making is more broadly strategic and more ideologically driven than decision making in the Courts of Appeals. I find that on the rare occasions when the Supreme Court has issued an interpretation of statutory language in the asylum statute it has exerted a kind of repelling force on lower courts deciding similar questions, rerouting ambiguities and interpretive disputes into other areas of law. The leading examples are the cases of *INS v. Cardoza-Fonseca* (1987, 107 S.Ct. 1207), wherein the Court held that a “well-founded fear of persecution” could arise from “even a 10% probability of persecution,” and the case of *INS v. Elias-Zacarias* (1992, 502 U.S. 478), wherein the Court held that a petitioner’s political neutrality did not count as a political opinion for the purposes of refugee status determination.

Cardoza-Fonseca does not give any definitive answer to the conceptual question of what conditions would justify a well-founded fear—it does not even purport to. The decision only gives an upper bound to the bar that a petitioner has to pass to demonstrate such a fear. Nor does it untangle all the tricky conceptual distinctions between the objective or material basis for fear and the subjective experience of fear. Similarly, *Elias-Zacarias* leaves much undecided as to what the meaning of “political opinion” is. But once the Supreme Court had decided these cases, the lower courts almost universally avoided all opportunities to clarify or elaborate the Supreme Court’s ruling on those questions. Judicial panels in the Courts of Appeals continued to dispute among themselves about whether petitioners in particular cases have met the “at least 10%” standard articulated in *Cardoza-Fonseca*, but they never questioned whether 8% or 9% probability of persecution would do. Nor did they challenge the notion that probabilities of persecution can be meaningfully calculated—even though *Cardoza-Fonseca* in principle leaves those questions open. Similarly, after *Elias-Zacarias*, Courts of Appeals judges generally avoid

questioning the meaning of either “political opinion” or “political neutrality.” Cases with empirical facts that seem to trouble the distinction or make the boundary difficult to draw are instead usually decided with reference to the credibility of the petitioner.

These are specific instantiations of the Supreme Court’s power to reroute legal interpretive disputes from one area of law to others: from questions over the meaning of “well-founded fear” to questions over standards of proof, for example. I refer to this dynamic as the Supreme Court creating *ersatz clarity* in the law. In legal studies this power is often conflated with the Court’s power to settle legal questions authoritatively by establishing binding precedents, but it is distinct, both conceptually and in terms of its practical consequences.

I relate my findings in both chapter 3 and chapter 4 to the law and society scholarship on legal norms and the normative settling of law. This literature provides a helpful vocabulary for describing what it means for legal questions to be settled or unsettled. Halliday (2009) and Halliday and Shaffer (2015) offer an agenda-setting theoretical formulation. According to their theoretical framework, legal principles can be called “settled” once they have passed through a series of stages beginning with the articulation of a problem and ending with widely shared “understandings of meaning reflected in the practices of officials” (Halliday and Shaffer 2015, 42). This description matches well my use of the term “settling” to refer to the concordance of federal judges in their articulations of narrowly defined propositions of law. Halliday and Shaffer go on to propose that the settling of legal issues that are global in scope is likely to develop recursively, with feedback loops between local, national and global developments. They further propose that settling is more likely to occur the more closely a transnational legal order (TLO) is aligned with an issue area (Halliday and Shaffer 2015, 47). A TLO is in turn defined as “a collection of formalized legal norms and associated organizations and actors that authoritatively

order the understanding and practice of law across national jurisdictions” (Halliday and Shaffer 2015, 11).

Asylum is a clear example of a legal issue area that is global in scope. While my empirical reach in this dissertation—the federal appellate courts of a single national jurisdiction—is not broad enough to test Halliday and Shaffer’s hypotheses concerning the recursivity of legal settling or the factors that predict the alignment of TLOs to issue areas, my analysis in chapters 3 and 4 can be read as a treatment of what settling looks like within one small segment of a still-contested TLO. In chapter 4 I discuss the Supreme Court’s occasional citations of foreign law in asylum cases, a brief acknowledgment of the broader global context in which U.S. federal court asylum decision making is situated. My organizational analysis chapters 3 and 4 is thus an extension of the work done by Halliday and collaborators on legal settling to the empirical context of judicial decision making. My engagement with the TLO literature could readily be extended by elaborating on asylum decision making in comparative international context.

In my third empirical chapter (chapter 5), I turn away from the organizational dynamics of the courts to provide a close textual analysis of one set of interpretive disputes that are especially conceptually challenging: disputes in the courts over the meaning of the statutory phrase “particular social group,” one of the five categories of persons who can receive protection under the asylum statute. The disputes over the meaning of “particular social group” are not the most numerous in case law and do not involve the most highly cited cases, but they generate some of the most sociologically complex and interesting interpretive claims by judges. There are, in my coding scheme, 33 distinct interpretive disputes over the meaning of “particular social group.”

In chapter 5, I identify a mechanism by which interpretive disputes proliferate rather than settle over time. Judges tend to generalize incrementally from cases in their written opinions while not being beholden to any clear empirical standards to support their generalizations beyond the case at issue. I rely on an old concept from the sociology of knowledge to describe this aspect of how judges reason in cases and how it contributes to the perpetuation of interpretive disputes. Judicial theorizing about the meaning of “particular social group” has family resemblances to the process of incremental theorizing that Robert Merton described as *middle range theory*. But because judges theorize without relating their legal claims in any principled way to empirical evidence, they do not succeed in producing the kind of unified (i.e., settled and internally consistent) theoretical system that Merton hoped the practice of middle range theorizing would bring about. Judges also rely on locally pertinent decision making heuristics in ways that can exacerbate existing tensions in judicial interpretations. This practice is another manifestation of the non-systematicity of judicial decision making that contributes to the perpetuation of unsettled law.

A final lesson from chapter 5 is that persistent interpretive disputes are especially likely to arise in reference to statutory standards like “particular social group”—a term that is both vague and central to the application of the asylum statute. Some volume of persistent interpretive dispute somewhere in the court system was very likely here, even given that there is scope for an individual court to institute rules and norms to minimize its development (as the example of the Second Circuit in chapter 3 shows). I reach this conclusion on the basis of a review of how widely dispersed interpretive disputes over the meaning of “particular social group” are. Disputes over that question arise in almost every Circuit Court of Appeals (including—once—the very uncontentious Second Circuit), and they have repeatedly arisen in court cases with and

without the involvement of amici curiae and/or powerful and experienced litigators. They have arisen in cases from many different countries and conditions of possible persecution. They have also arisen in non-U.S. jurisdictions that rely on the same statutory language in asylum law: Canada, Germany, the UK and France. Once interpretive disputes over the meaning of “particular social group” do arise in the federal appellate courts, they are more likely to proliferate than to settle, given the judicial tendency towards middle range theory and unsystematic reliance on decision making heuristics.

In my final empirical chapter, chapter 6, I pose the question, “how do judges frame legal questions from cases in the first place?” Part of the puzzle here is that there is often some slippage in just how a legal question is framed even within a final, published opinion—see again the examples in fn. 1 above. More broadly, it is a puzzle to determine how it is that, for example, some cases turn out to be decided on the grounds of whether a petitioner has met the required standard of proof for showing a “well-founded fear,” while other cases with similar facts and similar procedural histories in the immigration courts and the BIA will be decided on grounds of what the meaning of “well-founded fear” in the statute actually is. Put another way, my first three empirical chapters address questions of how the courts work in fact; my final empirical chapter addresses a condition of possibility for the courts to work the way they do and for judges to understand their own work in the terms that they do. This final chapter thus addresses a question that is conceptually prior to the questions I pose in the earlier empirical chapters.

The first part of chapter 6 is dedicated to a close reading of the oral arguments and written opinions in the case of *Cece v. Holder*, which was decided by the Seventh Circuit Court of Appeals en banc in 2013 (733 F.3d 662). This is a continuation of the empirical analysis in chapter 5: many of the essential tensions in judicial efforts to define “particular social group” are

front and center during the oral arguments preceding *Cece*, and these tensions are not entirely resolved even in the final written opinions. I supplement my close reading analysis with interview data from clerks and judges. Using this single case study as an extended example, I identify several factors that bear on judicial framing of questions from cases.

I follow up my close reading of *Cece* with a focus on one of those factors: the strategic interest of judges in framing questions in cases that will allow them to reach a desired outcome known in advance. Here I rely on a broader set of cases for empirical support. The modal dispute type in my database of interpretive disputes in asylum law is a dispute within a judging panel over whether the petitioner has met the required standard of proof. Disputes of this type constitute 207 out of 718 distinct disputes I counted through my coding procedures (see Figure 2.7, chapter 2). I argue on conceptual and empirical grounds in chapter 6 that judges use questions over standards of proof in asylum cases to get the cases to “come out” in a way that accords with their policy preferences. As in the arguments and written opinions in *Cece*, in the many panel disputes over standards of proof we find judges using their limited freedom to frame questions out of cases in order to engage selectively with legal questions.

I rely on new theoretical resources in chapter 6, as the argument is pitched at a different level of analysis from the arguments of the earlier chapters. I argue that the pragmatist action theory developed by Dewey 1950[1922] and Joas (1996) offers the best model for understanding the processes by which judges identify and articulate questions out of cases. In the conclusion of chapter 6 I contrast this pragmatist approach favorably to other models of action, namely Weber’s typological approach and rational actor models that treat instrumental ends as well defined and fixed.

Taken together, my empirical chapters argue that both the formulation of legal questions in appellate court cases and judgments on those legal questions in written opinions are structured by social factors that are little discussed by judges, legal scholars or the existing social scientific literature on judicial behavior. The rules and norms that govern case processing in courts, the small group dynamics among judges, the individual interests of judges—both jurisprudential and political/ideological—all contribute to directing judicial attention towards some problems and away from others. The standard practice of middle range theorizing (without empirical grounding) in judicial opinions, reliance on local decision making heuristics and hesitance to elaborate on unclear Supreme Court precedents are mechanisms that translate close scrutiny and attention to legal questions into unsettled law. My several empirical chapters deal with different contextual factors that play into whether legal questions will be engaged or avoided by judges and, correspondingly, whether there are likely to be many explicit interpretive disputes that persist in case law. Each of the explanatory factors discussed in turn in my several empirical chapters plays a role in determining what legal questions end up being actively engaged in the appellate courts, as well as when and where. The findings should be of interest to sociologists of knowledge, who study the social contextual conditions that give rise to particular ideas and interests. The findings should also be of interest to law and society scholars interested in the evolution of law and legal settling. Finally, although I do not engage directly with literature in the sociology of immigration, I hope the study will also prove interesting to immigration scholars who are interested in the role of the federal courts in setting immigration law and policy.

In the conclusion (chapter 7) I review my empirical findings and discuss how they can be tested and generalized in future research. Because my data collection relies on specific qualities of asylum case law—namely, a stable statute over time and a significant volume of explicit

interpretive dispute among judges—the approach will not work as a method to study knowledge work in every area of law. There are some specific areas of law other than asylum, however, which are promising candidates for study and which would pose a genuine test to the strength of my conclusions here. I identify these areas of law in the conclusion. I also identify potential avenues for further research stemming from different aspects of my empirical work.

A final word on the scope of sociology of knowledge as a disciplinary endeavor is appropriate here. Sociologists of knowledge tend to employ nominalist rather than essentialist definitions of “ideas” and “knowledge,” “knowledge production” and “knowledge work”: “knowledge” is what scientists, artists, professionals, ideologists and so on produce when they advance propositions in their respective domains of expertise. The effectiveness of their knowledge work is generally judged by sociologists by heuristic criteria—it is effective if it wins them wide recognition or acceptance, or if it helps them to navigate the world. For sociologists studying knowledge production in physics, for example (Collins 1975; Pickering 1984; Knorr Cetina 1999), it matters little, or not at all, whether their research subjects have uncovered the true nature of reality. What matters for the analysis is that the sociologist can follow the internal logic, the heuristic utility and the implications of their expert knowledge claims. This nominalist approach suits my purposes here. Throughout this dissertation, the question of which side of a given interpretive dispute has gotten the law right is peripheral to my interest in how judges generate and settle, or fail to settle, interpretive disputes over the meaning of the law.

This stance distinguishes my approach from the mainstream of legal scholarship, which aims for a settled and normatively defensible understanding of the law. This normative orientation is on display in passages like the following from three major studies of the law of refugee status: “a broad and inclusive approach to interpreting ‘political opinion’ is vital to

ensuring the ability of the refugee definition to evolve and accommodate modern refugees” (Hathaway and Foster 2014, 423); “*despite European authority to the contrary*, the specific requirement [of UN Convention Art. 1(C)(5)] to show the ability of the refugee to avail herself of home state protection...makes it clear that...something that goes beyond the simple absence of a risk of being persecuted must be demonstrated” (Hathaway and Foster 2014, 487–488, my emphasis); “thinking and application have progressed substantially in the subsequent practice of States and tribunals [in defining ‘particular social group’], if not always without difficulty” (Goodwin-Gill and McAdam 2007, 77); “the best and most functional definition of [particular social group] can be found in the Board’s decision in *Matter of Acosta*” (Anker 2014, 412). These normative projects chart a fundamentally different course in the interpretation of legal texts from the one I take here. It has not been possible for me to avoid altogether normative position taking on questions of law throughout this dissertation, but I have tried to minimize my direct engagement in that discourse.

1.4. Alternative disciplinary approaches to judicial decision making

Although it is largely absent from sociology of knowledge, the social production of judicial decisions is a well-established topic of investigation in cognitive psychology, cognitive anthropology and, as noted above, in political science and economics. In this final section of the introduction, I discuss some of the insights of these alternative disciplinary approaches and how they inform my analysis in places. My aim is to clarify the relevance of this dissertation to readers outside my core audiences of sociology of knowledge and law and society while also clarifying some of my own framing decisions and theoretical assumptions. In some respects the several distinct disciplinary approaches to judicial decision making amount to a clear and productive division of labor. My focus on organizational rules and norms is not dealt with in the

experimental psychology literature on judgment and decision making, and in turn I have nothing original to contribute on processes or mechanisms within the mind that affect decision making. In other respects, identifying agreement and disagreement across disciplinary boundaries presents serious difficulties, because it is difficult to disentangle divergent disciplinary norms around language, methodology and level of analysis, which might be reconciled, from bedrock disagreements over ontology and epistemology.

Tversky and Kahneman's foundational work in cognitive psychology on biases and heuristics (Tversky and Kahneman 1974; Kahneman and Tversky 1984; Kahneman 2011) provides experimental evidence for the role of unconscious mechanisms like priming⁹ and anchoring¹⁰ in decision making. Others have elaborated this approach with specific reference to legal decision making (Hastie 1994; Connolly et al. 2000, 197–240; Dhimi et al. 2007), although these latter authors have focused more on jury decision making than on judicial decision making, which can be more readily modeled in an experimental setting. This literature provides the appropriate framework for considering the role of judges' Bayesian expectations in their decision making, which in turn limits and relativizes what can be said about the specifically sociological factors in the social production of judicial decisions.

Kahneman compiles evidence from several experimental settings that base rate probabilities—defined as “facts about a population to which a case belongs that are not known to

⁹ Priming refers to the experimental finding that actions, emotions and associations in thought can be influenced by exposure to particular experiences, whether or not the subject is conscious of the association.

¹⁰ Anchoring refers to the finding that “when people consider a particular value for an unknown quantity before estimating that quantity...estimates stay close to the number that people considered” (Kahneman 2011, 119). A surprising extension finding is that considering a random and hence symbolically meaningless value before answering a numerical question can still act as an anchor. Kahneman gives an experimental example of experienced German judges rolling a pair of dice before making a sentencing decision in a hypothetical case (2011, 125–126).

be relevant to the individual case”—tend to be “underweighted, and sometimes neglected altogether,” when a rich contextual story about the case of interest is also provided (2011, 168). This finding generates the expectation that in narratively complex political asylum cases—i.e., ones in which the appellant or government provides a great deal of rich empirical detail and/or additional parties such as legal clinics or amici curiae weigh in during the legal proceedings—the baseline expectation will be defeated more frequently. In the case of political asylum law decisions, the appellant nation of origin provides probably the most pertinent base rate probability. When a judge is faced with an appellant from Haiti or Mexico s/he will likely have the initial expectation that a successful claim is much less probable than when faced with an appellant from Iran or China—even if s/he is not aware of the precise differential rates of asylum grant for nationals of those countries.¹¹

Equation (1), the basic statement of Bayes’s theorem, provides the solution for how judges “ought” to assess the probability of ruling in favor of the appellant, given the idealized assumption that appellant country of origin is the only base rate information available to the judge prior to hearing the case:

$$P(\text{grant}|\text{country } A) = \frac{(P(\text{country } A|\text{grant})P(\text{grant}))}{P(\text{country } A)} \quad (1)$$

¹¹ Asylum grant and remand rates by appellant country of origin have fluctuated significantly over time. Ramji-Nogales et al. (2009, 65–72) document a drop in grant and remand rates from 2001 to 2002 for all countries producing large numbers of asylum claimants in the U.S., as the result of a 2002 Department of Justice policy change designed to streamline case processing. For this reason average grant and remand rates by country across all years are not especially informative, but rates have consistently been lower for Haiti than for other asylum producing countries. The grant and remand rate for Haiti was well below 10% in both 2001 and 2002, while it was over 50% in 2001 for several other countries producing large numbers of claimants (Armenia, Brazil, Cameroon, India, Iran, Russia) (Ramji-Nogales et al. 2009, 70). In many years, the grant and remand rate for appellants from Mexico has dropped below 1% (Executive Office for Immigration Review 2000–2013).

The equation can be solved if we know the overall rate of asylum decisions favorable to the appellant ($P(\textit{grant})$), the proportion of asylum grants made to nationals of country A ($P(\textit{country A}|\textit{grant})$) and the percentage of overall applications from country A ($P(\textit{country A})$). Knowing also the final decisions made in every case, we can assess whether judges seem to be applying Bayesian logic in their decision making in political asylum law or (as Tversky and Kahneman's experiments would lead us to expect) they ignore Bayesian logic when confronted with compelling particularistic narratives (Kahneman 2011, 166–174). In chapter 5 I apply this test to a set of cases featuring petitioners from Central American countries. I find support for Tversky and Kahneman's argument, which in turn supports my rationale for engaging in close textual analysis with the set of cases at issue in chapter 5. These are cases where narrative accounts are highly developed. In chapter 6, I briefly revisit the biases and heuristics literature to propose that reliance on availability heuristics is one factor in how judges frame questions out of cases.

For the most part, however, this dissertation pursues a different set of questions from the psychological biases and heuristics scholars. They have little to say about how decision making might be influenced by the social role of the judge, judicial professional training and sense of professional ethics, political forces or the structure and function of courts as institutions. My core explanatory claims in this dissertation are different from but not directly antagonistic to theirs.

Judgment and decision making are likewise major research topics in cognitive anthropology, which shares a recent history with the cognitive psychology literature but has become a separate enterprise as disciplinary conventions have diverged (Bender, Hutchins and Medin 2010). Some important findings are held in common. For example, both literatures are committed to realism in reaction to the highly stylized analytic model of *homo economicus*, the internally consistent, ends-oriented decision making actor. Both argue that a key to

understanding human decision making in realist terms is the role of heuristics, which provide our evolved response to situations where information is unavailable or high cost. However, Hutchins (1980; 1995) and especially Gigerenzer (Gigerenzer, Todd and the ABC Research Group 1999; Gigerenzer and Engel 2006) frame some of the major organizing concepts of cognitive anthropology—namely distributed cognition and ecological rationality—as direct challenges to Tversky and Kahneman. The disagreements can be difficult to follow because both literatures lay claim to the terms “heuristics” and “bounded rationality.”

Against the biases and heuristics scholars, Gigerenzer draws a sharp separation between bounded rationality and optimization under constraint. The former, Gigerenzer argues, is the experimentally observable manner in which humans make decisions, while the latter fails to make sense on a conceptual level. The notion that human decision making involves optimization of some function covertly reintroduces the unrealism of the model of *homo economicus*, even if we posit that optimization takes place under realistic constraints like cognitive biases and costs of information processing. Gigerenzer insists that this approach is doomed by a paradox at its center: that to model “optimization under constraints is to model ‘limited’ search by assuming that the mind has essentially unlimited time and knowledge with which to evaluate the costs and benefits of further information search” (Gigerenzer, Todd and the ABC Research Group 1999, 11). Instead of identifying human decision makers as logically rational and operating under constraints, Gigerenzer and other cognitive anthropologists have located rationality in the environment—human beings are *ecologically* rational. This means that human cognitive mechanisms work by exploiting “the structure of information in the environment to arrive at more adaptively useful outcomes” (Gigerenzer, Todd and the ABC Research Group 1999, 24).

The clearest examples relevant to legal decision making come from experimental research on juries. Experimental work finds that jurors make decisions through an “active, constructive comprehension process in which evidence is selected, organized, elaborated, and interpreted...to create a summary mental model...of what happened in the events under dispute” (Hastie and Wittenbrink 2006, 259). Ecological heuristics enter into this a narrative construction process when a juror relies on background cultural knowledge to fill out their understanding of the facts explicitly presented to them. Such background cultural knowledge can be straightforward and utterly taken for granted (“a face-to-face threat by someone wielding a weapon would give cause for a reasonable person to fear”) or complex and finely calibrated to the observed environment (“failure to make eye contact means you have something to hide”).

Hutchins’s (1980) ethnographic study of land dispute settlement in Trobriand Island courts provides a model of how ecological rationality can manifest in decision making by judges. Hutchins draws on laboratory experiments by Peter Wason and collaborators (Wason and Shapiro 1971; Wason and Johnson-Laird 1972; cf. Griggs and Cox 1982, a failure to replicate the Wason and Johnson-Laird result) to show that human decision makers are less likely to make logical errors when they are able to solve logic problems by manipulating familiar objects in culturally familiar arrangements (Hutchins 1980, 10–11). Hutchins’s main interest in his Trobriand case study is the differentiation of Trobriand concepts of property and the tracing out of causal relations that govern property ownership. The enduring and generalizable lesson for students of judicial decision making is that we can expect judges to try to reason from culturally familiar concepts and conceptual organization when possible, and we can expect that errors of inference will be higher when judges are forced to reason with culturally unfamiliar concepts and organizations of concepts. The Wason and Johnson-Laird experiment indicates that the error

level here might be very high.¹²

Gigerenzer and his collaborators' difference making argument against Tversky and Kahneman is primarily about theoretical framing and what is meant by the endlessly contested term "rationality." It does not invalidate the experimental evidence amassed by Tversky and Kahneman that anchoring, priming and so on affect human decision making. It does, however, bring into clearer view the role that supra-individual social phenomena—institutions and culture—have in decision making. My arguments throughout this dissertation are consonant with the ideas that (1) judges rely on an elaborate and not entirely internally consistent set of interpretive tools and strategies to decide questions of law and that (2) often "local" conditions surrounding decision making in particular cases are highly significant to the outcome. In chapter 5, I invoke the idea of ecological rationality to account for situations where judges favor consistency in the context of a single case at the cost of perpetuating dispute in the case record at large. In my discussion of framing in chapter 6, I find evidence that judges' heuristics are liable to mislead them when they are compelled to reason about circumstances that are starkly culturally foreign to the United States.

¹² In the Wason and Johnson-Laird experiment, university students were asked to solve a formally identical logic problem using (1) stamped and sealed envelopes (culturally familiar objects in culturally meaningful organization) and (2) labels with letters and numbers written on either side (culturally familiar objects in culturally meaningless organization). The experimenters found that the success rate at task (1) was about 70%, while the success rate at task (2) was about 5%. Hutchins explains, "the difference is that the letter problem is easily represented in terms of prior cultural knowledge...while there is no corresponding cultural knowledge about the relation of letters to numbers on opposite sides of labels whose use is unknown" (1980, 10–11). Recent legal cases forcing judges to think beyond binaries of sex and gender may cause similar conceptual puzzlement. One example: the International Association of Athletics Federations (IAAF) recently submitted South African runner Caster Semenya to sex tests to determine if she was eligible for women's international track and field competition. The IAAF eligibility policy with respect to sex was not clearly defined in advance, and Semenya may have had one of dozens of genetically distinct intersexual conditions. Semenya was eventually cleared to compete but the results of the IAAF tests and deliberations were not made public—the IAAF's conceptual trouble went hand in hand with public relations difficulties (Economist 2009a; 2009b).

So much for cognitive psychology and anthropology. Political science and economics have also made major contributions to the study of judicial decision making, overwhelmingly in terms of what I have characterized as behaviorist models. Their models place a heavy emphasis on the strategic interests of judges, both in terms of their political preferences for certain outcomes and in terms of more personal preferences for leisure time, for promotion or celebrity, for unanimity on the court, etc. The evidence they have compiled that individual strategic interest plays into judicial decision making is overwhelming. At many points throughout this dissertation, I cite that basic discovery as crucial context and foundation to my own arguments, although my emphasis lies elsewhere.

Behaviorist students of judicial decision making have also cast themselves as the heirs of the tradition of “legal realism” (Farber 2001; see also Epstein, Landes and Posner’s advocacy for “defensible realisms,” 2013, 28), establishing a family relation between their work and recent law and society scholarship that claims to represent a “new legal realism” (see Erlanger et al. 2005; Macaulay 2005; Silbey 2005; Suchman and Mertz 2010; and Cross 2013). In chapter 5 I rely on “legal realism” and its implied opposite, “legalism,” as models for generating expectations for how legal questions will be resolved.

The basic claim of legalism is that the law operates (or as a normative theory, it ought to operate) in a “limited domain,” such that “considerations of morality, policy, and politics that would otherwise be part of a wise decision [are] unavailable to the legal system” (Schauer 2004, 1909). Legalism overlaps with but is not identical to formalism, the claim that law is (or normatively, ought to be) a matter of rule following (Schauer 1988). Like the behaviorist scholars, I find legalism to be inadequate as a complete theory of judicial decision making, although I give it credit for playing a larger role than many behaviorists are inclined to do. The

common behaviorist line is well encapsulated by Richard Posner: legalism has not disappeared, “but its kingdom has shrunk and grayed to the point where today it is largely limited to routine cases” (Posner 2008, 1).

My argument throughout this dissertation is broadly within the realist tradition insofar as I point to extra-legal factors influencing judicial decision making, although the mantle of legal realism has been claimed in so many different contexts that it is now difficult to give it any very precise meaning. In chapter 5 I argue against the common reliance on a binary opposition between legalism and realism as the central tension in the explanation of judicial decision making. To rely on such a binary opposition is to sidestep or distort a great deal of complexity in how judges write and self-present, especially beyond the borders of the United States. Those judges who are most explicit and vocal about their interpretive approaches tend to adopt more elaborate models than a balancing of legalism and realism—textual originalism, the economic analysis of law or pragmatism, for example. If the interpretive work of judicial decision making bears any relation to developments at the leading edge of legal theory, then legalism vs. realism will be a poor model for understanding the substantive problems facing judges in the twentieth and twenty-first centuries. Furthermore, the legalism vs. realism division assumes a focus on the United States—with its highly politicized and politically powerful courts—and is of limited use elsewhere. Two major issues in contemporary judicial decision making are (1) the status of international law and (2) the appropriateness of borrowing legal reasoning from the court systems of other nations governed by different constitutional orders (Slaughter 2004; Black and Epstein 2007). Debates over these issues play out both within and outside the United States. In asylum law, the UN *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011[1979]) and interpretive guides to comparative jurisprudence (e.g.,

Hathaway and Foster 2014; Goodwin-Gill and McAdam 2007) are regularly cited in judicial decisions. One of the few asylum cases to reach the Supreme Court included an extended discussion of the meaning of the French word *refoulement* and the legislative intent of the Netherlands' delegate before the UN Convention.¹³ These debates often do not manifest as problems of choosing between legalist and realist interpretive approaches.

The most significant difficulty with the legalism/realism opposition in the context of this dissertation is that neither pole allows much room for us to take the knowledge work of judging seriously. As I have indicated above, one way to think of knowledge work in judicial decision making is to identify those places where the reasoning in a decision is not—and perhaps cannot be, as a conceptual matter—either purely instrumental or purely mechanical. Nor is knowledge work easily locatable on a one-dimensional scale between these two poles.

I have argued here and elsewhere (Owens 2016) that the behaviorist approach to judicial decisions, because it systematically discounts the self-understandings of judges and typically relies only on descriptive statistical data to the exclusion of much else, has a limited explanatory scope that sociologists of knowledge can and should move beyond. Many scholars working within law and economics have begun to pursue a different kind of synthesis that would address some of the same theoretical difficulties. The recent literature on “behavioral law and economics” (Sunstein 1997; Sunstein 2000; Harrison 2007, 63–141; Zamir and Teichman 2014) aims to relativize many traditional assumptions and findings in rational choice theory by considering psychological, evolutionary and genetic impulses to action as well as instrumentally rational (hence conscious) ones.

¹³ See *Haitian Centers Council, Inc. v. McNary* (969 F.2d 1350, 2nd Cir.); *Sale v. Haitian Centers Council, Inc.* (509 U.S. 155; S.Ct.).

Scholars of behavioral law and economics have advocated methodological diversity in empirical legal studies (Engel 2014), as I have done here. Scholarly collaborations and overlaps of theory and method have also created strong links between the psychological biases and heuristics literature and behavioral law and economics (Kelman, Rottenstreich and Tversky 2000; Kahneman, Knetsch and Thaler 2000). Perhaps the most significant substantive difference between behavioral law and economics, on the one hand, and the biases and heuristics literature, on the other, is the enduring commitment of scholars in behavioral law and economics to frame their explanations in terms of the core concepts of rationality and utility as they developed in rational choice theory and neoclassical economics. A group of leading practitioners has characterized behavioral law and economics as different from traditional law and economics primarily by merit of its recognition that actors' rationality, willpower and self-interest are all bounded rather than infinite (Jolls, Sunstein and Thaler 2000, 14–16)—but contra Gigerenzer, they understand this to be the foundation for an optimization problem. The basic model of the actor, as a bounded individual with independent and well-defined preferences, and the basic analytic strategy of modeling utility functions are typically both preserved in behavioral law and economics.

The methodological pluralism of behavioral law and economics raises the possibility of a productive division of labor between this field and the sociology of legal knowledge. The lingering commitments to utility function modeling in behavioral law and economics point in the other direction. A review of Sunstein's edited volume *Behavioral Law and Economics* (2000) cautioned "premature efforts to package [studies in rational choice theory and cognitive psychology] as a new interdisciplinary 'movement' may not be helpful" (Farber 2001, 281). This was almost two decades ago, but it may still be too soon to identify the core elements of

behavioral law and economics that will prove durable as an intellectual movement. The boundaries of behavioral economics remain indistinct, and the field overlaps with the literatures mentioned above. A recent volume on *The Law and Economics of Irrational Behavior* (Parisi and Smith 2005) includes a chapter by Gigerenzer in which he reiterates his insistence on the difference between bounded rationality and optimization (Gigerenzer 2005) and another chapter by Christine Jolls that presents bounded rationality as an optimization problem, motivating the problem by citing Gary Becker, Tversky and Kahneman on biases and heuristics and Jolls's own work with Sunstein and Thaler (Jolls 2005). Because I do not wish to speculate about the future development of behavioral law and economics, I have little to say about it in the rest of this dissertation. The insights from this work that are relevant to my research questions and my findings are covered by the experimental work of the biases and heuristics scholars, which I do discuss.

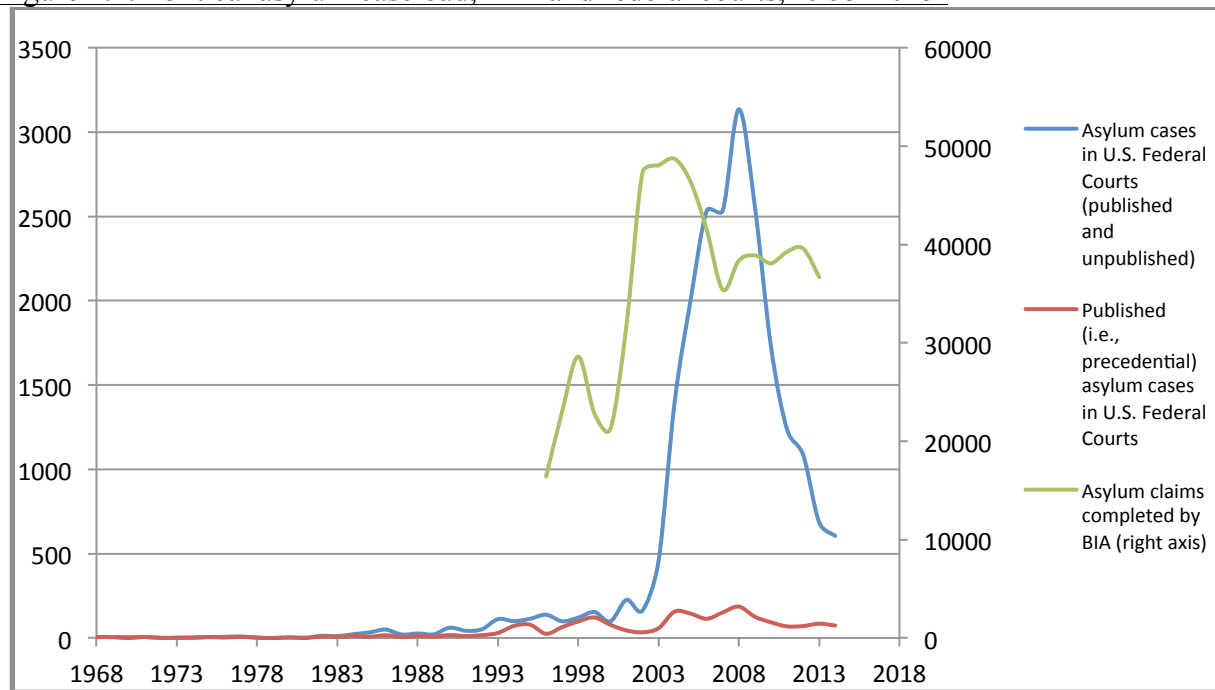
Chapter 2. Methods and Methodological Approach

2.1. Case Search Procedures and Coding

2.1.1. Database of cases

The text data for this dissertation come from a database of 21778 cases (21759 Courts of Appeals cases and 19 Supreme Court cases) decided between January 1968 and April 2015. I compiled this database using the Westlaw database and search engine to identify all federal court cases containing the terms (refugee AND asylum). The almost all of these cases (all but 55) were decided after 1980, when refugee protection on the grounds of “well-founded fear” became part of the statutory law of the United States, in addition to the international treaty obligation it has been since 1968. There was a dramatic spike in the federal court caseload after 2002, which peaked in 2008 (Figure 2.1). Individual political asylum claims that reach the federal courts must be heard first by an Immigration Judge (IJ) and then (if the petitioner appeals the decision) by the Board of Immigration Appeals (BIA). Only then is an appeal to the federal Courts of Appeals possible. The federal court caseload is therefore proximately dependent on the volume of cases that reach the BIA and the relationship between that administrative agency and the federal courts. Hamlin (2014, 75–80) attributes the spike in caseload to inefficiencies and functional failures of the BIA, together with the readiness of Courts of Appeals judges to take on a politicized role in shaping refugee policy. Broader geopolitical events such as the terrorist attacks of September 11, 2001 and statutory changes to asylum law may also be relevant causal factors.

Figure 2.1. Political asylum caseload, BIA and federal courts, 1968–2015¹



The essential purpose of this database is to allow me to identify a set of dyadic disputes arising within and between cases and courts that is *comprehensive* with respect to the legal questions that have prompted disagreement in the federal courts and *representative* with respect to the distribution of those disputes within and between courts. There are some limitations inherent in Westlaw as a source and in the search procedures I used, as I shall outline below, but none of them are fatal to this essential purpose of the database.

Comparisons with more restrictive search procedures indicate that my database contains very few false positives. Of the 21778 cases in my database, 10115 (46%) appear for the Boolean search in Westlaw (asylum AND refugee AND “well founded fear”). In extensive searching and coding of this subset of cases, I identified and eliminated 87 (<1%) false positives. I then examined case by case a random sample of 176 cases from among the remaining 54% of cases containing the terms (asylum AND refugee NOT “well founded fear”). Of these, 171 (97%) were

¹ BIA data from Executive Office for Immigration Review *Statistics Yearbooks*, 2000–2013. Available <http://www.justice.gov/eoir/statistics-and-publications>.

political asylum cases.

Breaking down my database in this way also usefully revealed that the more restrictive Boolean search (asylum AND refugee AND “well founded fear”) captures almost all of the cases of particular interest here—namely, cases that contribute to the development of case law and to legal interpretive disputes. The cases that do not include the phrase “well-founded fear” are mostly cursory dispositions, which contain little or no background information on the case and little or no exposition of the law. In the 176-case sample I examined, 87% (after excluding false positives) were cited zero times in the case record. The mean number of citations was 2.5. None of the cases included a separate dissent or concurrence. Only two were implicated in explicit interpretive disputes according to my coding procedures. Accordingly, while I use the more expansive database of 21778 cases to generate descriptive data about the entire universe of political asylum cases, I rely on the more restrictive set of cases generated by the search terms (asylum AND refugee AND “well founded fear”) to identify case law disputes (compare sets A and B in Figure 2.4 below). A further quality check with the political asylum data collected by Ramji-Nogales et al. (2007, 2009) confirms the viability of this approach.

Errors of omission, or false negatives, pose the opposite threat to the quality of my data. The Westlaw database is comprehensive with respect to Supreme Court decisions and officially published Courts of Appeals decisions. It has extensive but not comprehensive coverage of “unpublished” Courts of Appeals decisions.² Westlaw’s coverage of unpublished opinions varies

² The published/unpublished distinction in reference to judicial opinions is widely referenced but confusing, because almost all “unpublished” opinions today, and for many decades, are available online and in print form in the Federal Appendix (a case law reporter published by West publishing company). “Unpublished” opinions are not recognized by the courts as having precedential value; they are typically quite short and include little or no analysis. There is evidence that judges pay close attention to the designation they give to cases and may deploy the “unpublished” designation for strategic purposes (Law 2005).

by court and has increased over time. Representatives from Westlaw have reported to me that coverage is very sparse before 1968 and very extensive since 1990, so while the database contains apparently very few unpublished political asylum decisions prior to 2001 (Figure 2.1), this may be driven more by the true rarity of unpublished Courts of Appeals asylum cases in those years than by limitations of Westlaw. Circuit Court clerks' offices have been unable to provide me with precise information about the history of their practice in reporting cases to Westlaw before or after 1990.

Cases completed annually by the BIA rose sharply between 1996 and 2004, then declined slightly and leveled off between 2004 and 2013. The sharp rise in Courts of Appeals cases thus followed, after a time lag, a sharp rise in the volume of BIA cases (see again Figure 2.1). This is a useful check on the quality of my data and helps to make sense of the trend in volume of the Courts of Appeals cases, although the BIA statistics have their own limitations. Records of the BIA caseload are not available for years prior to 1996, so I cannot compare Courts of Appeals and BIA caseload trend lines back to 1980. Additionally, the Executive Office for Immigration Review does not disaggregate BIA caseload by type of case. While most of the BIA cases are asylum appeals from the Immigration Courts, not all of them are (Hamlin 2014, 79).

Ramji-Nogales et al. (2007, 2009) built a comprehensive database of asylum cases for two years (2004–2005), using several sources, including the government database PACER, Westlaw and the database compiled by David Law (2005) of Ninth Circuit opinions. Their exhaustive approach to identifying cases for two years of the highest volume activity allowed me to quality check my own data for errors of omission. I compared Ramji-Nogales's 2005 data to mine. Ramji-Nogales et al. identify 377 cases from 2005 that are not in my database; my database, meanwhile, includes 2,007 cases from the year 2005. Under the assumption that Ramji-

Nogales’s dataset and my dataset collectively capture the entire population of cases and include no false positives, my 377 omissions for 2005 amount to 16% of the population. These omissions imply that my calculations of dissent rates by court in chapter 3 will be slight overestimates, but the omissions are overwhelmingly cursory dispositions and therefore not very substantively interesting for the purposes of this dissertation. The distribution of cases by court is similar across the two databases, which encouragingly suggests that there is no major systematic bias by court as to which cases are identified by my search procedures. Compare Figures 2.2 and 2.3. The small discrepancies that do exist suggest that Ramji-Nogales may have systematically failed to capture some Ninth Circuit cases and I may have systematically undercounted from the Fourth Circuit.

Figure 2.2. Caseloads by court, 2005
(data from Ramji-Nogales et al. 2009)

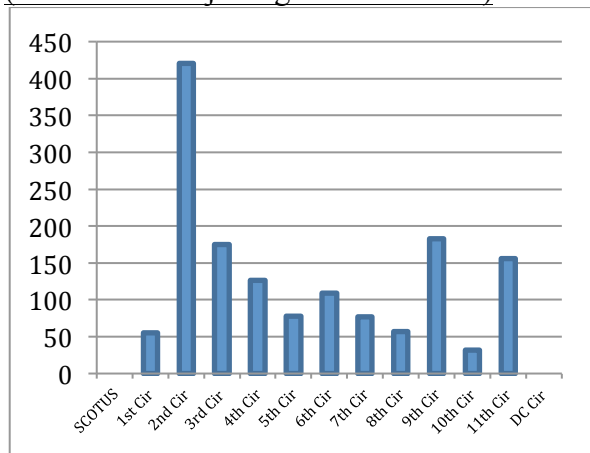
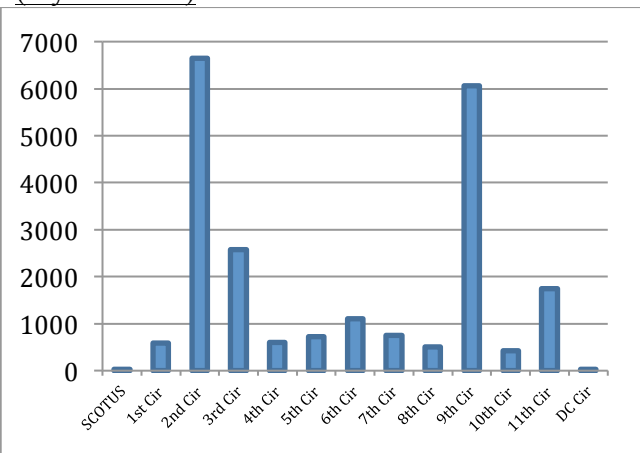


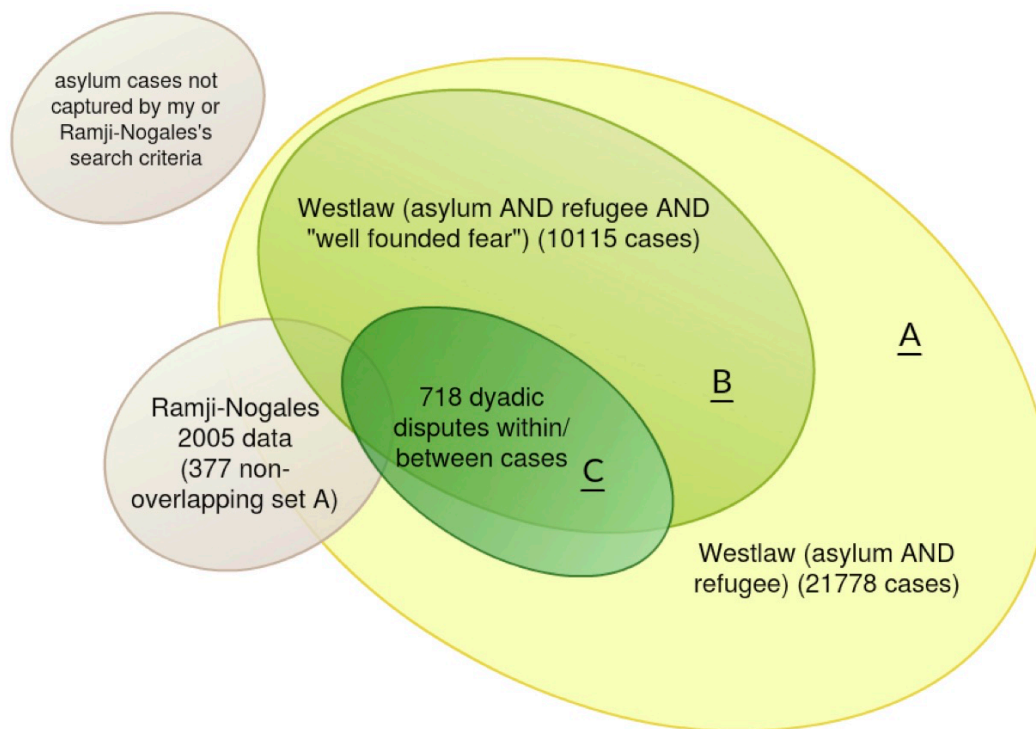
Figure 2.3. Caseloads by court, 1968–2015
(my database)



2.1.2. Database of interpretive disputes

Searching for interpretive disputes within case law was a labor-intensive process, and to make the task more manageable, I restricted my search to those cases generated by a Boolean search in Westlaw for (asylum AND refugee AND “well founded fear”) (set B in Figure 2.4). From an initial set of 10115 results, I eliminated 87 false positives to leave a database of 10028 cases, which I searched for interpretive disputes within panels, within courts and across courts.

Figure 2.4. Database construction search criteria and results



A final quality check justifies my use of this set of cases to search for disputes. As noted above, I examined a random sample of cases generated by the search criteria (refugee AND asylum NOT “well founded fear”) and found them to be almost uniformly irrelevant to the development of case law and interpretive dispute. I conducted the same test with a random 150-case sample of the cases that appear in Ramji-Nogales’s 2005 data but are excluded from set B. These 150 cases cite an average of 5.9 cases and are cited on average 5.3 times. Seventy-nine percent of them are cited zero times in the case law record. Only one of the cases includes a dissent.³ Only one other case is implicated in a dyadic dispute over a question of political asylum law, such as would have been included in my database of disputes if my search procedures had

³ The case is *Dosa v. Gonzales*, 6th Cir. 2005, 143 Fed.Appx. 674. The dissent disputes the majority opinion that the initial Immigration Judge’s adverse credibility determination was supported by substantial evidence.

located it.⁴ I can therefore say with reasonable confidence that my search procedures have not excluded any cases that contribute significantly to disputes in the case law or to the development of asylum law jurisprudence.

I do not directly study the asylum decisions by the Immigration Courts and the BIA. These administrative bodies are focused on fact-finding rather than on legal interpretation, and consequently the messy empirical variation from case to case would be a major confounding factor in any attempt to treat these cases analytically in the way that I treat the federal court decisions, as instances of knowledge work that take place under narrowly constrained conditions and are therefore amenable to comparative analysis. The data I have collected only support a study along the narrow lines of a comparative analysis of appellate court opinions. It would certainly be a worthwhile undertaking to attempt a broader study of the social production of asylum decisions that included attention to the administrative state, the legislature and other social actors, but I hope that by this point the narrower scope of my undertaking here has been sufficiently justified on both theoretical and methodological grounds.

Selection bias in the set of cases appealed to the federal court is likely in two respects. First, the asylum seekers who appeal their cases up to the Court of Appeals are likely to be, on average, better off materially than the average asylum seeker—which is not to say that they are likely to be well off in absolute terms. As I indicated in the introduction, no more than 8% of asylum seekers in any given year clear the procedural requirements and other hurdles to appeal their BIA decisions to the Courts of Appeals. Second, there is a possible underrepresentation of cases that present a strong challenge to the U.S. government's interest, because the government

⁴ The dispute is between *Muhanna v. Gonzales*, 3rd Cir. 2005, 399 F.3d 582 and *Ahir v. Mukasey*, 9th Cir. 2005, 527 F.3d 912. *Ahir* disputes the holding in *Muhanna* that an adverse credibility finding alone cannot support a finding that the appellant's asylum application was frivolous.

does not appeal BIA decisions.⁵ Cases of this type would be, for example, cases in which the petitioner is granted asylum despite having a criminal record or having participated in political activity hostile to the policies of the United States government. There are, however, numerous cases involving petitioners with criminal or politically violent backgrounds that reach the Courts of Appeals, with outcomes that fall out in favor of and against the petitioners, so the bias against these cases is not categorical.

The third and final likely selection bias is that the asylum claims that reach the Courts of Appeals will skew toward weakness relative to the total set of claims made at the administrative level. Asylum seekers with the most convincing claims, and those able to secure the most effective legal representation, will be more likely to gain asylum in the non-adversarial Asylum Office hearings, at the Immigration Courts or the BIA. The potential effect of this selection bias is complicated. The totality of the empirical data suggests that most of the plausible interpretive questions that could arise from the core statutory law governing asylum recognition have been raised in the Courts of Appeals at some time or another. No part of the asylum statute stands out as wholly unaddressed by the appellate courts.⁶ However, if the cases in which claims are presented are systematically weak ones, then legal interpretive questions may be raised in response to these cases in a rather disorderly way, with little analytic separation imposed

⁵ The government does not contest BIA decisions in the Courts of Appeals because the BIA and the Immigration Courts act on the authority of the Attorney General. The Attorney General does have the very broad authority to certify a BIA decision on her own initiative, although that authority is very seldom used (Trice 2010, 1766–1767). I thank a personal contact for bringing this to my attention.

⁶ I observe in chapter 5 that there is an imbalance in the appearance of judicial interpretive *disputes* over some statutory grounds versus others: the meanings of “particular social group” and “political opinion” are highly contested in the courts, whereas the meanings of “race” and “religion” in the asylum context are not. However, there are plenty of asylum cases that are decided on protection of race or religion grounds. These cases simply have not produced interpretive disputes about the statutorily protected ground.

between what are, in principle, distinct legal questions: what constitutes “persecution”? What conditions are necessary to produce a “well-founded fear”? Was the petitioner a member of a protected group? Have they shown that their membership in the protected group was causally linked to the threat of persecution? As one court informant explained it to me: Courts of Appeals asylum claims “are so weak...probably weak across the board. They’re not very compelling persecution claims [and] that leads to judges not having as much interest in reviewing the claims carefully...They don’t spend as much time trying to figure out how to conceptualize the field and so they end up with [worse] precedents.”⁷ This selection bias towards weak cases does not make the asylum decisions less sociologically interesting as knowledge work or less vitally important for asylum seekers, but it may make the dynamics of judicial knowledge work in asylum cases less generalizable to areas of law where judges are on balance more highly motivated and intellectually engaged.

From a baseline of 10028 cases—those containing in the full text (asylum AND refugee AND well founded fear), with false positives eliminated—I identified 718 interpretive disputes between cases over refugee status determination and procedural questions related to refugee status determination (set C, Figure 2.4). I located panel disputes with a full-text search for (dissent OR dissenting OR concur OR concurring), which yielded 532 disputes arising within 436 cases. When a dissenting or separately concurring opinion identified multiple legal disagreements with the majority, I coded multiple disputes instead of one. For identifying disputes across cases and across courts, I relied on Westlaw’s system of coding negative case histories (explained below). Westlaw has some limitations for this purpose, but it is by far the best available resource.

⁷ Former clerk, Second Circuit Court of Appeals. Interview with the author, 14 July 2015.

There is almost no ambiguity as to the presence or absence of an interpretive dispute within an appellate court panel: when there is a dissent, there is an interpretive dispute; when there is a concurrence, it is usually made clear whether there is an interpretive dispute or not. Disputes that arise when the Supreme Court overturns Courts of Appeals decisions are usually signaled equally emphatically. The very small number of such cases also makes them easier to handle.

The sociological and legal meaningfulness of “interpretive dispute” is more difficult to pin down precisely when it occurs between cases but *not* between courts in a hierarchical relationship—i.e., intracircuit splits and Circuit Court splits. The basic principle of my coding scheme has been to reflect as closely as possible the explicit, systematic understanding—the “logic” as it is sometimes called—of the law. To that end, I have relied on Westlaw’s negative case history indexing to identify interpretive disputes between cases and between courts. This feature of Westlaw compiles a record of later cases that have made explicit negative mention of a given case. Many cases have at least some negative case history, and a few are very heavily indexed, with many other cases standing in antagonistic relation to them. Figure 2.5 shows what the database interface looks like, taking as an example a Second Circuit case (*Stevic v. Sava*) that was overturned by the Supreme Court and cited negatively by several other cases.

Figure 2.5. Westlaw's negative case history indexing interface⁸

List of 9 Negative Treatment for Stevic v. Sava

Negative Treatment

Negative Direct History

The KeyCited document has been negatively impacted in the following ways by events or decisions in the same litigation or proceedings:

1. [Stevic v. Sava](#) **KEYCITED** 

678 F.2d 401 , 2nd Cir.(N.Y.) , May 05, 1982

Certiorari Granted by

2. [Immigration & Naturalization Service v. Stevic](#)

460 U.S. 1010 , U.S.N.Y. , Feb. 28, 1983

AND Judgment Reversed by

3. [I.N.S. v. Stevic](#) **MOST NEGATIVE** 

467 U.S. 407 , U.S.N.Y. , June 05, 1984

Negative Citing References (6)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Rejected by	 1. Marroquin-Manriquez v. I.N.S. 699 F.2d 129 , 3rd Cir. Alien sought review of Board of Immigration Appeals order of deportation. The Court of Appeals, Aldisert, Circuit Judge, held that: (1) alien had not presented evidence showing...	Jan. 27, 1983	Case		 4 F.2d
Disagreement Recognized by	 2. Galaviz-Medina v. Wooten 27 F.3d 487 , 10th Cir.(Colo.) Alien filed petition for writ of habeas corpus seeking review of administrative denial of discretionary relief from deportation. The United States District Court for the District...	June 20, 1994	Case		 1 F.2d
Called into Doubt by	3. Reyes v. I.N.S. 747 F.2d 1045 , 6th Cir. Alien appealed from denial by the Immigration Appeals Board of the Immigration and Naturalization Service of her petition for asylum or withholding of deportation. The Court of...	Aug. 23, 1984	Case		 4 F.2d
Called into Doubt by	 4. Saballos-Cortez v. I.N.S. 749 F.2d 1354 , 9th Cir. Alien sought review of order of the Board of Immigration Appeals denying application for withholding of	Dec. 21, 1984	Case		 2  4  5 F.2d

⁸ Image credit: Westlaw. Available <http://www.westlawnext.com>.

Westlaw relies on a finely differentiated typology of terms to indicate the degree of negativity in a citation (examples of these categories are visible in the far left column, labeled “Treatment,” in Figure 2.5). These categories of negative citations range from “distinguished by,” which never signals an interpretive dispute, to “rejected by,” “abrogated by” or “overruled by,” which almost always indicates a dispute (although not always one over a question of political asylum law). “Distinguished” cases never signal interpretive disputes because they entail only judges explaining why the legal question, the controlling precedent and/or the relevant facts are decisively different from one case to the next.

I treated these different indexing terms somewhat differently in compiling my database. I coded disputes as occurring between panels within the same court, or between the several Courts of Appeals, whenever Westlaw’s negative case history indexed an *explicit disagreement within case law over a question of political asylum law*. Thus, I ignored all negative case history indexing that: (1) identified cases as superseded by statute; (2) involved a dispute over a question not centrally related to political asylum procedures or refugee status determination; (3) identified a case as “overruled on other grounds” but in the context of political asylum law was cited positively or neutrally; or (4) involved a later case “distinguishing” the empirical facts of an earlier case or “calling into doubt” or “disapproving of” an earlier decision without raising an explicit dispute over a question of law.

Westlaw’s negative case history indexing is compiled by trained legal researchers (it is not the product of computational content analysis), and it is widely used by lawyers, judges and clerks in legal research. The indexing scheme thus plays a significant role in developing the logic of the law, and it is self-reinforcing as a model of that logic and of the pertinent citation links between cases. When lawyers arguing cases and clerks and judges authoring opinions do their

legal research, they frequently rely on Westlaw's characterization of what is the controlling precedent over what issue, where different interpretations of law have occurred in the courts and so on.

The Westlaw indexing scheme is, however, sometimes ambiguous as to whether an interpretive dispute has appeared in the case record (cases are "called into doubt by" and "disapproved of by" one another). Westlaw also indexes one class of cases that are *not* recognizable as meaningful disputes by legal scholarship but that I argue *are* sociologically meaningful as interpretive disputes. These are cases "not followed as dicta by" other cases. Judges refer to passing observations that they do not intend to have the force of law as "obiter dicta": sometimes they mark their disagreement with claims that have been made as dicta in earlier cases, but they do not interpret these divergences themselves as legally meaningful disputes. What is sociologically relevant here diverges from what is legally relevant: I code disputes even when one side of the dispute is a claim made as dicta. The exception is when a dicta claim is made in speculative rather than propositional form, e.g., "it might be that an appellant in such-and-such a situation would have a valid claim to asylum status, but the court does not need to decide that issue today." I do not code such speculative formulations as contributing to interpretive disputes.

The Westlaw scheme does not index any *implicit* disputes across cases, and for that reason it certainly excludes some information that would, other things equal, be interesting and useful to have. By way of analogy, one can think of the way intellectual history is written. In writing an intellectual history of political theory, it would usually be an unnecessary and counterproductive methodological limitation to focus only on explicit disagreement among the major political theorists as signaled through citation. We can safely assume that a contemporary

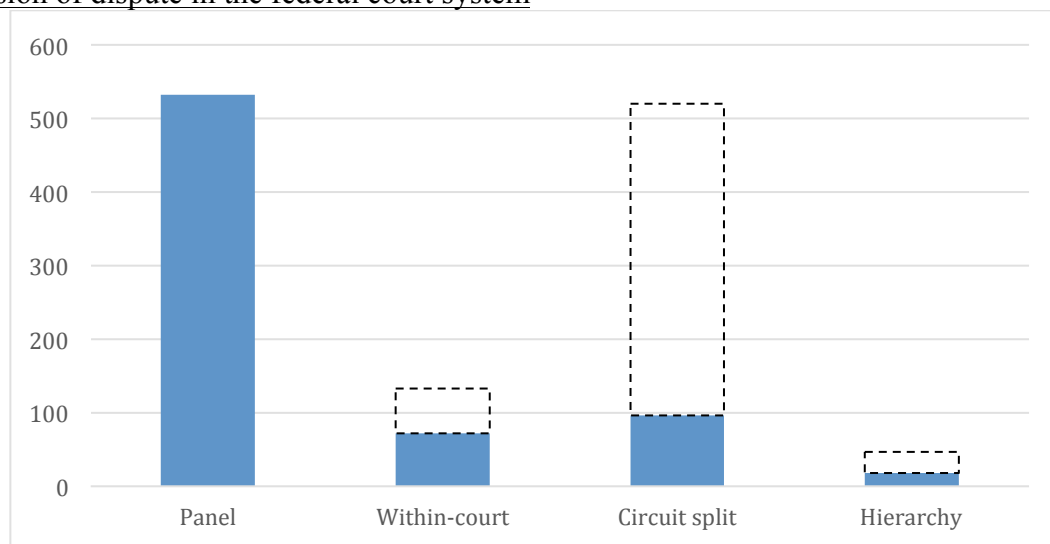
author has Hobbes and Rousseau in mind when s/he discusses the state of nature, and Kant when s/he uses the phrase “perpetual peace,” even if those authors are not mentioned by name. By contrast, strictly limiting attention to disputes signaled via citation is neither excessively distortive nor very easily avoidable in the study of interpretive disputes in case law.

For all practical purposes a dispute in case law does not exist unless it is acknowledged in the case law record, and the authors of judicial opinions are highly conscious of this. An Eleventh Circuit opinion that rules in opposition to an unpublished and forgotten opinion from the Seventh Circuit without acknowledgment does not create a Circuit Court split of which the Supreme Court or other Circuits will take notice. Nor does the unacknowledged Seventh Circuit opinion matter to the further development of case law or to the concrete determination of future asylum claims. Some Circuits even note explicitly in the text of their unpublished opinions that they do not create binding precedent. A study of interpretive disputes in judicial decision making would need more theoretical motivation, and might be on shakier theoretical ground, if it diverged from the law’s own logic as to what constitutes an interpretive dispute. What is more, as a practical matter it would be nearly impossible to find and code consistently all implicit interpretive disputes from any large set of cases. Attempting this expanded record of interpretive disputes would introduce coder reliability and consistency problems much more acute than the problems that develop from reliance on the Westlaw indexing system.

In my coding of disputes I have excluded interpretive disputes over questions not directly related to refugee status determination or legal procedure. For example, disputes about the scope of due process protection couched as questions of Constitutional law were excluded; disputes about whether the 1980 Refugee Act extends due process protections to asylum seekers intercepted at sea were included. My list of 718 disputes takes interpretive disputes, rather than

dyads of cases, as the fundamental unit. When two cases dispute two questions of law, I coded two disputes rather than one. In the coding of Circuit Court splits, when more than two Circuits were implicated in the dispute, I coded one dispute rather than multiple. I followed the same procedure for instances where the Supreme Court overturns multiple rulings at once. Figure 2.6 shows the breakdown of disputes by the dimensions in which they appear within the legal system. The dashed lines indicate how the list expands when we take dyads of cases rather than interpretive disputes as the fundamental unit of analysis.⁹

Figure 2.6. Count of interpretive disputes (solid bars) and disputing dyads (dashed lines) by dimension of dispute in the federal court system



I identified 16 categories of interpretive disputes that can in turn be collapsed to five broad problems in the law: “whom does the statute protect?” (1–6 in Figure 2.7 below); “who no longer needs protection?” (7–8); “who is not deserving of protection?” (9–10); “what are the appropriate evidentiary standards?” (11–12); and procedural questions (13–16). A trivial number

⁹ The dashed lines in Figure 2.6 indicate that a significant number of interpretive disputes spill over into a network of cases rather than remaining isolated between two cases. They are not instructive of much beyond that, however; in some ways they are only a measure of how expansive judges are in their citation practices. If a split among multiple Circuits becomes entrenched, it is common for judges in their opinions to cite many cases on either side of the dispute to frame their own position.

of panel dissents (three) did not specify the nature of the disagreement.

Figure 2.7. Coding of categories of dispute

Count of cases Dispute category	Dimension of dispute				
	Panel dispute	Intracircuit split	Circuit split	Hierarchy	Total
1. Conditions for “well-founded fear”	21		2	1	24
2. Designation of “persecution”	39	13	10	2	64
3. Designation of “particular social group”	15	7	11		33
4. Designation of “political opinion”	18	1	1	1	21
5. Designation of “religion”	2				2
6. Statutory language—other	9	1	2		12
7. Questions surrounding internal flight alternative	2		1		3
8. Questions surrounding resettlement	2		2		4
9. Designation of “particularly serious nonpolitical crime,” etc.	14	2	2	2	20
10. Designation of “persecutor bar”	2	3		1	6
11. Standards for asylum and withholding of deportation distinguished	7	2	2	1	12
12. Standards of proof	207	9	16		232
13. Procedural—Chevron deference questions	19	3	8	1	31
14. Procedural—jurisdiction	38	14	17	3	72
15. Procedural—standard of review	50	8	6	1	65
16. Procedural—other	84	9	16	5	114
17. Not specified	3				3
Total	532	72	96	18	718

A few formal features of political asylum law in the United States need to be explained in order for Figure 2.7 to be fully understood. In the following paragraphs, I briefly outline the most relevant points. Appendix A gives further exposition with examples of difficult-to-code borderline cases.

The core definition of “refugee” as someone who has “well-founded fear of persecution” “for reasons of” “race, religion, nationality, political opinion or membership in a particular social group” gives rise to the first six categories of dispute. Disputes I have coded as concerning “conditions for ‘well-founded fear’” include, for example, the question addressed by the Second Circuit in *Stevic v. Sava* (1982, 678 F.2d 401) and then the Supreme Court in *INS v. Stevic* (1984, 467 U.S. 407) as to whether a “well-founded fear” depended on a “clear probability” of persecution or if some lesser probability would suffice. Disputes I have coded as concerning “designation of ‘persecution’” mostly concern disputes over whether particular acts—e.g., death threats made by telephone, forced sterilization in enforcement of government family planning policies, etc.—constitute “persecution.”

The UN Protocol and the 1980 Refugee Act both make provision for certain classes of people who do not need protection: those who can without undue burden resettle in some part of their home country and be safe from persecution (the “internal flight alternative”) and those who have established nationality in another country and enjoy state protection from persecution in that country (the UN language) or have been “firmly resettled” (the prevailing standard in U.S. case law) in a third country where they are safe from persecution. The UN Protocol and the Refugee Act also both make provision for those who are undeserving of protection. This includes those who have “committed a crime against peace, a war crime, or a crime against humanity,” those who have “committed a serious non-political crime outside the country of refuge prior to [their] admission to that country as a refugee” and those who have been “guilty of acts contrary to the purposes and principles of the United Nations.”¹⁰ The language of the Refugee Act also excludes from protection on the grounds of a “particularly serious nonpolitical crime” and adds

¹⁰ United Nations. 1951. *Convention Relating to the Status of Refugees*. Ch. 1, Art. 1(F). Available <http://www.unhcr.org/3b66c2aa10.html>.

two exclusionary conditions: the “alien ordered, incited, assisted, or otherwise participated in the persecution of any person [on the UN’s protected grounds]”; and “there are reasonable grounds for regarding the alien as a danger to the security of the United States.”¹¹ A separate section of the Immigration and Nationality Act holds that aliens, including asylum seekers, are inadmissible if they have committed “crimes involving moral turpitude.”¹²

The UN Convention and Protocol and the U.S. Refugee Act all begin with the legal definition of “refugee,” but equally fundamental to all three documents is the commitment to “non-refoulement” (non-expulsion or non-return). The UN language has it that “no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” on protected grounds.¹³ The commitment to non-refoulement is also expressed in the Convention Against Torture (CAT, ratified by the U.S. in 1994), without the condition that the alien in question already be recognized as a refugee. The CAT mandates that the U.S. may not deport aliens to countries where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁴ A settled point of U.S. case law holds that the “substantial grounds” requirement for protection under the CAT requires a showing of “clear probability” of persecution—a higher standard than the “well-founded fear” showing required for recognition as a refugee.

Many refugee status determination cases turn on procedural questions, and disputes between judges over the correct legal response to these procedural questions are common. The

¹¹ *Refugee Act of 1980*. Public Law 96–212. *U.S. Statutes at Large* 94, 102. Title II § 202(h)(2).

¹² 8 U.S.C.A. §1182(a)(2)(A)(i).

¹³ United Nations. 1951. *Convention Relating to the Status of Refugees*. Ch. 5, Art. 33. Available <http://www.unhcr.org/3b66c2aa10.html>.

¹⁴ United Nations. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Part 1, Art. 3. Available <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

most commonly disputed procedural issues are the court's jurisdiction to review certain questions, the standard of review that is to be applied and the application of the principle of statutory interpretation known as "*Chevron* deference." The universally recognized jurisdictional grant for the federal courts in these cases is that they will review questions of law with deference to the BIA decision and will take the facts of the case as given; there is, however, a great volume of dispute over what this means in practice. The principle of *Chevron* deference, established in the Supreme Court case *Chevron USA, Inc. v. National Resources Defense Council* (1984, 467 U.S. 837) holds that the federal courts owe deference to bureaucratic agencies on the interpretation of statutes that those agencies administer. The principle is commonly expressed in terms of a two-step test: if (1) the statute is ambiguous or does not address the question at issue and (2) the agency's interpretation of the statute is reasonable, then the courts ought to defer to the agency's decision making. The application of both steps has been contested in federal courts.

Finally, it is important to recognize that the development of statutory law in the U.S. imposes structural constraints on the interpretive disputes represented in Figure 2.7. In addition to the 1980 Refugee Act, the major statutory changes in refugee law in the U.S. since 1951 have come from the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and the REAL ID Act of 2005. Both imposed some measures to make it more difficult for asylum seekers to gain admission to the United States. IIRIRA, passed by a Republican Congress and signed by President Clinton, restricted the flow of asylum seekers to the Immigration Courts by empowering border control officers to conduct interviews with would-be asylum applicants and, in the absence of demonstration of a "credible fear," remove them before they enter into the refugee status determination process. It also imposed a one-year time limit on applying for asylum after entering the country and restricted Courts of Appeals jurisdiction to review

discretionary denials of asylum by the Attorney General. The REAL ID Act imposed increased scrutiny on identity verification for asylum appellants, demanded a higher level of deference from the Courts of Appeals to BIA determinations and restricted Court of Appeals jurisdiction to hear appeals. Finally, the REAL ID Act raised the burden of proof on petitioners by introducing the condition that “the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *a central reason* for persecuting the applicant” (my emphasis).¹⁵ The “centrality” of a protected ground to the threat of persecution had not previously been expressly considered in statutory law.

IIRIRA and REAL ID both introduced bottlenecks for asylum seekers at the beginning of the pipeline, and these bottlenecks have produced huge growth in both the number of total claims arising in the federal courts and the number of disputes occurring within and between courts. Legislative action since 1980 has thus succeeded in dramatically limiting the number of petitioners granted asylum in the US, but at the same time it has exacerbated rather than resolved legal uncertainty as to the protections afforded by asylum law. It has likely increased efficiency of case processing in the Immigration Courts and the BIA, and it has probably increased the volume of cases raising procedural questions that reach the appellate courts relative to the volume of cases raising core definitional or conceptual questions.

2.2. Interview Data

I interviewed 36 former Courts of Appeals term clerks, two Courts of Appeals judges from the Seventh Circuit and staff attorneys from the Second, Fourth, Fifth, Seventh and Ninth Circuits for a total of 43 interviews with informants who have worked in the Courts of Appeals. Interviews with clerks were between 45 minutes and an hour and a half, with most interviews

¹⁵ *REAL ID Act of 2005*. Public Law 109–13. *U.S. Statutes at Large* 119, 302. Title 1 § 101(a)(3)(B)(i).

lasting around one hour. Judge and staff attorney interviews were approximately 30 minutes (one conversation, with a representative of the Fourth Circuit staff attorney's office, was conducted via email).

Among the term clerks, I spoke with representatives from the Supreme Court and every Circuit Court of Appeals save the Tenth Circuit and the Federal Circuit. Those who clerked on the Supreme Court (three total) had all held a prior clerkship position on one of the Courts of Appeals, as is now a de facto requirement for Supreme Court clerks. I weighted my sample towards representatives of the Second and Ninth Circuits (seven and nine interviewees, respectively). The Second and Ninth Circuits hear the majority of asylum cases between them, and my analysis in chapter 3 focuses on the organizational features of those two courts. My interviewees all served one-year terms as clerks to a single judge and completed their clerkships between 1995 and 2015, with the majority having clerked in 2010 or later.

My clerk interviewees numbered 26 men and 10 women. Men responded to my interview requests at a higher rate than women, but the imbalance in my set of respondents also reflects an apparent gender imbalance in the general population of federal Courts of Appeals clerks. The post-clerkship employment of those I interviewed ranged across private practice, government and academia. My interviewees included former clerks of judges and Justices who are famous in the legal community and former clerks of judges who are relatively unknown. Some had clerked for active Courts of Appeals judges while others had clerked for judges who had attained senior status.¹⁶ I found interviewees through personal contacts and snowball sampling, use of the *Judicial Yellow Book* directory, through searching the alumni database of one elite law school,

¹⁶ At age 65 or after 15 years on the bench, Circuit Court judges may elect to take senior status. They can continue to sit on panels to decide cases, but they do not sit on en banc panels and their administrative responsibilities are otherwise reduced.

junior faculty lists at several other law schools and junior associate lists at several large law firms. I also targeted some clerks from particular courts who would have been in a position to work on some recent and particularly significant asylum cases. I contacted 114 former clerks to get 36 interviews, for an overall positive response rate of 31.6%. The lowest positive response rates by court were for the Tenth (0/4) and Seventh Circuits (3/39). My response rate from the Seventh Circuit was unusually deflated because I asked a number of interviewees if they would be willing to discuss a specific case with me (*Cece v. Holder*, discussed in detail in chapter 6), and clerks in general were much more willing to talk about court organization and process than about specific cases.

Most clerk interviewees permitted me to record interviews on the condition of anonymity. When I quote them in what follows, I identify them as “a former clerk on the *N*th Circuit” and provide no other identifiers. I have sought corroboration from multiple sources whenever I have relied on information that is not available in the public record. In chapter 3 I report on the differentiated practices of some particular chambers. In some instances I name those chambers, but I do so only when the identity of the judge in question is important to the argument and when the details I report on are plausibly knowable by employees of the court outside of that chambers. Thus, a report about the work organization of Judge A’s chambers has been corroborated by at least two sources unless otherwise noted in the text, and such a report may have come from judges, from clerks who worked for Judge A or from clerks who worked for a different judge on the same Circuit.

I contacted eight of the nine active judges on the Seventh Circuit Court of Appeals to request interviews specifically pertaining to their ruling in one major recent case heard en banc (*Cece v. Holder*, discussed in detail in chapter 6). Only one (Diane Wood) was willing to discuss

that specific case with me. One other (Frank Easterbrook) agreed to speak with me about the judicial decision making process in general.¹⁷

2.3. Comparative Case Study Methodology and the Network Structure of Interpretive Disputes

Although I rely on qualitative interviews and some statistical analyses of a large database of cases and interpretive disputes, the core of the analysis in this dissertation is close textual analysis and comparative case study. Distinct advantages recommend small-n comparative case study as a method in the social sciences. Important rare events like revolutions and civil wars often cannot be studied in sample sizes large enough to permit valid statistical inferences, and the conceptual work of answering the questions, “what is a case?” and “what is this case a case of?” can be informative in themselves, although they are largely precluded in the quantitative analysis of large datasets. The latter of these two issues is the primary motivation for my methodological approach, although the former issue (the small-n problem) is also relevant in chapter 4, which examines the small number of Supreme Court asylum cases, and chapter 5, which focuses on the handful of cases that engage at length with the meaning of “particular social group.”

My cases are dyadic pairs of judicial opinions that between them generate a dispute over a question of law. This analytic framing, as I have noted in the introduction, is uncommon in sociolegal studies. I adopt it because it usefully focuses our attention on knowledge work in judicial decision making more directly than does a focus on decision outcomes as cases. It also departs from the model assumptions of the two most influential approaches to case study method in sociology, namely, the methods of difference and agreement adapted from John Stuart Mill

¹⁷ The single active Seventh Circuit judge with whom I did not request an interview was Richard Posner. Posner is a major interlocutor with this work through his scholarship on judicial behavior, as well as a major subject of analysis in chapter 3, and I thought it would be counterproductive to make him *also* one of only three judge informants in my interview study. If more of his Seventh Circuit colleagues had agreed to interviews, I would also have sought out an interview with Posner. But the majority of the judges declined to speak with me.

(Skocpol 1979, 36–40; see also extensions and challenges in Lieberman 1991 and Mahoney 2000) and Charles Ragin’s comparative qualitative analysis (Ragin 2000; Ragin 2008). Both approaches assume the independence of cases, which is an untenable assumption in the analysis of interpretive disputes arising in common law appellate court cases. My comparative analysis therefore eschews the attempts at formal logical validity in the comparative frameworks of Skocpol and Ragin. More appropriate to my data are case study techniques that treat cases as temporally and causally related: in particular I rely on process tracing (George and Bennett 2005; Bennett 2008) and techniques of network analysis.

I adopt George and Bennett’s close attention to the structural constraints on comparison imposed by ordering of cases in time. This matters most in chapter 5, but it informs the analysis of the other empirical chapters, too. As I have noted above, I do not treat opinions as comparable if they were decided under different statutory regimes.

The interpretive disputes I study form a network (Figure 2.8). Disputes between cases are embedded in the much larger network of all asylum cases linked by explicit citation. Figure 2.9 is a partial map of that larger network: it shows the cases included in the Figure 2.8 network plus all of the cases that they cite in depth (as opposed to showing only the negative citation links, as in Figure 2.8). I have used Westlaw’s system of indexing depth of citations (see again Figure 2.5) to filter the network in Figure 2.9 to show only the most in depth citations. These add up to approximately 800 out of 17500 total first-order citations from the asylum cases implicated in disputes. The larger network of 17500 ties (not pictured) and several thousand additional nodes is so dense that its visualization is not at all instructive. A complete map of the network citations linking all 22000 asylum law cases to the cases they cite would be far larger and denser still.

Figure 2.8. Network of dyadic disputes in political asylum law, excluding panel disputes

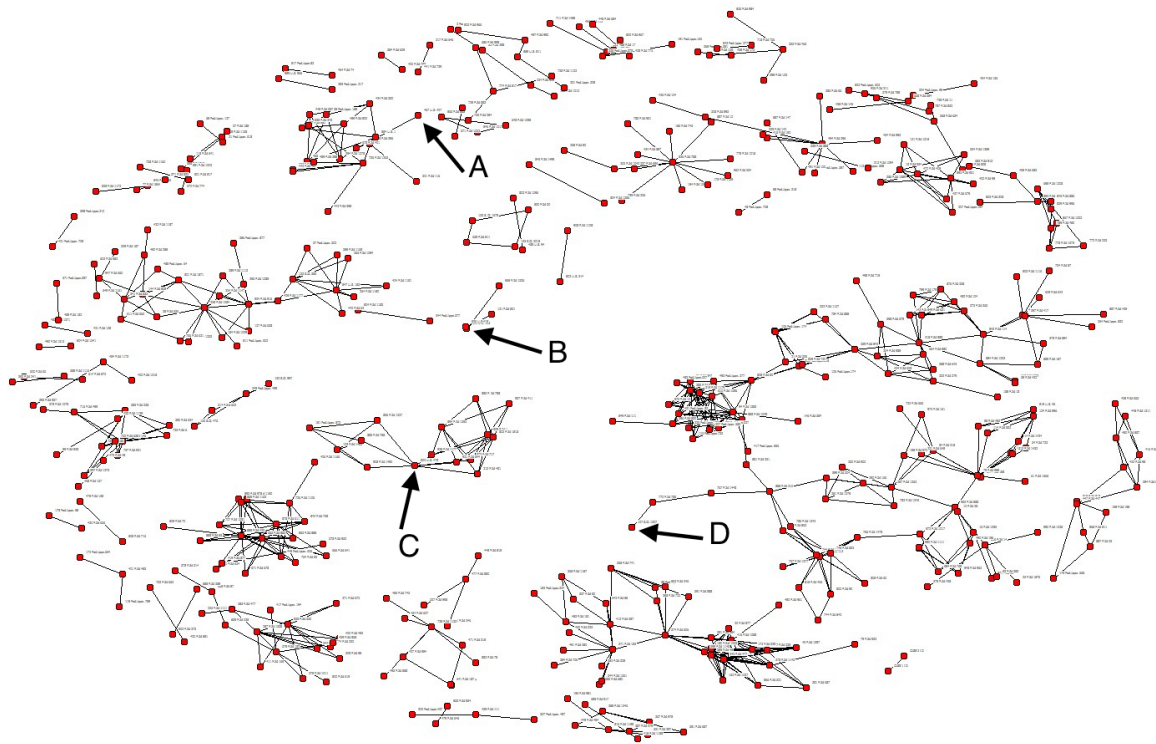
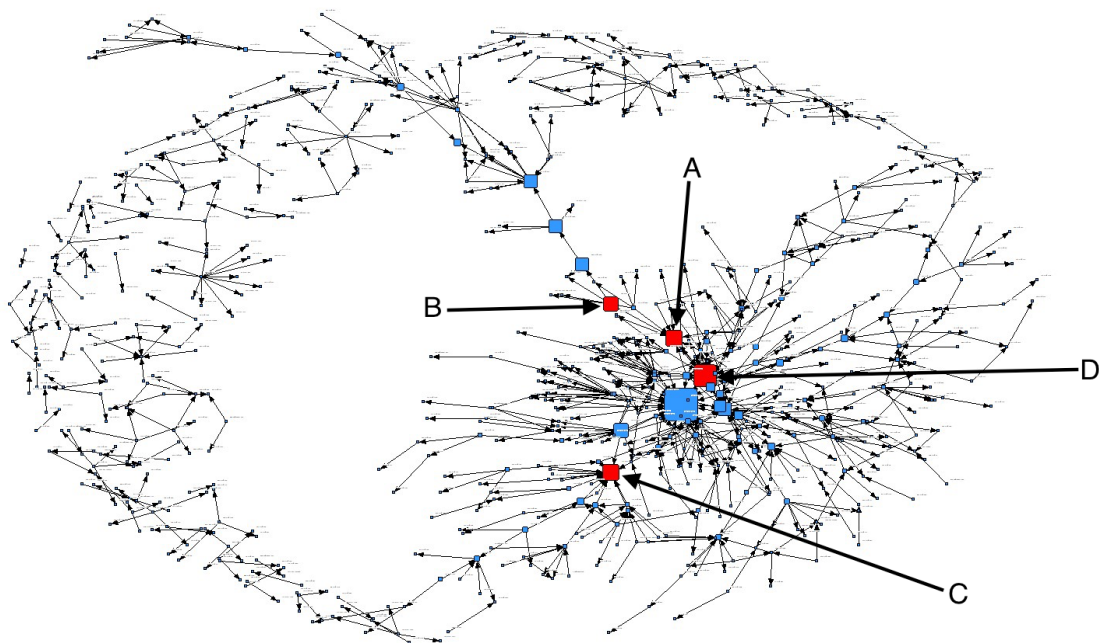


Figure 2.9. Network of dyadic disputes in political asylum law and their first-order linked cases (in depth citations only)



There are two lessons to draw from the visualizations in Figures 2.8 and 2.9. The first is that the Supreme Court plays a much less central role in the negative citation network than in the general citation network. Supreme Court cases are at the core of the densely connected citation network shown in Figure 2.9. The nodes in Figure 2.9 are sized proportional to their betweenness centrality scores (a count of the number of times a given node is an element in the shortest bridge between two other nodes in the network—see Wasserman and Faust 1994, 178, 188–191). In a case law citation network like this one, betweenness centrality can be interpreted as a measure of which cases are likely to be important as precedents or otherwise important in propagating legal principles from one context to another, and here most of the largest nodes are Supreme Court cases, including the four that are labeled A, B, C and D.¹⁸

In Figure 2.8 (the network of dyadic disputes only), by contrast, the Supreme Court cases are not easy to spot. They are not central in the dispute network. The arrows and labels A, B, C and D mark out the same four highly cited Supreme Court cases in both Figures: *INS v. Stevic*, *Sale v. Haitian Centers Council, Inc.*, *INS v. Elias-Zacarias* and *INS v. Cardoza-Fonseca*, respectively. Figure 2.8 shows that three out of four of these are linked *in dispute* to only one other case. Only *Elias-Zacarias* (labeled C) could be called a central node in the dispute network; by any measure, all of the others are peripheral. The relative insignificance of major Supreme Court opinions in the dispute network gives us some cause to question the commonsense notion that the Supreme Court is overwhelmingly important in guiding the development of judge-made law. I argue in chapter 4 that the reality of the Supreme Court’s role

¹⁸ The largest node of all (not labeled, to the lower left of node D) is the Supreme Court case *Chevron*, the key administrative law case discussed above on p. 65. Thus the most central case in the citation network of asylum law cases is not itself an asylum case. This fact teaches us something about the intellectual structure of asylum jurisprudence (it is subordinated to general administrative law jurisprudence), but it is not highly relevant to the main findings of this dissertation.

is nuanced in a way that is not well captured by straightforward statements of this commonsense idea. The Supreme Court is typically *not* contributing to the conceptual elaboration of law that takes place in small but dense clusters of interpretive disputes.¹⁹

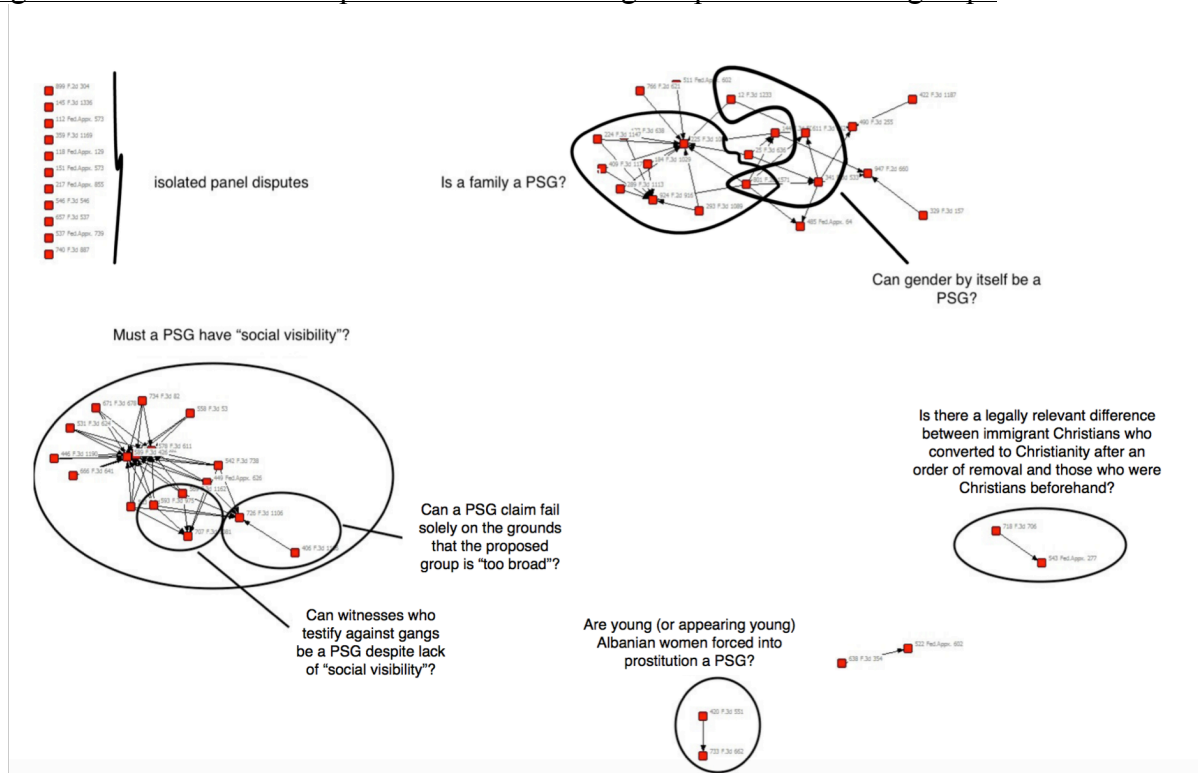
The second important lesson from the network depictions above is that negative citations between cases are not evenly distributed across all asylum cases (Figure 2.8). The Supreme Court cases are mostly peripheral within the network of disputes, but at the same time there are *no* cases with especially high centrality measures in absolute terms. Figure 2.9 is a much more densely connected network overall than Figure 2.8. In Figure 2.8, only 11 cases are linked to 10 or more other cases in dispute (none of these 11 are Supreme Court cases). Only 38 cases (out of 830) have a betweenness centrality measure of greater than 0. The combination of low degree centrality measures and low betweenness centrality measures for nodes in the Figure 2.8 network confirms what is intuitively clear from the visual: instead of a dense network with a few clearly important cases, we find that the dispute network is composed of many isolated dyads and small clusters (although some of these small clusters are densely connected when viewed in isolation from the rest of the network).

This pattern of segmented small clusters repeats itself at smaller scale in the set of cases implicated in disputes over the meaning of “particular social group” (Figure 2.10), which I

¹⁹ This argument can also cut in the other direction: given that we know the Supreme Court to be of central importance in the judicial decision making process, don’t these network graphs cast doubt on the usefulness of a study centered on interpretive conflict? I acknowledge the validity of this challenge, and I acknowledge that my methodological approach outlined here is poorly suited to identifying steady, incremental changes in legal interpretation that occur without major conflict, even if they introduce major changes into the legal knowledge system. With that blind spot acknowledged, the important question becomes how much my method adds to our existing understanding of decision making at the Supreme Court and its consequences. I argue in chapter 4 that my method does indeed have something to contribute here, as long as one bears in mind that a holistic picture of the Supreme Court’s precedent-setting function would need to look at precedents set in the absence of interpretive disputes as well.

discuss at length in chapter 5. Both in general in asylum law and at the very small scale (Figure 2.10 includes only 33 cases), we find that negative citation across cases is concentrated in clusters, with many scattered, isolated appearances elsewhere.

Figure 2.10. Network of disputes over the meaning of “particular social group”



We see from Figure 2.10, for example, that there is no overlap in the negative citation networks disputing the question, “is a family a particular social group?” and the question, “must a particular social group have social visibility?” This runs counter to what we might expect, given that both questions are contested by a relatively large number of cases and given that the answer to the “family” question bears directly on the answer one can give to the “social visibility” question (under the reasonable assumption that one’s family membership is typically not “socially visible”). In chapter 5, I discuss disputes over the meaning of “particular social group” and argue that judicial efforts to clarify the meaning of “particular social group” often depend on narrowly focused decision making heuristics and the path dependent ordering of cases

in time. The networks in Figures 2.8 and 2.10 depict the outcome of the processes described in chapter 5: changes and inconsistencies in judge-made law do not develop in an orderly fashion—they develop instead in small clusters and many relatively isolated incidents.

Quantitative network methods are useful for exploratory analysis and hypothesis testing, but the downside to relying on them is that they tend to oversimplify precisely the conceptualization questions that comparative case study is designed to address. To answer the questions, “what is a node?” and “what is a tie?” I fall back on interpretive case comparison. A within-panel dispute means something different, both legally and sociologically, from a Circuit Court split. Both are different from an interpretation of law in the Courts of Appeals overturned by the Supreme Court. Nor are all federal appellate judicial decisions created equal. An important Supreme Court decision can become a legal shibboleth with a symbolic meaning that begins to shift or fracture over time. *Chevron* may be the most relevant example of such a shibboleth in the context of administrative law. *INS v. Cardoza-Fonseca* (480 U.S. 421, S.Ct. 1987), which established the principle that even a 10% chance of persecution would be sufficient to ground a “well-founded fear,” is another possible example drawn more specifically from asylum law. Because “even a 10% chance” remains a speculative standard under any real world circumstances and because it was framed as a sufficient but not a necessary condition for protection, the *Cardoza-Fonseca* decision remains subject to reinterpretation and changes in its practical application over time. The distinctive importance of *Cardoza-Fonseca* to the development of asylum jurisprudence comes up in chapter 4 on the Supreme Court.

Chapter 3. Patterns of Decision Making and Dispute Across the Courts of Appeals

3.1. Introduction

This chapter analyses inter-organizational variation in decision making and dispute across the several federal Circuit Courts of Appeals. The Courts of Appeals are similar in many ways but different in some respects, including the frequency with which they generate interpretive disputes—internally and in relation to other Circuits—over questions of law. This granular difference poses a more interesting sociological puzzle than most of their broad similarities. Formally, we should expect the intellectual products of Courts of Appeals to be largely consistent: these Courts all administer the same federal laws, albeit with different geographic jurisdictions and with different numbers of judges sitting on the bench. Functionally, we should expect the same: the broad outlines and many details of court structure and administrative procedure are dictated by federal legislative rules that apply to all the courts. From a cultural perspective, we might expect courts with different geographic jurisdictions to look different, but recent sociological studies of institutional culture have by and large tended to focus on the opposite trend. The motivating project of new institutionalist and world polity literatures is to explain the surprisingly high degree of *convergence* in legal norms (and other social norms) across different organizational and national cultural contexts (see Halliday and Shaffer 2015, 24–26). In looking at the Courts of Appeals, we are looking at organizations with formal structures and functional imperatives that are closely and clearly aligned, so differences in output, more than similarities, call out for explanation.

The outstanding recent study of knowledge production in organizational context is Fourcade's (2009) study of the profession of economics in the United States, Great Britain and France. Fourcade emphasizes variations in national culture, which have manifested as "specific

histories, regulatory institutions, and struggles—both material and symbolic” across the three national contexts. These specific national trajectories, she argues, have in turn generated “different categories of agents” who control the national discourses of economics. This is the key mechanism by which, for example, U.S. economists “have authority to craft definitions of ‘discrimination,’ ‘pollution’ and ‘welfare’” while French economists lack that social and political capital (2009, 243). The power of Fourcade’s argument is her ability to show how an intellectual enterprise (economics) that values scientific formalism very highly can nonetheless be shaped to its core by other, entirely unrelated, value commitments and normative tendencies, about which its practitioners traditionally have not been very reflexive. The professional judiciary is, like economics, strongly committed to certain kinds of formalism, and like economics, it is structured by both national and international fields. In these ways Fourcade’s study is a useful model for the analysis I present here, although ultimately my focus is on smaller scale, subnational patterns of organizational difference. Where Fourcade’s argument focuses on the role of history and cultural values in generating national differences, my argument cuts in the other direction. I examine how court rules and accompanying normative commitments can affect knowledge work in a context in which value orientations are, and remain, stable and relatively homogenous.

The long tradition of social scientific studies of courts has focused on the political and social integrative functions of courts.¹ By focusing on instances of interpretive dispute in the courts, I aim to identify direct causal relations between the organizational features of the courts and decision making outcomes—i.e., causal relations between organization and knowledge work that are not mediated by political interests or distributions of material resources. The political

¹ Some of the major landmarks in this literature are Tocqueville (2006[1835–1840], 99–105); Shapiro (1981); Abraham (1986); Rosenberg (1991); Brenner and Spaeth (1995); Epstein (1995); Songer, Sheehan and Haire (2000); and Ginsburg (2003).

dimension of judicial decision making and the functional role of judging and courts ably discussed by other authors are fixed points in the background of my analysis,² and I do not dispute that calculations of political and material interest can explain *much* of the variance in judicial decision making outcomes. My argument in relation to these studies is that in some respects, distinct court-level rules and norms have a direct effect on decision making outcomes. The U.S. Courts of Appeals provide good evidence for this because they exist, at a high level, within a single national context and a single historical tradition. Many of the exogenous pressures that they experience are experienced in common. The Supreme Court has less to teach us through comparative analysis, given that it is so formally and functionally distinct from the other federal appellate courts. For that reason I discuss the Supreme Court separately in the next chapter.

This chapter proceeds in several parts. In the following section (3.2), I review the empirical patterns in the organization-level data and the particular questions they raise. In the next sections (3.3.1–3.3.6), I review several possible explanations for those patterns. I find evidence for some and not others. I find evidence that the Courts of Appeals judges have cultivated normative standards (3.3.1–3.3.2) and instituted formal rules (3.3.3) that are designed to be more or less tolerant of interpretive disputes. Low tolerance for interpretive dispute on the Second Circuit asylum docket is a byproduct of the Second Circuit personnel privileging *efficiency* in case processing. High tolerance for interpretive dispute in the Ninth Circuit grows out of a commitment to demonstrating that the law can be effectively administered in a single, large and culturally diverse appellate court. The tradeoffs that court personnel are making

² See, e.g., Tocqueville (2006[1835–1840], 99–105) on the political power of the independent judiciary; Garoupa and Ginsburg (2009) on the social significance of the reputation of the judiciary; Epstein, Landes and Posner (2013, 30–47) on organizational features of the federal courts that promote efficiency and minimize internal conflict.

between *efficiency* and *elaboration of law* in both settings are rooted in a shared, high-level value commitment to provide access to justice (3.3.3). When court norms and rules are designed to quash interpretive disputes, they can be highly effective. However, there is reason to doubt whether court norms of collegiality are durable over time.

I identify a significant role for a few individual judges who set out to move the law through their own particular jurisprudence, and I observe that their individually influential jurisprudence is produced in relational context. In other words, I find interpretive disputes to be produced from the interaction between highly influential individuals and the court setting in which they work. This finding is based in a contrast of two majorly influential judges, Alex Kozinski and Richard Posner. These two are by standard measures hardly distinguishable from one another in terms of their political commitments, but they end up judging asylum cases very differently because of the different positions they occupy in the organizational ecology of the court system (3.3.4).

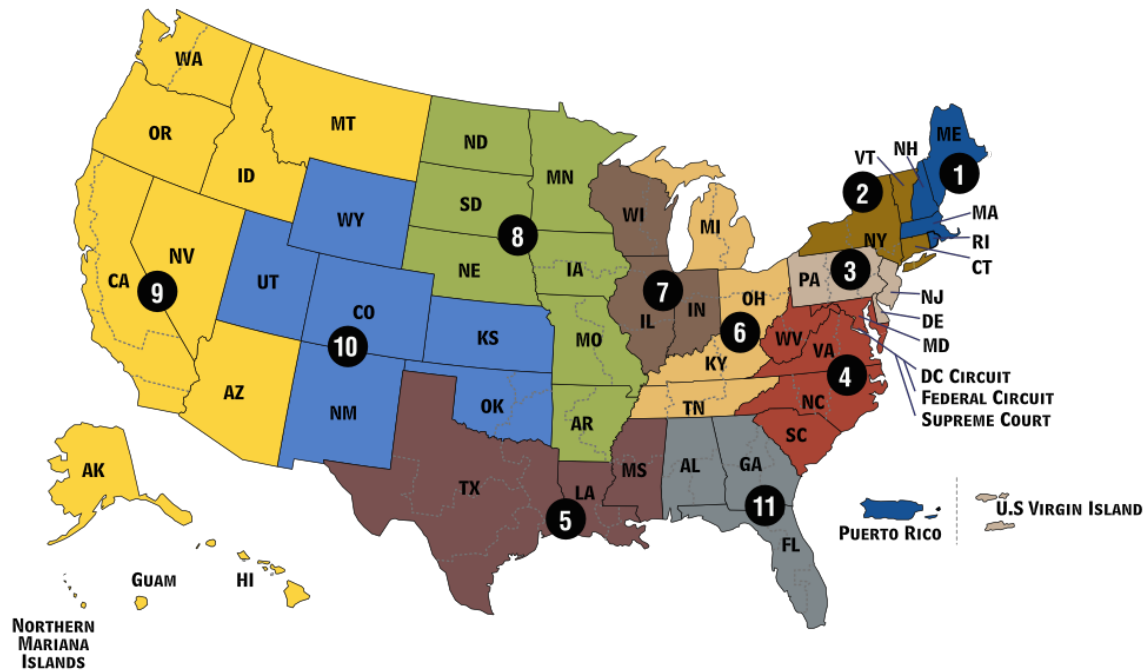
I test two further hypotheses but do not find evidence to support them. Channeling Roger Gould's argument in *Collision of Wills* (2003), we might expect status ambiguity in the courts to be a driver of conflict in the form of unsettled law. This hypothesis fits neatly within the bounds of the overall argument of this dissertation that legal questions become settled on the basis of structured engagement or avoidance of those questions by judges, and sociologists of knowledge working in other contexts have repeatedly found status competition to be one of the most important social drivers of knowledge work (Merton 1973; Collins 1998). Nonetheless, I do not find evidence to support the idea that status ambiguity is an important driver of unsettled law (3.3.5). Nor is there evidence that challenges of communication or coordination across the larger Circuits has any direct effect the their ability to settle legal questions (3.3.6).

The findings in this chapter are supported with data from interviews with Circuit Court clerks and staff attorneys, testimonies by judges in Congressional hearings and published writings and existing organizational analyses of the courts. The final section (3.4) concludes and reviews the relevance of this chapter to organizational sociology and the sociology of knowledge.

3.2. Empirical Patterns

There are thirteen United States Courts of Appeals. Twelve of them have separate geographic jurisdictions that partition the country: the First through Eleventh Circuits and the DC Circuit (Figure 3.1). The thirteenth, the Court of Appeals for the Federal Circuit, was established with a specialized subject matter jurisdiction (to hear patent law disputes) rather than with a geographic jurisdiction. The Federal Circuit hears no asylum claims and plays no role in immigration law. The other twelve hear appeals from all claims for asylum, withholding of removal and protection under the Convention Against Torture that are initially decided in Immigration Courts within their geographic jurisdictions. Unlike the Supreme Court, which has discretion to choose which cases it will hear, the Courts of Appeals are required to issue a decision on any appeal that is filed to them and meets procedural and jurisdictional requirements. This is true notwithstanding that, in practice, many cases will be disposed of with simple summary orders, often without oral arguments being held and often without any elaborated reasoning for the judgment being issued in a written opinion.

Figure 3.1. Federal Circuit Court jurisdictions map³



Cases are typically decided in the Courts of Appeals by panels of three judges. Cases are assigned in batches to panels of three judges through processes that approximate randomness. They are not always truly random, as the Ninth Circuit has instituted corrective mechanisms so that a judge's travel schedule is not too onerous. The staff attorneys' offices in the Ninth Circuit and several other Circuits also sometimes batch similar cases together to decrease the possibility that the same legal question will be decided differently by two differently constituted panels.⁴ Pursuant to a vote by the judges, cases can be heard or reheard en banc, a procedure whereby all active judges (i.e., excluding those judges who have elected to take the reduced administrative workload associated with "senior status") will sit together and rule on a case. In instances where the en banc hearing is a rehearing of a case initially decided by a three-judge panel, the en banc ruling is authoritative and supersedes the initial one. The en banc procedure is relied upon to test

³ Image credit: U.S. government. Available: <http://www.uscourts.gov/file/document/us-federal-courts-circuit-map>.

⁴ Staff attorney, 9th Cir. Court of Appeals. Interview with the author, 26 October 2015.

and sometimes overturn old Circuit precedents, to resolve intracircuit inconsistencies in the law and to address cases that some judges feel strongly are important and may have been wrongly decided. In the Ninth Circuit alone, the procedure for en banc rehearing does not involve all active judges (at present 28) but rather involves a subset of 11 active judges, including the Chief Judge and ten others randomly selected.

Between them, the Second and Ninth Circuits have heard 58% of the total asylum caseload of the federal Courts of Appeals under the modern statutory regime of refugee protection, and they have starkly different trajectories in terms of their ability to settle interpretive questions of law. In every dimension and by most basic measures, the Ninth Circuit is more disputatious in asylum law than any of its sister Circuits. The Ninth Circuit generates more panel disputes than any other federal appellate court and generates them at a higher rate than any save the DC Circuit and the Supreme Court (Figure 3.2). It generates panel disputes at approximately 25 times the rate of the Second Circuit, despite the fact that these two courts both have a great deal of experience processing asylum claims and have roughly the same amount of experience. The same pattern holds if we look at what happens within the courts over time and within the judicial hierarchy. The Ninth Circuit reconsiders and reverses its own prior rulings in asylum law at a higher rate than any other Circuit Court of Appeals and about 10 times more frequently than the Second Circuit. The Ninth Circuit also sees its asylum law cases overturned by the Supreme Court at a higher rate than any of its sister Circuits and about four times more frequently than the Second Circuit (Figure 3.3). Meanwhile, the Second Circuit generates panel disputes in asylum cases at a lower rate than any other court. It is involved in both intracircuit disputes and disputes with the Supreme Court at a lower rate than almost any sister Circuit. The

Eleventh Circuit exhibits consistently low levels of disputatiousness in all dimensions and also hears a significant number of asylum claims (8% of the total federal court caseload).

The DC Circuit is anomalous in these measures in large part because it has heard so few, and somewhat unusual, asylum cases. There are 34 cases from the DC Circuit in my database of 21778, and several of those are not individual refugee status claims but rather class action lawsuits that present legal problems different from the core interpretive problems posed by the statutory definition of refugee. An example is *Hotel and Restaurant Employees Union, Local 25 v. Smith* (846 F.2d 1499, DC Cir. 1988), a case that concerned a union's standing to sue the Attorney General for revisions to the Immigration and Naturalization Service's treatment of Salvadoran asylum seekers and aliens more generally. The high rate of within-panel disputation in asylum cases in the DC Circuit (14.7%, about three times higher than the Ninth Circuit) does not reach statistical significance ($p < 0.05$) in a simple binary logistic regression model with all courts as covariates. This result that remains robust when we control for the fixed effects of the year of each case decision, while all other Circuit Courts and the Supreme Court remain statistically significant predictors of differential panel dispute rates under both model specifications.⁵ I therefore give no further attention to the DC Circuit here. We would need to undertake analysis of another area of law—for example, administrative law, in which the DC

⁵ The two models I tested are:

(1) $Y = \beta_0 + \beta_1 DCCir + \beta_2 1stCir + \beta_3 2ndCir + \dots + \beta_{12} 11thCir$

and

(2) $Y = \beta_0 + \beta_1 DCCir + \beta_2 1stCir + \beta_3 2ndCir + \dots + \beta_{12} 11thCir + \beta_{13} Time1 + \dots + \beta_{T+12} TimeT$

where $Time1=1968$, $TimeT=2014$ and $Y = \log$ odds of dissent.

In (1) $\beta_1 = -1.00$ with S.E. of 0.786.

In (2) $\beta_1 = -1.39$ with S.E. of 0.853.

The only other coefficients of possible interest here are those for the 2nd and 9th Cir. In equation (2), $\beta_3 = -4.52$ (S.E. = 0.638) and $\beta_{10}(9th\ Cir.\ coef.) = -1.38$ (S.E. = 0.561).

Circuit hears a very large number of cases—to begin to understand how the organizational setting of the DC Circuit affects the settlement versus non-settlement of the law.

Figure 3.2. Panel disputes as a fraction of total caseload

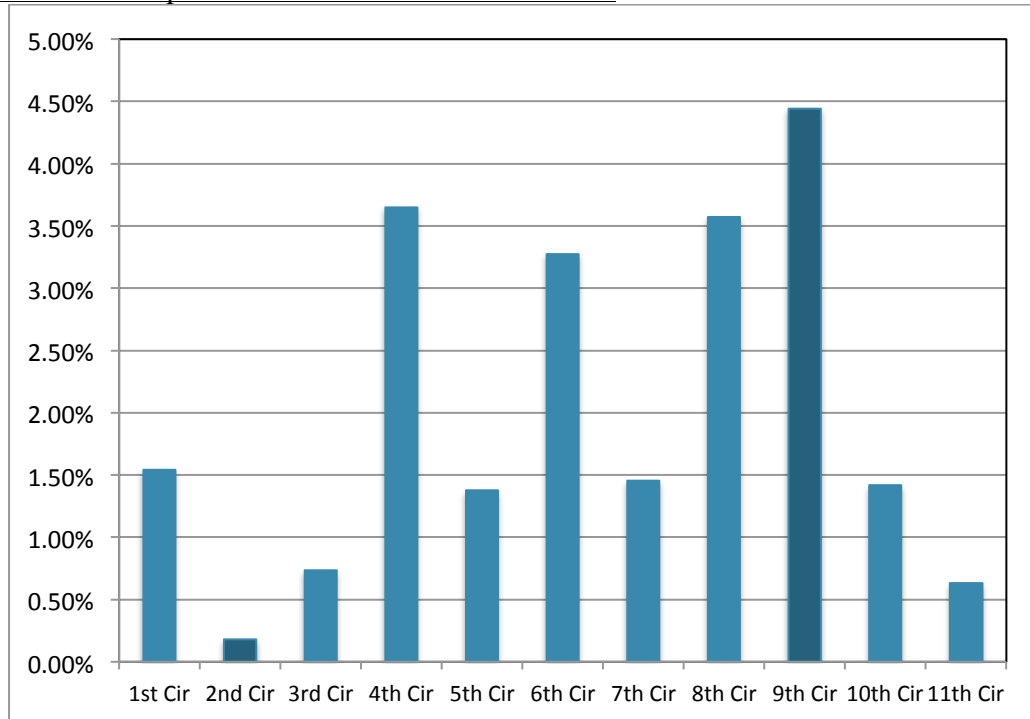
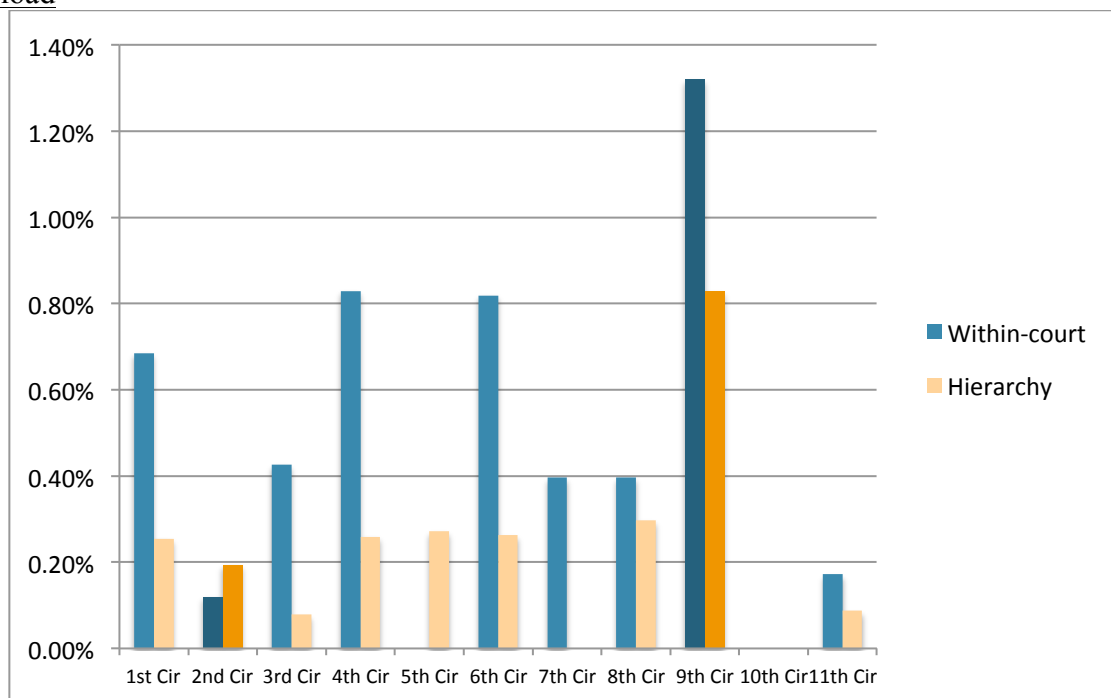


Figure 3.3. Intracircuit splits and cases overturned by Supreme Court as a fraction of total caseload



3.3. Organized Engagement and Avoidance of Legal Questions in the Courts of Appeals

Organizational differences between the Courts of Appeals manifest both in normative practices and in formally codified rules. In describing the organizational differences that explain the empirical patterns just reviewed, I first give a brief overview of how I am using the word “norms” and some of the central norms that govern action in the Courts of Appeals (section 3.3.1). I then argue that the normative salience of interpretive disputes is not constant over time or across the several courts, and the degree of normative sanction against interpretive dispute in the courts is a predictor of the volume of interpretive dispute in the courts (section 3.3.2). In addition to strong normative discouragement of interpretive dispute, the Second Circuit has instituted formal rules to minimize the volume of interpretive dispute that appears in its asylum jurisprudence. The way these rules operate in practice is to take judicial attention away from asylum cases and to discourage the elaboration of legal reasoning in these cases (section 3.3.3).

3.3.1. Social structure and norms in the Courts of Appeals

I use the term “norms” to refer to a system of social control enforced by informal sanctions. Most personnel of the federal courts have normative obligations within that social world and play a role in enforcing the normative order against others (in fact, enforcement against others is one of the key normative obligations). In the Courts of Appeals, crucially important norm-governed activities include: the division of labor between clerks and judges; the communication practices within and between judges’ chambers, particularly with respect to active cases; the attention paid to the political salience of legal issues before the court; and measures that are taken to avoid all varieties of what I have termed “interpretive disputes” (i.e., panel dissents and concurrences as well as intra- and intercircuit splits). Activities in each of these areas are fundamentally important to how cases are decided in the courts, but there are few

formal rules in place to guide action. There are instead longstanding practices in place governing activity in the aforementioned areas, with the judges and their clerks as the key enforcers within the very small and demographically stable social worlds of the Courts of Appeals.

One of the notable features of the normative order in the Courts of Appeals is that some of the norms governing professional work have been so strongly institutionalized that they have become *rule-like*. This makes it easier to identify them in analysis and easier to see their causal force. My clerk interviewees regularly marked sharper distinctions between value propositions and court norms than they did between court norms and formal legal rules. They were uniformly quick to stress that their own value orientations (as opposed to those of the judges) had no bearing on how cases were decided. On the other hand, rules and well-established norms in the courts are so tightly coupled that in some instances my clerk interviewees were unclear or even indifferent as to whether some principles governing the work of the courts were actually codified as rules or not. This was apparent in a few instances when I asked them to explain what was meant by the common turn of phrase that out-of-Circuit case law is “persuasive authority” but not “binding” or “precedential authority,” as in the exchange quoted below:

Clerk: We’re bound to follow Sixth Circuit precedent, of course, so to the extent there’s a clear answer in Sixth Circuit precedent, you know, unless it was an interesting legal issue, there would be no reason to look at other Circuits [when researching case law].

Interviewer: Is the mandate to follow precedent within your Circuit and treat the other Circuits’ law as only persuasive and not precedential, is that codified somewhere as a rule, or is that just a practice that has become entrenched?

Clerk: You know what, I don’t – if I ever knew the answer to that, I’ve certainly forgotten it. So I won’t even take a guess at it.

Interviewer: Okay. Well, it’s a question for research, so I can –

Clerk: Well, I’ll give you a guess. My guess is that there is a Supreme Court opinion that says that. (Former clerk, Sixth Circuit Court of Appeals. Interview with the author, 2 September 2015).

It is a distinctive feature of courts that the actors who populate them are oriented towards codified rules, and towards treating norms as rules, to such a great degree. Halliday and Shaffer

(2015) elaborate on the concept of “legal norm” by arguing that one of the defining features of a legal order over and against “other forms of social ordering” is that legal norms can be formalized in text and “stabiliz[ed] within the minds...of the actors who implement and apply the norms” (2015, 15, 44). Clerks and judges working in the federal courts are in the vanguard of the movement towards formalization and stabilization of legal norms. In a comparative ethnographic and interview-based study of Courts of Appeals organizational culture, Cohen (2002) similarly identifies the normative order of the courts as a strong constraint on action and closely linked to formalized rules (40–41, 169ff.). Cohen’s work also offers another clear marker of how permeable the categories of *rules* and *norms* appear to be at the federal courts, even to very close observers:⁶ he identifies the doctrine of stare decisis as a “formal constraint” on federal judges (2002, 41). While I depart from that characterization and instead describe stare decisis in this dissertation as a powerful norm (as Knight and Epstein (1996) do in reference to the Supreme Court), Cohen has substantial reasons to back up his position. Stare decisis is “fundamental to the American system of justice,” and it does much to create “stable expectations...by each member of the group as to the behavior of the other members under specified conditions” (Herbert Simon’s description of what formalization of rules in organizations accomplishes) (Cohen 2002, 40–41).

The staffs of federal judges’ chambers consist of a single judge with a lifetime appointment, a set of term clerks (usually four) who serve for one- or two-year terms, and a small additional staff of secretaries, interns and/or externs. Other court employees, for example the staff attorneys and librarians, serve the Court without an association with a specific judge’s chambers. The term clerks are usually recent law school graduates in their mid- to late-twenties.

⁶ Before beginning his scholarly work, Cohen himself was a clerk on the Ninth Circuit Court of Appeals.

As of 2015, 82% of all Courts of Appeals judges were 60 years old or older.⁷ There are variations in how judges manage their law clerks' labor. Gulati and Posner (2015) interviewed 70 Courts of Appeals judges and distilled a typology of three styles of management of staff (primarily clerks): the editing judge (a "standard" model), the authoring judge (a "stripped down" model in terms of clerks' responsibilities) and the delegating judge (a "hierarchical" model).

There are essentially zero opportunities for career advancement within the federal court system for judges. The chief judgeship of a court is determined purely by the formal factors of age and tenure at the court, not by any merit criteria. Nor is judge pay linked to merit in the federal courts. As for the term clerks, they have no chance of promotion within the court, but their relationship with their judge may be important to launching their future careers. Term clerks commonly go on to elite legal careers in government, private practice or academia, and some eventually become judges. The role of Courts of Appeals judges in helping their clerks to secure a second clerkship at the Supreme Court is an object of such interest and attention in the legal profession that there is a term in common usage—"feeder judge"—to designate those judges who have greater than average success in this venture (Garrow 2006).

The demographic and professional features of judges' chambers generate the expectation that clerks will be extremely deferential to judges, no matter which of Gulati and Posner's models the chambers most closely resembles. This expectation was borne out in my interviews with clerks. Some of those I contacted told me they would have to seek permission from their judge before agreeing to an interview. Several others who declined indicated that it was out of respect for their judges. As Gulati and Posner observe, tell-all books about the inner workings of

⁷ As of 31 August 2015. Judicial biographical data is available from the Federal Judiciary Center. Available <http://www.fjc.gov/history/home.nsf/page/judges.html>.

federal court clerkships are extremely rare, even though there are several hundred new Courts of Appeals ex-clerks turned out into the world each year.

Judges' personal preferences also exert a strong influence on the institutional cultures of their chambers. This is as one would expect given the long tenure of the judges, the rapid turnover of clerks and the judges' direct control over clerk hiring. Many of my clerk interviewees stressed repeatedly that their answers about work organization would not generalize, because they simply didn't know how other judges ran their chambers.

Clerks across all Circuits seemed to take for granted the court norms around communicating with and about other chambers, even though the standard practices varied across courts and occasionally across chambers within courts. My informants on the Seventh Circuit, for example, described a casual Circuit-wide attitude towards information sharing between clerks, while clerks from the Eleventh Circuit identified such information sharing as highly unusual and perhaps inappropriate.⁸ The Sixth and the Ninth Circuits have general systems of sharing "bench memos"—overviews of cases and the legal issues they raise written up in advance of oral arguments—among all judges who are sitting together on a panel. But a few judges' chambers do not share memos with some or all of their colleagues. Ninth Circuit Judge Alex Kozinski's self-exemption from the memo-sharing system is public knowledge. Several interviewees intimated to me that other judges have likewise opted out in recent years, although

⁸ "Every judge kind of has their own attitude, their own position on whether they want that communication. My judge did. Judge A encouraged us to talk to other chambers, mostly because I think A wanted to know what was going on in other chambers, and how other chambers were thinking about cases or thinking about opinions...There was stuff going on in the courthouse, and we [Judge A's clerks and clerks in other chambers] would talk about it – we would have lunch together and talk about it." Former clerk, 7th Cir. Court of Appeals. Interview with the author, 26 August 2015.

"There was very little contact with the other clerks of the judges on the Eleventh Circuit about cases. I really think we almost never did [discuss cases with them]." Former clerk, 11th Cir. Court of Appeals. Interview with the author, 8 July 2015.

all but one were unwilling to name names.⁹ The situation on the Sixth Circuit appears to be more fractious, with failure to share memos more widespread and also more indicative of deep divisions among the judges.¹⁰

My clerk interviewees demonstrated just as much intellectual deference to judges as deference on matters of chambers cultural and work organization. More than once, when I grew careless with my phrasing and asked a former clerk how s/he would decide a legal question, they would correct me by saying that the *clerk* never decides anything, only the judge. They frequently relied on the possessive formulation, “my judge.” Some were uneasy about making any statement for quotation, even anonymously, that could be construed as criticizing a judge’s work performance.

3.3.2. Collegiality and court norms around interpretive disputes and unsettled law

The category of “legal interpretive disputes” around which this dissertation is organized is not a category that is immediately acknowledged as meaningful by judges or other court personnel. Dissents, intracircuit splits and intercircuit splits share important features. They are

⁹ One interviewee suggested that Judge Rawlinson has opted out of the memo-sharing system, although I could not get any other informant to corroborate this. “In terms of who doesn’t share now, I don’t know the names of them. I just heard that there are more of them. But I’m pretty sure those two [Kozinski and Rawlinson] didn’t share, even when I was there.” Former clerk, 9th Cir. Court of Appeals. Interview with the author, 2 September 2015.

¹⁰ “So Judge A, for example, will always share bench memos with other judges, unless other judges aren’t sharing with A, in which case, A won’t share bench memos, because it becomes kind of a labor imbalance. Some judges are very secretive about their analysis of the cases, and they will not circulate their clerk’s bench memo in advance of oral argument.” Former clerk, 6th Cir. Court of Appeals. Interview with the author, 20 August 2015.

“Some judges just have a practice of not sharing bench memos, and they just wouldn’t share them with anyone, and then some judges would just share it with some judges that either they might be friendlier with, or more likely to agree with, and then not with others. So when I was there, the Sixth Circuit was fairly fractured, politically, and so conservative and liberal judges often did not share bench memos with each other, but would share with other conservative and liberal judges, and then some judges just never shared with anybody, that was just their practice.” Former clerk, 6th Cir. Court of Appeals. Interview with the author, 2 September 2015.

varieties of the judiciary's functional failure to settle interpretive questions with total clarity. But legal professionals recognize major differences between disputes in these different dimensions that are collapsed in my framing of all these things as instantiations of "legal interpretive dispute." What is more, neither panel disputes nor splits within or between the Circuits are all equal in their eyes. Judges are likely to treat dissents in en banc panels as more significant than a dissent in a regular case, because the Supreme Court is more likely to take notice of the issue heard en banc and might be persuaded by the dissent. Finally, the personnel of the different Circuit Courts express different attitudes towards how undesirable interpretive disputes are.

My clerk informants from the Second and Eleventh Circuits stressed the strong norm of collegiality that persist on those Circuits. Clerks from these two courts also tended to stress the existence of such a norm as a positive accomplishment. They sometimes referenced the incivility of "other Circuits" as something that the Second Circuit has "worked very hard not to have."¹¹ By contrast, the former clerks I spoke with from the Sixth Circuit noted serious communicative breakdowns within their Circuit that had introduced conflict into decisions. Former clerks from the Ninth Circuit tended to occupy a middle ground between the personnel of the Second and the Sixth. They often acknowledged that the Ninth Circuit is less unified in its jurisprudence than some others, but none acknowledged open and politically motivated personal dislike between judges, the way that my informants from the Sixth Circuit did.

Former clerks across all Circuits wished to avoid any implication that frequent dissents were any kind of threat to the legitimacy of the institution. They all acknowledged that dissents would sometimes be unavoidable, and when they did occur it was part of the ordinary course of business, with no especially negative ramifications. However, their baselines for what kinds of

¹¹ Former clerk, 2nd Cir. Court of Appeals. Interview with the author, 10 August 2015.

situations would make a dissent unavoidable varied across Circuits. A Ninth Circuit informant suggested that a dissent might even arise for relatively trivial reasons, quite unlike an intracircuit split. A dissent within a panel might arise because the judge “want[s] the party that’s losing to know that [she] took their side, and they should feel like they weren’t totally shut down by three judges.”¹² In this formulation, the within-panel dispute appears to have a social integrative function that might match or even exceed the importance of getting to the right interpretation of the law. Some clerks from the Second and the Eleventh Circuits, meanwhile, described their judges seeking out *any* compromise that would resolve the case while avoiding the possibility of a dissenting opinion.

Quantitative data provide evidence of persistent normative differences in attitudes towards dissenting and writing separately, between courts and over time. The patterns visible in aggregate data align with the reports of my court informants. Between 2005 and 2010, the Sixth Circuit dissent rate in en banc cases was 93%, the highest of any of the Circuit Courts and higher even than the dissent rate in the notoriously politically divided Supreme Court (Epstein, Landes and Posner 2013, 68, 270). Such a high dissent rate is also a recent phenomenon in the Sixth Circuit: between 1925 and 2002, the Sixth Circuit dissent rate in en banc cases was 71%.¹³ The change followed extremely contentious affirmative action and death penalty cases heard en banc by the Sixth Circuit in the early 2000s, which split the Circuit and involved frank accusations of bad faith on both sides.¹⁴ The Ninth Circuit had a relatively high en banc dissent rate in 2005–

¹² Former clerk, 9th Cir. Court of Appeals. Interview with the author, 29 August 2015.

¹³ Data from Songer (1998) and Kuersten and Haire (2007) databases.

¹⁴ The death penalty case was *In re Byrd* (269 F.3d 578, 6th Cir. 2001). The affirmative action case was *Grutter v. Bollinger* (6th Cir. 2002, 288 F.3d 732). Judge Danny Boggs penned strong dissents in both cases. In a separate concurrence in *Grutter*, Judge Moore wrote of Boggs’s dissent that it had done “grave harm...to this court and even to the Nation as a whole...the only reason [for the inclusion of Boggs’s ‘Procedural Appendix’] is to declare publicly the dissent’s

2010 (80%), as did the Second Circuit (80%). The lowest rates came in the Eleventh Circuit (53%) and Seventh Circuit (58%).

The high en banc dissent rate in the Second Circuit accords with reports from my clerk interviewees that while the Second Circuit judges pride themselves on minimizing dissents, they are highly conscious of the strategic significance that dissents and separate concurrences can take on in certain cases. The Second Circuit judges are, clerks reported, not hesitant to dissent when they think they have a chance to significantly move the law, and en banc rehearings will provide such opportunities at a higher rate than regular panel hearings.¹⁵ The long term data on decisions across all areas of law available from the Songer database (Songer 1998; Kuersten and Haire 2007) supports the clerk perspective. The Second Circuit hears cases en banc infrequently and that when it does, there is likely to be a dissent.¹⁶

Interpretive disputes arise more frequently in contexts where interpretive disputes are more normatively acceptable—even to the point of being encouraged in moderation. Ninth Circuit clerks report less effort put into avoiding internal dissensus than Second Circuit clerks,

unfounded assertion that the majority's decision today is the result of political maneuvering and manipulation" (752–753).

¹⁵ “Judge A loves concurrences...A sees a very different role in a concurrence than in an opinion for the court. [In a concurrence] A is more free to suggest how A thinks the law should change, maybe make a call to the legislature.” Former clerk, 2nd Cir. Court of Appeals. Interview with the author, 14 July 2015.

“[Dissenting] was seen as kind of a waste of resources if there wasn't some actual reason for it...[But] at the very beginning of my term, there was a case that was of great significance and did implicate competing ways of seeing the world and ways of seeing what the role of the federal courts was in relation to national security...There were lots of dissents en banc...I think the dissenters all thought that it was important to register their thoughts in some way or another.” Former clerk, 2nd Cir. Court of Appeals. Interview with the author, 3 August 2015.

¹⁶ There are five 2nd Cir. en bancs out of 1800 total cases in the combined Songer and Kuersten and Haire data, which covers 1925–2002. Only the 1st Cir. has a lower rate of en banc hearings (4/1800). In this data, the 2nd Cir. en banc dissent rate is 80% (4/5), just as it is in the Epstein et al. 2005–2010 data. By comparison, the 9th Cir. has more en banc cases than the 2nd Cir. (14/1800) and generates dissents at a lower rate (8 of the 14 cases, or 57%).

and the Ninth Circuit generates panel disputes and intracircuit splits much more frequently than the Second Circuit. It is also easier to find Ninth Circuit judges than Second Circuit judges commenting publicly on their political differences of opinion with their colleagues (e.g., Kozinski 2003, 259). Cause and effect are not cleanly analytically separable here, but the attitudes of the court employees still matter because they can accelerate a cyclical development and so be self-fulfilling, even if they begin as post hoc rationalizations. The experience of the Sixth Circuit seems to be an example of this. Once the norm of respectful collegiality and good faith effort to agree has broken down, it becomes very difficult to maintain that the judges are working hard to prevent dissents. Conversely, once insiders concede to themselves and others that the court is “fairly fractured, politically,”¹⁷ a dispute in a case will seem like less of a transgression of normative expectations. In the next section, I narrow my focus to look exclusively at asylum case processing in the Second and Ninth Circuits. I point to both norms and codified rules that explain the divergent disputatiousness of these two courts, the central empirical puzzle of this chapter.

3.3.3. Balancing efficiency and elaboration of law in the Second and Ninth Circuits

The Circuit Courts of Appeals were established by the Judiciary (Evarts) Act of 1891, sharpening the organizational divide between the trial and appellate courts in the judiciary. The Act provided for three judgeships in each appellate Circuit Court. The Second Circuit was established to cover the states of New York, Connecticut and Vermont, the Ninth Circuit to cover most of its present day jurisdiction. Hawaii, Arizona, Alaska and island territories were later additions (Frederick 1994, 18). The Tenth and Eleventh Circuits were post-Evarts innovations, established by splitting the original jurisdictions. The Eleventh, the youngest, was

¹⁷ Former clerk, 6th Cir. Court of Appeals. Interview with the author, 2 September 2015.

established in 1981 to cover Alabama, Georgia and Florida when the judges of the Fifth Circuit petitioned Congress to split their Circuit in two (Baker 1994, 12).

The recent institutional history of the Courts of Appeals is dominated by a few themes shared in common across the courts, most prominently a rapidly expanding caseload from about 1970 to the present (Posner 1996, 62; Cohen 2002; Levy 2011) and the challenge of keeping pace with a massively complex and fast-changing legal and social order. The federal courts find themselves administering law in a legal system that is now “choking on statutes” (Calabresi 1982, 1–7) as well as an immense volume of case law. Another major difficulty facing the federal courts at present, particularly relevant for the law of asylum, is the challenge of reconciling national and international law in an increasingly globalized world.¹⁸ Against that shared background, the Courts of Appeals each have their own distinct organizational histories and path dependent developments. Important differences have developed between the Second and the Ninth Circuits with respect to case management and processing.

Following the lead of the Fifth Circuit in the late 1960s, all of the Courts of Appeals have adopted screening processes to increase case processing efficiency by eliminating oral argument and streamlining opinion writing in some cases (Baker 1994, 108; Cleveland and Wisotsky 2012, 199–200).¹⁹ This entails relying on staff attorneys’ offices in the courts to recommend cases for

¹⁸ On the implications of international jurisprudence for asylum law in the United States, see Anker (2014, 332–335, 660ff.) and Hamlin (2014, 181–194). On the challenges of reconciling international and national law generally, see Slaughter (2004).

¹⁹ There are a number of comparative studies of case management in the Courts of Appeals from the 1980s to the present, although none that cover all of the Circuit Courts. A 1987 study commissioned by the Federal Judicial Center (Cecil and Stienstra 1987) relies on interviews with judges and court staff to describe procedures in the Third, Fifth, Sixth and Ninth Circuits and is the best resource available for the early years of the Refugee Act’s implementation in the U.S. The most valuable recent sources are Cohen (2002) and Levy (2011), two further in-depth interview accounts of case management practices across several Circuits. Two editions of Richard Posner’s *Federal Courts* (1985; 1996) provide useful information from the vantage point

which oral argument is unnecessary and, in some cases, to draft short summary orders or dispositions to decide those cases. In every Circuit, it is the prerogative of any judge assigned to a case to “kick” or “reject” a case from the streamlined screening process and have it be scheduled for oral arguments. The Circuits vary in how they instruct the staff attorneys to conduct the screening process, in how the judges participate in review of screened cases, in how frequently they reject cases from the screening process.

The Second Circuit was the last to give up on the commitment that all parties to cases decided on the merits should have the opportunity to be heard in oral argument, but in 2010 they instituted Local Rule 34.2, which routed immigration appeals (including asylum appeals) to a “Non-Argument Calendar”—meaning that oral arguments would not be heard in those cases unless the judges assigned to review them requested otherwise. Local Rule 34.2 provides:

The court maintains a Non-Argument Calendar (NAC) for the following classes of cases: (1) Immigration. An appeal or petition for review, and any related motion, in which a party seeks review of the denial of:

- (A) a claim for asylum under the Immigration and Nationality Act (INA);
- (B) a claim for withholding of removal under the INA;
- (C) a claim for withholding or deferral of removal under the Convention Against Torture;
- (D) a motion to reopen or reconsider an order involving one of the claims listed above.

(2) Other. Any other class of cases that the court identifies as appropriate for the NAC.

of an appellate judge, although Posner is more concerned with system-wide patterns than with intercircuit variation. Several additional papers and volumes from 1980 to the present, authored by judges and by scholars, fill in further details, as do the statistics available through the Administrative Office of the U.S. Courts Annual Reports. I have relied on Baker (1994), Cecil (1985), Cleveland and Wisotsky (2012), Hellman (1990), Levy (2013), McKenna, Hooper and Clark (2000), Newman (2009), Oakley (1991), Oakley and Thompson (1990), O’Scaannlain (2012), Richman and Reynolds (2013), Wasby (1988) as well as the five central studies cited above and the Administrative Office of the U.S. Courts statistics (available: <http://www.uscourts.gov/statistics-reports>). I have relied on interviews with staff attorneys and clerks to fill in gaps in my understanding of the current case management procedures.

The essential tradeoff that the courts are grappling with in instituting these administrative reforms is between *efficiency* in processing cases and *elaboration of the law* in two senses: the *elaboration of legal reasoning in opinions* in line with the traditional role of common law courts and the *elaboration of the procedural opportunities* for petitioners to pursue their claims on appeal. As Judge Diarmuid O’Scainnlain of the Ninth Circuit has pointed out, neither pole on the spectrum from efficiency to elaboration offers appellants greater certainty of *access to justice* than the other (O’Scainnlain 2012). The need to deal with the tradeoff is widely understood by members of the judiciary and the legal profession as an unwelcome but inescapable direct consequence of caseload growth. Several commentators frame their recommendations for the future of the federal courts in terms of an idealized “Learned Hand model” of judging (e.g., Richman and Reynolds 2013, 3). Under this idealized model, judges would be able to devote optimal attention to each and every case, giving them the best possible odds of making the correct judgment for the development of judicial precedents and for justice for the contending parties. The role of court central staff would be purely administrative, and neither central staff nor judges’ term clerks would play any direct role in the writing of opinions. Part and parcel of most contemporary references to the “Learned Hand model” is the presumption that it has become, in the current federal court system, obviously unrealizable.

Ever since explicit consideration of case management strategies beyond the Learned Hand model began, the Ninth Circuit has weighted more heavily than any of its sister Circuits towards elaboration of the law in its case processing, while the Second Circuit—especially since 2008—has privileged *efficiency in the processing of immigration cases in particular* more than any of the other Circuits. While the Ninth Circuit has, like every other Circuit, introduced measures to streamline its case processing, it has also been most willing to curtail the potential

procedural efficiencies gained by those measures. Relative to the other Circuits, the Ninth Circuit judges have historically rejected cases from their screening panels at a high rate and reject a high volume of asylum cases from screening panels relative to the rejection rate for other cases. The Ninth Circuit has also exhibited high variance in the rate at which individual judges vote to reject cases from the screening panels.²⁰ In the late 1980s, Cecil and Stienstra found that the Ninth Circuit’s screening and case streamlining procedures were “more elaborate, and more dependent on the work of the staff attorneys” than the work of any of the other Circuits examined (the Third, Fifth and Sixth). They also found the Ninth Circuit judges more evenly split over the contemporary importance of oral argument than the judges of the Third, Fifth or Sixth Circuits (Cecil and Stienstra 1987, 85, 134). The Ninth Circuit experimented with a program to process cases without briefs in order to streamline its docket in the early 1980s, but the program lasted only two years and processed only 60 cases. The Federal Judicial Center conducted an autopsy of the failed program and discovered “rather extreme diversity of opinion among judges” as to its merits and its appropriateness in application to particular cases, while there was “surprising uniformity of opinion among counsel [i.e., lawyers admitted to practice before the Ninth Circuit]” (Shapard 1988, 443).

The collective tendency of the Ninth Circuit towards elaboration over and against efficiency has continued to the present. The Ninth Circuit judges have consistently maintained a broadly united front against splitting the Circuit, a move that would simplify many of the within-Circuit administrative problems at a single stroke (albeit at the cost of heightening the challenge of keeping federal law consistent between Circuits). A Ninth Circuit staff attorney reported to me that while some judges are more comfortable than others with the operation of screening and

²⁰ Cecil 1985, 27–35; Cecil and Stienstra 1987, 82; Oakley and Thompson 1990, 109–110; Oakley 1991, 881. Compare the 2nd Cir. model described in Levy (2011, 325–366).

motions panels as currently constituted in the Circuit, there is no movement in the Circuit's staff to introduce further reforms for the sake of efficiency. There is widespread satisfaction that the process is efficient, and according to the staff attorney's report, none of the judges have proposed to eliminate any of the safeguards currently in place that are intended to preserve access to justice for the parties to suits.²¹ I have been unable to find any recent law review articles or public commentaries by Ninth Circuit judges urging further Circuit reforms for case processing efficiency. While that is not dispositive, it does generally support the line of argument I heard from the staff attorney and from former Ninth Circuit clerks.

The Ninth Circuit occupies a distinctive place in the institutional history of the judiciary and has generated a distinctively large volume of commentary. The particular challenges faced by the Ninth Circuit have sometimes stood in for the challenges of administering law to provide access to justice within the judiciary as a whole. Substantial ink has been spilled, both scholarly and legislative, on the particular challenges of reforming the Circuit. Almost from its inception, the Ninth Circuit has attracted concerns that it is too large for effective or efficient administration and thus ought to be split. Splitting the Circuit was an "inevitable" outcome, according to Ninth Circuit Judge William Denman in 1937, but it remained a problem for the future. In the context of Congressional hearings on splitting the Ninth Circuit in 1990, Chief Judge Alfred Goodwin still maintained that "splitting the Ninth Circuit is an old idea whose time [had] not yet arrived" (Denman and Goodwin quoted in Frederick 1994, 216). Several years on but still in the midst of the Congressional debate on the topic, O'Scannlain (1995) pressed the same "inevitable, but not imminent" line. The Senate accepted this assessment and declined to divide the Circuit (Baker

²¹ Staff attorney, Ninth Circuit Court of Appeals. Interview with the author, 26 October 2015.

1994, 74–105). Now two decades on, the issue does not appear to be at the forefront of public, judicial or legislative consciousness.

Given its geographical scope and its association with the legal challenges distinctive to the American frontier (see especially Frederick 1994), the Ninth Circuit has become a powerful symbol of two linked challenges that are endemic to the federal system: first, the challenge of maintaining the legitimacy and consistency of federal law *across* the Circuits; and second, maintaining the consistency of law *within* the Circuit, a problem that has grown more acute as the caseload has grown. The symbolic significance of the Ninth Circuit in this regard has been reinforced by the longstanding and unresolved debate over whether to split the Circuit. In a speech a few years before the Senate hearings on splitting the Circuit, then-Chief Judge James Browning went so far as to argue that imposing an administrative simplification on the Ninth Circuit model would trigger a collapse and reorganization of major elements of the federal court system:

The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of circuits will be necessary (Browning, quoted in Schroeder 1989, 7).

Several other Ninth Circuit judges have likewise expressed the view that the Ninth Circuit is an important bulwark in defense of the existing model of the federal courts (e.g., O’Scainnlain 1995; Reinhardt 1995, 1514; Kozinski 2003, 257). They have, perhaps in reaction to the view of the Ninth Circuit as a uniquely important “laboratory” for the federal judiciary, instituted more checks, balances and opportunities for reversal in case management than the other Circuits. Their commentaries on the Congressional debate over splitting the Circuit convey

the impression that the specific history and structural position of the Ninth Circuit looms large in their self-understandings and their shared sense of professional responsibility.²²

In his organizational study, Cohen quotes from an interview with Kozinski²³ where the judge further develops the idea that his court should embrace a degree of unsettled, inefficient decision making in the judicial process:

I think [the bench memorandum sharing process] is a cheat. You talk about the redundancy of having three sets of clerks look at it, but the redundancy is part of the process of appeal. Otherwise, we would only have one judge...They have three judges, three offices, with three sets of staff and three chambers, three sets of computers with three sets of files, three sets of facilities in all respects, because they...want us to do the work three times. If they would only want us to do the work once, we would have appeals with only one judge. [...]

It's not, in my judgment, a sin to duplicate work; it's a required virtue. (Kozinski, quoted in Cohen 2002, 100).

This passage shows a judge highly attuned to the tradeoff between efficiency and elaboration of law, as well as someone aware of the significance of organizational structures in shaping that tradeoff in practice. In section 3.3.4 below, I will return to Kozinski's outsized influence on the Ninth Circuit and his role in creating a large volume of unsettled asylum law there.

The Fifth Circuit, which at the time of its split in 1981 had a bench of 29 active judges and a geographic jurisdiction stretching from Florida to Texas, was up to that point closely

²² Given that we find several Ninth Circuit judges over such a long time pushing the same argument that the Circuit needed to be split but not just yet, it is easy to imagine that another important motivator in these debates is the judges' reluctance to devolve their considerable personal power as judicial authorities over such a large territory. If so, then self-interest is another reason the Ninth Circuit judges have to embrace and defend a relatively high level of unsettled law in their court. Judges interested in maintaining and expanding their political and legal power may dislike having colleagues challenge and unsettle their opinions, but it seems likely that many would prefer that scenario to having the territorial scope of their judicial authority cut in half.

²³ Cohen does not name the judge, but he identifies him as "the one judge on the Ninth Circuit who does not participate in the bench memorandum sharing process" (2002, 100). Additionally, Kozinski himself has been very explicit about his position on this issue. Cohen goes on to quote him as saying, "I've told my colleagues. This is not a secret."

comparable to the Ninth Circuit in terms of geographic scope and size of the bench. The two courts responded quite differently to the shared challenge of administering law in a large Circuit with a fast-growing caseload. The Fifth Circuit judges unanimously petitioned Congress to intervene and split the Circuit, while the judges of the Ninth Circuit resisted such a reform. The Ninth Circuit judges who testified in the Senate hearings strongly marked the differences between the two Circuits and collectively argued for why, even though a split was perhaps appropriate in the Fifth, it would not be in the Ninth.²⁴ Baker's (1994) comparative account of the Congressional hearings on both Circuits suggests that the divergent preferences of the two groups of judges was the difference-making element in the Congressional hearings, notwithstanding that it took some time and a few stops and starts for the split of the Fifth Circuit to take effect (Baker 1994, 52–105).

As for the Second Circuit, in one crucial respect it looks much like the Ninth Circuit in its commitment to elaboration of the law. The Second Circuit held out longer than any of the other Circuits in preserving the right to oral argument in every case it decided on the merits. Up to 2010, the Second Circuit was committed to providing oral argument in every case except for those involving incarcerated parties without representation (who would usually not be given leave to appear in court) and those in which the parties had voluntarily waived access to oral argument. The tradeoff countenanced by the Second Circuit was to limit the length and comprehensiveness of oral arguments and to dispose of a relatively large proportion of cases by summary order (McKenna, Cooper and Clark 2000, 74).

²⁴ Testimony of Chief Judge Goodwin and Judge Browning. United States Congress. Senate. Committee on the Judiciary. *On S.948 (Ninth Circuit Court of Appeals Reorganization Act of 1989). Hearing Before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary*. 101st Cong., 2nd sess., 1989, 307–310.

When the Second Circuit finally did capitulate to submitting some panels to screening, it adopted more aggressive streamlining policies in application to immigration law cases than any of its sister Circuits: the Non-Argument Calendar (NAC) as described in Local Rule 34.2 (quoted on p. 98 above). The NAC system pursues efficiency more aggressively than most practices in the other Circuits in two distinct ways. First, an explicit rule that cases presenting appeals in a given substantive area of law are to be routed for fast treatment is unusual. My interviewees across the Circuits reported that immigration claims commonly would be routed to staff attorneys’ offices—along with Social Security claims and claims made by petitioners without counsel. But no Circuit other than the Second has codified a rule that the set of *all* cases from a given area of substantive law will be routed for accelerated processing and presumptively not scheduled for oral argument. As of 1990, the screened and non-argued cases were distributed among all major substantive areas of law in the Ninth Circuit, albeit unevenly (Oakley and Thompson 1990, 117–123). In interviews, staff attorneys from the Fifth, Seventh and Ninth Circuits confirmed that their current practices do not entail targeting cases from a particular substantive area of law for expedited processing. In other words, the Second Circuit places the burden of its efficiency reforms very heavily on petitioners in immigration cases, while the other Circuits distribute the burden somewhat more evenly.

The judges of the Second Circuit made that choice consciously and explicitly, after “discuss[ing] [the] choice extensively” and finding “only slight disagreement,” as former Chief Judge Jon Newman recounts in his law review article on the adoption of the rule:

The principal reason for [applying an accelerated procedure only to asylum] was that most asylum cases present a single issue—whether an adverse credibility finding by the BIA is supported by substantial evidence—and the court and its staff counsel could be expected to develop expertise with respect to this recurring issue that would permit use of an expedited process of decision-making without impairing the fairness or quality of decisions (Newman 2009, 433).

Second, the Second Circuit’s administrative approach under the NAC is to have judges vote on whether to send a NAC case to oral argument in sequence. Thus, the second judge to vote will see the first judge’s vote, and if both of the first two pass on the case, the final judge in the panel will see that two of his or her colleagues have already voted to decide the case without argument (Levy 2011, 349). If the judges are susceptible to confirmation bias in their assessment of what cases are and are not important, such an approach will decrease the rate at which NAC cases are rerouted to oral argument. The serial screening approach has also been adopted by the Fifth Circuit, but it was considered and rejected by the Ninth Circuit (Oakley and Thompson 1990, 109–110).

Shortly before the institution of the NAC, the Second Circuit adopted a procedure—not codified as a rule but plainly visible in the written opinions as a court norm—that Soucek (2012) has referred to as “copy-paste precedent.” Between 2008 and 2012, the Second Circuit issued eleven summary orders in which it inserted the following passage verbatim:

In order to constitute a particular social group, a proposed group must (1) exhibit a shared characteristic that is socially visible to others in the community, and (2) be defined with sufficient particularity (quoted in Soucek 2012, 160).

The first case in which the passage appears is *Romero v. Mukasey* (2nd Cir. 2008, 262 Fed.Appx. 328), and the same gloss on the “particular social group” standard has appeared in further Second Circuit summary orders since Soucek’s article appeared (*Vucaj v. Holder*, 2nd Cir. 2014, 554 Fed.Appx. 48; *Yokoyama v. Holder*, 2nd Cir. 2014, 571 Fed.Appx. 12). Most of the summary orders in which this passage appears are instances of the Second Circuit denying asylum claims, although there are two exceptions in which the petition is granted. All of them are instances in which the Second Circuit mechanically reiterates, instead of revisiting, its understanding of the meaning of “particular social group” as a protected class.

Soucek objects to the practice of the Second Circuit’s “copy-paste precedent” on two grounds: that the passage is wrong as a matter of law, i.e., that it misapplies the latest standard established by the BIA and owed deference in the Second Circuit; and that unpublished summary orders such as these “do guide the opinions that follow, but troublingly, not as deliberately, and not nearly as openly, as precedential opinions do” (Soucek 2012, 154). Whether he is correct or not that the reused text contains an error of law is beyond the scope of my argument. It is clear, however, that this case management innovation, paired with the formally codified Rule 34.2, has enabled the Second Circuit to avoid making any contribution to the elaboration of this tricky question of political asylum law.²⁵ I will argue below, and again in chapters 5 and 6, that the statutory protected ground of “particular social group” is the locus of the most stubbornly persistent and conceptually challenging interpretive disputes in asylum law. Two other Courts of Appeals—the Seventh and the Ninth—have heard recent en banc cases centered on the interpretation of that statutory phrase, signaling its importance to the judges on those courts. The Second Circuit, which has been implicated in only two interpretive disputes since 2008 and none since instituting the NAC in 2010, has opted out of addressing this conceptual challenge or others that might arise from close examination of cases in the asylum context.

One episode in particular at the Second Circuit provides strong qualitative evidence that the judges have made a conscious and successful effort to avoid further elaboration of the law of asylum. In the case of *Gjura v. Holder* in 2012, the Second Circuit was faced with a petitioner who claimed a well-founded fear of persecution on the basis of her membership in the particular social group “young, unmarried Albanian women.” The court issued an initial decision

²⁵ The representative of the 2nd Cir. staff attorney’s office I spoke with acknowledged familiarity with Soucek’s article but declined to give any comment on it. Staff attorney, 2nd Cir. Court of Appeals. Interview with the author, 3 November 2015.

upholding the Immigration Judge’s determination that this group was *not* a particular social group for the purposes of refugee status determination, but before final publication, they withdrew the opinion and decided the case on narrower grounds, upholding the IJ’s claim that the petitioner had failed to demonstrate past persecution or well-founded fear for the future. The court thereby declined to issue an ultimate opinion on the question of whether “young, unmarried Albanian women” is a particular social group (695 F.3d 223, 2nd Cir. 2012; 501 Fed.Appx. 91, 2nd Cir. 2012). Withdrawing an opinion already written and scheduled for publication is an unusual move. The case of *Gjura* is a case of the Second Circuit paying special attention to an asylum claim—more attention than most asylum claims receive since the institution of the NAC—and going out of its way to avoid elaborating the law on an important issue that the case gave them an opportunity to address.

In the final, narrower summary order, the deciding judges gave no explanation of the considerations that went into withdrawing the initial *Gjura* decision. My informants from the courts were also generally very reticent to discuss details about the processing of particular cases like this one. But some brief comparisons with the work of other courts gives an indication of the salience that the case might have had for the law, had the Second Circuit stuck with its decision to decide it more broadly. A year after *Gjura* was decided in the Second Circuit, the Seventh and the Ninth Circuits both issued their en banc opinions tackling head on the meaning of “particular social group” (*Henriquez-Rivas v. Holder*, 670 F.3d 1033, 9th Cir. 2012; rehearing en banc, 707 F.3d 1081, 9th Cir. 2013; *Cece v. Holder*, 668 F.3d 510, 7th Cir. 2012; rehearing en banc, 733 F.3d 622, 7th Cir. 2013). The published cases were 28 pages apiece in the Federal Reporter, both including strong dissenting opinions. The Seventh Circuit case *Cece* dealt with practically identical empirical material as *Gjura*—a woman claiming protection on the grounds of her

membership in the particular social group “young Albanian women at risk of trafficking for prostitution.” The Ninth Circuit case *Henriquez-Rivas* grappled with the many linked conceptual issues that had arisen over years in the Ninth Circuit’s jurisprudence on the meaning of “particular social group.” Such opinions are written for a wider audience than most. The Supreme Court takes notice of Circuit Court splits (and there are numerous such splits over the meaning of “particular social group”), and they take notice of en banc rehearings as a signal that the Courts of Appeals judges have identified a legal issue as especially important and difficult.

The several episodes discussed above—the Congressional debates over splitting the Fifth and the Ninth Circuits, the institution of the Second Circuit’s NAC, the withdrawal of the original Second Circuit opinion in *Gjura* and the evolution of case management practices across all Circuits—are all fairly technical procedural episodes in the history of the federal court system. I have argued that they all made significant contributions to knowledge production in the courts. Occasionally the judges articulate high-level value considerations in these debates, as in Browning’s speech about the Ninth Circuit as a “laboratory” quoted above. But more often, the judges have engaged with these organizational changes in a mostly technical and rule-oriented mode. When values are invoked, value commitments are not what differentiate the practices of the several Circuits. All of my staff attorney interviewees expressed a firm commitment to finding the optimal balance of efficiency and elaboration in the work of their offices, even though they described somewhat different practices. It is the adoption of different technical solutions to a generally shared challenge of caseload management has led to different outcomes in the courts’ knowledge work.

Conservative and liberal political allegiances are not strongly in evidence in any of the episodes detailed above, and the judges of different Circuits do not fit Fourcade’s description of

different “categories of agents” in the international economics field. In narrowing the holding in *Gjura*, for instance, the Second Circuit offered no explicit explanation in terms of the value and the pitfalls of establishing a precedent in a difficult or confused area of law. They offered only the technical explanation that “we need not decide the issue of whether young, unmarried Albanian women constitute a social group for asylum purposes” (502 Fed.Appx. 92).

Organizational and administrative decisions, including differences in local court rules, have the potential to shape knowledge work in the courts. This is noteworthy not least because of how value-laden the consequences of these technical decisions can be. The statutory interpretation of “particular social group” is, for the Second Circuit judges and federal appellate judges in general, a technical question, as all questions of statutory interpretation are. There is no professional or moral imperative for them to answer it, and in fact it may be more desirable from their perspective *not* to answer it if the case that presents it can be decided more narrowly. From a broader perspective, however, it is clear that there is a major moral stake in how the federal courts choose to define “particular social group” for the purposes of the asylum statute. Some of the interpretive disputes that do arise over this question implicate large classes of people: are Albanian women at risk of trafficking a particular social group? Are wealthy landowners targeted by the FARC in Colombia? Are the spouses of women who undergo state-sponsored forced sterilization? But the problem of deciding whether to answer or not answer these questions is not addressed in moral terms in the strongly rule-governed institutional context of the federal courts. Some value questions are in flux for federal judges, but the notion that statutory interpretation is primarily a technical and not a moral enterprise is not one of them. This is why a rule change like the implementation of the NAC can so strongly curtail the Second Circuit’s contributions to the elaboration of asylum law.

3.3.4. Relational jurisprudence

Some written opinions in asylum cases bear the clear imprint of an individual judge's authorship, both in rhetorical style and in argumentative focus. A small number of judges have made it their business to construct a jurisprudence of asylum across many cases, not only by reiterating the same ideas but also by cross-referencing their written opinions to emphasize ongoing administrative or interpretive problems that, in the judge's view, demand the attention of the judiciary and government policymakers. Because the Courts of Appeals are small and stable organizations in terms of their personnel, and because judges receive lifetime appointments and often stay on the bench for decades, these concerted individual efforts can exert a significant intellectual influence on the work of the entire court.

When individual judges do majorly impact the jurisprudence of their court, the influence does not flow in one direction only. Distinctive legal positions adopted by a judge are by necessity adopted in relation to the other actors in the legal system who structure the decision making environment. This includes other judges who sit on the bench, as well as litigators (particularly those who are repeat players in the court) and the lower level adjudicators whose decisions are on review in the appellate courts. At a further remove, relational jurisprudence is also developed in relation to legislators who wrote the laws that are being interpreted in court and the judges of who established precedents that constrain decision making in the present.

I use the term *relational jurisprudence* to capture two key features of how individual judges can have an outsize influence on the knowledge production of their courts. First, I refer to judges' *relational* jurisprudence because their impact is produced *out of the interaction* between the core individual and other actors who contribute to the knowledge work of the court. Second, I refer to relational *jurisprudence* to underscore the point that I am describing highly differentiated

approaches to judging and legal reasoning. Of course, all judges can affect outcomes on their courts be being more conservative or more liberal, more restrained or more activist, and they do so in relational context. But these very general descriptors fail to capture the creativity and distinctiveness of individual commitments that sometimes arise and profoundly shape the decision making context of a court. As I shall argue with reference to asylum, relational jurisprudence can be highly impactful when the core individual is developing jurisprudential commitments that are independent of their political or ideological positioning.

The judge who stands out most for the impact of his relational jurisprudence in asylum cases is Kozinski of the Ninth Circuit. He has written voluminously and provocatively in opposition to the “tiresome...nitpicking” in his colleagues’ reviews of IJ opinions,²⁶ of their “pretty gutsy” flaunting of Supreme Court authority,²⁷ and of the adverse effect these tendencies will have on holistic administrative justice: “IJs, who are doubtless chary of being vilified by august courts of appeals judges, become even more reluctant to make adverse credibility findings, even when they have good reason to believe the asylum applicant is lying.”²⁸ His criticisms sometimes skirt the line of accusing colleagues of bad faith. He often composes long lists of cross-references between his asylum opinions, emphasizing that he is critiquing a long running and systematic problem—the discussion of “tiresome nitpicking” above is an example. In one remarkable instance, Kozinski writes of his own experience arriving in the United States as a refugee:

²⁶ *Kumar v. Gonzales*, 9th Cir. 2006, 444 F.3d 1043, 1056.

²⁷ *Henriquez-Rivas v. Holder*, 9th Cir. 2013, 707 F.3d 1081, 1103. Kozinski here takes issue with the 9th Cir.’s attitude towards the “ordinary remand rule” enforced by the Supreme Court which states that the Courts of Appeals are not supposed to conduct independent fact-finding to resolve cases. If additional fact-finding is necessary to resolve an asylum case, the Courts of Appeals are supposed to remand the case to the BIA for further review.

²⁸ *Kumar v. Gonzales*, 9th Cir. 2006, 444 F.3d 1043, 1061.

When my family and I arrived in this country—also refugees from Communism—we were treated by the INS with dignity and compassion. I believe that the great majority of those who deal with the agency have similar experiences. (*Rodriguez-Roman v. INS*, 9th Cir. 1996, 98 F.3d 416, 432).

Without making his personal history or psychology a major lever in the analysis presented here, we can at least make the observation that the sentiment expressed is consistent with his asylum jurisprudence overall. In many combative opinions and dissents in asylum cases, the BIA and IJs are rarely the subjects of his ire.

On that point, Richard Posner of the Seventh Circuit presents an interesting contrast to Kozinski. His judging style, and his asylum jurisprudence in particular, is in many ways comparable to Kozinski's. Both are Reagan appointees. In the behaviorist literature, their ideological tendencies in judging are scored very similarly.²⁹ Both are moderately conservative with libertarian tendencies in some areas of law. Both are well known and rhetorically brilliant writers who have used their asylum decisions and dissents as vehicles for lambasting the status quo in asylum law administration and judging.

For all their similarities, Kozinski and Posner have oriented their asylum jurisprudence in sharply divergent ways, and in doing so they set up a comparative study in the influence an individual judge can have in generating or settling interpretive dispute within a court. Kozinski has been a persistent critic of his fellow judges on the Ninth Circuit. Posner has directed equally stringent criticism at the Immigration Courts and the BIA but none at his fellow judges.

Although this often means that Kozinski is arguing to uphold IJ and BIA rulings in opposition to

²⁹ See, e.g., Yung (2013). Yung constructs an ideological scale to measure of the tendencies of judges to vote together on panels, drawing on a database of 30,000 judicial votes in 2008. The scale runs from -100 to 100, with ideological variance among 9th Cir. judges of 17.2 and among 7th Cir. judges of 10.3 (Yung 2013, 1801). On this scale Posner scores an 18.7 and Kozinski scores an 18.5. Kozinski's score is not reported in Yung's published paper because Kozinski did not meet the threshold of 200 interactions with other judges in the time period of the study. Yung reported his score to me (on the basis of 135 interactions) in personal correspondence.

his more left-leaning colleagues while Posner is arguing to overturn IJ and BIA rulings as arbitrary or capricious, those links are not foreordained. Kozinski could, in principle, voice his frustrations at the failures of the asylum process by criticizing the IJs or BIA for not issuing clearer or better-reasoned arguments.

Posner has charged the IJs and BIA with “a pattern of serious misapplications by the board [BIA] and the immigration judges of elementary principles of adjudication,” with “woefully inadequate” analyses and ignorance of “the elementary facts of contemporary history, even those that bear vitally on its missions.”³⁰ Much more frequently than most other judges, he draws on his own geopolitical and historical knowledge outside of the case record to correct the reasoning of these lower level adjudicators. He has not only reversed their decisions repeatedly but has emphatically drawn attention to the pattern:

At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals...The performance of these federal agencies is too often inadequate. This case presents another depressing example (*Pasha v. Gonzales*, 7th Cir. 2005, 433 F.3d 530, 531).

Posner’s focused intent to change the status quo of asylum adjudication is evident in passages such as those quoted above, and he has been successful within his Circuit. When Posner has written opinions in published asylum cases, 45 out of 47 times (96%) he has commanded the unanimous agreement of the Seventh Circuit panel.³¹ Still, the scope of his influence may be most clearly visible in the two instances where his colleagues have disagreed with him. In the case of *Apouviepseakoda v. Gonzales* (7th Cir. 2007, 475 F.3d 881), where Posner wrote in

³⁰ *Niam v. Ashcroft*, 7th Cir. 2004, 354 F.3d 652, 653; *Osmani v. INS*, 7th Cir. 1994, 14 F.3d 13. The passage quoted above from *Niam* includes a long list of citations to Posner’s other opinions in which he found the BIA analysis wanting.

³¹ The rate of dissents and disputing concurrences across all 7th Cir. asylum cases is even lower than 4% (it is 1.45%), although that statistic includes both published and unpublished opinions.

dissent from a panel that upheld the BIA's decision, the majority obliquely chided Posner for "mouth[ing] [the standard of review] and then proceed[ing] to pick apart what an IJ has done," but even while doing so the majority catalogued several shortcomings in how the IJ conducted the hearing and saw fit to note that "there have been plenty of recent examples of the kinds of cases in which an IJ's findings do not pass muster" (475 F.3d 890, 892). In the only other non-unanimous panel, Judge Evans wrote separately from Posner's majority opinion to express his "growing unease with what [he saw] as a recent trend by this court to be unnecessarily critical of the work product produced by immigration judges" (*Guchshenkov v. Ashcroft*, 7th Cir. 2004, 366 F.3d 554, 560). But growing unease notwithstanding, Evans concurs with Posner's judgment to vacate the order of removal in that case.

The arguments that Kozinski and Posner have developed in asylum jurisprudence are not merely rhetorical flights for their own gratification. Their colleagues within and even beyond their Circuits have taken notice and responded to them. I asked former clerks if they had any opinions of the IJs and the BIA, or if the IJs and BIA had any particular reputation within the circuit court in which they had worked. Few had anything positive to say. Some had no opinion, while others noted that the IJs and BIA are charged with an extremely hard job and an unreasonable caseload. Several former clerks clearly thought very little of the BIA's work output, but the clerks from the Seventh Circuit (i.e., Posner's Circuit) were by far the most vocal. One reported to me that "the Board of Immigration Appeals is atrocious. They're awful. They're the worst."³² Another said, "well, you know, I had a view of BIA before I joined the court, which was developed [because] I came across a lot of opinions that Judge Posner wrote about the BIA,

³² Former clerk, 7th Cir. Court of Appeals. Interview with the author, 26 August 2015.

and he has a very dim view of them.”³³ Several of my clerk interviewees from the Seventh Circuit, as well as one each from the Second and Third Circuits, made such explicit references to Posner as a formative influence on their views of the BIA.

There is a contrast here to the prevailing attitudes in the Second Circuit, where the IJs and BIA are likewise not held in high regard. In my interviews with Second Circuit clerks, negative opinions about the BIA came through frequently, and sometimes unprompted by me, as in the following exchange:

Interviewer: When you were beginning to talk about your own particular research practice, you said ‘in a normal case, not in immigration cases.’ So is there something different that you would do when you were working on an immigration case?

Clerk: Well, in an immigration case, there wouldn’t be a district court opinion. There would only be the BIA and the IJ, and those would often not be paragons of either writing or research (Former clerk, Second Circuit Court of Appeals. Interview with the author, 10 August 2015).

Another noted, “nobody has any faith in the BIA, in terms of judges.”³⁴ One former Second Circuit clerk reported to me that in her judge’s chambers, each clerk had a list of all the immigration judges in the Second Circuit, listed in order of their asylum grant rate, “which ranged something like from 2% to 98%”:

I always checked [the list] when I looked at an asylum case, and I believe my co-clerks did too. I looked to see if the IJ leaned toward granting or rejecting. If their rejection rate was on the high end, I would definitely scrutinize the case more closely (Former clerk, Second Circuit Court of Appeals. Interview with the author, 2 July 2015).

Skepticism of the quality of immigration court and BIA decisions in the Second Circuit appears to be widespread, and the circulation of the list of IJ grant rates demonstrates a concerted move

³³ The clerk did, however, go on to note that his view of the BIA softened after having worked as a clerk on the 7th Cir.: “I don’t have a high view in the BIA, in terms of its analytical record, and I find some of their reasoning to be puzzling, but you know, it’s not really the position of the Seventh Circuit or any Courts of Appeals to substitute their own reasoning for the BIA’s.” Former clerk, 7th Cir. Court of Appeals. Interview with the author, 21 September 2015.

³⁴ Former clerk, 2nd Cir. Court of Appeals. Interview with the author, 14 July 2015.

towards institutionalization of that skepticism within at least one judge's chambers.³⁵ But this skepticism is much more rhetorically muted than in the Seventh Circuit.

Kozinski's drive to undermine the jurisprudence of some of his colleagues on the issue of refugee status determination contributes directly to dissensus in the Ninth Circuit, in the form of dissents within panels. It also makes a broader, less direct contribution to the production of interpretive dispute by creating precedential lines of reasoning that are in tension with those established by other Ninth Circuit judges with a clear left-leaning bent in asylum cases.³⁶ Posner's excoriation of the IJs and BIA has created legal dissensus of a different kind—a conflict between the administrative and interpretive authority of the judiciary and the executive—that is beyond the scope of this dissertation. The conflict it has generated within the Seventh Circuit, or between the Seventh Circuit and the other Courts of Appeals, has been minimal and very mild. The different rhetorical approaches of these two judges, similar as they are in ideological profile and overall voting behavior, has contributed to significant variation in outcomes at the organizational level.

Kozinski's and Posner's sustained and polemical lines of argument in asylum jurisprudence are exceptional. Some judges have an obvious and consistent tendency to be more sympathetic towards asylum applicants than others. The massive inconsistencies in reverse/remand rates this creates has been documented by Ramji-Nogales et al. (2007; 2009) and

³⁵ None of the former clerks of other 2nd Cir. judges I spoke with mentioned the existence of similar lists in their chambers, although several made mildly disparaging remarks about the BIA and IJs, similar to the exchanges quoted above.

³⁶ Judges Pregerson and Reinhardt stand out most clearly in this role. They are the authors of opinions that introduced the 9th Cir.'s "disfavored group" doctrine, whereby members of a group that can be shown to be "disfavored" in a particular country face a lower bar for demonstrating their personal well-founded fear of persecution. The doctrine, which was never embraced by any other Circuit, was most frequently applied to cases of Indonesian Christians. See *Wakkary v. Holder* (9th Cir. 2009, 558 F.3d 1049). Reinhardt was the first to articulate the doctrine, in his opinion in *Kotasz v. Holder* (9th Cir. 1994, 31 F.3d 847).

replicates similar patterns that appear at the immigration court level (see Miller, Keith and Holmes 2014). Beyond this basic patterning of political preferences, some influential judges exhibit a personal writing (or perhaps editing) style or a concern with particular points of substantive or procedural law that cuts across multiple asylum cases. Guido Calabresi of the Second Circuit exhibits little hesitation in overturning IJ adverse credibility findings with respect to petitioners from China making persecution claims related to forced sterilization,³⁷ notwithstanding the high degree of deference that Courts of Appeals judges owe to IJs on factual findings. Frank Easterbrook of the Seventh Circuit has repeatedly articulated his skepticism that appearance and demeanor can be used reliably to assess credibility in testimony, against the conventional wisdom that prevails in, e.g., Calabresi's decisions.³⁸ Stephen Reinhardt of the Ninth Circuit occasionally reproduces lengthy transcripts of the immigration court hearings in his opinions.³⁹ Bruce Selya of the First Circuit focuses more frequently than his peers and colleagues on the openness to interpretation of the term "persecution."⁴⁰ Some judges make more strategic use than others of the power of precedential holdings to expand or contract the legal rights of asylum seekers in future cases.

Other examples of individual tendencies in asylum jurisprudence could be enumerated, but all of the judges whose works I examined showed, on the surface at least, much more

³⁷ See *Qui v. Ashcroft* (329 F.3d 140, 2nd Cir. 2003); *Huang v. INS* (436 F.3d 89, 2nd Cir. 2006); *Ming Shi Xue v. Board of Immigration Appeals* (439 F.3d 111, 2nd Cir. 2006); *Zhong v. U.S. Dept. of Justice* (480 F.3d 104, 2nd Cir. 2006); but cf. *Liu v. U.S. Dept. of Justice* (455 F.3d 106, 2nd Cir. 2006); *Me Chai Ye v. U.S. Dept. of Justice* (489 F.3d 517, 2nd Cir. 2007).

³⁸ See *Mitondo v. Mukasey* (523 F.3d 784, 7th Cir. 2008); *Djedovic v. Gonzales* (441 F.3d 547, 7th Cir. 2006); cf. Calabresi's footnote in *Majidi v. Gonzales* (430 F.3d 77, 81 fn. 1, 2nd Cir. 2005).

³⁹ See *Li v. Holder* (559 F.3d 1096, 9th Cir. 2009); *Rostomian v. INS* (210 F.3d 1088, 9th Cir. 2000).

⁴⁰ See *Bocova v. Gonzales* (412 F.3d 257, 1st Cir. 2005); *Jiang v. Gonzales* (474 F.3d 25, 1st Cir. 2007).

deference to their fellow decision making authorities than either Kozinski or Posner. None approached their asylum decisions with nearly such a sustained or rhetorically forceful pursuit of a single line of argument. Nor did any of them exhibit the same determination to move the law of the entire court, as Posner and Kozinski have done through their cross-referencing of multiple opinions advancing the same line of argument.

There is reason to believe that the idea of relational jurisprudence will provide useful insights beyond the asylum context. For one, the basic idea already plays an important role in some analyses of judges and judging, particularly in intellectual biographies of Supreme Court Justices. In the Supreme Court context, Justices frequently develop highly individualized jurisprudential commitments that in turn shape the development of law in the Court as a whole. Two instructive examples of relational jurisprudence from the current Supreme Court are Justice Kennedy's commitment to marriage equality as a matter of Fourteenth Amendment law and Justice Thomas's hostility to the principle of stare decisis. These examples reveal the same features of relational jurisprudence I have highlighted here in the contrast between Posner and Kozinski: (1) independence from political preferences as measured on a one- or two-dimensional scale and (2) profound relational influence on colleagues with direct implications for how settled or unsettled the law is.⁴¹

⁴¹ Kennedy is the majority author in all of the Supreme Court's cases that have advanced the Constitutional protection of homosexuals, from *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003) through *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015). This may be an unexpected jurisprudential path for a Catholic judge appointed by Ronald Reagan, who on many other legal issues has been a steady conservative voter at the Supreme Court. But by the time of the *Obergefell* decision, which legalized same-sex marriage as a matter of constitutional right, it was clear to all observers and to Kennedy's colleagues that this was an issue area of great personal importance to him. *Obergefell* divided the Court 5–4, and most close observers of the courts were unsurprised to see that Kennedy wrote for the majority. His opinion, however, came in for harsh criticism for its failure to clearly articulate the legal principles at issue and failure to respond clearly to the arguments in the dissents. Legal scholar Andrew Koppelman

In a social setting where so few actors wield so much power and have so many repeated interactions, it is unsurprising that the interactional level is highly significant in determining outcomes in cases. My finding that relational jurisprudence matters in the Courts of Appeals as

floated the hypothesis after the decision that the other members of the majority might have wished to write separate concurrences to shore up the technical strength of the opinion, but worried about the prospect of alienating Kennedy, their crucial fifth vote, by implying that his legal reasoning alone was insufficient (Koppelman 2015). Scalia in his dissent strongly implies that this was the dynamic at play among the majority when he wrote: “if, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began [with *Obergefell*’s opening sentence], I would hide my head in a bag” (135 S.Ct. 2630).

If Koppelman’s narrative of the politics behind the case is in fact correct, there are two ways that Kennedy’s claim of ownership over homosexual rights issues before the Court will have affected the settledness of the Supreme Court’s jurisprudence in that area: (1) Kennedy’s role muted potential concurrences that would have increased the number of interpretive disputes produced *within* the *Obergefell* case; and (2) because these potential concurrences were muted, the opinion leaves precedents that are *less* clear than they otherwise might have been and therefore opens its claims up to more contestation and interpretive dispute in the future implied fundamental rights cases.

Like Justice Kennedy’s championing of the rights of sexual minorities and Kozinski’s and Posner’s starkly divergent views on how much deference is owed to the BIA, Thomas’s stance on *stare decisis* is not readily deduced from his political positioning. Thomas is commonly and correctly identified as one of the most reliable conservative votes on the Supreme Court in politically charged cases, but his conservative voting record has a radical basis to it. He is defiantly opposed to the idea that the Supreme Court should have a bias in favor of allowing “wrongly” settled law to remain settled. Contra Thomas, the other Justices regularly articulate their respect for precedent in their opinions, and Knight and Epstein find in an empirical study “substantial support for the view that a norm of *stare decisis* exists” at the Supreme Court (1996, 1032).

This has two important consequences for the development of law at the Supreme Court. First, Thomas has authored a series of dissents, partial dissents and concurrences that have not commanded the agreement of any of his colleagues on the bench. One of the most notable examples comes in his concurrence in *United States v. Lopez* (1995), where he expressed his readiness to roll back several decades of the Court’s steady expansion of Congressional power under the Commerce Clause of the Constitution. Second, Thomas’s idiosyncratic jurisprudence means that, in 25 years on the Court, he has been the majority author on fewer cases than average and on very few of the Court’s highest profile cases. According to the Spaeth database, Thomas was majority author of an average of 9.8 cases per year up to 2013, while Scalia—the closest Justice to Thomas ideologically—was majority author of an average of 13.5 cases per year. Frequent swing voters O’Connor and Kennedy were majority opinion writers in 19.0 and 25.0 cases per year, respectively. The rarity of Thomas majority opinions has meant fewer opportunities for Thomas’s distinctive jurisprudence to become the controlling law applied in the lower courts.

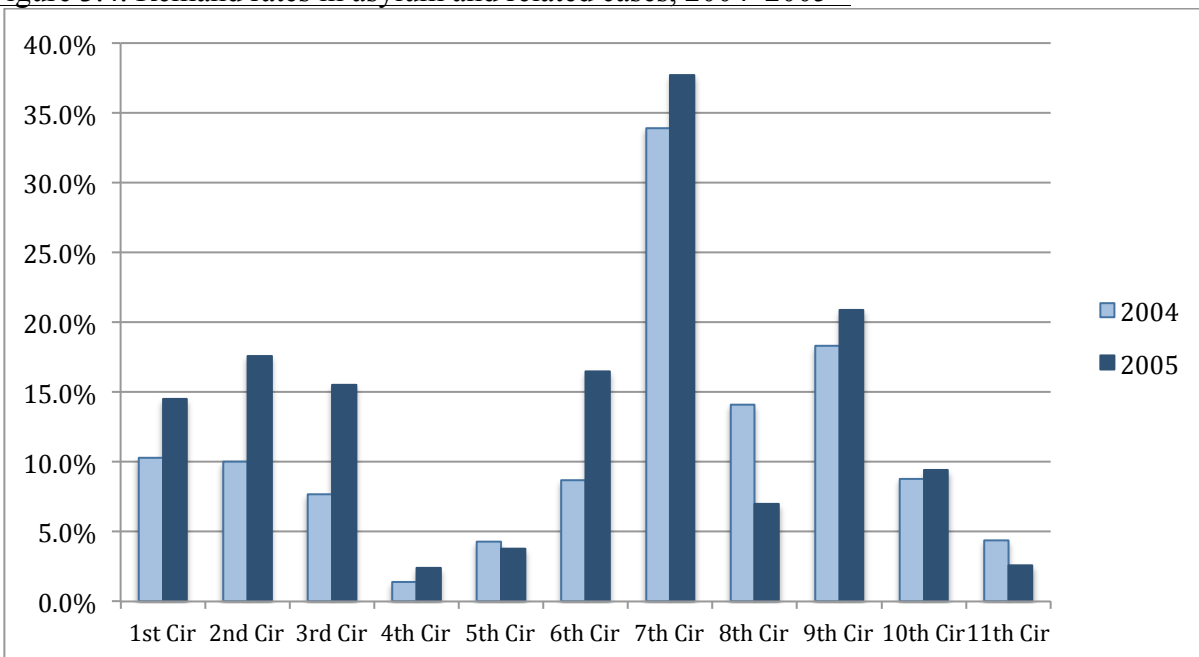
well as at the Supreme Court level is perhaps more surprising, given that interactions are more diffuse and the political stakes of the median case are far less at the Courts of Appeals than at the Supreme Court.

The jurisprudence of an individual federal appellate judge and the jurisprudence of his or her court are co-constitutive. The judges who have the ability and the inclination to write rhetorically impactful opinions and formulate consequential precedents do so within the constraints of their Circuit's existing jurisprudence; meanwhile, the jurisprudence of a Circuit (and of the federal judiciary as a whole) is formed by the incremental work of individual actors. Feedback loops of this kind have been discovered many times over in the sociological literature on organizations. The idea of “recursivity” introduced by Halliday and collaborators is one example that was developed with specific reference to law (Halliday and Carruthers 2007; Halliday 2009; Halliday and Shaffer 2015). Padgett and Powell's dictum that “in the short run, actors create relations; in the long run, relations create actors” (Padgett and Powell 2012, 2) is a related idea, more directly applicable to a demographically stable, small group organizational setting. Individuals play a role in shaping organizational norms and directing institutional precedents in legal decision making that are more particularistic than their political ideologies. Two judges with ideologically similar profiles (such as Kozinski and Posner) can develop quite different jurisprudential agendas that have different organization-level consequences.

As a final comment on the phenomenon of relational jurisprudence, it is worth noting that the example of Posner shows how relational jurisprudence can influence not only the settledness or unsettledness of law but also outcomes for petitioners. At least partly as a result of Posner's influence, the Seventh Circuit remands asylum cases to the BIA—meaning they find *against* the

Board and in favor of the asylum petitioner—at a much greater rate than any other Court of Appeals (see Figure 3.4.).

Figure 3.4. Remand rates in asylum and related cases, 2004–2005⁴²



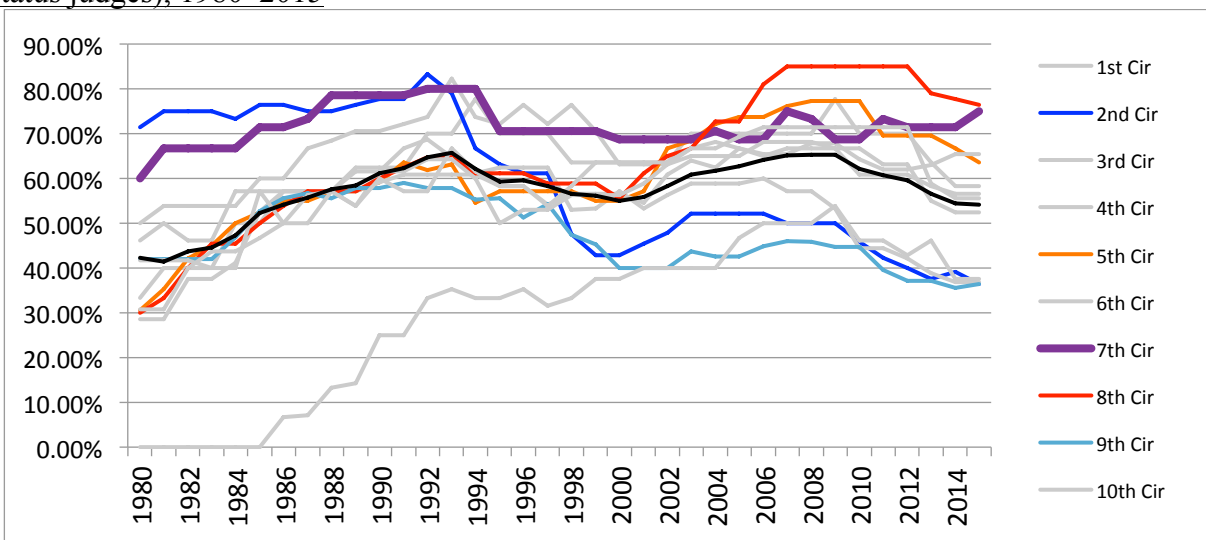
This is just the opposite of what we should expect if political interest of individual judges were the driver of remand rates in asylum.⁴³ The Seventh Circuit has consistently had a bench with a

⁴² Data from Ramji-Nogales et al. (2009, 78).

⁴³ In studies of the causal impact of political-ideological preferences on judicial decision making, scholars typically construct some measure along which they can rank judicial ideology or political preference and then examine judges' ideological scores as a predictive factor in explaining their rulings. Often the measure employed has been a simple binary measure of the political party of the judge's nominating president. Many other, more elaborate measures have been introduced, which may rely on subjective coding of the political valence of decisions or on measures of relational distance between judges voting together on panels (e.g., Yung 2013). Such measures may model the distribution of political interests more plausibly than a simple binary distinction of Republican/Democrat, but they also introduce methodological problems. Subjective coding loses any claim of formal validity, and if such coding schemes are applied over a large set of cases, they may be just about as crude as the nominating president proxy: for example, by coding every decision in favor of a criminal defendant as "liberal." Relational distance measures introduce an endogeneity problem into the analysis by using the outcome of interest (how judges vote in particular cases) as an input to construct the independent variable (judge ideology). Consequently, the simple nominating president proxy remains in use even in

strong majority of Republican-appointed judges since the passage of the Refugee Act in 1980 (see Figure 3.5). At present, the Seventh Circuit has the second largest majority of Republican-appointed judges in any of the Court of Appeals. We might expect Republican-appointed judges to be relatively more hostile to non-citizen asylum petitioners than Democratic appointees, but in the Seventh Circuit they turn out to be far more sympathetic than the Democratic-dominated Second and Ninth Circuits. Nor can we explain the pattern with the idea that “hostility to the BIA (and the administrative state more broadly)” is the conservative judging principle that explains outcomes for asylum petitioners in the Seventh Circuit. The Seventh Circuit is also much more generous to asylum applicants than the heavily Republican Fifth and Eighth Circuits.

Figure 3.5. Proportion of Republican-appointed judges in the Courts of Appeals (including senior status judges), 1980–2015



The core project of this dissertation is to explain variations in the production of unsettled law in federal courts, but of course settled versus unsettled law as an outcome of judging is intrinsically linked to other kinds of outcomes in the courts, including, most centrally, outcomes for petitioners. The preceding paragraph shows a new dimension of analytic utility in my

the most recent work on judicial behavior, and it is likely the best option available in many applications.

approach of framing this study around interpretive disputes. I invoked the concept of relational judging to explain the high volume of interpretive dispute in asylum law in Kozinski's Ninth Circuit. In turn, the concept of relational judging stands as a compelling explanation for the exceptionally good outcomes for petitioners in Posner's Seventh Circuit, where an argument in terms of the Seventh Circuit judges' political interests would fail.

3.3.5. A failed hypothesis: status ambiguity as a driver of interpretive dispute

In the preceding sections (3.3.1–3.3.4), I have described the norms, rules and relational jurisprudence that differentiate the Second and Ninth Circuit Courts of Appeals from one another in their processing of asylum cases. These arguments are elements of a broader claim, which runs through the rest of the empirical chapters of this dissertation: the organized engagement and avoidance of legal questions in the courts shapes when and where interpretive disputes will emerge. Interpretive disputes emerge in the places where intellectual and material resources are concentrated. In the remainder of this chapter, I address two additional potential causal explanations that I considered but found not to be supported by the available data. The first failed hypothesis is that status ambiguity among judges generates conflict in the form of interpretive disputes. The second hypothesis that I find not clearly supported by my data, discussed in section 3.3.6, is that the different geographic distribution of the Circuits and the different models of intracircuit communication could impact the courts' ability to settle interpretive legal questions.

Sophisticated theory and strong empirical evidence in sociology support the idea that status ambiguity breeds social conflict (Gould 2003, 17). Certainly there is status ambiguity in the Courts of Appeals. There is essentially no official recognition for professional merit available to Courts of Appeals judges. There are markers of status differentiation, for example being highly cited by one's colleagues, being ranked highly for influence or the quality of one's

judging by the American Bar Association or in scholarly literature,⁴⁴ being a “feeder” judge (i.e., one whose clerks have a high success rate in securing Supreme Court clerkships—Gulati and Posner 2015 confirm that the “feeder” judge phenomenon is symbolically important for judges). But the symbolic meanings and the appropriate measures of these unofficial markers are perennially open to contestation. Nomination to the Supreme Court is an obvious and immensely symbolically powerful status marker, yet one’s chances of Supreme Court nomination are even more subject to variation beyond the judges’ own control than the other quality metrics just listed.

In this status-ambiguous universe with many repeated interactions between judges, the rhetorical openness of the judicial opinion as a literary genre and the opportunity to write separately in dissent or concurrence provide many opportunities for judges to confront one another as competitors for social and intellectual capital. The Courts of Appeals therefore seem to be a promising organizational context for locating Gould’s theory in practice.

To test the hypothesis, I looked at two proxy measures for status ambiguity and two different measures of the unsettledness of law in the courts. I considered size of the court as a likely proxy for status ambiguity, on the theory that it is more difficult to establish informal hierarchy in a larger group. I also considered turnover in the courts as a likely proxy for status ambiguity, on the theory that informal hierarchies are likely to become entrenched over time and are likely to be disrupted by new entrants. As measures of unsettledness of law, I relied on my data on within-panel interpretive disputes in asylum law. I also relied on data from the Songer database as presented by Epstein, Landes and Posner (2013) on the dissent rates in en banc cases

⁴⁴ The American Bar Association has a Standing Committee on the Federal Judiciary, which evaluates the professional qualifications of all nominees to the federal judiciary (District Courts, Courts of Appeals and Supreme Court) and publicly assigns them a ranking from “well qualified” (and historically, sometimes “extremely well qualified”) to “not qualified.”

across the Courts of Appeals. Given that en banc hearings put all active judges on the court in a shared decision making context, and given that they all recognize the en banc hearings to be of special importance, we would expect conflict driven by status ambiguity to express itself most sharply in these cases. These two different measures of two variables each yield four different ways to test the relationship between status ambiguity and unsettled law. Figures 3.6–3.9 show the four different bivariate relationships. Measures of status ambiguity are constant in the top two and in the bottom two charts; measures of unsettledness of law are held constant in the leftmost two and in the rightmost two charts.

Figure 3.6. Asylum panel dispute rate (1968–2015) by court size

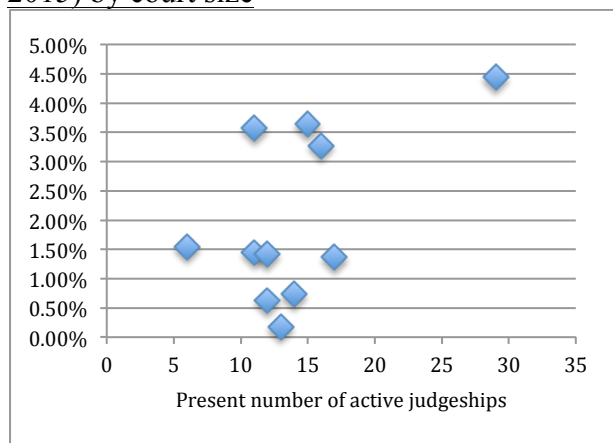


Figure 3.7. En banc dissent rate (2000–2015) by court size

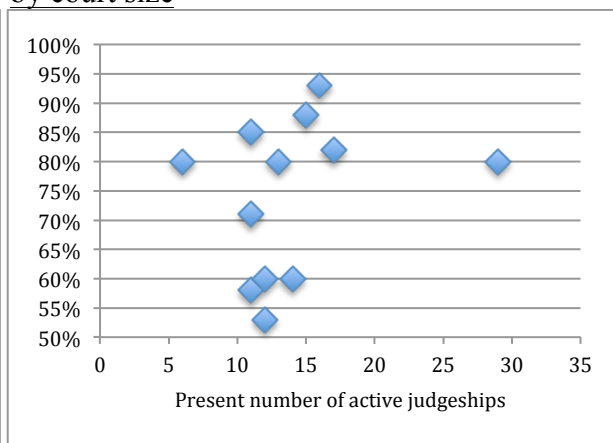


Figure 3.8. Asylum panel dispute rate (2000–2015) by judge turnover

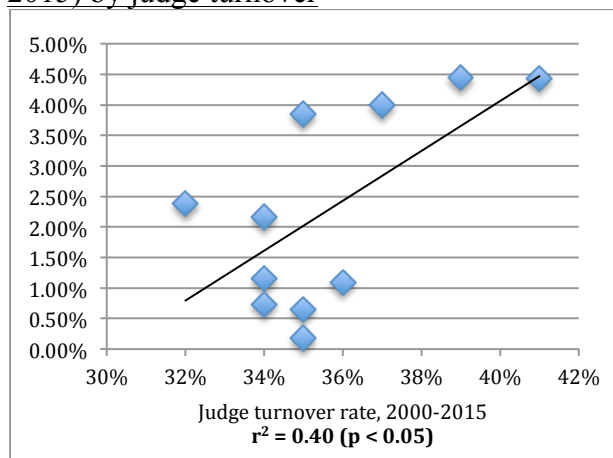


Figure 3.9. En banc dissent rate (2000–2015) by judge turnover



Of these four tests of the relationship, only one yields a statistically significant bivariate association: the relation of judge turnover rate⁴⁵ to the within-panel asylum dispute rate. This is not good evidence for the theory, particularly since in this context, the data on en banc dissent rates is likely to be a more accurate measure of unsettledness of law than data on asylum panel dispute rates in particular.

The idea of status ambiguity as a cause of unsettled law, if I had found support for it, would have fit comfortably within the bounds of the general thesis I am advancing about organized engagement and avoidance of dispute. One strong possibility is that the hypothesis fails because political alignment trumps status as a driver of conflict in the courts. This certainly seems to be the case in the Supreme Court, for instance. The Supreme Court is staffed by nine Justices, making it smaller than any of the federal Courts of Appeals,⁴⁶ and every case is heard en banc, so there is a much higher rate of repeated interaction among the judging personnel. These factors predict a lower rate of conflict driven by status ambiguity (Gould 2003, 38), but empirically we find that the Supreme Court is very disputatious. What is more, the disputes within panels on the Supreme Court follow patterns of political alignment much more frequently than the most significant lines of potential status ambiguity. Following Gould, we would expect status ambiguity to be greatest among Associate Justices with similar ideological profiles and similar tenures on the court. The best-paired examples on the Court as of 2016 are: Antonin Scalia and Clarence Thomas (Reagan-Bush appointees in 1986 and 1991); Ruth Bader Ginsburg and Stephen Breyer (Clinton appointees in 1993 and 1994); and Sonia Sotomayor and Elena

⁴⁵ I calculated turnover since 2000 in each of the Circuit Courts as:
$$\frac{(new\ commissions + retirements + deaths + reappointments\ to\ another\ court)}{total\ authorized\ judgeships * 2}$$
. For political reasons, sometimes vacancies on the courts are not filled promptly, which is why a measure that accounts for both vacancies and new commissions is needed.

⁴⁶ That is, if we include senior status judges in the count. There are fewer than nine active judges at present on the 1st Cir. Court of Appeals.

Kagan (Obama appointees in 2009 and 2010). But each of these pairs votes together at high rates. Using the Spaeth database coding of Supreme Court voting (Spaeth et al. 2015), I find that Scalia and Thomas voted together in 80% of cases in which they both cast a vote. The rates for Ginsburg and Breyer and for Sotomayor and Kagan, are 79% and 81%, respectively. By contrast, Scalia and Ginsburg—by many accounts close personal friends—voted together only 50% of the time.

Another possibility is that the measures of status ambiguity I have relied on are mismeasures or insufficiently precise measures. Length of tenure on the courts could be less important than I have supposed. Some relatively junior judges may have higher status by merit of being more highly cited or being regarded as likely candidates for the Supreme Court. However, this line of thinking takes us away from a social structural argument about the importance of status and towards a relational or interactional argument like the one made above with reference to Kozinski and Posner. A theory about the effects of status will become less useful the more we have to differentiate the status of individuals on the basis of special circumstances.

3.3.6. Geography and intracircuit communication

Geographic jurisdiction is an obvious point of variation between the Circuits that might have a direct or mediating effect on Circuit propensity to generate case law disputes. Here the evidence is mixed and not conclusive. The Ninth Circuit covers portions of the country that vote consistently Democratic in national elections (California, Hawaii, the Pacific Northwest) and areas that vote consistently Republican (Arizona, Alaska, Idaho). We might expect that covering such a large and heterogeneous section of the country would prompt more dispute, either because the individual judges experience more inner tension over their judicial mandate or because the judges collectively have diverse political leanings reflecting the diversity in their jurisdiction.

Geographical jurisdictional variation is meaningfully correlated with the variation in personnel across courts. Of the 244 active and senior judges currently sitting on the benches of the First through Eleventh Circuits, 55% were born and 56% attended law school within the geographic jurisdiction of their current court.⁴⁷ In terms of its coverage of politically heterogeneous territory, the closest comparison to the Ninth Circuit is the Sixth (Michigan, Ohio, Kentucky and Tennessee). The Sixth Circuit is, like the Ninth, more disputatious than average, especially internally (see again Figures 3.2–3.3 and the Sixth Circuit’s 93% en banc dissent rate, referenced on p. 93). The Sixth Circuit also serves as a model for how the norm of collegiality can break down within a court in such a way that leads to increased internal disputation. There is thus some support for the hypothesis that Circuit political heterogeneity is a relevant variable in generating interpretive disputes, but the asylum law data alone are hardly conclusive. More leverage could be gained over this question by comparing the Ninth Circuit (a large and politically heterogeneous Circuit territory) to the Fifth (a large and politically homogenous Circuit territory) and comparing the Sixth Circuit to the neighboring Seventh and Third Circuits.

Even more simply, geographic expanse might contribute to disputatiousness within a court by increasing communication and coordination problems. The smaller courts have a larger proportion of judges who live in the same city and work in the same building as one another, and the larger Circuits tend to hear oral arguments in more far-flung locations. The Ninth Circuit regularly hears oral arguments in Honolulu, Pasadena, San Francisco, Seattle, Portland and Anchorage. The Second Circuit regularly hears arguments only in New York City and New Haven. The Seventh Circuit regularly hears arguments only in Chicago and the Fifth Circuit only

⁴⁷ As of 31 August 2015. Judicial biographical data is available from <http://www.fjc.gov/history/home.nsf/page/judges.html>.

in New Orleans. It is easy to imagine that proximity would make it easier for judges to reach agreement and maintain consistency between cases in a complex area of law.

Almost none of my clerk interviewees found it plausible that Circuit expense would meaningfully affect the knowledge work of the courts. They spoke from very limited experience—most having spent a single year in a single chambers—but many convincingly argued that there was no clear mechanism by which Circuit expense could hinder communication or create an increased tendency towards dispute. Even in the Circuits with judges’ chambers concentrated in a single building, there was little reliance on physical proximity to facilitate communication. Research on cases is to a great degree siloed within chambers, with communication by email or phone favored over in-person communication for official purposes. In public testimonies, judges maintain that most of the time, each judge’s position is worked out at or before oral arguments. Their private conferences in chambers after the oral arguments rarely involve debates on the merits of cases (e.g., Wald 1992, 177). My clerk interviewees, who were not privy to the judicial conferences but could observe how frequently voting intentions on the panel changed after those conferences, widely corroborated this perspective. A single interviewee, from the Second Circuit and the Supreme Court, expressed a different view on the importance of geography. This clerk explicitly contrasted the collegiality and closeness of the Second Circuit—where “the judges are in the same building...they smile at each other in the hallways [and] know each other’s families and spouses...a lot of [them] went to Yale”—with the more geographically and politically diverse Sixth and Ninth Circuits.⁴⁸ But even in this comment, the clerk proposed that geographic proximity was significant only in conjunction with a strong norm of collegiality. Cohen’s court informants likewise mostly dismissed the idea that

⁴⁸ Former clerk, 2nd Cir. Court of Appeals. Interview with the author, 3 August 2015.

geographic spread could hinder intracircuit communication, offering similar rationales to those outlined here (Cohen 2002, 153–160).

The largest Circuits—the Ninth and the pre-1981 Fifth Circuit—have also demonstrated the ability to overcome coordination challenges in complex and high stakes administrative decision making contexts. The Fifth Circuit’s unanimous petition to Congress to split the Circuit was discussed above. While the Ninth Circuit resisted being split and presented a much more equivocal message to Congress, in another setting the judges exhibited a similar capacity for coordination. When Federal Rule of Appellate Procedure 32.1 was adopted in 2006, the Ninth Circuit judges presented a united and passionate front of opposition (Barnett 2005; Gant 2006; Richman and Reynolds 2013, 62–67). The rule holds:

A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.

Rule 32.1 was promulgated in reaction to several Circuits prohibiting citation of unpublished opinions by lawyers, petitioners or other interested parties in their briefs to the court. Several Circuits—the Second, Fourth, Seventh, Eighth and Ninth (Richman and Reynolds 2013, 68–69)—previously had in place rules that restricted litigants in their courts from citing earlier non-precedential opinions. The other Circuits did not have such local rules, and so the new Federal Rule 32.1 required nothing of them. The concerted Ninth Circuit opposition to the rule change was justified on the grounds of judicial efficiency. The judges did not want to be faced with reconciling many more precedential arguments, and they publicly worried about their ability, being a large Circuit, to adequately monitor all the decisions being made by other panels in real time. The opposing argument, advanced by the Congressional committee that proposed the Federal Rule, was that the federal courts “should not be able to forbid parties from citing back to

it the public actions that the court itself has taken,” a result that was taken to be “antithetical to American values and to the common law system” (minutes of the Appellate Rules Committee, quoted in Richman and Reynolds 2013, 62).

The Ninth Circuit ultimately lost the fight over Rule 32.1 and so was compelled to allow litigants to cite from any prior opinion. Scholars who have looked at the impact of the rule change up to the present have found little impact (Richman and Reynolds 2013, 69; Barnett 2005, 1551), but the Congressional debate still stands as a sharp example of the Ninth Circuit mobilizing and advocating for (what they assumed would be) efficiency over and against elaboration. It has been described as an “organized interest group lobbying campaign...led by Judge Alex Kozinski” (Burbank 2005, 22–23; see also Kozinski 2004). Thirty-eight out of 47 Ninth Circuit judges joined the public campaign against the institution of Rule 32.1. Eight stayed silent and one (A. Wallace Tashima) supported the rule change (Barnett 2005, 1500).

The Second Circuit is an unusual case with regard to internal communication. The Second Circuit judges adhere to the old-fashioned system of sending all official communications by fax. As far as I could tell from interviews, the Circuit is unique in this regard. Email and occasional phone calls are normative for communication in the other Circuits. One interviewee suggested a plausible mechanism by which the Second Circuit’s old-fashioned communication model could even increase, rather than decrease, the consistency of their lawmaking: “I think part of the purpose [of the fax system] is to slow down [the judges] and make the discussion more thoughtful.”⁴⁹ This argument is neatly continuous with the rational choice modeling of dissents favored in much of the judicial behavior literature. Dissenting, other things equal, imposes a greater cost on judges than joining a majority opinion. Modern communications

⁴⁹ Former clerk, 2nd Cir. Court of Appeals. Interview with the author, 4 September 2015.

technology decreases the cost of writing a separate opinion (again, other things equal) and so may make it more attractive to do so. By opting not to embrace to the fullest the space-time compression effected by modern communication technology, the Second Circuit has made it more costly to argue with one another and perhaps less attractive.

Stronger evidence of causal forces might emerge with more data—i.e., if this study were extended beyond its empirical reference to asylum law. On the other hand, and perhaps more likely, evidence regarding the impact of Circuit size and political leaning on court disputatiousness would remain mixed. One facet of my argument in this chapter has been that the impact of individuals in these small and slow-to-change organizations can be significant.⁵⁰ Posner and Kozinski have individually impacted the asylum jurisprudence of their Circuits, and the concerted effort of the Ninth Circuit judges to avoid a federal rule that they thought would lead to more confusion and complexity in their case law limits my general characterization above of the Ninth Circuit's organizational norm of privileging elaboration of law over efficiency. An orderly and conclusive story of organization-level cause and effect may remain beyond reach even with exhaustive data from the Courts of Appeals, given the unpredictable influence of individual actors in small group settings.

3.4. Conclusion: Knowledge Work in Courts

This chapter sits at the intersection of the well-developed field of organizational and political analysis of courts and the far less developed field of analysis of social knowledge production in organizational settings. The work of Epstein, Landes and Posner (2013) provides a powerful synthetic statement of the collective findings of economists and political scientists as to how the U.S. federal judiciary operates as a political system. On the other hand, the sociology of

⁵⁰ The courts are slow to change in personnel and in their use of modern technology, at least. They have faced dramatic changes in their dockets over the last few decades.

knowledge has not yet produced a clear theoretical framework for the assessment of organizational effects on social knowledge production. The relatively few studies that exist tend to stress contingency and contextual specificity more than commonalities across fields. I have followed that trend here by focusing on organizational dynamics that are not only specific to the U.S. federal judiciary but in some instances, specific to asylum law decision making within the U.S. federal judiciary. The Second Circuit's NAC and the divergence in approach to asylum law of the otherwise ideologically similar Kozinski and Posner are both influences on court decision making that are highly specific to the asylum context.

Identifying what will generalize from the argument will depend on comparative study of case law in other substantive areas of law. However, it is already possible on the basis of this study of a single area of case law to see some ways in which an ideal typical legalist model of court functioning falls short and some ways in which contemporary realist approaches can be extended. I begin with the legalist model.

Second Circuit Judge Jon Newman, in his article quoted above defending the NAC, goes on to say:

My view, admittedly not entirely objective, is that the fairness and quality of the decisions rendered by NAC panels have been equivalent to what would have occurred had all NAC cases been decided by RAC [Regular Argument Calendar] panels after oral argument (Newman 2009, 435–436).

This argument is representative in microcosm of a common view, perhaps even the dominant view, of the staff attorneys, clerks and judges who work in the courts: that the organizational features of the court do not have an especially significant role in determining case outcomes, certainly not enough to create systematic inequalities for petitioners, because the legal rules that bind judges to certain conclusions are of overriding importance. The staff attorneys I spoke with

and the published writings of most Courts of Appeals judges hew strongly to this view.⁵¹ Many of them are concerned about the contemporary caseload and the pressure it puts on the courts, but broadly they agree that the system is managing the pressure well enough and is not creating inequalities within the system.

Newman's specific hypothetical claim in his article is persuasive: that *if* all of the NAC cases heard in the Second Circuit over the past several years had instead been argued orally, "the fairness and quality of the decisions rendered [would] have been equivalent." But this claim, like many normative claims about whether the law is functioning well or poorly in fact, rests on strong normative and factual presumptions. In this case, Newman helpfully articulates one explicitly: the NAC is unlikely to alter outcomes in asylum cases because "most asylum cases *present a single issue*—whether an adverse credibility finding by the BIA is supported by substantial evidence" (Newman 2009, 433, my emphasis). It is an easy rhetorical move for judges to cast a case as one concerning standards of proof alone even if it could have been decided on the basis of a more far-reaching inquiry into the meaning of the relevant statutory language. This rhetorical move may be especially tempting in many instances where deciding a case on the merits would raise hard conceptual questions about the meanings of key statutory terms: "well-founded fear," "persecution," "particular social group," and/or "political opinion."

Newman's specific hypothetical claim is predicated on the understanding that the Second Circuit

⁵¹ Cohen, the former clerk and subsequently an organizational sociologist, is also sanguine about the impact of organizational choices on the quality of judging decisions. He writes, "the federal courts' slow evolution has enabled them to continue to produce a similar quality of justice without sacrificing the ideals that have characterized the appellate process throughout the courts' long history" (2002, 218).

Of course, it is also possible to find occasional oppositional views by those who are more skeptical of the impact recent organizational decisions have had on judging quality. Recall Soucek (another clerk-turned-scholar) and his condemnation of "copy-paste precedent" (pp. 105–106) and Kozinski's defense of the importance of redundancy in the appellate review process (pp. 102–103).

rarely reframes IJ and BIA decisions that are made on the grounds of petitioner credibility. As we have seen with the example of the Ninth Circuit, it is possible for the Courts of Appeals to adopt a more aggressive approach to appellate review in practice. As we have seen with the example of the Sixth Circuit, court-wide norms like this are not necessarily stable over time. When we recognize these contingencies in Newman's claim, it no longer looks like such a solid assurance that organizational features of his court matter little to decision making outcomes.

Finally, I turn to what my perspective has to add to the many existing realist studies of courts and court functioning. As I noted at the outset, there is a large body of work on the political and social functioning of the Courts of Appeals. Because this literature tends to eschew analysis of the rhetorical content of judicial decisions and is overwhelmingly methodologically individualist, there is ample opportunity to complement and complicate its findings with an analysis focused on (1) judicial knowledge production and (2) organization-level variation.

Significant and systematic differences in decision making outcomes can develop as a consequence of organization-level differences between the courts. Specifically, certain legal questions are readily engaged in certain contexts and systematically avoided in others. The factors I have found to be most significant are variations in local court rules and norms, as well as the relational influence of individual actors on their colleagues on the court. The fact that there is court-level variation in how these patterns of engagement and avoidance play out limits the opportunity for judges to issue rulings in accordance with whatever strategic ambitions or other preferences they may have. This general point has already been recognized in the scholarship on "dissent aversion" on judging panels (see Epstein, Landes and Posner 2013, 255ff.). My contribution here is to extend it beyond the small-group setting of the judging panel. Some judges are able to influence the jurisprudence of their Circuits beyond the scope of the panels

they sit on—the contrast between Kozinski and Posner is the key example in the asylum context. Court rules and norms can induce court-level variation in a similar fashion.

The implication is that the development of case law is less like a simple aggregation of individual action than either the ideal-typical legalist or most legal realists usually suppose. In chapter 6 I point to other features of the decision making process that structure the engagement and avoidance of legal questions and the propensity of judges to dispute the interpretation of the law. The cumulative result is that the strategic action of individual judges is always intertwined with—and often frustrated or transformed by—broader contextual factors. The constraint on individual action, furthermore, is not limited to the constraint of legalism (i.e., that judges cannot ignore the plain meaning of a statute or a well-established precedent even if they would like to). The constraint is also normative and institutional. In the next chapter, I continue my focus on the organizational level by turning to asylum case processing at the Supreme Court and the impact Supreme Court asylum decisions have had on judging in the Courts of Appeals.

Chapter 4. Supreme Court Decision Making and Ersatz Clarity in Asylum Law

4.1. Introduction

This chapter examines the 19 asylum cases decided by the U.S. Supreme Court since 1968 and their importance in relation to judge-made asylum law in the Courts of Appeals. As with the Courts of Appeals, the great majority of these cases have come since 1980. The central empirical question is the same as the one posed in the previous chapter, here applied to the empirical context of the Supreme Court: how do organizational dynamics influence the settling of some legal questions and the production and perpetuation of interpretative disputes over others? Given the organizational differences between the Supreme Court and the Courts of Appeals, however, the account here takes a different form from the account given in the previous chapter.

For the purposes of my argument, there are three essential organizational differences between the Courts of Appeals and the Supreme Court. Two of them tend to make organizational analysis of the Supreme Court more difficult and conclusions more uncertain than in the case of the Courts of Appeals; the third cuts in the other direction. First, the comparative approach I employed to identify empirical puzzles in the last chapter is not possible here. Because the Supreme Court reviews Courts of Appeals decisions and issues legal decisions that are binding on them, the Supreme Court cannot be easily brought into the comparative framework I established in the last chapter. Nor does the Supreme Court have other “sister circuits” to which it can be straightforwardly compared.

The Supreme Court is, however, embedded in an institutional network of courts: international courts that issue decisions and advisory guidelines on refugee status determination as well as the highest courts of other national systems that, like the U.S., apply the approach to

refugee law that originated in the 1951 UN Convention. The former group includes the Court of Justice of the European Union, the European Court of Human Rights, the Inter-American Court of Human Rights and Commission on Human Rights, the UN Committee Against Torture, Human Rights Committee and High Commissioner for Refugees (see tables of cases in Hathaway and Foster 2014, *xiv – xviii*; Feller, Türk and Nicholson 2003, *xxii–xxvi*). National court systems that have issued a significant number of decisions enforcing the UN definition of refugee include Australia, Austria, Belgium, Canada, France, Germany, Ireland, Japan, New Zealand, Switzerland and the United Kingdom (Hathaway and Foster 2014, *xviii–lxvi*). Of course, the U.S. Supreme Court also stands in an important institutional relationship to the Circuit Courts of Appeals.

Given these relations, a different kind of comparative framework is possible here, along the lines of the literature on transnational legal orders (TLOs). Halliday and Shaffer define a transnational legal order as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions” (Halliday and Shaffer 2015, 11). That definition certainly fits the law of refugee status as it is practiced in international courts and in many of the nations that are signatory to the UN Convention and/or Protocol. Halliday and Shaffer stress that the existence of a TLO does not imply perfect concordance on the meaning or application of legal norms across local and global contexts. In fact, much of their empirical work is dedicated to examining just how actors in the legal system negotiate discrepancies in the interpretation of TLOs and TLO alignment with issue areas (Halliday and Shaffer 2015, 46–55). The interpretive disputes over asylum law that emerge at the Supreme Court level can be seen as normative struggles of this type. Halliday and

Shaffer's theoretical vocabulary is hence useful for describing the transnational context in which Supreme Court decision making in asylum law takes place.

The second essential difference between Supreme Court decision making and decision making at the Courts of Appeals is that the Supreme Court has discretionary authority to review cases. It does not have mandatory appellate jurisdiction over cases heard by the lower courts, as the Courts of Appeals do. The Supreme Court now receives thousands of requests to review cases each year ("writs of certiorari") and typically selects a docket of about 70 cases (the Court's agreement to hear a case is known as a "grant of cert"). While many Courts of Appeals decisions are routine, it can hardly be said that any Supreme Court case decided on the merits is a routine case. The mere fact of the Court agreeing to hear a case makes it unusual relative to the vast majority of the cases for which the Court receives writs of certiorari. In the last chapter I made repeated reference to the strategic aspects of Courts of Appeals decision making and acknowledged the strategic interests of judges as standing in the background of my analysis of organizational effects on judicial knowledge work. Because Supreme Court decision making is so fundamentally strategic and often so politically consequential in all of its phases, it is more difficult to separate out political from non-political factors in decision making outcomes.

The third and final crucial difference between the Supreme Court context and the Courts of Appeals context is that the total volume of asylum cases heard by the Supreme Court is less than the volume heard by any one of the Courts of Appeals. The Supreme Court's 19 cases is in fact far less than the volume heard by any Circuit except for the DC Circuit. I motivated the analysis in the last chapter with a description of statistical patterns that suggested interesting points of variation in how judges decide across the different courts. In this chapter, the much smaller set of cases under analysis invites a more direct approach. I read closely the entirety of

Supreme Court asylum jurisprudence and identified the cases of particular interest in the context of this dissertation—namely, those that deal directly with the question of who will be recognized as a refugee. Those cases are the focal points of my analysis. I mention only in passing the Supreme Court cases that deal with procedural issues and other issues peripheral to the knowledge problem of refugee status determination.

This chapter relies more heavily on secondary data than my other empirical chapters. There are extensive literatures already existing on the Supreme Court cert process,¹ the functioning and strategic uses of Supreme Court precedent,² the past and present role of dissenting and concurring opinions at the Court,³ the role of clerks⁴ and the individual jurisprudential philosophy of almost every individual Justice who has been appointed to the Court in the past century.⁵ Where the patterns of the Supreme Court's asylum jurisprudence fit the theoretical accounts established by scholars working with larger datasets and more immediate knowledge of the interior workings of the Court, I have found little reason to contest the prevailing views or to reinvent their analyses. The consequence is that my argument in this chapter is in closer alignment with the behaviorist literature than it is in much of the rest of the dissertation. The Supreme Court is able to settle interpretive questions more decisively than the Courts of Appeals by virtue of its institutional authority to set precedents for the future that are

¹ See Boucher and Segal 1995; Brenner 1997; Caldeira, Wright and Zorn 1999.

² See Brenner and Spaeth 1995; Knight and Epstein 1996; Richards and Kritzer 2002; Hansford and Spriggs 2006.

³ See Walker, Epstein and Dixon 1988; Maltzman and Wahlbeck 1996; Corley 2010; Urofsky 2015.

⁴ See Best 2002; Ward and Weiden 2006; Peppers 2006; Pether 2007.

⁵ There are comprehensive biographies of almost all the Justices. There are also many collective biographies and histories covering each “era” of the Court associated with a given Chief Justice—e.g., the “Warren Court,” the “Rehnquist Court” and the “Roberts Court.”

binding on all the federal courts. Consistent with the behaviorist literature, I find evidence that the Justices deploy this authority in patterned ways aligned with their ideological preferences.

At the same time, however, my findings here are congruent with the analysis of the other chapters, where I have sometimes been critical of the behaviorist model of judicial decision making. I argue here that the internal logic of the law is an indispensable element in our understanding of judicial decision making, and I identify a mechanism by which the Supreme Court contributes to the settling of legal questions that is distinct from either the authority of reason or the authority of precedent. Decisions in major Supreme Court cases have the effect of repelling the lower courts from engaging with certain legal questions. This is not the same thing as the lower courts demonstrating a respect for established precedent, and it can create a kind of *ersatz clarity in the law*, whereby the Supreme Court blocks the further development of legal thinking on a topic without either solving the problem as a knowledge problem or establishing a clear precedent.

This claim echoes the analyses of shifting sites of contestation in legal interpretation in the literature on settling and TLO alignments (e.g., Block-Lieb and Halliday 2015) and builds on an argument broached earlier with reference to network visualizations of my data. In chapter 2 I commented on the minimal importance of Supreme Court precedents in the network of explicit interpretive disputation relative to the clear centrality of Supreme Court precedents in the overall network of citations between cases (see again Figures 2.8 and 2.9). Not only does the Supreme Court bind the Courts of Appeals with its precedential holdings, it also repels the Courts of Appeals away from developing case law around certain questions, such that ambiguities are rerouted and interpretive disputes arise with reference to other questions. The clearest examples

in asylum law are the Supreme Court decisions *INS v. Cardoza-Fonseca* and *INS v. Elias-Zacarias*, both of which I discuss in detail below.

The remainder of this chapter proceeds in four sections. In section 4.2, I give a chronological overview of the asylum cases that the Supreme Court has heard. In the next section (4.3), I focus on the two cases where the Supreme Court has made the most substantive interventions in the question of who can claim refugee status in the United States. In these cases, the actual content of the Supreme Court's holdings and reasoning does not align exactly with the impact the cases have had on the lower courts. Specifically, the Supreme Court is able to quash debate and interpretive dispute over parts of the statute, but latent disagreements persist and may manifest as interpretive disputes over other statutory questions instead. I describe these developments as the production of *ersatz clarity* in the law—an unintended consequence of the precedent-setting power at the Supreme Court. In section 4.3 I also briefly discuss the process by which the Supreme Court decides to hear a case. I observe that in this phase of the decision making process, the Justices exert much more direct control than do judges in the Courts of Appeals, and the evidence suggests that they use the opportunity to act strategically. Section 4.4 analyzes within-panel interpretive disputes in Supreme Court asylum jurisprudence. My analysis here differs in some ways from the discussion of relational jurisprudence in the Courts of Appeals in chapter 3. The different organizational form of the Supreme Court facilitates an even more prominent role for individual actors, and in the asylum context we see a mix of ideological bloc voting and more highly differentiated relational jurisprudence. Section 4.5 concludes.

4.2. An Overview of Supreme Court Asylum Jurisprudence

In the period between the U.S.'s ratification of the UN Protocol (1968) and the passage of the U.S. Refugee Act (1980), the Supreme Court heard a single case that dealt with the legal

question of refugee status determination. *Rosenberg v. Yee Chien Woo* (S.Ct. 1971, 402 U.S. 49) asked whether an asylum seeker's "firm resettlement" in a third country had to be taken into account in the context of an asylum claim in the United States. The Court held that it did. In the same period the Court heard two procedural cases concerning refugees, one on the question of federal court jurisdiction (*Cheng Fan Kwok v. INS*, S.Ct. 1968, 392 U.S. 206) and another on the petitioner's right to a second hearing before another government authority (*INS v. Stanisic*, S.Ct. 1969, 395 U.S. 62). None of the three cases from this period have had any significant impact on the subsequent development of asylum law.

Following the 1980 Refugee Act, two early decisions made major interventions in statutory interpretation that have shaped the course of asylum litigation, admissions and removal procedures ever since. The cases, *INS v. Stevic* (S.Ct. 1984, 467 U.S. 407) and *INS v. Cardoza-Fonseca* (S.Ct. 1987, 480 U.S. 421), established two distinct burdens of proof for asylum seekers making claims under different statutory authorities. Recall from the introductory chapter that once a petitioner has shown that s/he meets the statutory standard to be recognized as a refugee—demonstrating a well-founded fear of persecution on a protected ground—a grant of asylum is made only at the discretion of the Attorney General. Once a petitioner has been denied asylum, however, either for failing to meet the statutory standard or at the discretion of the Attorney General, s/he may subsequently apply for withholding of removal. The withholding of removal provision protects petitioners from being deported to countries where they can show that they are at risk of persecution or torture, and relief under that second provision is non-discretionary: that is, the Attorney General cannot withhold it unless the alien him/herself (1) has participated in persecution, (2) has been convicted of or is seriously suspected to have committed a particularly serious nonpolitical crime or (3) presents a danger to the security of the United

States. *Stevic* and *Cardoza-Fonseca* established that petitioners faced different burdens of proof while seeking relief under these two different statutory standards. Withholding of removal required a showing of a “clear probability of persecution” (the holding of *Stevic*), while the “well-founded fear” standard governing asylum set a lower bar: even a 10% probability of persecution would be sufficient to establish a “well-founded fear” (480 U.S. 431). *Stevic* reversed an earlier judgment of the Second Circuit, and *Cardoza-Fonseca* affirmed an earlier judgment of the Ninth Circuit.

Both cases remain landmarks in asylum jurisprudence. *Cardoza-Fonseca* has been cited over 2800 times in subsequent case law and *Stevic* over 1200 times (by contrast, *Brown v. Board of Education I* has been cited just under 2500 times in subsequent case law).⁶ Asylum seekers who appeal their cases to the federal courts commonly apply for both asylum and withholding of removal at the same time, and the holdings in *Cardoza-Fonseca* and *Stevic*, taken together, have given federal judges an easy way to dismiss withholding of removal claims without consideration when they are made after asylum claims have failed. If petitioners cannot pass the “well-founded fear” bar, then presumptively they cannot pass the higher bar of showing that they face a “clear probability” of persecution.

The “at least 10% probability” and “clear probability” standards are now routinely cited in Courts of Appeals and BIA decisions in their assessments of the evidence in a case. However, judges never apply these purported standards to empirical facts in any way that would be a recognizable and acceptable use of probability measures to a social scientist or statistician. They rarely, if ever, have data available that would allow them to do so even if they wanted to. A typical application of the standard is instead a review of the facts in the record (the Courts of

⁶ As of January 2016. Citation counts from Westlaw.

Appeals cannot engage in new fact-finding), followed by an ex cathedra conclusion that the “at least 10%” threshold has been met or has not been met.⁷ The recent Ninth Circuit ruling in *Lopez v. Holder* is a representative example. The court’s opinion reads in part:

Lopez’s testimony has not established a pattern of persecution closely tied to her...The three murders she relies on occurred over the span of a decade, and Lopez did not know who killed her relatives or why they were killed. Since the BIA correctly determined that Lopez and her mother were similarly situated to each other, any claim of a well-founded fear is further undercut by the fact the Lopez’s mother has not been harmed (2014, 578 Fed.Appx. 682).

Judges have come to rely heavily on the rhetoric of the holdings of *Stevic* and *Cardoza-Fonseca*, but given how open to interpretation the probability standards articulated in those cases are, judges have much leeway in how their decisions in subsequent cases actually come out.

Stevic and *Cardoza-Fonseca* are unusual even within the small set of Supreme Court asylum cases in that they engage in the interpretation of statutory language that bears directly on the processes of refugee status recognition. Even after the Refugee Act was passed, many of the Court’s other cases involving asylum-seeking petitioners have dealt only indirectly with the substantive law of refugee status determination. A 1983 case, *INS v. Chadha* (462 U.S. 919), was a landmark in constitutional separation of powers jurisprudence but did not clarify the statutory meaning of “refugee.” The Supreme Court has ruled in favor of both the Attorney General and the BIA against charges of abuse of discretion when they exercised their authority to deny motions to reopen removal proceedings.⁸ On the other side of the ledger, the Supreme Court recently preserved the jurisdiction of the courts to review BIA denials of motions to reopen

⁷ More precisely, in the wake of the 2005 REAL ID Act, the Courts of Appeals rule on whether a reasonable adjudicator would be compelled to conclude that the BIA erred in *its* application of the 10% standard. This requirement for deferential review ought to make some judgments easier, but correspondingly it ought to make some judgments more difficult: the conceptual problem of drawing a boundary between petitioners who win and those who lose is not eliminated.

⁸ *INS v. Abudu* (S.Ct. 1988, 485 U.S. 94); *INS v. Doherty* (S.Ct. 1992, 502 U.S. 314).

removal proceedings.⁹ Three other Supreme Court asylum cases have turned on yet another separation of powers issue: the question of how much deference the Courts of Appeals owe to the BIA to make initial determinations on particular points of statutory interpretation. In each of the three cases, the Supreme Court ruled in favor of preserving interpretive authority with the BIA and against aggrandizing the role of the federal courts.¹⁰ Two further cases have dealt with the issue of award of attorney fees under the Equal Access to Justice Act.¹¹

Following *Stevic* and *Cardoza-Fonseca*, the Supreme Court's next significant intervention in a case bearing directly on refugee status determination came in *INS v. Elias-Zacarias* (S.Ct. 1992, 502 U.S. 478). Overturning a Ninth Circuit decision, the Supreme Court held that a guerilla organization's attempt to conscript a Guatemalan native into its military force did not constitute persecution on account of political opinion. *Elias-Zacarias* has had a major impact on subsequent interpretation of "political opinion" as a protected ground. The case is now widely held to "stand for" the position that political neutrality cannot constitute a political opinion under the meaning of the statute (Anker 2014, 372–374). Relatedly, the Court declared, "persecution must be on account of the *victim's* political opinion, not the persecutor's" (502 U.S. 478).

Elias-Zacarias remains the only opinion in which the Supreme Court has issued a holding explicitly on the meaning of one of the statutory protected grounds: the meanings of race, religion, nationality and particular social group have never been addressed by the Supreme Court in the asylum context, and the Court has not revisited the meaning of "political opinion"

⁹ *Kucana v. Holder* (S.Ct. 2010, 558 U.S. 233).

¹⁰ See *INS v. Aguirre-Aguirre* (S.Ct. 1999, 526 U.S. 415); *INS v. Orlando Ventura* (S.Ct. 2002, 537 U.S. 12); *Gonzales v. Thomas* (S.Ct. 2006, 547 U.S. 183).

¹¹ *Commissioner, INS v. Jean* (S.Ct. 1990, 496 U.S. 154); *Ardestani v. INS* (S.Ct. 1991, 502 U.S. 129).

since 1992. Because of this, *Elias-Zacarias* has taken on a singular importance for legal scholars attempting to interpret the scope of the protected grounds. It has also become a focal point in case law, cited 6225 times as of January 2016. Perhaps even more strikingly, *Elias-Zacarias* is cited in over 12000 appellate court petitions by asylum seekers and the government—a huge number given that the federal courts have only heard about 21300 asylum cases since *Elias-Zacarias* was decided in 1992. The case has become a standard reference point for litigants on both sides in asylum cases before the federal courts. But as with *Stevic* and *Cardoza-Fonseca*, the impact of *Elias-Zacarias* on lower court jurisprudence has not aligned especially closely with what the Supreme Court actually said. The Court in *Elias-Zacarias* did not give a complete answer to the question of what “political opinion” means, but it has had the practical effect of discouraging the Courts of Appeals from further elaborating or contesting that definitional question. I elaborate on this observation in the next section.

In two recent cases, the Supreme Court has interpreted statutory terms that do not constitute part of the definition of “refugee” but still bear directly on whether asylum seekers will be able to stay in the United States by defining the “bars to admission” included in the Refugee Act. In *Negusie v. Holder* (S.Ct. 2009, 555 U.S. 511), the Court assessed the meaning of the so-called “persecutor bar,” which prohibits aliens from gaining asylum if they have “assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion,” but the Court ultimately declined to give its own reading of what that statutory provision meant. The case concerned an Eritrean national who had been forced to work as a prison guard while the prisoners under his supervision were subjected to persecution under the meaning of the statute, and the Court remanded the case to have the BIA provide its own interpretation of the statute

before the federal courts offered one. In *Moncrieffe v. Holder* (S.Ct. 2013, 133 S.Ct. 1678), the Court examined the meaning of “aggravated felony,” which is a second bar to admission as a refugee, along with having participated in or assisted persecution. Here the Court did issue a ruling, finding over the dissents of two Justices that possession of marijuana with intent to distribute was not an aggravated felony (this interpretive dispute was given as a model in chapter 1—see again Figure 1.3).

Finally, three Supreme Court asylum cases concerning the treatment of Haitian asylum seekers have reached the Court: *Commissioner, INS v. Jean* (S.Ct. 1990, 496 U.S. 154), *U.S. Department of State v. Ray* (S.Ct. 1991, 502 U.S. 164) and *Sale v. Haitian Centers Council* (S.Ct. 1993, 509 U.S. 155). *Jean* concerned the award of attorney’s fees, and the Court found in favor of the Haitian petitioners. In *Ray*, the Court denied a Freedom of Information Act request by Haitian asylum seekers to release the names of Haitian nationals who had previously been returned to Haiti by the U.S. government. In *Haitian Centers Council*, several organizations together brought a class action on behalf of Haitian asylum seekers, challenging the U.S. government’s interdiction at sea program, which denied those fleeing Haiti by boat even the opportunity to receive an asylum hearing. Here, again, the U.S. government prevailed against the Haitian petitioners. John Paul Stevens, writing for the Court, held that the discretion of the executive branch to interdict asylum seekers at sea was not restricted by either national legislation or international obligations.

This short overview of cases covers the whole history of the Supreme Court’s asylum jurisprudence under the modern regime of refugee protection. Some key features of the cases stand out. First, the Court is not especially interested in asylum. They have had opportunities to address still-outstanding statutory interpretive questions and have declined to do so. Perhaps the

most significant is the question of the meaning of “particular social group,” which remains unsettled within and between the Circuits and which reached the Supreme Court in the form of cert petitions after the Seventh Circuit decided *Cece v. Holder* en banc (2013) and after the Second Circuit declined to decide *Gjura v. Holder* (2013) on the merits (see again the discussion of both cases in the previous chapter). Second, where the Court is interested in asylum, it is more interested in procedural questions and separation of powers than in interpretation of the statutory definition of “refugee.” Third, the Court is not especially interested in aggrandizing the power of the judiciary in the domain of asylum law. They have voted consistently to defer to the executive branch in matters of primary statutory interpretation (*Aguirre-Aguirre*, *Orlando Ventura* and *Thomas*) and in matters of discretion over execution of the law (*Abudu* and *Doherty*).

A fourth notable feature of these cases is the comparative frequency of claims originating with Haitian asylum seekers. Their claims have mostly met with failure: *Jean* was a win for Haitian asylum seekers, but *Ray* and *Haitian Centers Council* were two much more consequential losses. While it is remarkable that Supreme Court asylum jurisprudence has had so many points of contact with Haitian refugees in particular, these cases and their litigation histories fit comfortably with the well-established finding in law and society literature that greater material resources correlate with success in litigation (Galanter 1974; Songer, Sheehan and Haire 2003) and with other empirical data suggesting that Haitians are disfavored in the asylum process in the U.S.¹²

Finally, it is worth noting that several of the Supreme Court decisions cite the U.S.’s legal obligations under the UN Protocol and/or cite the UNHCR *Handbook* for interpretive guidance. The recognition of the relevance of international law in asylum begins with brief references in

¹² See the grant and remand rates by country of origin in Ramji-Nogales et al. 2009, 70. See also the discussion of the interdiction at sea program in Hamlin 2014, 41.

the pre-1980 decisions *Stanisic* and *Yee Chien Yoo*. In the period after the 1980 Refugee Act, Stevens is the single Justice most clearly interested in asylum and one of two (along with Anthony Kennedy) most interested in the application of international law to asylum. Stevens wrote the majority opinions in *Stevic*, *Cardoza-Fonseca*, *Abudu* and all three of the Haitian cases (*Jean*, *Ray* and *Sale*), as well as a dissent from Antonin Scalia's opinion in *Elias-Zacarias*. His reliance on the UN Protocol in *Cardoza-Fonseca* set the tone for engagement with international law in all of the Supreme Court asylum decisions to follow. In *Cardoza-Fonseca*, Stevens built his argument around the interpretive principle that the U.S. Refugee Act was designed to bring national legislation into closer alignment with its international treaty obligations. In *Sale*, the statutory requirements of the UN Convention were directly at issue before the Court, and Stevens's engagement with international law there was even more substantial. In his *Elias-Zacarias* dissenting opinion, Stevens cited the "symmetry [of the Refugee Act] with the United Nations Protocol" to bolster conclusions already reached on other, less controversial interpretive approaches (502 U.S. 487). Kennedy's opinions in *Aguirre-Aguirre* and *Negusie* both follow Stevens's example in their treatment of international law by quoting *Cardoza-Fonseca* on Congress's intent to align national and international legal obligations (526 U.S. 427; 555 U.S. 520).

It remains unusual and somewhat controversial for the U.S. Supreme Court to cite foreign or international law in its decisions. Even though the regime of refugee recognition and protection that is applied in the U.S. federal courts is directly derived from U.S. international treaty obligations, it is not an inevitable outcome that the Supreme Court should reference asylum law in just the way that it does. U.S. asylum law can be seen, as noted above, part of a transnational legal order, and like many TLOs, essential elements of its meaning and application

remain contested at the international level. In asylum cases, the U.S. Supreme Court acts in a crowded strategic field that also includes legislators, administrative authorities and other influential actors within the legal system. The role that these latter authorities may play in shaping the law takes us beyond the scope of this dissertation; it is enough to note here that the Court's invocations of international authority to support a legal interpretation are particular strategic moves within this context. They are important contributions to what Halliday and Shaffer refer to as the "alignment" of TLOs to issue areas (Halliday and Shaffer 2015, 46). Nowhere in the Supreme Court's asylum jurisprudence is the authority of international law taken to supersede the authority of Congressional statutes properly interpreted, but reliance on it does allow Stevens and Kennedy to bolster certain positions that they wish to reach. This is especially clear in Stevens's *Elias-Zacarias* dissent. Kennedy has an earned reputation for enthusiasm for international law that extends beyond the asylum context (e.g., Brand 2007, 429, 432–433), so his citations to international law in asylum cases may be part of a broader strategy to bring U.S. federal law into closer alignment with international rule of law.

4.3. The Decision Making Process at the Supreme Court

4.3.1. Cardoza-Fonseca, *Elias-Zacarias* and the Production of Ersatz Clarity

The Supreme Court Justices are in general highly sensitive to the significance of their ability to set legal precedent and shape the course of law. Over time, they have collectively constructed many elaborate and finely tuned systems of precedent and jurisprudence, such that the legal treatments of some issues scarcely resemble the broader policy discussions that parallel them outside of the courts. Recent scholarship on judicial behavior has argued that Supreme Court Justices think of their decisions in terms of "jurisprudential regimes" (Richards and Kritzer 2002; Scott 2006; see also Knight and Epstein 1996). Framed as a criticism of a simpler

“attitudinalist” model of judging, Richards and Kritzer’s jurisprudential regimes argument holds that the Supreme Court Justices construct interpretive approaches to sets of cases in ways that diverge from the “mechanistic” application of legal precedents. Features of these regimes include, for example, “setting the level of scrutiny or balancing the Justices are to employ in assessing case factors” (Richards and Kritzer 2002, 305).¹³ The result of cases being viewed in light of a particular jurisprudential regime is path dependency in Supreme Court decision making: cases are viewed and decided from changing vantage points as the regimes in which they are situated develop over time.

When the Court has broached core definitional issues in asylum law—namely, in *Stevic*, *Cardoza-Fonseca* and *Elias-Zacarias*—it has built up aspects of what Richards and Kritzer refer to as a jurisprudential regime. Stevens’s and Kennedy’s citations to international law stake out an interpretive approach to asylum law that cannot be limited in application to a narrow set of cases. Meanwhile, Scalia’s opinion in *Elias-Zacarias* does not restrict itself to elaboration on the meaning of “political opinion”—the immediate question presented in the case—but rather attempts to develop a principle that would also apply to the interpretation of the other protected grounds:

¹³ In some areas of law—equal protection jurisprudence arising from the 14th Amendment, for example—the Supreme Court has made the setting of a “level of scrutiny” an important part of its formal accounts of its decision making process. In the equal protection context, the Court says that it examines constitutional claims at one of three levels of scrutiny. Government classifications on the basis of race or national origin are subjected to “strict scrutiny” and are illegitimate unless the government can demonstrate a “compelling state interest” and a narrow tailoring of the government policy/classification to meet its end. Classifications on the basis of gender or sex are subject to “intermediate scrutiny.” All other government classifications—e.g., those based on age, wealth, residential neighborhoods, occupation, mental or physical disability, education level, sexual orientation and so on—are ostensibly subjected to the lowest level of scrutiny. At this lowest level, the government needs only to articulate a “rational basis” for laws that classify people along such lines in order to pass constitutional scrutiny.

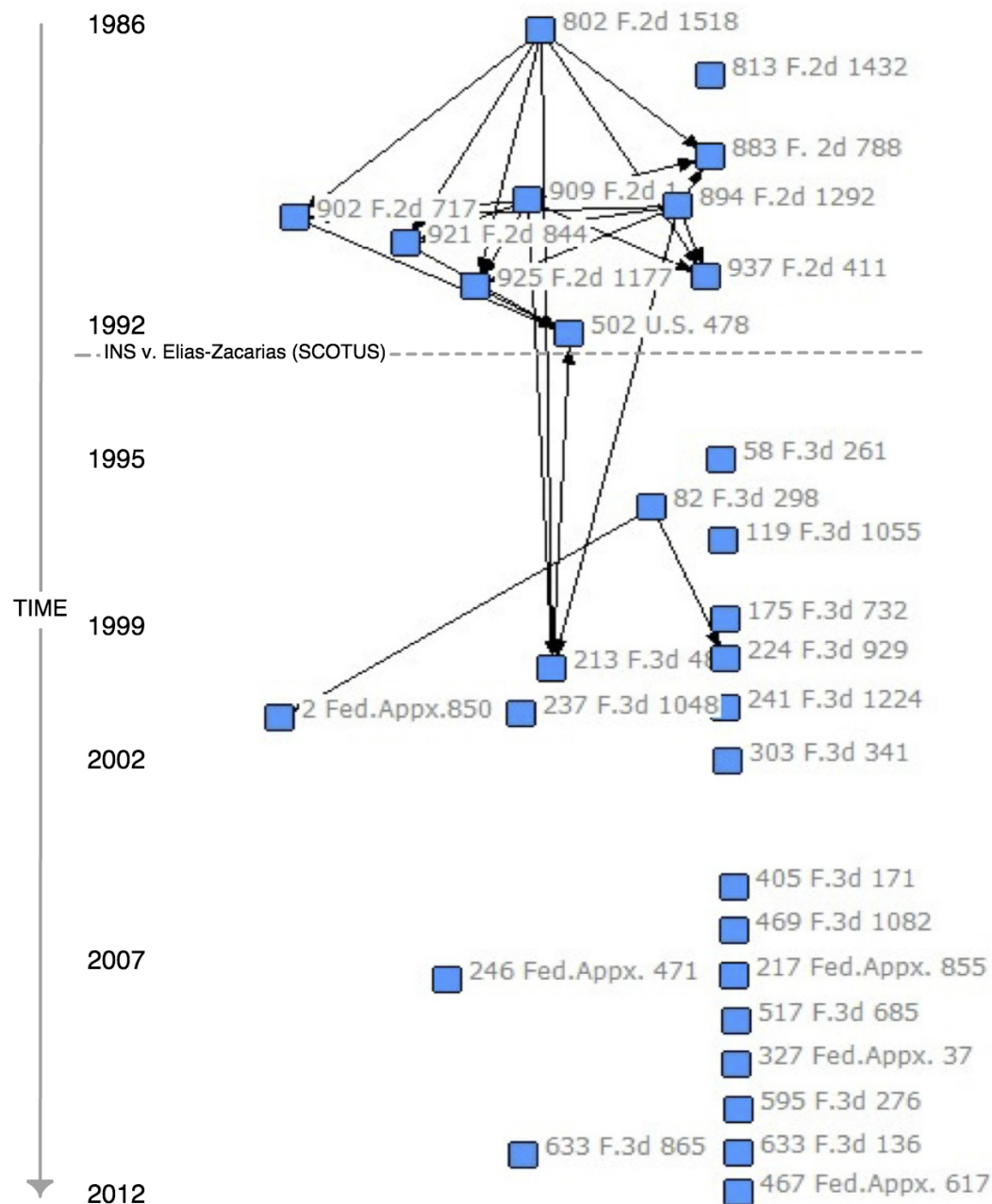
The ordinary meaning of the phrase “persecution on account of...political opinion”...is persecution on account of the *victim’s* political opinion, not the persecutor’s. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion (502 U.S. 481, emphasis in the original).

This interpretive move, much like the citation of international law, can be seen as an effort to develop a jurisprudential regime.

The institutional power of the Supreme Court means that its impact on Courts of Appeals decision making, in addition to being profound, can also be difficult to control or predict, even by the Justices themselves. The Supreme Court’s decisions in *Cardoza-Fonseca* and *Elias-Zacarias* have influenced the law of refugee status determination beyond the immediate holdings of those cases and even beyond the establishment of a jurisprudential regime. In these two cases, the Supreme Court has (whether intentionally or not) compelled the avoidance of certain questions by the Courts of Appeals, even without explicitly deciding those questions.

A network visualization of interpretive disputes helps to clarify this argument. Figure 4.1 below shows the network of all interpretive disputes from my database over the meaning of “political opinion,” before and after the Supreme Court’s decision in *Elias-Zacarias*. The isolated nodes in the diagram are cases in which there is a dispute within the panel (i.e., a dissent or a concurrence that disagrees on some question of law). The ties between nodes indicate the existence of an interpretive dispute between two cases, just as in Figures 2.9 and 2.10 in chapter 2. The cases are organized chronologically along the vertical axis to make clear the impact of the Supreme Court intervention. The arrangement of the cases on the horizontal axis simply optimizes readability and is not structurally meaningful.

Figure 4.1. Time-structured network of case law disputes over the meaning of “political opinion”



The key feature to note from Figure 4.1 is the immediate and strong dampening effect that *Elias-Zacarias* has on inter- and intracourt disputes around this problem of statutory interpretation. *Elias-Zacarias* intervened, as Supreme Court opinions often do, on an interpretive

question that had generated a rather confusing collection of disagreements across cases and across Circuits. The Supreme Court's intervention on the question of political neutrality as political opinion settled an intercircuit split between the Ninth Circuit, on the one hand, and the First, Fourth and Eleventh Circuits, on the other.¹⁴ A single later opinion in the Ninth Circuit found political neutrality to be an expression of political opinion "notwithstanding" the analysis in *Elias-Zacarias* (*Rivera-Moreno v. INS*, 9th Cir. 2000, 213 F.3d 481, 484); this is visible in Figure 4.1 as the single node beneath the dashed line that is linked in dispute to any of the nodes above the dashed line.¹⁵ With the exception of that anomalous opinion, there is no dispute over the meaning of "political opinion" between courts or between panels within courts after the Supreme Court handed down *Elias-Zacarias*. There is a steady drip of dispute within panels over how to apply the *Elias-Zacarias* holding (represented by isolated nodes in Figure 4.1). This pattern stands in clear contrast to the pattern of dispute that appears over the meaning of "particular social group," to be discussed in the next chapter (see Figure 5.2, chapter 5). On that statutory question there has been no Supreme Court intervention, and we find a messy tangle of disputes within and between the Courts of Appeals that continues up to the present rather than being cut off by a single decisive intervention.

The Supreme Court in *Elias-Zacarias* did not make a general statement purporting to settle the meaning of "political opinion." Rather, it imposed some limits on how that phrase

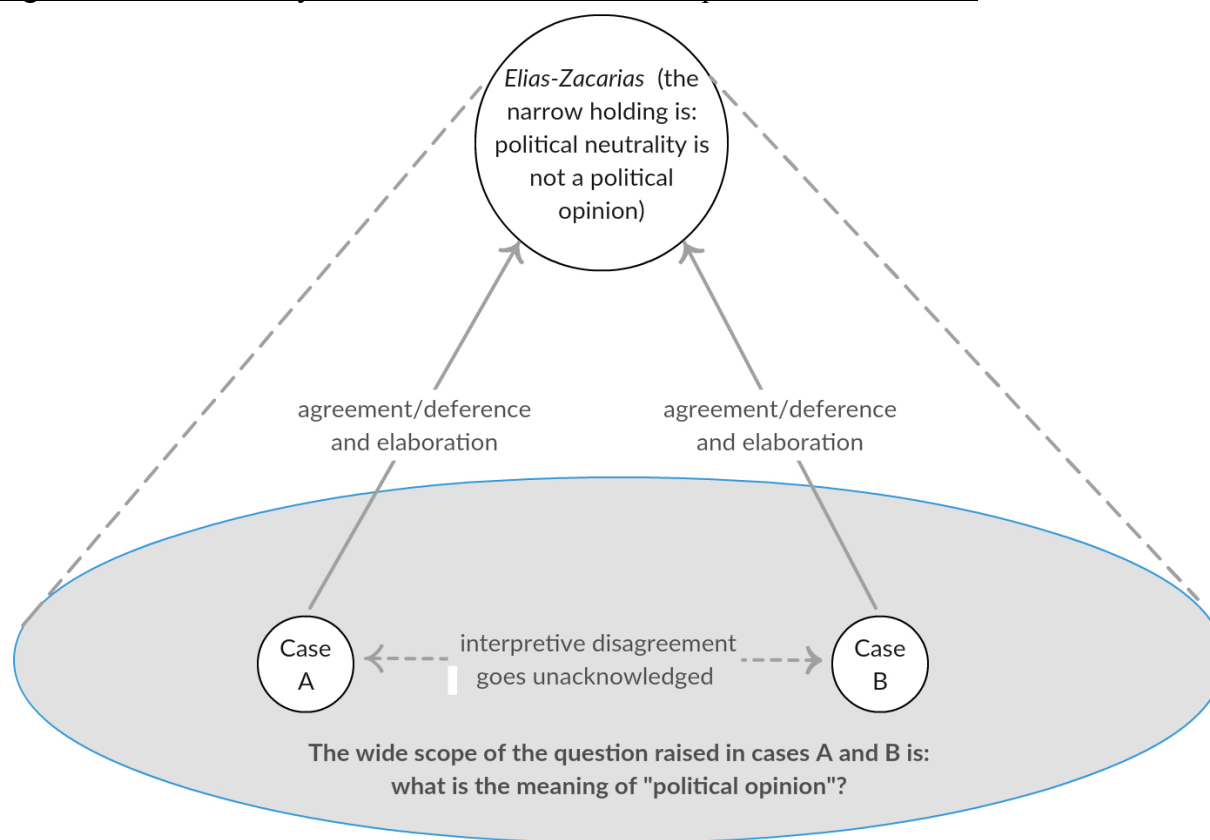
¹⁴ See *Elias-Zacarias v. U.S. INS*, 9th Cir. 1990, 921 F.2d 844; *Canas-Segovia v. INS*, 9th Cir. 1990, 902 F.2d 717; *Cruz-Lopez v. INS*, 4th Cir. 1986, 802 F.2d 1518; *Perlera-Escobar v. Executive Office for Immigration*, 11th Cir. 1990, 894 F.2d 1292; *Alvarez-Flores v. INS*, 1st Cir. 1990, 909 F.2d 1. Of the several opinions, the 1st Cir.'s engagement with the question is the most cautious. The clearest and strongest disagreement is between the 11th and 9th Cir.

¹⁵ The 9th Cir. justifies this move by arguing that the Court did not reach the question whether neutrality amounts to holding a political opinion. There is some textual basis for this argument, although the dissent by Stevens in *Elias-Zacarias* and the preponderance of case law across all Circuits after 1992 have read Scalia's opinion in *Elias-Zacarias* to the contrary.

could be interpreted for the purposes of refugee status determination: political neutrality could not be thought of as a political opinion, and a persecutor's political motive was insufficient to justify an asylum claim in the absence of any political opinion of the victim. These positions leave plenty of questions open, as evidenced by the persistence of within panel disputes at a rate of about one per year from 1995 to 2012. Some examples of these disputes are: (1) whether opposition to a tax levied by the Colombian National Liberation Army (ELN), a non-state insurgency, was the expression of a political opinion (*Garcia v. U.S. Atty. Gen.*, 11th Cir. 2007, 217 Fed.Appx. 855); (2) whether an act of whistleblowing was an expression of a political opinion (*Gyumushyan v. Holder*, 9th Cir. 2009, 327 Fed.Appx. 37); and (3) whether assisting North Korean refugees in contravention of Chinese state policy was the expression of a political opinion (*Long Hao Li v. Attorney General of the U.S.*, 3rd Cir. 2011, 633 F.3d 136).

These persistent ambiguities over the meaning of “political opinion” remain isolated within panels after 1992 because of the impact that *Elias-Zacarias* has had on the contours of debate over the meaning of “political opinion” in the courts. *Elias-Zacarias* has become a ritual focal point of citation in these cases, and it mediates between the opinions that cite it favorably to conceal disagreements that might otherwise appear as explicit interpretive disputes. *Elias-Zacarias* appears to cast a long shadow, so to speak, over the set of cases dealing with the question of what constitutes a political opinion. Figure 4.2 is a stylized representation of this dynamic.

Figure 4.2. Ersatz clarity in the law in the wake of a Supreme Court decision



Interpretive disagreements within panels are less likely than inter- and intracircuit splits to be concealed in this fashion because the judges on a panel must apply their understanding of “political opinion” to precisely the same set of facts; they have no opportunity to ignore or distinguish on the basis of factual differences a conflicting reading of “political opinion.” Nonetheless, the within-panel disputes are still often powerfully mediated by the holding in *Elias-Zacarias*. One example is the case of *Garcia* mentioned above, in which the Eleventh Circuit panel disagrees over whether opposition to a tax levied by the Colombian ELN was an expression of a political opinion. The dissent accuses the majority of an “erroneously narrow reading of ‘political opinion’” (217 Fed.Appx. 863). Both the dissent and the majority cite *Elias-Zacarias* as support for their views and cite the same prior cases citing *Elias-Zacarias* for further support.

The pattern of avoidance of substantive disagreement in the Courts of Appeals is similar with respect to disputes over the meaning of “well-founded fear” following the Supreme Court ruling in *Cardoza-Fonseca*. The visual network pattern (not shown here) is less dramatic, because *Cardoza-Fonseca* was decided so soon after the passage of the Refugee Act that there was relatively little case law and hence relatively little disputation between the Courts of Appeals that preceded it. Following *Cardoza-Fonseca*, however, the network pattern of dispute is very similar to the one shown in Figure 4.1. Save for two intercircuit splits, all interpretive disputes over the meaning of “well-founded fear” after 1987 occur within panels.

The within panel disputes over the meaning of “well-founded fear” after *Cardoza-Fonseca* resemble the “political opinion” disputes that followed *Elias-Zacarias*. Recall that the Supreme Court’s holding in *Cardoza-Fonseca* did not aim to resolve the question, “what will constitute a well-founded fear of persecution?” The decision only imposed a limiting condition on the answer to the general question, just as *Elias-Zacarias* did: even a 10% chance of persecution would be enough to ground a well-founded fear. Correspondingly, after *Cardoza-Fonseca*, there are disagreements within panels about whether petitioners have met the requisite standard or not, but there are no interpretive disputes to be found in the case record as to whether the 10% standard makes sense, whether another empirical standard would be more fruitful, or whether a less than 10% probability of persecution would be sufficient to meet the well-founded fear requirement.

My claim that the Supreme Court in *Elias-Zacarias* and *Cardoza-Fonseca* has created ersatz clarity in the law, rather than providing actual conceptual clarification of the asylum statute, rests on a few concurrent observations. The most straightforward route to this conclusion is an “internal” criticism of the reasoning the Court relies upon in, especially in *Cardoza-*

Fonseca. With its “at least 10%” reasoning in that case, the Court is in effect saying: “There is a standard governing our ruling in this case, and the petitioner meets the standard. We will provide an upper bound for the standard [in quantitative terms that may be impossible to apply rigorously in practice], but we will not tell you exactly what the standard is.” Reasoning like this, I claim, does not provide real conceptual clarity.

Evidence from the network structure of interpretive disputes reinforces my internal criticism of the reasoning in *Cardoza-Fonseca* and also shows that a decision like *Elias-Zacarias* can create ersatz clarity, even though the Court’s reasoning in that opinion appears to be more tightly articulated and more feasible to apply in practice. Looking at the network structure of interpretive disputes, we find that: (1) Supreme Court opinions are not central to the network of interpretive disputes viewed synchronically (see again Figure 2.8, chapter 2); (2) disputes over some questions proliferate within and between courts when the Supreme Court does not intervene (see Figure 4.1 above and the analysis in chapter 5 below); (3) these dispute chains are effectively quashed when the Supreme Court does intervene (see Figure 4.1 above); and (4) within-panel disputes over the application of a Supreme Court standard are more resistant to quashing than between-court disputes and disputes occurring within courts over time (see Figure 4.1 above and the analysis of “standards of proof” disputes in chapter 6 below). The concept of “ersatz clarity” is an interpretive frame that makes sense of all of these observations at once.

The next chapter will discuss a contrasting set of cases: those that question the meaning of “particular social group.” Here the Supreme Court has not intervened and the dynamic that has developed over time around that statutory interpretive question is very different. The Courts of Appeals judges have debated the meaning of “particular social group” in more detail and in less constrained terms than they have debated the question of what “political opinion” means in light

of *Elias-Zacarias* or what the standard of proof is in asylum cases in light of *Cardoza-Fonseca*. While the interpretive question over the meaning of “particular social group” has not settled, it is possible in one respect to say that it is more developed than the statutory interpretation of “political opinion” or “well-founded fear.” The intervention of the Supreme Court in the latter two statutory questions and not the first seems to have produced settling at the expense of conceptual *elaboration*, while final conceptual *clarity* has remained elusive in all three cases.

This tradeoff is similar in form to another tradeoff that is important in legal scholarship: the question of federal versus state control over policy domains. An argument frequently made in favor of devolving power to the states is that it allows for experimentation and wider scope for the discovery of optimal solutions to political problems. Centralizing control with the federal government, on the other hand, may stifle such experimentation. The dynamic I have described here between the Supreme Court and the Courts of Appeals is that Supreme Court rulings may similarly quash the elaboration and development of statutory interpretations in the lower courts, sometimes unwittingly. It is a normative question that may interest legal scholars whether this ultimately leads to “better” or “worse” law being made in the courts.¹⁶

4.3.2. A Prior Step: Deciding to Decide

I have focused on the cases of *Cardoza-Fonseca* and *Elias-Zacarias* because they contain the Supreme Court’s most impactful and direct contributions to the law of refugee status determination and because they have allowed me to illustrate an underappreciated, unintended consequence of the Court’s precedent-setting power. If we take a wider view, however, there is ample evidence to support the dominant scholarly view that Supreme Court decision making is highly strategic and that the Justices exercise a high level of control over how they impact the

¹⁶ Thanks to David Strauss for pointing out this parallel to me.

law. A brief overview of the Supreme Court's process of "deciding to decide" helps to make that clear.

The first step in Supreme Court decision making is deciding to decide on a case. The Court will do so when four out of nine Justices enter a vote in favor of granting cert. The same functional procedure has been in place at least since 1925 (Stevens 1983), although its implementation in practice has changed as the number of petitions to the Court has grown. The working presumption is now that cert will not be granted, and the Justices no longer discuss the merits of each individual cert petition. The role for clerks in this process has also expanded over time. Clerks now review the cert petitions received at the Court and draft memos with recommendations as to whether or not the Court should agree to hear a case. Since 1973, this responsibility has been "pooled" among the clerks of several Justices, such that a single clerk-authored memo will circulate to multiple Justices with a single recommendation on a case. At present, all of the Justices save Alito participate in a common cert pool (Peppers 2012, 329, 395). When the Court declines to hear a case for which a party has petitioned for review, the practical consequence is that the lower court judgment stands. This has the same practical result as a very narrow Supreme Court ruling in favor of the party that prevailed in the lower court, even though it is not technically the same result in the eyes of the law. It is therefore unsurprising to find that the Supreme Court challenges legal interpretations made by the Courts of Appeals in 17 out of its 19 asylum cases (89%); the Justices will tend not to grant cert in a case in which six or more them agree that the lower court ruling was correct.

The political science literature on the cert process at the Supreme Court holds that this is a major opportunity for the Justices to act on political preferences and that they embrace the opportunity (Perry 1991; Caldeira, Wright and Zorn 1999; cf. Goldstein 1999, 191–192).

Literature on the role of clerks likewise cites the cert pool as one of the arenas in which clerks can most readily exercise their influence at the Court (Brenner 1997; Best 2002, 37–40; Ward and Weiden 2006, 127ff.; Peppers 2006, 194). On the other hand, the accounts of Justices and the few clerks who have written or spoken publicly about their work on the Court tend to describe cert pool work as a technical legal task, not a task with major political significance (e.g., Ginsburg, quoted in Peppers 2012, 395). The two perspectives are only superficially at odds. The way to bridge between them is to recognize that legal questions addressed by the Court are significant or insignificant only in relation to the broader social, cultural and political milieu. In their review of cert petitions, we should suppose both Justices and clerks to be guided by a finely tuned orientation to legal issues that would escape the understanding of lay observers, but we should suppose that they are also informed by political considerations of what, within the law, matters in broad social, cultural and political terms. Many of the cases that the Supreme Court selects for review are those that check both boxes.

The pattern of Supreme Court grants of cert in asylum cases accords with a view of the cert process as driven by the dual consideration of legal and political interest. As we have already seen, the Court has only occasionally granted cert in asylum cases that bear directly on questions of refugee status determination, and none of their rulings in such cases have been especially expansive. More commonly the Court has granted cert in asylum cases that bear on broader separation of powers issues, and they have decided those cases with an emphasis on separation of powers rather than an emphasis on statutory interpretation as pertains narrowly to asylum law. The Court’s decision to hear the *Haitian Centers Council* case and the several other procedural cases reflect a serious concern with the question, “what are the procedural rights of asylum seekers?” over and above the question, “who exactly is a refugee?” Due process

considerations are constitutional questions with wide applicability outside of the asylum context. The Court has relatively little power to direct asylum policy through cases dealing with the definition of “refugee” or the interpretation of the various bars to asylum status, given that refugee admissions are discretionary and the Attorney General establishes an annual quota for admissions. It is consequently unsurprising to find that the Court has historically been more invested in answering procedural questions than statutory definitional questions in the asylum context.

An application to contemporary concerns in the politics of asylum may help to illustrate what is practically at stake in this reading of the Supreme Court’s cert process. The masses of people displaced by sectarian violence in Syria and Iraq in the 2010s are *not* refugees under international and U.S. law simply by merit of having been displaced in a warzone, notwithstanding the terminology applied by the media and politicians. To be officially recognized as refugees under international or U.S. law, they must demonstrate well-founded fear of persecution as well as a causal link between their persecution and one of the five protected grounds. There are likely to be many refugee status claims arising from the contemporary Middle Eastern wars that raise hard questions about (1) the causal link between persecution and membership in a protected class and (2) the scope of the protected classes of “religion,” “nationality,” “political opinion” and “particular social group” in the asylum statute. At present, the federal courts have a clear opportunity to shape the law on these definitional and causal nexus questions. But if my reasoning about what motivates Supreme Court decision making about when to grant cert is correct, the Supreme Court will be less inclined to hear cases that squarely raise one or more of these issues than to hear cases that challenge the scope of legislative or executive authority to set the terms of refugee admissions to the U.S. The Court

may perceive that it could have the largest practical impact on the contemporary refugee crisis by ruling on procedural and separation of powers issues rather than on definitional or standard of proof issues, and it may wish to play that role if it is going to wade into the debate over refugee admissions at all.

4.4. Interpretive Disputes within the Supreme Court

It remains to discuss the generation of within panel disputes at the Supreme Court. In the last chapter I argued that the appearance of disputes within panels is the result of the confluence of a few different factors: the normative salience of interpretive dispute in a given court at a given time, the political preferences of particular judges and finally the outsized influence of a small number of judges whose relational jurisprudence affects the decision making environment of their entire court. In the Supreme Court context, the same factors are in play, and the particular organizational features of the Court serve to make dissenting within a panel a frequent, and frequently acutely instrumental, choice. At the Supreme Court every case is heard en banc, and there is an incredibly high level of public scrutiny on individual Justices and cases. There is much public and scholarly criticism of the Court's factiousness, but at the same time it is widely taken for granted (by outside observers and often, it seems, by the Justices themselves) that the Court's decision making is frequently partially political and sometimes overwhelmingly political. The Justices may be concerned about the legitimacy of the Court and about the power of the judiciary relative to the other branches of government, but they do not have to worry about their decisions being overturned by any higher authority. These conditions sometimes seem to push the Justices towards ideological bloc voting and sometimes towards the construction of highly individualized jurisprudential agendas, of the kind exhibited by Kozinski and Posner and discussed in the last chapter. In the case of asylum, however, the latter of these two tendencies is

muted. Only two of the Justices (Stevens and Kennedy) have shown any clear interest in developing an individual jurisprudence in this area of law.¹⁷

The rates of dissent and separate concurrence at the Supreme Court are very high, in asylum cases and in general. This is a modern phenomenon: rates of Supreme Court dissents and separate concurrences spiked suddenly around 1940 and have remained roughly steady ever since, with about 50–65% of cases annually generating dissents and about 45% of cases generating separate concurrences (Corley et al. 2013, 116). The rates of dissent and separate concurrence in asylum cases align with those trends. The high modern dissent rate in part reflects the inherent legal complexity of cases that find their way to the Supreme Court and in part reflects the ideological and material interests that are at stake in many of its decisions. Urofsky (2015) and Henderson (2007) describe how normative standards in the Court have shifted over time. There are clearly observable transitions in the Court’s standard practices, from the old British model of judges each delivering opinions individually (“*seriatim*”), to a period where the standard practice was to have the Court issue a single opinion (sometimes signed by an individual author and sometimes signed “*per curiam*,” meaning “from the Court”) to the present situation of frequent dissents and concurring opinions. The latest model resembles the old practice of *seriatim*, with the difference that the Justices frequently cross-sign one another’s opinions even while writing separately. Urofsky chronicles many instances where Justices in the earlier periods registered their disagreements with colleagues in one way or another but followed the normative standard by not formally dissenting. He also shows clearly how, over time, that normative bulwark against formal dissent has considerably diminished.

¹⁷ Hence my examples of relational jurisprudence at the Supreme Court given in the previous chapter (chapter 3, fns. 41–42) were drawn from outside the asylum context.

Epstein et al. offer an explanation for the modern spike in dissenting opinions: “we conjecture that the surge was attributable to the Justices’ having observed that many dissents by Holmes, Brandeis, Stone and Cardozo had become law, whereas previously dissents had rarely become law” (Epstein, Landes and Posner 2013, 266). This formulation begs a part of the question that it tries to answer—why did Holmes et al. decide to invest the energy in producing their now-celebrated dissents?—but it does provide a convincing approach to the interpretation of dissents within the contemporary Court. The terms in which the Justices dissent and concur separately often appear designed to speak to the future and to cast the Justices as visionaries more than consensus-builders. There are, in many places, indications of strategic moves being made to influence the scope of precedents and jurisprudential regimes established by the Court.

These considerations seem to be present in the asylum cases, albeit in milder form than in some of the more politically contentious cases. Of the three Supreme Court opinions that have most substantially impacted the law of refugee status determination, Stevens’s opinion in *Stevic* commanded unanimity in the Court, while *Cardoza-Fonseca* and *Elias-Zacarias* both fractured the Court. The division of the Justices in *Elias-Zacarias* followed well-worn political divisions: Stevens dissented, joined by Justices Blackmun and O’Connor, holding that he would have upheld the Ninth Circuit judgment recognizing the petitioner as a refugee on the basis of his political opinion. Scalia’s majority opinion reversing the Ninth Circuit was joined by the typically more conservative Justices Rehnquist, White, Thomas and Kennedy, as well as Justice Souter.

In *Cardoza-Fonseca*, Stevens’s majority opinion prompted more division: separate concurrences from Blackmun and Scalia, respectively, plus a dissent by Powell, joined by Rehnquist and White. In this more fractured set of opinions, divisions in the Justices’

jurisprudential philosophies are more prominently on display than their political leanings.

Scalia's separate concurrence is centered around an objection to Stevens's inquiry into legislative history, a very familiar line of argument from the committed jurisprudential textualist: "judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent" (480 U.S. 452–453).

Blackmun's separate concurrence cuts in the opposite direction, emphasizing that the BIA should in future cases pay special attention to legislative intent when interpreting "well-founded fear," and in particular the fact that the legislature meant to bring U.S. statutory law into alignment with the UN Protocol, which itself "has a rich history of interpretation in international law and scholarly commentaries" (480 U.S. 449). Scalia and Blackmun thus vote together in this case on the meaning of "well-founded fear," but their jurisprudential methods for discovering that meaning are fundamentally different. The dissent by conservative Justice Powell rejected Stevens' conclusion that "well-founded fear" set a lower bar than "clear probability" of persecution, but because Powell failed to convince his conservative colleague Scalia on this point, the distribution of votes in *Cardoza-Fonseca* looks less like ideological bloc voting than the distribution of votes in *Elias-Zacarias*.

4.5. Conclusion

This chapter has discussed the Supreme Court's decision making in asylum law, relying heavily on the extensive existing literature on Supreme Court decision making. The Court's asylum jurisprudence is compatible with the general scholarly view of the Court as a highly political Court that values and strategically exercises its precedent-setting authority. The most original argument I have made here is that a Supreme Court holding can compel the avoidance of related questions in the Courts of Appeals, an organizational decision making dynamic I have

referred to as the creation of ersatz clarity in the law. This dynamic imposes a limitation on the Supreme Court's ability to control the development of jurisprudence. The frequency of interpretive dispute within the Court in asylum cases matches the general tendency towards dissents in contemporary Supreme Court jurisprudence and is likely a result of the Supreme Court's highly politically charged decision making environment, as many contemporary Supreme Court dissents appear to be.

I have also stressed some organizational differences between the Courts of Appeals and the Supreme Court that require us to search for explanations different from those given in the previous chapter. The Supreme Court is smaller and more static than the Courts of Appeals in terms of personnel, and appointments to the Supreme Court are more highly politicized than appointments to the Courts of Appeals. The Court hears far fewer cases, exercises control over what cases to hear and hears all of its cases en banc. These factors together contribute to an organizational context in which each individual Justice can have a larger and more individualized impact on the Court's jurisprudence than most of the Courts of Appeals judges can hope to have. The Supreme Court Justices have exercised their considerable individual power sometimes by developing differentiated jurisprudential regimes and sometimes by collaborating in more straightforward ideological bloc voting.

This chapter and the previous one together give an account of the relationship of organizational form and organizational norms to knowledge production, stressing how organizational differences can result in different outcomes for knowledge production. The comparative framework I relied on in the last chapter and the comparative references to international law in this chapter are analytically useful, although the inferences we can draw are clearly limited by the many counterfactuals that we are unable to observe. From looking at the

U.S. federal courts, we get no information as to how the production of judicial decisions and the settlement of legal questions would look different if judges and Justices were appointed for limited rather than lifetime terms, for example. Nor is it readily apparent how much the specific explanations given here would have to be changed in the analysis of other areas of law. There are some patterns in organizational influence on decision making that look likely to be generalizable beyond asylum, including the role of Supreme Court decisions in altering the decision making environment for the Courts of Appeals that was discussed in this chapter. But a more general statement of the role of organizations in influencing the production of judge made law will have to await a broader comparative analysis, with reference to a wider range of substantive law, than what is provided in these two chapters.

Chapter 5. The Textual and Temporal Dynamics of Interpretive Dispute Over the Meaning of “Particular Social Group”

5.1. Introduction

This chapter turns away from the organizational conditions discussed in the previous two chapters to focus on another factor bearing on the settling or perpetuation of judicial interpretive disputes in the courts. Here I analyze the reasoning that judges themselves put forward in their written opinions and how they position their legal and social scientific claims in relation to the existing body of case law, with reference to one conceptually difficult problem of statutory interpretation: defining “particular social group” for the purposes of refugee status determination. In other words, this chapter focuses on the internal logic of case law as it has developed over time.

The empirical puzzle addressed here is why the legal meaning of “particular social group” has not settled over time in U.S. case law. The two poles of legalism and realism generate two contrasting predictions for how a statutory interpretive problem like defining “particular social group” (hereafter PSG) will play out. The baseline expectation of a legalist would be that over time precedent would narrow the range of possible readings of PSG and eventually settle its meaning. Dworkin’s (1986) idea that judge-made law is like a collectively-authored “chain novel,” which tends to develop in orderly and progressive fashion even though it is neither teleological nor deductive, is one example of this way of thinking about the law. By contrast, the baseline expectation of a legal realist would be that language as open to interpretation as “particular social group” and “immutable characteristic...fundamental to identity or conscience” (an early and influential interpretation of the meaning of PSG, arising from the BIA case *Matter of Acosta*) would not provide much of a constraint on a deciding judge. The realist might

therefore predict that the interpretation of PSG will not be subject to much probing legal analysis and that cases will be decided on other grounds. Neither expectation is met in fact. Instead, we find intense close analysis of the categorical meaning of PSG and a failure to reach settled consensus as to its meaning.

Explaining the pattern demands an account of legal reasoning that is broadly speaking realist but also takes seriously the internal logic of the law. A realist approach is necessary to explain why the system of incremental generalization from cases and deference to precedent has failed to lead to settled consensus. Dworkin's chain novel idea does not fit well with the continued non-settling and occasional reversals in the courts over the meaning of PSG. Other legalist and philosophical accounts of how legal reason works (e.g., Levi 1970[1948]; Levin 1992; Schauer 2009) usually have equally little to say about how or why some legal questions remain in dispute for decades in a legal system that relies heavily on an institutionally powerful judiciary and a common law system of deference to precedent. On the other hand, the default tendency of realist social scientific scholarship to disregard the internal logic of the law is unsatisfying in reference to contexts like the disputes over the meaning of PSG, which involve starkly posed differences in the interpretation of core concepts that cannot, as we shall see below, readily be explained away as epiphenomenal to some other conflict of interests. I put into practice here the proposal of some recent scholars who have urged that social scientific studies of judicial decision making should move beyond the dichotomy of legalism and realism to study the internal logic of the law in social scientific terms (Tamanaha 2009; Bybee 2012; Owens 2016).

The argument of this chapter proceeds in four parts. In section 5.2, I outline the pattern of interpretive disputes over the meaning of PSG that have arisen in the Courts of Appeals and make the case that these disputes are an especially good site to study how the internal logic of

case law matters to judicial decision making. The disputes are persistent over time and across cases from around the world, and the contextual information available indicates that judges are genuinely divided on the core question of what constitutes a social group. Imbalances of power in litigation and in international relations, the political ideologies and Bayesian priors of judges all fail to explain away the pattern of disputes we observe and their persistence over time.

In section 5.3, I trace the development of two representative dispute chains dealing with the PSG question. The first concerns whether a family constitutes a particular social group; the second is a second-order dispute arising between the Second and Sixth Circuits over the compatibility of tests proposed by the BIA and the Sixth Circuit. Both dispute chains model an important dynamic in how interpretive disputes in general develop over time: judges are highly motivated to reconcile their holdings with other recent and within-Circuit decisions, which can perpetuate and even expand internal contradictions within the case law record at large. Section 5.4 zooms out from the close analysis of data in section 5.3 to provide a generalized interpretation of the findings there. In sections 5.3–5.4 my analytical approach follows George and Bennett’s process tracing model and their emphasis on the theory-generating potential of studying a single event or case as it develops over time (George and Bennett 2005, 6–7; Bennett 2008, 704–707). I stress the temporally contingent character of judicial reasoning as it is deployed in practice. The judicial style of reasoning, which entails theoretical generalization but neither systematic theory-building nor strict standards for empirical support of theoretical claims, creates a situation where, across the totality of case law, PSG disputes are likely to arise and likely to proliferate rather than to settle. One way to describe this process unfolding in the two case studies is to rely on the fruitful distinctions between different forms of legal rationality that appear in Weber and in the contemporary cognitive anthropology literature. The ecologically and

formally rational action of judges (Gigerenzer, Todd and the ABC Research Group 1999; Weber 1968[1922], 655–656) leads to outcomes that are substantively irrational at the system level (Weber 1968[1922]). Section 5.5 concludes and suggests avenues for future research.

5.2. Empirical Patterns

The rationale for close attention to the cases examined in this chapter is less immediately apparent than the rationale for the selection of cases examined in each of the other empirical chapters of this dissertation. In chapter 3 I looked at disputes implicating the Second and Ninth Circuits because those Circuits have by far the largest asylum caseloads and exhibit widely divergent tendencies to generate interpretive disputes. In chapter 4 I looked at Supreme Court jurisprudence, an important focal point given the uniquely powerful institutional position of the Supreme Court and its case law precedents. The modal dispute in my database is a within-panel dispute over standards of proof (see again chapter 2, Figure 2.7), and chapter 6 devotes close attention to those cases. By contrast, the motivation for closely analyzing disputes over the meaning of PSG as I do in this chapter becomes clear only on a closer look at the substantive content of the cases themselves and the relations between them.

I identified 33 distinct disputes over the interpretation of PSG, linking 55 distinct cases with 106 dyadic ties (see again chapter 2, Figure 2.10; see Figure 5.2 below). These roughly subdivide into two types of disputes: disputes over whether some other language is a legally permissible clarification of the term PSG and disputes over whether some quite narrowly empirically specified group fits the definition. Cases attempting to clarify the term propose the following specifications: PSG as “visible and externally recognizable”; as “voluntary associational relationship”; as characterized by a “common, immutable characteristic”; and as “sufficiently particularized.” The explicitly contested empirical groups are (in the chronological

order that the disputes arise before the courts): deserters and persons avoiding military service; family; new entrepreneurs in post-Communist Russia; police officers; ethnic Sinhalese; non-nuclear family; elite, landowning cattle ranchers targeted by Maoist groups; ethnic Kongolese; women (gender); members of a military organization; young (or appearing young) attractive Albanian women forced into prostitution; middle class small business owners; witnesses who testify against gang members; schizophrenic and bipolar individuals in Tanzania who exhibit outwardly erratic behavior.

The importance of these 55 cases as a set comes from their collective engagement with a single question of law—“what is a PSG?”—and the depth with which the judges authoring opinions in these cases have engaged the interpretive problem it presents. These cases and the disputes that arise between them are, collectively, a clear distillation of judicial knowledge work sustained across many different courts and cases. In fact, the interpretive disputes over the meaning of PSG are the best available vehicle in my database for assessing how the internal logic of legal decision making works in asylum law. We have seen in the previous two chapters that the organizational rules and norms of the courts can contribute to the engagement and avoidance of legal questions and, in consequence, to the law being settled or unsettled within and across the federal appellate courts. But once a particular panel of judges in a particular case does engage a question, we want to know how the characteristic processes of judicial reasoning will contribute to its settling or perpetuation. The 33 disputes over the meaning of PSG are data well suited to this inquiry: the available evidence indicates that they cannot be explained away either as post hoc rationalizations by judges who decided their cases on other grounds or as epiphenomenal to other, “real” disputes distinct from the apparent disputes over the meaning of PSG.

Opinion length and the number of prior authorities cited are simple but reasonable measures of the depth of judicial engagement in a case, and both provide evidence that the deciding judges saw the questions raised in these 55 cases as especially important and worthy of extended treatment. The mean length of immigration law cases in the U.S. Federal Reports from 1980 to 2002 is 5.0 pages with a standard deviation of 3.3 pages.¹ By contrast, the 55 PSG-disputing asylum cases have a mean page length of 10.0 with a standard deviation of 6.9. The 55 PSG-disputing asylum cases cite on average 26 authorities while the average for immigration cases from 1980 to 2002 is 13.

We can continue to assess how seriously the deciding judges took the interpretive problem presented in these cases by comparing actual remand rates with the expected probability of remand given the petitioner's country of origin and the rate of asylum grant for the given country-year. Tversky and Kahneman's finding that decision makers tend to abandon Bayesian reasoning when faced with compelling narrative accounts provides the basis for believing that this test will be informative (Kahneman 2011, 166–174). The appeals from Central American petitioners, which make up 24 out of the 55 total PSG-disputing cases, provide the clearest test of the judges' tendency to override their initial expectations, because the cases are relatively numerous and the overall asylum grant rates for Central Americans are very low. Immigration Court grant rates for Central American country-years corresponding to the 24 PSG-disputing cases in the Courts of Appeals range from approximately 1.8% (Guatemala in 2002) to less than

¹ Page counts and citations statistics for immigration cases are from the Songer (1998) and Kuersten and Haire (2007) databases, which include a weighted probability sample of published Courts of Appeals cases from 1925 to 2002. The databases include 22 immigration cases from 1980 to 2002. If unpublished cases were included in these databases, mean page count and number of authorities cited would both likely be lower.

0.15% (Mexico in 2010).² Meanwhile, 29% of the Central American appellants in PSG-disputing cases had their petition granted and/or their case remanded for reconsideration by the BIA: one out of three from Honduras; two out of eight from Guatemala; two out of ten from El Salvador; two out of three from Mexico.

In 2013, the Ninth Circuit granted a Mexican asylum seeker's petition in the case of *Cordoba v. Holder* (726 F.3d 1106). Cordoba claimed he had been "abducted and held for ransom by members of a Mexican drug cartel because of his status as a landowner." The Immigration Court grant rate for petitioners from Mexico in 2013 was 1.56% and the total volume of applications from Mexico was 74,000 (42% of all asylum applications that year). A Bayesian-reasoning judge with knowledge of these numbers would have approached the case of *Cordoba* expecting the petitioner to have a 1.9% chance of success, if anchoring on the Immigration Court numbers. In 2000, the Ninth Circuit granted asylum to another Mexican petitioner who claimed persecution as a member of the PSG, "gay men with female sexual identities in Mexico" (*Hernandez-Montiel v. INS*, 225 F.3d 1084). Bayesian-reasoning judges would have put the petitioner's odds of success in that case lower than 0.3% if anchoring on the Immigration Court grant rate. The expected grant/remand rates for most Central American country-years likewise fall in the range of zero to 2% as long as one makes Bayesian predictions from the Immigration Court volume of applications and grant rate. These statistics are evidence that the narrative complexity of the PSG-disputing cases encourages judges to override their

² Country-year grant rates are calculated from the EOIR Statistical Yearbooks. Statistics are not reported before 1996 and are not exhaustive. The Yearbooks only give exact numbers for (1) those countries from which the largest numbers of petitioners are granted asylum and (2) those countries from which the largest numbers of petitioners have sought asylum. 1.8% (Guatemala in 2002) and 0.15% (Mexico in 2010) are both upper bounds for grant rates in the relevant country-years, as exact measures cannot be made from the Yearbooks.

prior expectations more than usual and so increases the odds of a favorable outcome for the petitioner.

The actual outcomes for petitioners in PSG-disputing cases are closer to Bayesian expectations if we imagine judges anchoring on the grant/remand rates for asylum petitioners in the Courts of Appeals rather than the grant rates at the Immigration Courts, although they are still high. If anchoring on the grant/remand rates for Mexican petitioners in their own Circuit in 2013, the Ninth Circuit panel of judges deciding *Cordoba* would have approached that case anticipating a 33% likelihood of granting or remanding the petition. The panel of judges deciding *Hernandez-Montiel* in 2000 would have anticipated a 29% likelihood of granting or remanding the petition. The Ninth Circuit judges in fact remanded both cases to the BIA. The Ninth Circuit has a grant/remand rate of 38% across all cases it heard from Central America that are implicated in PSG disputes, higher than Bayesian expectations for most Central American country-years and significantly higher than the Ninth Circuit's overall grant/remand rate in asylum cases (Ramji-Nogales et al. 2007, 362–363).

In citing these numbers I am taking judicial departure from Bayesian expectations as an indicator of deeper-than-typical judicial engagement with the issues raised in a case. One possible rejoinder to this argument is that I have gotten the causality backwards. It could be that judges engage in more extensive exploration of legal issues in a written opinion only after they have already resolved to reach an atypical conclusion, such as granting asylum to a petitioner from Mexico. But in adopting this argument, one would need to explain why the grant/remand rate in the PSG-disputing cases from Central America is *only* 29% across all of the Courts of Appeals. Why do judges in the other 71% of these cases wade into the conflict of PSG interpretations if they anticipate denying the petitions from the start? The proposal that these

cases raise challenging legal questions that engage the deep thought of judges is the most straightforward and convincing way to make sense of the observed split between petitions denied and petitions granted or remanded. Across the entire set of 55 PSG-disputing cases, the split is nearly perfectly even: in 27 cases (49%) the asylum petition is granted or remanded. That rate is much higher than the overall Court of Appeals grant rate and also much higher than the Immigration Court grant rate for most country-years, notwithstanding significant fluctuations in Immigration Court grant rates within and between countries.

Consistent with the findings in chapter 3, the Ninth Circuit exhibits a greater tendency towards dispute in PSG cases than any of its sister Circuits. Also consistent with what we have already seen, dispute between the Circuits is more prevalent overall than intracircuit dispute in these cases, and the courts can rely on organizational rules and norms to avoid making a potentially contentious ruling on the PSG question—recall the discussion of the Second Circuit case of *Gjura v. Holder* in chapter 3. Organizational factors are clearly relevant to the outcomes of cases that turn on the interpretation of PSG. Nonetheless, interpretive disputes over the meaning of PSG are not limited to any single organizational setting. They originate in every Circuit Court of Appeals save the Fifth Circuit and the DC Circuit. If we expand the scope of analysis to PSG interpretation beyond the United States, we find points of agreement and disagreement distributed widely across and within other national judiciaries. Canada, for example, has had a series of internal disagreements in its case law over the meaning of PSG that strongly resemble those that have taken place in the U.S. courts, in part because Canadian courts have sometimes imported into their own jurisprudence the standards that the BIA and the Courts

of Appeals have proposed for PSG interpretation.³ Interpretive disagreements in dealing with the PSG question thus seem likely to arise in a common law court system processing asylum claims in one way or another, regardless of organizational context. Interpretive disputes over the meaning of PSG arise in Canada, even though Canada has a straight hierarchy of federal courts instead of the collection of “sister Circuits” that exist in the U.S. system. Interpretive disputes also occur within and across international and national judiciaries that are much less politically powerful than the U.S. federal judiciary.⁴

³ The Canadian Supreme Court ruled on the interpretation of PSG in the case of *Canada v. Ward* (2 S.C.R. 689, SCC 1993) and explicitly adopted the “immutable characteristic” standard from the BIA’s *Acosta*. *Ward* denied asylum to a former member of the terrorist group the Irish National Liberation Army who claimed asylum as a member of the INLA as PSG and also on the basis of fear of persecution by the INLA. The Supreme Court reasoned that “[INLA] membership is neither characterized by an innate characteristic nor is it an unchangeable historical fact. Its objective of obtaining specific political goals by any means, including violence, cannot be said to be so fundamental to the human dignity of its members that it constitutes a ‘particular social group’” (2 S.C.R. 693). Another Canadian case, this time at the Federal Court of Appeals, approvingly cited and quoted at length the Ninth Circuit’s holding in *Sanchez-Trujillo v. INS* (discussed below) that the existence of a “voluntary association” was of “central concern” in identifying a PSG (*Canada v. Mayers*, 1 F.C. 154, FCA, 1992). *Mayers* and *Ward* thus reproduced in Canadian jurisprudence one of the core PSG disputes that has troubled U.S. jurisprudence (see also Galloway and Acton 2015, 213–221 on divergent applications of *Ward* in Canadian courts).

The tension between the two approaches was clearly visible in the Canadian context in the two cases of *Chan v. Canada* (3 F.C.R. 675, FCA 1993) and *Cheung v. Canada* (2 F.C.R. 314, FCA 1993). The two cases concerned appellants who claimed refugee status protection as women (*Cheung*) or families (*Chan*) faced with forced sterilization under the one child policy in China. In *Cheung*, the PSG claim was recognized and the appeal was allowed; in *Chan* the court denied the PSG claim. The decision in *Chan* was made over the dissent of one judge, who argued that the PSG claim should have been recognized as grounded in a voluntary association, in line with *Mayers*. The majority in *Chan* treated the immutable characteristic test in *Ward* and in the BIA’s *Acosta* as dispositive: “The particular social group to which the appellant belonged was ‘parents in China with more than one child who disagree with forced sterilization.’ Such a group does not fall within any of the categories of ‘particular social group’ established by *Canada (Attorney General) v. Ward*.”

⁴ The European Union Court of Justice and the German Administrative Court have adopted an approach that requires petitioners to demonstrate both a shared fundamental characteristic and social distinction. In application of this rule, the German courts have denied the validity of PSG claims based on gender, homosexuality and family (Hathaway and Foster 2014, 429–430). This

Other contextual factors likewise fail to explain away interpretive disputes over the meaning of PSG. The distribution of cases that are implicated in these disputes suggests that the appearance of the disputes cannot be put down to roles of litigators or amici curiae or to the geographic origin of the claim. The cases implicated in PSG disputes involve male (25), female (20) and transgender (1) appellants as well as families (9). They come from Central America (24), South America (8), Eastern Europe and the former USSR (6), China (3), Iran (2), South Africa (2) and nine other countries scattered across Asia and Africa.

The preponderance of cases from Central and South America reflects both the large numbers of asylum seekers from those countries and the difficulty that the courts have had in assessing the claims of those fleeing gang violence and violence by guerilla groups in failed states. But the spread of cases that raise disputes over the meaning of PSG beyond Central and South America indicates that the conceptual difficulty raised by the PSG question can arise in quite different contexts. A dispute arises between the Seventh and Third Circuits in 2013, for example, over whether Christians who converted to Christianity after an order of removal from the United States are part of the same PSG as longstanding Christians (*Shu Han Lin v. Holder*, 718 F.3d 706, 7th Cir. 2013; *Li Zhang v. Atty. Gen. of the U.S.*, 543 Fed.Appx. 277, 3rd Cir.

approach puts the German courts at odds with the current controlling precedent in the U.S. federal courts; it also puts them at odds with the U.K. House of Lords, which issued an opinion that the dual requirement to show a fundamental characteristic and social distinction “propounds a test more stringent than is warranted by international authority” (*Fornah v. Secretary of State for the Home Department*, UKHL 46, 2006; Hathaway and Foster 2014, 432). Disagreement along another axis appears between the U.S. federal courts and the French National Court of Asylum, which has declined to recognize homosexuals as a PSG in cases where the appellant did not seek to “express openly her homosexuality through her behavior” (*Mlle F*, CNDA 513547, 2005; Foster 2012, 52 fn. 433). U.S. federal courts have consistently maintained that no one should be expected to hide their membership in a group that is subject to persecution as a reasonable accommodation to avoid persecution.

2013). This dispute arises notwithstanding many cases prior to 2013 dealing with the asylum claims of Chinese Christians.

The skill and experience of particular litigators cannot account for when PSG disputes appear in the case law record. Seven cases out of 55 involve counsel for petitioners who are repeat players within this set of cases, and none of those counsels were representatives of large or elite law firms. In only three cases out of 55 did one of the 350 largest law firms in the country represent the petitioner.⁵ In all other cases, the organization representing the petitioner was a small law office—often a specialized immigration clinic—or else no counsel for the petitioner is named in the judicial opinion or briefs. (There is, on the other hand, evidence in at least one case of the opposite tendency—that inept legal representation can contribute to the production of judicial disputes. In one of the dispute chains I analyze in detail below, there appears a Ninth Circuit case in which the court observes that “[the petitioner] cites to no case that extends the concept of persecution of a social group to the persecution of a family” (*Estrada-Posadas v. INS*, 9th Cir. 1991, 924 F.2d 916), even though a prior Ninth Circuit case *had* held precisely that (*Sanchez-Trujillo v. INS*, 9th Cir. 1986, 801 F.2d 1571). A more diligent counsel for the petitioner in *Estrada-Posadas* would have found and cited the Circuit precedent in *Sanchez-Trujillo*.)

Amicus curiae briefs are filed in eight of the 55 cases: two are filed by the UNHCR; two by the ACLU; one by the Harvard Immigration and Refugee Clinic and one by Deborah Anker, the current and longtime director of the Harvard Clinic; one each by the National Immigrant Justice Center, Human Rights Watch Americas Watch and a handful of other organizations.

⁵ Law firm size measured by total number of attorneys (*National Law Journal* 2015). The cases are *Hernandez-Montiel v. INS*, 9th Cir. 2000, 225 F.3d 1084 (representation by Sheppard Mullin), *Molina-Estrada v. INS*, 9th Cir. 2002, 293 F.3d 1089 (representation by Cooley) and *Temu v. Holder*, 4th Cir. 2014, 740 F.3d 887 (representation by McDermott Will & Emery).

These institutions are repeat players in political asylum disputes that more plausibly have the knowledge base and institutional power to influence the framing of problems and case outcomes, but there is no evidence that the interventions of the amici are crucial to the development of PSG interpretive disputes in the case law. The outcome is favorable to the petitioner in exactly half of the cases in which an amicus brief is submitted (four out of eight), the same success rate for petitioners in general in PSG-disputing cases (27 out of 55). In one case, the written opinion explicitly denies that the argument made in the amicus brief may be considered, because it relies on facts that are not represented in the administrative record (*Fatin v. INS*, 12 F.3d 1233, 1241, 3rd Cir., 1993). In another, the written opinion holds that the argument of the amici “lacks merit” (*M.A. v. U.S. INS*, 899 F.2d 304, 309, 4th Cir., 1990). The opinion-writing judges in a few other cases do comment on the briefs and give evidence of having read them, but in none of the eight cases do they indicate that the amicus briefs influenced their holding on the narrow question of how to interpret PSG.

Amici do have some success in identifying cases that will turn out to be jurisprudentially important. Across all asylum law cases, those in which amici intervene include many that are among the most highly cited in the case record.⁶ But there is no clear evidence that amici have a significant ability to shape the framing of the PSG question or affect the outcomes of the PSG disputing cases. This is moderately surprising in relation to the literature on the role of amicus briefs in federal court decision making, which has usually found some influence of amicus briefs on case outcomes (although most of this literature has focused on amicus briefs in the Supreme

⁶ This includes 9 out of 19 asylum cases heard at the Supreme Court and (a better test of the ability of potential amici to identify important cases) 6 out of those 19 cases when they were heard at the Courts of Appeals before the Supreme Court agreed to hear them on review.

Court rather than in the Courts of Appeals; see Collins 2004, 808; Epstein, Landes and Posner 2013, 321–323).

In sum, PSG disputes have repeatedly arisen in court cases absent any involvement of powerful litigators or *amici curiae*. They have arisen in cases that span the globe, although failed states and gang violence in Central and South America have generated cases that involve this conceptual puzzle with special frequency. There is some evidence that courts can avoid the problem when they wish to do so and that they can even avoid classes of cases that are likely to raise the problem. The absence of the Fifth Circuit from any of these disputes is one indication of this: the Fifth Circuit covers Texas and therefore has had appellate jurisdiction over many cases involving those fleeing gang violence in Central America, which we might expect to generate some interpretive disagreement over the PSG question. The Fifth Circuit's analysis is cursory in almost all of these opinions and leans heavily on the deference due to the BIA.⁷ The absence of Haitian petitioners from any of the PSG disputing cases is another indicator that structured avoidance of the conceptual puzzle is possible in some circumstances. A large percentage of all asylum claims made in the United States are from Haiti. Those claims are denied in the immigration courts and before the BIA at very high rates,⁸ and Haiti's turbulent tradition of failed democracy and generalized political terror deployed against the population makes it a prime candidate state to produce interpretively difficult PSG-based claims at the appellate level,

⁷ Through a Boolean search in Westlaw for (asylum AND refugee AND gang), I identified 56 Fifth Circuit cases involving asylum claimants fleeing persecution by gangs or because of their involvement in gangs. Only three of these were published opinions. Every one of the 53 unpublished petitions was denied. Search conducted 4 June 2015.

⁸ From 2009–2012, Haiti was one of the top ten asylum claim-producing nations to the United States each year. Only Mexico, Guatemala, El Salvador, Honduras, China and the Dominican Republic consistently produced more claims in the U.S (Executive Office for Immigration Review 2013, D2). Grant rates across all countries have changed over time, but the rate for asylum seekers from Haiti has been consistently low relative to other countries (Ramji-Nogales 2009, 70; Executive Office for Immigration Review 2000–2013).

yet they have not generated any interpretive dispute. But these instances of non-appearance of the conceptual puzzle are exceptions to the more general rule that, across many contexts and over time, the Courts of Appeals have engaged deeply with the PSG question and have failed to settle it.

The failure of the statutory meaning of PSG to settle is empirically clear. The distribution of disputes over time suggests that the courts are not closer to establishing a determinative understanding of PSG than they were in 1968 or 1980 (Figures 5.1–5.2). Figure 5.2 reproduces the data first presented in chapter 2, Figure 2.10, but here cases are ordered along the vertical axis to show how the several chains of dispute have unfolded and grown denser over time. In contrast to the interpretive disputes over the meaning of “political opinion,” which appeared almost exclusively within panels following the Supreme Court’s ruling in *Elias-Zacarias* (see again chapter 4, Figure 4.1.), disputes over the meaning of PSG have continued to appear between Circuits and within Circuits over time—varieties of dispute that are in general more disruptive to legal professionals’ normative standards and expectations for how the courts should function. Because these disputes have not been isolated within panels, they have also implicated new cases at an ever-accelerating rate (indicated by the convex trend line in Figure 5.1). The especially high volume of new interpretive disputes appearing in 2013 (see again Figure 5.1) is driven in part by two long and complex en banc opinions published in the Seventh and Ninth Circuits, respectively (*Cece v. Holder*, 7th Cir. 2013, 733 F.3d 662; *Henriquez-Rivas v. Holder*, 9th Cir. 2013, 707 F.3d 1081). Both opinions were substantial efforts to settle the meaning of PSG within their respective Circuits; both prompted dissents. The Ninth Circuit’s *Henriquez-Rivas* decision overturned prior Ninth Circuit law on the relevance of “social visibility” to PSG identification. The Seventh Circuit’s *Cece*, which I discuss in detail in the following chapter,

disagreed with a prior Sixth Circuit opinion. Thus, between them these two opinions generated several new interpretive disputes in the case law record. Whether they will succeed in settling the question within the Seventh and Ninth Circuits for the future remains to be seen.

Figure 5.1. Proliferation of “particular social group” disputes over time

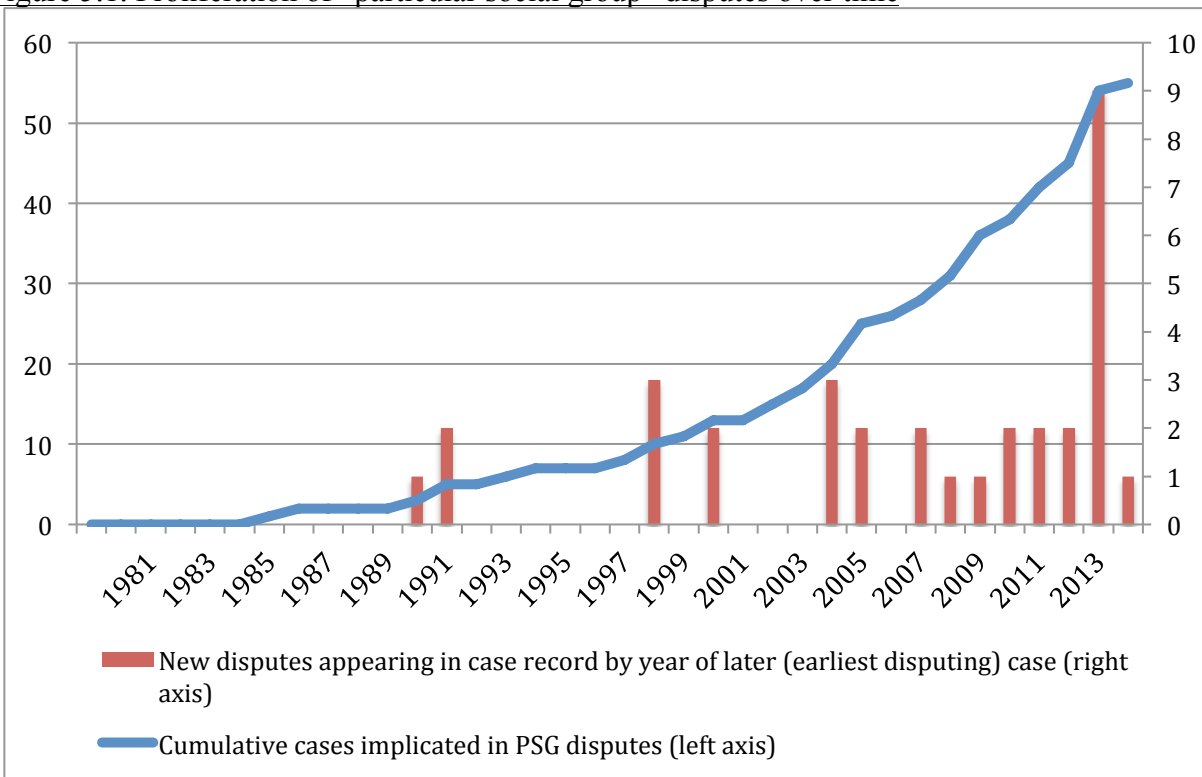
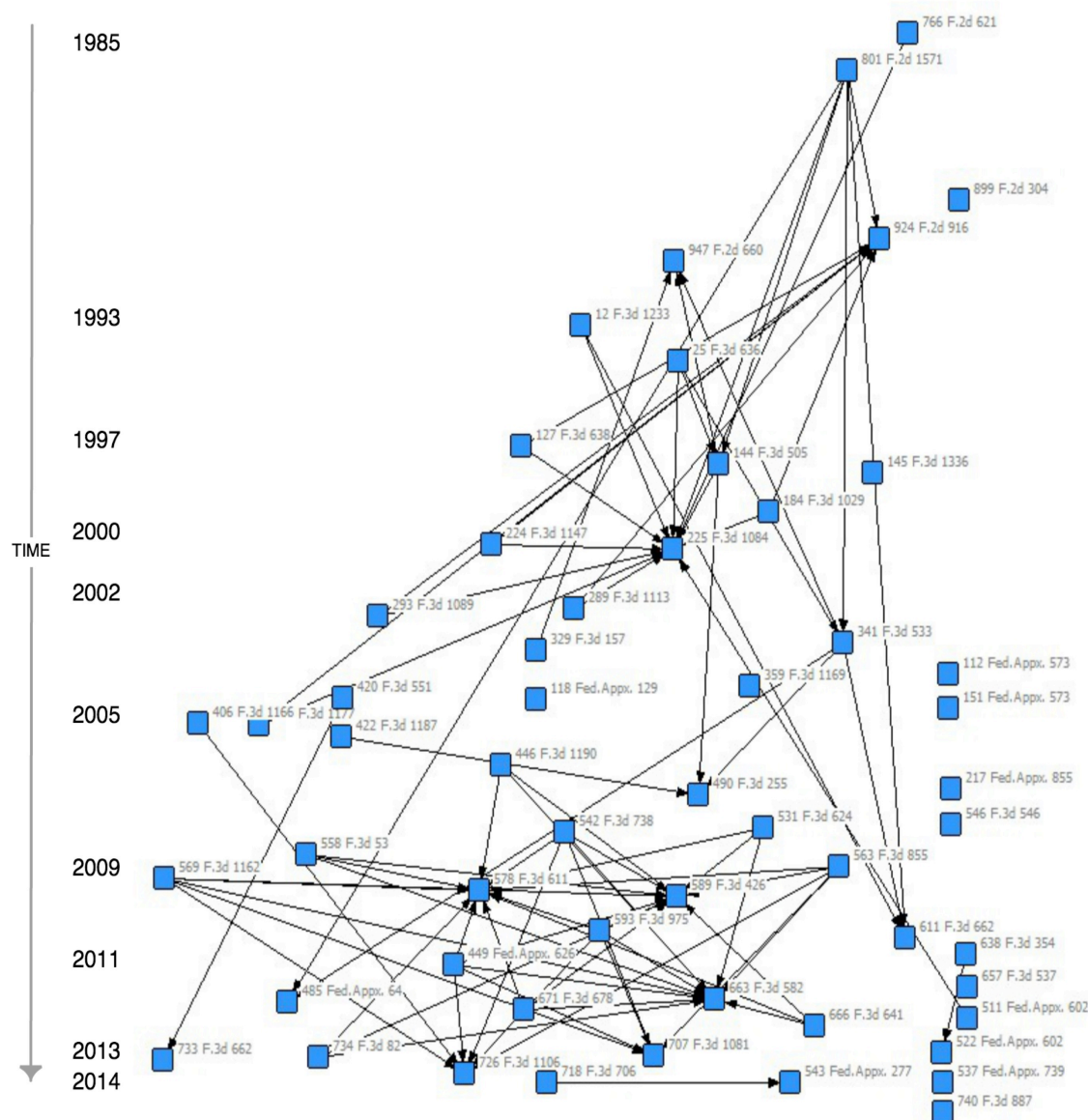


Figure 5.2. Time-structured network of disputes over the meaning of “particular social group”



5.3. The Development of Dispute Chains Over Time

5.3.1. Background to the Case Studies

The earliest significant intervention in the statutory interpretive question, “what is a PSG?” came in the BIA’s 1985 decision *Matter of Acosta*. In *Acosta*, the BIA ruled on the asylum claim of a Salvadoran appellant who was a member of a taxicab drivers’ union (COTAXI) and claimed a well-founded fear of persecution from anti-government guerillas who,

he believed, were behind anonymous threats he had received after refusing to participate in work stoppages that were designed to damage the national economy. Essential to the asylum claim, Acosta claimed a causal nexus between his fear of persecution and his membership in the PSG of COTAXI drivers. The BIA ruled against him, explaining that they interpreted the statutory meaning of PSG by relying on the doctrine of *ejusdem generis*. The author of the BIA decision wrote:

The doctrine [*ejusdem generis*, meaning “of the same kind”] holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words...The other grounds of persecution in the [1980 Refugee] Act and the [UN] Protocol listed in association with “membership in a particular social group” are persecution on account of “race,” “religion,” “nationality,” and “political opinion.” Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed...Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution (BIA 1985).

The *Acosta* decision has been criticized and recast many times in the Courts of Appeals, but the immutable characteristic test has survived these challenges mostly intact and remains the single most important doctrinal standard for the interpretation of PSG. It still exerts an important influence on PSG interpretation in the Courts of Appeals. In fact, given that the Supreme Court has never issued a ruling on the interpretation of PSG for the purposes of refugee status determination, the Courts of Appeals decision making process is controlled more from below (by the BIA’s decisions and the requirement of *Chevron* deference—explained above in chapter 2, pp. 65–66) than from above. The BIA *Acosta* decision has influenced Courts of Appeals decision making on the PSG question since 1985 without managing to head off disagreement about how to apply the law in practice, and there is little reason to expect that recent developments—for example, two BIA decisions in 2014 that established a requirement that PSGs show “social

distinction” (BIA 2014a; BIA 2014b; Anker 2014, 429)—will mark a decisive change in that respect.

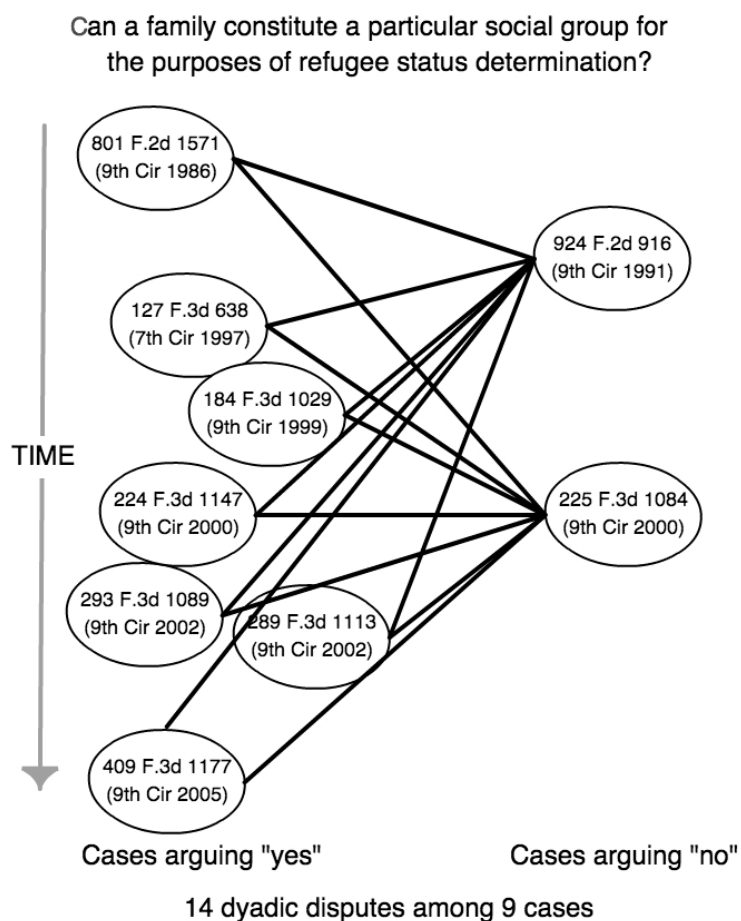
My analysis of Supreme Court decision making in chapter 4 primes us to expect that if the Supreme Court were to issue a decision on the interpretation of PSG, it would have the effect of constraining and redirecting the existing disputes. After a Supreme Court ruling, we would expect few if any intercircuit disputes over the meaning of PSG, but we might see a growth in within panel disputes over the application of the category to a particular set of facts. That may yet happen. The 2013 Seventh and Ninth Circuit en banc cases of *Cece* and *Henriquez-Rivas*, both of which produced split decisions, increase the likelihood that the Supreme Court will take notice of the continued lack of settling on the PSG question. On the other hand, the PSG question has neither the broad implications for jurisprudence nor the political import that are often crucial considerations in whether the Supreme Court decides to grant cert. The likeliest outcome is that the Supreme Court will not lend its institutional authority to the cause of settling the meaning of PSG in the asylum statute.

I now turn to two case studies of specific dispute chains. The question raised in the first one, “is a nuclear family a PSG?” is no longer (or at least, not at present) doctrinally contested anywhere in the U.S. federal courts. Every Court of Appeals has now answered it in the affirmative. But the dispute chain is no less informative or important for the sociology of knowledge by virtue of being settled today from the perspective of legal scholars. In fact, studying an old dispute chain has certain advantages. The stubborn persistence of an interpretive dispute and its eventual settling are both in view here.

5.3.2. Case Study One: Interpretive Dispute over “Family” as a PSG

The dispute over whether a family can constitute a PSG implicates nine judicial opinions, eight of them from the Ninth Circuit (Figure 5.3).⁹ This small network of disputing cases overlaps with several other case law disputes, but taken in isolation the family issue is a good illustration how the uncontroversial application of legal knowledge and heuristics can contribute to the production and perpetuation of interpretive disputes in case law.

Figure 5.3. Network structure of case study one



⁹ Other cases have decided the question of whether a family qualifies for asylum but have not explicitly noted the existence of the case law dispute in the text of their opinions (e.g., *Gebremichael v. INS*, 1st Cir. 1993, 10 F.3d 28). These cases are not captured by my search procedures for identifying interpretive disputes, but including them would not change the thrust of my analysis.

The Ninth Circuit made its first comment on the possibility of family as a PSG in 1986 in *Sanchez-Trujillo v. INS* (9th Cir. 1986, 801 F.2d 1571). The entire treatment of the question in that case runs as follows: “perhaps a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people” (801 F.2d 1576). Five years later the Ninth Circuit ruled on the family question again, this time in the opposite direction: “[the petitioner] cites to no case that extends the concept of persecution of a social group to the persecution of a family, and we hold it does not. If Congress had intended to grant refugee status on account of ‘family membership,’ it would have said so” (*Estrada-Posadas v. U.S. INS*, 9th Cir. 1991, 924 F.2d 916, 919). The *Estrada-Posadas* decision does not cite *Sanchez-Trujillo*. There then follow two decisions by the Ninth Circuit that take *Sanchez-Trujillo* as the ruling authority without citing *Estrada-Posadas* (*Mgoian v. INS*, 9th Cir. 1999, 184 F.3d 1029 and *Pedro-Mateo v. INS*, 9th Cir. 2000, 224 F.3d 1147). Meanwhile the Seventh Circuit in *Iliev v. INS* (1997, 127 F.3d 638) issued its own ruling on the family question, citing *Sanchez-Trujillo* positively as well as a number of authorities in the Seventh Circuit that implicitly treated family as a PSG.

The later cases addressing the family question take notice of the split authorities. *Hernandez-Montiel v. INS* (9th Cir. 2000, 225 F.3d 1084) is the only decision in the case record to follow the *Estrada-Posadas* precedent. It does so with some ambivalence and in the context of casting doubt on *Sanchez-Trujillo*’s voluntary association standard: “in *Sanchez-Trujillo*, we [the Ninth Circuit] recognized a group of family members as a ‘prototypical example’ of a ‘particular social group.’ Yet, biological family relationships are far from ‘voluntary.’ We cannot, therefore, interpret *Sanchez-Trujillo*’s ‘central concern’ of a voluntary associational relationship strictly as

applying to every qualifying ‘particular social group.’” The court’s holding to reinforce the *Estrada-Posadas* precedent comes in a footnote: “we have since held that a family cannot constitute a particular social group under 8 U.S.C. § 1101(a)(42)(A)” (225 F.3d 1084, 1092). In *Chen v. Ashcroft* (2002, 289 F.3d 1113), the Ninth Circuit reverts to agreement with *Sanchez-Trujillo* on the family question, but again with hedging language. *Chen* refers to the decision in *Estrada-Posadas* as “dicta”¹⁰ and notes, without explicitly asserting that this is a relevant legal distinction, that the family discussed in that case was not a nuclear family. *Chen* then affirms the *Sanchez-Trujillo* decision as “the law of our Circuit” (289 F.3d 1115).

The final two entries to date in this unfolding dispute are *Molina-Estrada v. INS* (9th Cir. 2002, 293 F.3d 1089) and *Thomas v. Gonzales* (9th Cir. 2005, 409 F.3d 1177). *Molina-Estrada* acknowledges Ninth Circuit law that “in some circumstances” a family can constitute a PSG while still citing the contrary holding in *Estrada-Posadas*. Of all of the judicial opinions in the chain, *Thomas*, which was decided en banc, provides the most extensive discussion of the previous case law. *Thomas* also most clearly exhibits the judicial discomfort and sense of threat to professional legitimacy that can arise from interpretive disputes in case law. The *Thomas* decision first reviews how other Circuits have implicitly and explicitly treated the question of whether a family counts as a PSG and finds “no out of circuit authority to the contrary.” They then observe, “inexplicably, our circuit [the Ninth] has generated two diverging lines of authority on whether family or kinship ties may give rise to a particular social group. At least two panel decisions have squarely held that a ‘family’ cannot constitute a ‘particular social group’... We have also held the opposite” (409 F.3d 1177, 1186–1187). The en banc *Thomas* panel finally

¹⁰ Judges refer to passing observations that they do not intend to have the force of law as “obiter dicta” [“things said in passing”], as opposed to legally binding “holdings” (see again chapter 2, p. 60). The distinction is centrally important in legal reasoning, although it is not always clear-cut.

holds with the majority of earlier cases and gives some further specificity to the holding in response to the government brief in the case:

Reconciling these contrary lines of intracircuit authority is not possible. Therefore, consistent with the views of the BIA and our sister circuits, we hold that a family may constitute a social group for the purposes of the refugee statutes. We overrule all of our previous decisions that expressly or implicitly have held that a family may not constitute a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A)...We decline to hold, as the government urges, that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with one of the other four grounds enumerated in 8 U.S.C. § 1101(a)(42)(A), 1231(b)(3)(A) (409 F.3d 1187–1188).

There is a marked change in the rhetorical treatment of this question over twenty years, despite the fact that almost all of the cases dealing with it come from the same Circuit Court. *Sanchez-Trujillo*'s commentary on family as a PSG exists only as a manifestation of the judicial tendency and sense of professional obligation to establish precedential standards through incremental generalization. The petitioner in *Sanchez-Trujillo* argued that he was a member of the PSG “young, urban, working-class males of military age who had maintained political neutrality” in El Salvador, so the question of family as a PSG was unnecessary to decide the case. Written in the early years of Refugee Act statutory interpretation, *Sanchez-Trujillo* is forward looking—aspiring to settle anticipated interpretive questions for the future—instead of backwards looking, as is the embarrassed reconciliation of intracircuit dispute in *Thomas*. The cases under discussion neatly divide into an earlier set (from *Sanchez-Trujillo* to *Pedro-Mateo*) that take no notice of the split authorities, and a later set (*Hernandez-Montiel* to *Thomas*) that do take notice.

The standard techniques of legal interpretation are everywhere evident in these cases, and there is no evidence that the authoring judges disagree about the appropriateness of those techniques. The generalizing but strictly unnecessary comment regarding the family as PSG in *Sanchez-Trujillo* is fully in the spirit of “judge-centered incrementalism” described by Schauer

(2009, 106). Even when later cases disagree with the holding, they do not dispute the appropriateness of the argumentative approach. The Seventh Circuit in *Iliev* follows the standard practice of privileging its own institutional precedent over the precedent of other Circuits and so avoids a deep engagement with the interpretive dispute even while acknowledging that it exists in the Ninth Circuit. The later Ninth Circuit cases model a variety of strategies of legalist interpretation. *Estrada-Posadas* looks to plain meaning in the statutory text and legislative intent to answer the question. *Chen* and *Molina-Estrada* take notice of the Circuit split and so have a harder task in reaching a decision than either *Iliev* or *Estrada-Posadas*. Nevertheless, the authors of both *Chen* and *Molina-Estrada* are committed to avoiding the concession of Ninth Circuit internal inconsistency that the judges in *Thomas* are eventually forced to make (“reconciling these contrary lines of intracircuit authority is not possible”). The tactic adopted by the court in *Chen* is to downgrade the statement in *Estrada-Posadas* to dicta and hence not to treat it as binding precedent. The tactic adopted in *Molina-Estrada* is to imply a finer distinction of factual circumstances than the preceding cases. The court in *Molina-Estrada* references the prior holding that a family is a PSG “in some circumstances” but declines to elaborate on the circumstances in which it is and in which it is not. The court then decides the case on other grounds anyway: “assuming that Petitioner’s family is a ‘particular social group’ within the meaning of the statute, he has not established that he was persecuted ‘on account of’ his family membership” (293 F.3d 1095).

Figure 5.4. Legalist standards and divergent outcomes in the dispute over family as a “particular social group”

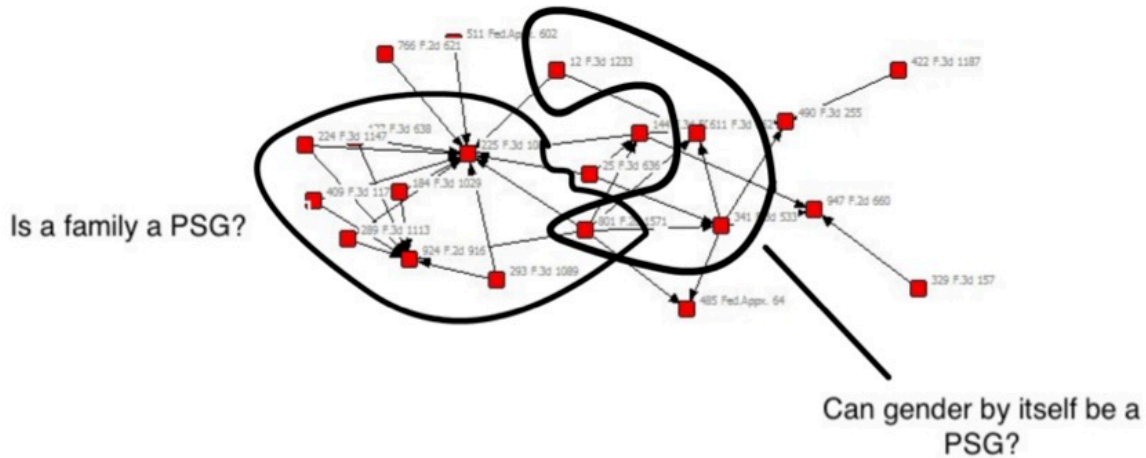
Case	Interpretive tools and strategies	Conclusion
<i>Sanchez-Trujillo</i> →	Inductive incremental theorizing →	Family a PSG
<i>Estrada-Posadas</i> →	Textual plain meaning and legislative intent (Congress) →	Family not a PSG
<i>Iliev</i> →	Circuit authority outweighs extra-Circuit authority →	Family a PSG
<i>Mgoian</i> →	Deference to precedent (“stare decisis”) →	Family a PSG

Figure 5.4, continued. Legalist standards and divergent outcomes in the dispute over family as a “particular social group”

<i>Pedro-Mateo</i> →	Stare decisis →	Family a PSG
<i>Hernandez-Montiel</i> →	Stare decisis →	Family not a PSG
<i>Chen</i> →	Stare decisis; dicta not binding →	Family a PSG
<i>Molina-Estrada</i> →	Stare decisis; divergent authorities distinguishable on the facts →	Family a PSG
<i>Thomas</i> →	Conflicting lines of precedent not reconcilable; consistency with BIA and Circuit courts	Family a PSG

The first reaction of a lawyer or judge to this extended discussion of the dispute over family as a PSG may be that it is much ado about nothing. There are only two cases disrupting the consensus that family is a PSG, and the question has now been apparently firmly settled in the only Circuit on which it generated any confusion. But treating this chain as a single dispute distributed across 14 dyads and 9 cases possibly understates the degree of disagreement expressed here. Wrapped up in the dispute is inconsistency over whether the answer to the family question in *Estrada-Posadas* is dicta or Ninth Circuit precedent. Several of these cases also question the soundness of the *Sanchez-Trujillo* voluntary association test and its compatibility with the notion of family as prototype of a PSG, which creates an overlapping but analytically distinct chain of disputation. A network depiction of the nine cases implicated in the “family” dispute chain plus all of the cases linked to them in first-, second- and third-degree disputes may be a more accurate indicator of how much confusion was introduced into the law as the courts grappled with whether a family was a PSG. This expanded dispute chain is visible in the upper right quadrant of Figure 2.10 (chapter 2, p. 75), and it is reproduced below as Figure 5.5.

Figure 5.5. “Family” dispute chain with first-, second- and third-degree dispute links



A close reading of the dispute chain over family as a PSG illustrates that neither the norm of deference to precedent, nor the canons of construction nor any other standard techniques of statutory interpretation contribute in the expected way to the system wide settling of this single, narrowly defined legal question. These techniques, consistently applied, instead accomplish just the opposite: the perpetuation of dispute over the question, “is a family a PSG?” In the later cases of *Chen* and *Molina-Estrada*, the authoring judges sought to bolster the formal rationality of the particular decision at hand by reading *Estrada-Posadas*’s opinion as dicta (*Chen*) and by introducing a new but unarticulated distinction between the earlier decisions on factual grounds (*Molina-Estrada*). Because these two opinions do not acknowledge the broader inconsistency that already existed in the Ninth Circuit’s case law, they do nothing to move it towards resolution. It is only when the en banc court in *Thomas* grasped the nettle of the Circuit’s previous inconsistency that the court reached a settling of intracircuit law that looks likely to persist without future disruption. The pattern is much the same when we look across a wider set

of cases that have grappled with the meaning of PSG. As in the debate over family, the application of standard techniques of statutory interpretation along with incremental generalization has produced many cases that are, like the family cases, mutually irreconcilable (Figure 5.6).

Figure 5.6. Key moments of PSG interpretation contributing to the perpetuation of dispute

Date	Claim	Source
1985	“immutable characteristic” test	BIA, <i>Acosta</i>
1986	“voluntary association” test family is a PSG	9th Cir., <i>Sanchez-Trujillo</i> 9th Cir., <i>Sanchez-Trujillo</i>
1987		
1988	policemen as such are not a PSG	BIA, <i>Fuentes</i>
1989		
1990		
1991	family not a PSG PSG must be “visible and externally recognizable”	9th Cir., <i>Estrada-Posadas</i> 2nd Cir., <i>Gomez</i>
1992		
1993	gender by itself not a PSG	3rd Cir., <i>Fatin</i>
1994		
1995		
1996		
1997		
1998	“voluntary association” test at odds with BIA <i>Acosta</i>	7th Cir., <i>Lwin</i>
1999		
2000	“immutable characteristic” test not dispositive	9th Cir., <i>Hernandez-Montiel</i>
2001		
2002		
2003	2nd Cir. <i>Gomez</i> ruling at odds with BIA <i>Acosta</i>	6th Cir., <i>Castellano-Chacon</i>
2004		
2005		
2006	“social visibility” test	BIA, <i>C-A-</i>
2007	2nd Cir. <i>Gomez</i> ruling compatible with BIA <i>Acosta</i>	2nd Cir., <i>Koudriachova</i>
2008		
2009	“social visibility” test rejected	7th Cir., <i>Gatimi, Ramos</i>
2010	gender by itself a PSG	9th Cir., <i>Perdomo</i>
2011		
2012	PSG must share a trait that is (1) sufficiently particularized, (2) common and immutable, (3) socially visible	6th Cir., <i>Gomez-Guzman</i>
2013	Service as a policeman can ground a PSG claim	11th Cir., <i>Gavilano-Amado</i> (dissent)
	Service as a policeman cannot ground a PSG claim	11th Cir., <i>Gavilano-Amado</i>
2014	“social distinction” test	BIA, <i>M-E-V-G, W-G-R-</i>

Several of the PSG case law disputes have a form similar to the dispute over family, with multiple cases lined up on either side. Examples include the dispute over the validity of the social visibility and voluntary association standards. Several other PSG disputes manifest as very specific questions that are contested within a single panel or between two cases only. I next turn to one of these dispute chains, i.e., one that has a substantially different network structure from the dispute over family as a PSG.

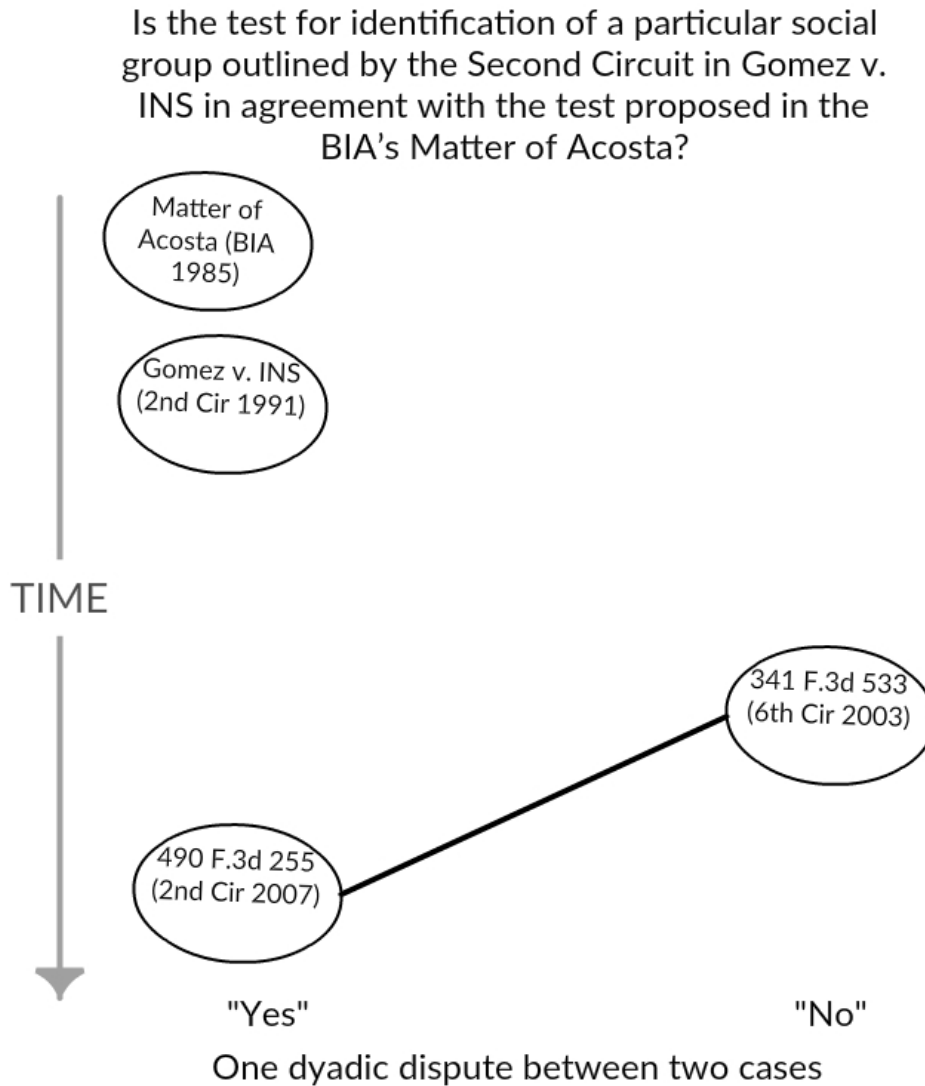
5.3.3. Case Study Two: A Second-Order PSG Dispute

My second case study arises between the Sixth Circuit and the Second Circuit over the question, “is the test for identification of a PSG outlined by the Second Circuit in *Gomez v. INS* (1991, 947 F.2d 660) in agreement with or at odds with the test proposed in the BIA’s *Acosta*?” The Sixth Circuit in *Castellano-Chacon v. INS* (2003, 341 F.3d 533) holds that the answer is no; the Second Circuit in *Koudriachova v. Gonzales* (2007, 490 F.3d 255) holds that the answer is yes. The BIA in *Acosta*, as we have seen, introduced the immutable characteristic test. The Second Circuit in *Gomez* writes:

“Particular social group” has been defined to encompass “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest”...A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general... (“A ‘particular social group’ normally comprises persons of similar *background*, habits or *social status*”) (947 F.2d 660, 664) (emphasis in original).

The Second and the Sixth Circuits then disagree: are these two tests compatible or not?

Figure 5.7. Network structure of case study two



In *Castellano-Chacon*, the Sixth Circuit interprets the Second Circuit holding in *Gomez* as follows: “the Second Circuit adopted the Ninth Circuit’s ‘voluntary associational relationship’ standard [from *Sanchez-Trujillo*], but additionally noted that the members of a social group must be externally distinguishable.” *Gomez* does cite *Sanchez-Trujillo*, although not the particular phrase “voluntary association,” in making reference to “a collection of people...actuated by some common impulse or interest.” The phrase “externally distinguishable” in *Castellano-*

Chacon is a close paraphrase of “...possess some fundamental characteristic...which serves to distinguish...” from *Gomez*. *Castellano-Chacon* thus does seem to describe fairly a two-step process of identification in *Gomez*. The only clear separation between the two accounts on a first reading is the reference in *Gomez* to the required external characteristic as “fundamental,” which is not repeated in *Castellano-Chacon*.

However, the Second Circuit in *Koudriachova* rejects the Sixth Circuit’s separation of the BIA test and the *Gomez* test:

[The] broad dicta in *Gomez*...should not be read as setting an a priori rule for which social groups are cognizable...Rather, *Gomez* should be read as standing for the proposition that an individual will not qualify for asylum if he or she fails to show a risk of future persecution on the basis of the membership claimed (490 F.3d 261).

In other words, *Koudriachova* holds that the Sixth Circuit in *Castellano-Chacon* read *Gomez* to be proposing a determining rule, when in fact *Gomez* is no more than dicta affirming that group membership matters. As in the first dispute chain discussed above, this disagreement arises from a combination of (1) inductive theorizing from cases that fails to command complete support in subsequent cases and (2) the application of commonly accepted interpretive tools and strategies in different contexts, where the relevant contextual change is empirical variation between the cases and the contingent order in which the Second and the Sixth Circuits heard these two cases (Figure 5.8).

Figure 5.8. Legalist standards and divergent outcomes in the dispute over *Acosta* and *Gomez* standards

Case	Interpretive tools and strategies	Conclusion
<i>Acosta</i> →	Ejusdem generis →	Immutable characteristic test
<i>Sanchez-Trujillo</i> →	Evaluation of the statutory language; legislative intent (United Nations and Congress) →	Voluntary association test
<i>Gomez</i> →	<i>Chevron</i> deference; consistency with BIA and sister Circuits desirable →	There exists a single PSG standard

Figure 5.8, continued. Legalist standards and divergent outcomes in the dispute over *Acosta* and *Gomez* standards

<i>Castellano-Chacon</i> →	<i>Chevron</i> deference →	<i>Acosta</i> and <i>Gomez</i> are not compatible
<i>Koudriachova</i> →	<i>Chevron</i> deference; read earlier Circuit opinions as favorably as possible →	<i>Acosta</i> and <i>Gomez</i> are compatible

The Second Circuit’s *Gomez* cites the BIA’s *Acosta*, the Ninth Circuit’s *Sanchez-Trujillo* and the First Circuit’s *Ananeh-Firempong v. INS* (1985, 766 F.2d 621) as relevant precedents but also adds some further elaboration on how the PSG standard ought to apply to the empirical case at hand:

Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics—other than gender and youth—such that would-be persecutors could identify them as members of the purported group...Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women...We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman (497 F.2d 664).

When the Sixth Circuit decided *Castellano-Chacon* in 2003, *Gomez*’s conciliatory reading of the prior case law was no longer available. In the intervening years, case law from several other circuits exploded the notion in *Gomez* that a single, coherent standard governed the interpretation of PSG in the federal courts and the BIA. The Ninth Circuit abrogated its earlier holding in *Sanchez-Trujillo*, and the BIA and a few other Circuits explicitly rejected “voluntary association” as a test for or determining feature of a PSG. The Sixth Circuit followed two simple heuristics in imposing their own order on the conflict of interpretations between the Circuits: (1) acknowledge Circuit splits when they exist and (2) when your own Circuit has no existing precedent on the issue, adopt *Chevron* deference as the first resort. They write, “we have not previously stated a specific test in the Sixth Circuit, and in doing so now we recognize the

deference due the BIA’s interpretation of the INA insofar as it reflects a judgment that is peculiarly within the BIA’s expertise” (341 F.3d 546).

To make sense of the explicit dispute between the BIA and the Ninth Circuit’s *Sanchez-Trujillo*, the Sixth Circuit had to decide how to classify the *Gomez* decision. They did so in apparently the least cognitively demanding way, namely by reading *Gomez* as a third test, one that splits the difference between *Acosta* and *Sanchez-Trujillo*: “the Second Circuit adopted the Ninth Circuit’s “voluntary associational relationship” standard, but additionally noted that the members of a social group must be externally distinguishable” (341 F.3d 546).

Finally, the Second Circuit in *Koudriachova* could not easily ignore the Circuit precedent established in *Gomez* or ignore the suggestion by the Sixth Circuit that *Gomez* violates the requirement of *Chevron* deference. To avoid the embarrassing conclusion that the *Gomez* decision violated the obligation of *Chevron* deference or committed an error of law by failing even to consider the requirement of *Chevron* deference, the Second Circuit in *Koudriachova* minimized the meaning of its own earlier decision, both legally (calling it dicta rather than precedent) and substantively (denying the notion that *Gomez* involved “setting an *a priori* rule” (490 F.3d 262)). The Sixth and Second Circuit panels in *Castellano-Chacon* and *Koudriachova* responded to different contextual imperatives to rely on different, equally valid sources of law and different but universally acceptable interpretive tools to reason to their decisions. This alone is sufficient to explain the dispute that arises between the two cases.

5.4. How Judicial Reasoning Perpetuates Interpretive Dispute

There are multiple elements of judicial reasoning that contribute to the perpetuation of dispute chains like those represented in Figures 5.3–5.4 and 5.7–5.8. First, judges rely on tools and strategies of interpretive analysis that are “controlled by the intellect” (Weber 1968[1922],

656): tools like *eiusdem generis* and other canons of construction, arguments from textual “plain meaning” and inquiries into legislative intent. Second, judges rely on institutional strictures that support the settling of hard questions at the cost of importing some irrationality into their decision making: deference to precedent and the related principle of deference to BIA decision making under the *Chevron* doctrine. In Weber’s terms, deference to precedent and deference to bureaucratic authorities are *formally* rational, because they are rules set out in advance, but they allow the entry of *substantive* irrationality into case law, insofar as they privilege the authority of tradition and status over the authority of reason. Legal scholarship has long recognized this permissive stance towards substantive irrationalism in the judicial decision making process and typically defends it on functional grounds (e.g., Schauer 2009, 38–44 and, again, Brandeis’s line from *Burnet* privileging settled law over reaching the right answer). Finally, judges rely on a substantive understanding of what social groups are.

The first two elements of judicial reasoning listed here can be called *legalistic*, because they can be expressed in purely doctrinal terms, without intersecting any particular domain of substantive knowledge. The doctrine of *Chevron* deference applies to court review of agency action in a wide variety of domains, from asylum to labor law to Social Security administration to taxation and many others. The canons of construction and the doctrine of *stare decisis*—that deference is owed to precedent—are applicable across all areas of law. The *substantive* knowledge claims that judges rely on—such as their ideas about what constitutes a social group—are different from the legalistic elements of judicial reasoning in this respect. The meaning of “social group” and “religion” are substantive social theoretical questions that are distinctively important in asylum claims but irrelevant in most other areas of law, and when

judges rely on them in the asylum context, they have to make recourse to some understanding of social group formation that will have its ultimate roots outside of legal doctrine.

In the long tradition of scholarship that poses the question, “how do judges reason?” scholars have typically focused on the first two (legalistic) elements of judicial reasoning and have had little to say about how judges tackle the third (substantive) element. This has been true in sociolegal studies (e.g., Weber 1968[1922]; Cotterrell 1984) as much as in the work of legal scholars and philosophers. Some of the unsettledness over interpretive questions that occurs and persists in judge-made law can be explained just with references to the formal features of judicial reasoning. Karl Llewellyn observed that many of the canons of statutory construction exist in relations of “thrust” and “parry,” such that any legal conclusion drawn from one of these canons could be counterbalanced by a conclusion of equal and opposite force drawn from another (Llewellyn 1960, 521–535). As one example of such thrust and parry, he gives: “if language is plain and unambiguous it must be given effect”; but “not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose” (Llewellyn 1960, 524). As legal realists have long recognized, interpretive dispute and unsettledness in the law can develop merely from the application of these doctrinal principles. To answer the question, “how do interpretive disputes arise in the courts?” the substantive knowledge claims that judges make do not always need to be invoked.

However, the substantive knowledge work involved in judging asylum cases also makes a major contribution to the persistent failures of settling that are empirically observable in the PSG dispute chains discussed in this chapter. The internal inconsistencies that can arise from the standard legalist approaches to interpretation are complicated and extended in time by the fact that the judges are developing substantive social theory (and other substantive knowledge

claims) in their written opinions concurrent with their development and application of legal doctrine. This has been generally underappreciated in the legalist and social scientific literatures on how judges reason.

In some places the social theoretical claims that judges produce in asylum law appear to be completely ad hoc—akin to what Bourdieu refers to as “spontaneous sociology” (Bourdieu 1989, 18; Bourdieu, Chamboredon and Passeron 1991, 20–26). But in other respects, “spontaneous sociology” does not do justice to the regularities and complexities of the substantive knowledge work that judges do in answering the PSG question. One of the disciplined practices that judges engage in that makes their substantive knowledge work recognizable as social theory *building* (as opposed to merely making social theoretical *claims*) is incremental generalization between cases, which resembles in some respects the sociological idea of “middle range theory” (Merton 1968).

Merton identifies middle range theory as theory that is “intermediate to general theories of social systems which are too remote from particular classes of social behavior, organization, and change to account for what is observed and to those detailed orderly descriptions of particulars that are not generalized at all” (Merton 1968, 39). Federal appellate court judges embrace a moderate course in theoretical generalization from cases and just as clearly abhor “total system theory,” as Merton labeled the contrasting style to middle range theory. Judicial opinions in common law courts generalize, but the judges writing them express their key legal claims with reference to the particulars of a case. Schauer gives a clear statement of the idea: “the spirit of the common law is very much a spirit of judge-centered incrementalism, in which the necessity of adjudicating concrete disputes informs gradual and experience-based development of law...Even in interpreting detailed statutes...judicial interpretations of statutes

become as important as the statutes themselves” (Schauer 2009, 106). Edward Levi’s *Introduction to Legal Reasoning* gives a similar account of the basic model: “the basic pattern of legal reasoning...is a three-step process...in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation” (Levi 1970[1948], 1–2).

Judges avoid abstract propositions that do not have some direct application to at least some set of possible concrete cases. One never finds reasoning about the meaning of PSG in a judicial decision that is pitched at the same level of abstraction as, for example, Simmel’s writings on the network constitution of social relations, Marx’s on the primacy of social relations of production or Durkheim’s or Freud’s on the organization of social life and morality around shared totems and taboos. Proffered definitions of PSG in judicial decisions are instead usually written as if they were arrived at inductively, beginning with the facts of the case. Even especially lengthy opinions usually have a formulaic structure. The facts of the case are presented first, then the legal question(s) at issue are articulated, then the decision is stated and justified in legal terms (that is, with reference to canons of construction, principles of statutory interpretation, controlling precedent and so on), often with supporting reasoning that is substantively sociological. The judicial avoidance of total system theory seems to be generalizable to other situations in which judges are called upon to reason with substantive knowledge at or beyond the limits of their professional expertise, although the willingness of judges to engage in total system theorizing may be variable over time and across different areas of law. This is a question for further research.

Merton’s ambition in introducing the idea of middle range theory to sociology was to push the discipline towards greater consensus, on the reasoning that (1) theory would be immediately empirically testable and (2) to the extent that different theories developed

separately, they would develop separately because they referred to different “delimited aspects of social phenomena”: his examples included “a theory of reference groups, of social mobility, or role-conflict” (Merton 1968, 40). Merton’s approach failed to turn sociology into a high consensus field because condition (2) was not met (Collins 1994). Sociologists have not agreed on the various domains in which delimited theories should develop. His example of a theory of role-conflict and role-sets now sounds old-fashioned, and contemporary scholars have not agreed as to the appropriate delimited theoretical domain that ought in principle to explain social roles and role-conflict—whether, for example, we ought to have separate theories of gender, race and class relations, or a theory of social stratification in general, or a theory of symbolic interaction in general, or a theory of role-taking rooted in social psychology.

The failure of consensus around the PSG question in judicial decisions is notably *not* a failure of this type. There is clear agreement among federal judges that the theoretical question, “what is a PSG?” is delimited by the statutory context in which the problem appears. There has been a failure of consensus instead because the testable hypotheses generated by the judges’ social theorizing are never tested, and their inductive generalizations have not commanded clear support from judges deciding later cases. The “social visibility” and “immutability” of particular personal and group characteristics is empirically testable, but such testing is not a part of what judges do. Consequently, the immutability of tattoos, the social visibility of witnesses against gangs and the social particularity of the landowning elite, for example, can easily be asserted in one instance and denied in another. No judge ever conducts an empirical investigation to settle such questions, so the likelihood that such an argument will lead to settled consensus depends in large part on the conceptual clarity and a priori persuasiveness of the theoretical generalization.

New additions of empirical content to asylum law (i.e., newly decided cases) *do* have “direct consequences for [the] theoretic system,” as Merton’s program for middle range theory demands (Merton 1968, 149–150). While judges do not strongly discipline their reliance on empirical facts or particular methods of empirical fact gathering, they are at pains to maintain systematic order in terms of how their terms and concepts relate to one another. One of the central reasons that legal reasoning is often so opaque to lay observers is that the legal preference for internal systematic consistency leads to the creation of elaborate and highly contingent legal doctrines. This is clear in the asylum context, just as it is in many other areas of law. The authoritative scholarly text on U.S. asylum law, Deborah Anker’s *Law of Asylum in the United States*, has a treatment of the interpretation of PSG that has swelled from 5pp. in the 1989 edition (Anker 1989, 67–72) to 72pp. in 2011 (Anker 2011, 335–407) to nearly 100pp. in the latest edition (2014, 411–505). The need for more extended treatment of the PSG question is mostly due to the complexity of internally ordering the several tests and standards proposed for the recognition of social groups (“immutable characteristic,” “voluntary association,” etc.) and the mass of case law declaring specific outcomes for different groups of people. It is not so easy to reconcile, for example, the Third Circuit’s rejection of Iranian feminists as a PSG (*Fatin v. INS*, 3rd Cir. 1993, 12 F.3d 1233) with the Seventh Circuit’s recognition of parents of Burmese student dissidents (*Lwin v. INS*, 7th Cir. 1998, 144 F.3d 505).

The difference between substantive sociological theorizing in the judicial context and Merton’s vision for sociology is that the judicial approach produces less symmetry between theoretical development and empirical development than does middle range theory. For the judges who work collectively to maintain the consistency of federal asylum law, almost all the weight of driving forward changes in the system is on conceptual distinctions and classifications.

Empirical propositions do enter into judicial theory building—for example, “tattoos are not immutable”; “landowners are a socially visible group”; and “women and girls in Somalia are commonly subjected to genital mutilation”—but the empirical claims that support the law of PSG interpretation in the courts run the gamut from strongly supported by the factual record of the case to ex cathedra pronouncements by judges with no evident grounding in verified fact.

The institutional constraints on judicial reasoning—deference to precedent foremost among them—are designed to facilitate the settling of legal questions when clarity and agreement are otherwise elusive for any reason. Often this system functions smoothly and successfully even in highly contentious circumstances, such that the Supreme Court can rule on issues that are deeply contentious in national political culture without losing its legitimacy or sparking revolt in the lower levels of the federal judiciary. However, the dispute chains examined above also reveal that the system of institutional constraints on judicial reasoning makes it difficult for judges to be anything but eclectic and opportunist in their reliance on empirical data, which in turn makes it more likely that a conceptual issue like the meaning of PSG will fail to settle.

I have discussed above the lack of any systematic methods or standards for judges drawing on empirical facts for the verification or testing of substantive knowledge claims they make about the constitution of social groups. For an example of how this might matter materially to case outcomes, consider once again the case of *Castellano-Chacon*, where Judge Boggs uses the terms “immutable” and “innate” interchangeably in the context of the discussion of the petitioner’s claim to be a member of the PSG “tattooed youth” (6th Cir. 2003, 341 F.3d 533, *passim*). In standard usage the two words do not denote the same thing, and the difference might matter very much in a discussion of facial tattoos denoting gang membership. (See also Kim’s

(2012) case study of how a British colonial court struggled to “see” tattoos and their cultural significance.) If the judge’s professional obligation in writing the *Castellano-Chacon* opinion had extended to providing an empirical verification of the claim that tattoos are not immutable, he might still have come to the same conclusion, but it would at least have been more difficult to slide between the use of “immutable” and “innate” without acknowledging the denotational difference.

The same lack of systematic standards characterizes judicial treatment of facts that establish crucial background understandings in a case. Judges rely on the parties to a case to bring relevant facts to their attention, and they are rarely in a position to try to systematize their stances towards different sources. In asylum cases the parties frequently rely on State Department country reports to establish important facts about conditions in a petitioner’s home country, which often in turn bear directly on whether the petitioner’s social group membership claim will be recognized by the court. Judges typically take the findings of these State Department reports as given, and they rarely comment on possible variation in the quality and reliability of the reports or on the possibility of degradation of the information over time. When faced with empirical data of even more uncertain quality—for example, consular letters, which are occasionally presented as evidence of country conditions—judges seem to proceed on little more than intuition about whether the source is reliable. Different perspectives on consular letters produce an interpretive dispute between *Angov v. Holder* (9th Cir. 2013, 736 F.3d 1263) and *Ezeagwuna v. Ashcroft* (3rd Cir. 2003, 325 F.3d 396).

The dispute chains analyzed in this chapter put on display a tension in the internal rationality of the law: “oracular” legal judgments in Weber’s sense (1968[1922], 976–978)—i.e., judgments that provide no justification, elaboration or inductive generalization of principle—are,

ironically, the judgments that most effectively guard against the most conspicuous failures of legal logic and rationality at the system level. Conversely, in instances where judges engage in inductive, incremental but non-empirical theorizing in an effort to meet a high standard of formal rationality, the substantive rationality of political asylum case law in general is put most at risk. In the case of PSG interpretation, judicial inductive theorizing leads directly to disputes about whether PSGs are characterized by immutable characteristics, voluntary associations, social visibility, social distinction or something else. These disputes, once arisen, have proven difficult to settle without resort to the principle of stare decisis (deference to precedent) and the authority of institutions over and against the authority of reason.

The contemporary heirs of legal realism in economics and political science have mostly bypassed these internal tensions in legal rationality, because they have mostly given up paying any attention to the local legalist logic of decision making. They have done so on the premise that the interesting variation in outcomes is best understood as a consequence of the formal features of cases (the identities of the interested parties, the age of controlling precedents, etc.) and the distribution of judges' instrumental interests. In this chapter I have sought to recover a way to assess social scientifically (and not just legalistically) the role of legal reasoning in generating interpretive disputes among judges.

The law of PSG interpretation is rational, but it is rational only in a highly circumscribed way. Its rationality does not confer some of the benefits that we usually suppose rational thought to provide: inferences and outcomes that can be predicted in advance, internal consistency by different decision makers and substantive defensibility in terms of ultimate ends and/or values. Nor is the law of PSG interpretation bound by strict standards for the discovery or verification of empirical facts, even though the analysis in judicial opinions often crucially relies on such facts.

The network of disputes depicted in Figure 5.2 above would be sparser, with fewer nodes and less dense ties, if each case in the case record decided the PSG question on the narrowest possible grounds with the least possible exposition, without factual exposition or incremental generalization to develop legal precedents. But the distinctive ingredients of judicial reasoning—the tools of statutory interpretation, the institutional constraints designed to facilitate the final settling of questions and the substantive knowledge claims that judges import or generate on their own—collectively contribute to the continued non-settling of the PSG issue.

5.5. Conclusion

My primary objective in this chapter has been to explain why interpretive disputes over the meaning of PSG have proven resistant to settling. I have also modeled an approach to the analysis of judicial reasoning that could be widely applied to other areas of law and, with more comparative data, could support a theory of how judicial knowledge production works in general. Judges are involved in substantive knowledge making in many other realms than the sociological classification of groups. They are, for example, amateur philosophers of causation (in some complex tort law claims) and amateur economists (in antitrust suits and corporate bankruptcy valuations) as well as amateur sociologists in asylum law claims and freedom of religion cases. A sociological account of substantive judicial knowledge production in each of these different realms would be possible and would enrich our understanding of judges not just as sociologists but also as knowledge workers more generally. The analytic focus on dispute chains that I have modeled here enables us to identify disagreements over narrowly focused substantive knowledge problems and evaluate their development over time.

Comparative analysis of interpretive dispute chains across other areas of law would help to clarify the generalizability and importance of these findings. It remains an open question what

kinds of substantive knowledge work are most prone to generate interpretive disputes in the courts. How frequently do judges dispute over the meaning of “social group” versus over the meaning of “religion” (in Constitutional freedom of religion cases)¹¹ or “market” (in antitrust cases)? How readily do they agree as to the standards they should use to assess witness reliability? How closely do they track the evolution of social scientific expert opinion on any of these questions? Is the law more likely to be settled with respect to substantive knowledge questions in the domains of disciplines that are low consensus and slow-moving (like sociology and philosophy) or those that are high consensus and fast-moving (like economics and the natural sciences)? What are the general characteristics of generalizing claims that tend to perpetuate disagreement—such as, “a PSG is a group that shares some immutable characteristic”—versus those that more efficiently bring about settling? Answering these comparative questions would bring us closer to a generalized understanding of how the judicial knowledge system works. It seems probable that legal questions will remain persistently unsettled in other areas of law where the application of the law hinges, as in asylum, on complex

¹¹ “Religion” is one of the protected grounds in asylum cases, but there are only two disputes over the meaning of “religion” in my database (versus 33 PSG disputes and 21 disputes over the meaning of “political opinion”). This is in itself an instructive finding in how judicial reasoning has developed in different areas of the law. In asylum cases as in U.S. federal court cases in general, deciding judges have tended to accept any petitioner’s self-declared system of belief as a religion for the purposes of asylum determination, as long as some more or less organized group shares the system of belief (Hathaway and Foster 2014, 399–400). This has held true even for claims made with reference to groups that have in other contexts sparked debate over the scope of the category “religion,” such as Falun Gong (*Zhao v. Gonzales*, 5th Cir. 2005, 404 F.3d 295; *Shan Zhu Qiu v. Holder*, 7th Cir. 2010, 611 F.3d 403) and the Church of Scientology (*Haghighatpour v. Holder*, 9th Cir. 2011, 446 Fed.Appx. 27). The BIA and the Courts of Appeals have thus done very little to elaborate on the conceptual meaning of “religion” in the asylum context. This may be because there is already a settled tradition of interpreting “religion” in the context of First Amendment protections and judges do not wish to disrupt or challenge that settled doctrine through claims made in the asylum context, a normatively less important area of the law.

or uncertain factual circumstances that are widely variable from case to case, but this, too, should be worked out in further comparative analysis.

The explanation I have advanced for how PSG disputes are generated leaves aside some things that are inaccessible from the available textual evidence. Why, for example, did the authors of *Estrada-Posadas* fail to cite or perhaps even fail to notice the prior Ninth Circuit precedent in *Sanchez-Trujillo*? The question is meaningful and a neat demonstration of the contingency of history in determining legal case outcomes. The protracted Ninth Circuit dispute over whether a family is a PSG might never have occurred if the authors of *Estrada-Posadas* had taken note of the decision in *Sanchez-Trujillo*, or if the authors of *Sanchez-Trujillo* had taken note of the BIA's *Acosta*. But a conclusive explanation of the observed outcome over and against the counterfactual one is not recoverable. If it were, it would have to be pitched at the level of phenomenology: how does a judge *experience* the process of deciding a case? How did the process unfold in real time—was the case poorly researched, was there a miscommunication between the judge and his clerks, did the judge consciously or unconsciously allow political preference for how the case should come out to guide his thinking?

In the face of many real world contingencies and variation in the individual proclivities of deciding judges, we are unlikely to develop a successful predictive model of when judges will rely on *eiusdem generis* versus statutory plain meaning, when they will invoke the authority of precedent and when they identify a holding in an earlier decision as *dicta*, but that does not mean we cannot make any inroads into a phenomenological and processual level of understanding of judicial decision making. I have suggested above that judges will opt for tools of legal interpretation that are cognitively least demanding and avoid direct disputation when possible (especially intracircuit dispute). Empirical work in cognitive psychology and cognitive

anthropology provides evidence that this is how decision makers in general tend to act, and this is already an advance on what text analysis alone can tell us about the choice between conflicting decision making heuristics with equal institutional legitimacy (cf. Llewellyn 1960; Schauer 1988; Macey and Miller 1992). In the next chapter I explore further what the available data can tell us about the processual contingency of and strategic inputs to decision making and dispute. In particular, I focus on how, and with what consequences, deciding judges treat legal cases as posing particular legal questions.

Chapter 6. How Cases Become Questions in Appellate Adjudication

6.1. Introduction

Up to this point, the framing of this study has taken as given the formulation of problems given by the judges themselves in their written opinions. I have tried to identify several social contextual factors that contribute to two judges disagreeing about interpretive questions like the meaning of “particularly serious nonpolitical crime” or the scope of “particular social group.” However, throughout my data collection and for the most part throughout my analysis I have accepted at face value the judicial premise that case law disputes really are about what they claim to be about. I have correspondingly set aside the possibility that the “real” content of the interpretive disputes I have analyzed may lie elsewhere.¹ Methodologically, proceeding in this way has allowed me to pursue a clearly defined and replicable data collection and coding procedure. Theoretically, the approach reflects a commitment to understanding the law as a knowledge system with an internal logic, not just as a reflection of political power dynamics or material interests. That is, it reflects a commitment to taking seriously the self-understandings and self-descriptions of my research subjects. This commitment is bolstered by my conclusions in chapter 3, where I found that relational jurisprudence influences the settling and unsettling of law but failed to find evidence that status competition separate from jurisprudential interests had a similar impact.

¹ The exception to this approach in the analysis of the preceding chapters has been in chapter 4, where I argued that the Supreme Court displaces disputes from one domain of law to another by issuing opinions that preempt conceptual elaboration in the Courts of Appeals without actually providing conceptual clarity. On this reasoning, I see some of the panel disputes that are ostensibly over whether a petitioner has met the standard for “well-founded fear” or has shown that the cause of their persecution was their “political opinion” are “really” expressions of disagreement about what “well-founded fear” means or about the scope of “political opinion.”

Nonetheless, taking judicial self-understanding and self-presentation in published opinions as a true representation of what judicial interpretive disputes are really about entails a simplification even within a framework that treats judges' social knowledge as constitutive of their social reality. This is because the questions presented in cases are not always wholly fixed at the outset. The question or questions presented are more likely to be open to redefinition in procedurally or empirically complex cases, but I will argue below that most asylum cases give judges the scope at least to adjust the emphasis or sequence of relevant inquiry. This chapter explores the openness of asylum cases to different types of framing by posing a question that is conceptually prior to the analysis in the preceding empirical chapters: "how are legal questions formed from legal cases in the federal appellate courts?"

My argument builds on two focal points in my text data and is supplemented with interview data. The first part of the chapter is a close reading of the oral argument transcripts and the published opinions in a single case, *Cece v. Holder*, which was decided by the Seventh Circuit in 2012 and reheard en banc in 2013. *Cece* concerned an Albanian woman who claimed a fear of persecution as a member of the particular social group. Precisely what the "particular social group" in question was remained a contested question throughout the hearings and in the several written opinions (both the original decision and the en banc rehearing prompted dissents). I describe the ambiguities inherent in the question, "on what 'particular social group' grounds did Cece claim asylum?" and how the judges first produce and then react to those ambiguities in the adjudicative process. The argument here is thus continuous with the analysis of "particular social group" interpretation in chapter 5.

In the second part of the chapter, I discuss how judicial framing has contributed to the generation of many interpretive disputes over whether petitioners have met the requisite

standards of proof in their asylum claims. I argue that disputes over standards of proof are often produced by judges who are strongly driven by an intuition or a normative desire to see a case “come out” one way or another. The steady persistence of these cases over time suggests there is a baseline level of politically-motivated judicial disagreement to be expected in asylum cases, even in the absence of any conceptual or definitional difficulty or any empirical ambiguities.

This chapter continues the thematic concerns of the preceding empirical chapters by elaborating on the organization and functioning of law as a knowledge system. Here I am especially focused on the role of individual actors in that process, as opposed to organizational dynamics (as in chapters 3 and 4) or the dynamics of temporal and textual interrelation of cases (as in chapter 5). Because individual action and meaning-making come to the fore here in a way that they do not in the previous chapters, I introduce new theoretical resources to support my argument: namely, John Dewey’s and Hans Joas’s pragmatist writings on social action. Habit and creativity, as described by Dewey in *Human Nature and Conduct* (1950[1922]) and Joas in *The Creativity of Action* (1996), are the key concepts I deploy to describe the work that judges do in framing legal questions.

6.2. Contingent meaning-making in oral arguments

One great merit of a pragmatist approach to action is that it offers a vocabulary for understanding the inputs to human action as wide-ranging and relatively fluid but also highly specific in given contexts. This turns out to be useful when we wish to make sense of the complex social scene of appellate court oral arguments. Because the work judges do in their chambers is private and confidential, oral arguments are the best available resource for studying the contingent formulation of questions and arguments in judicial opinions. But oral arguments are challenging data to interpret, as they give only partial representations of the arguments that

judges are testing out in relation to a case. Any theoretical framework to make sense of them needs to be able to cope with some fluidity of actors' perspectives and the meanings they derive from symbols and texts.

As a first example, consider this exchange from the Seventh Circuit's en banc oral arguments in the case of *Cece v. Holder*:

Judge Richard Posner: There's no reason to think that the people engaged in the international prostitution business dislike women, right? I mean, if you're in the – if you're a pimp, these are your, these are your employees, right?

Petitioner's counsel: Well it does take place in –

Posner: It doesn't mean they're misogynist, right? Probably they're just greedy, right?

Judge Diane Wood: There's every reason to think they think women are things, though.

Judge Ilana Rovner: Exactly.

Posner: We don't know anything about what pimps think, honestly. They may just be in it for the money.

Rovner: You're not a woman, how would you know?

Petitioner's counsel: These are difficult questions, and I would just point out –
[laughter].²

At the end of this exchange, Judge Rovner forcefully redirects the discussion through a reliance on what sociologists would refer to as standpoint theory. It is a move in a game that she already knows how to play, executed with a light but effective rhetorical touch and without forethought in the midst of a fast-paced exchange. Rovner is perfectly effective in cutting off a line of discussion in the midst of the oral argument, but just as quickly as her invocation of standpoint appears, it disappears again. There is no hint from Rovner that she disagrees in general with the contractarian liberalism that is so deeply ingrained in modern American legal theory and practice—an ontology and epistemology that is difficult to reconcile with standpoint theory. Throughout the rest of the oral argument, every judge on the bench, including Rovner, seems to proceed on the presumption that none of them have any privileged understandings of the case on

² *Cece v. Holder*, en banc oral argument, minute 26:50. Case number 11–1989. Available <http://media.ca7.uscourts.gov>. Accessed 25 January 2015.

basis of their personal identities. The notion that any of them *could*—that, for example, Rovner understands something better than Posner because she is a woman—is the basic idea of standpoint theory. That argument appears to be momentarily acceptable to all involved, but it would be highly destructive to the conventions of lawyering and judging if Rovner had pressed her claim any further, or if the others had taken her seriously for more than the brief moment it took to defeat Posner’s line of argument.

It is a challenge to give a principled explanatory account of what has happened here. On the basis of this exchange alone, it would be an overreach to interpret gender as a structural determinant of the argument that unfolded between the judges in *Cece*. Yet in that momentary confrontation, the judges’ genders, and Rovner’s presentation of her gender, did matter.

Now consider Dewey’s comments on “classification of instincts” as a lens through which to read the exchange:

The indefinite multitude of particular and changing events is met by the mind with acts of defining, inventorying and listing, reducing to common heads and tying up in bunches. But these acts like other intelligent acts are performed for a purpose, and the accomplishment of purpose is their only justification. Speaking generally, the purpose is to facilitate our dealings with unique individuals and changing events...Our thought is hard where facts are mobile; bunched and chunky where events are fluid, dissolving (Dewey 1950[1922], 131).

An appellate court oral argument seems especially well matched to the social reality that Dewey describes here. In the chaos of many judges lobbing individualized inquiries at the litigators and at each other, events and complex hypotheticals often seem to be “fluid, dissolving.” Alliances of persons and lines of argument are not totally fixed. All parties must “facilitate...dealings with unique individuals” on a changing basis. Accordingly, we can understand Rovner’s sudden adoption of the standpoint idea, her effective deployment of it in the conversation and her equally sudden abandonment of it to be an “intelligent act...performed for a purpose [i.e., cutting

off Posner's line of argument], [with] the accomplishment of purpose [its] only justification." By contrast, a structuralist reading of the exchange that treated gender identity and the standpoint of gender as fixed qualities informing the judges' social reality would have to be entirely non-specific with respect to when gender will matter (hence not very usefully explanatory) or would risk overfitting the available data.

The pragmatist action theorists have worked out a vocabulary for describing human action in terms that are internally consistent and not ad hoc, yet still able to take account of contingent and non-teleological developments that an episode like the one quoted above seem to demand. The general pragmatist characterization of action is that it is "caught in the tension between unreflected habitual action and acts of creativity...performed within situations which call for solutions" (Joas 1996, 129). The framing of the legal question at issue in *Cece* exhibits just this dynamic. The case before the court is something that the judges have to deal with, as they have to deal with all of the cases that are appealed to their court following the proper procedural and jurisdictional requirements. It is a matter of habit for the court to schedule the case for oral argument and then for the judges, their clerks and the other personnel of the court to follow standard preparatory procedures in their chambers for disposing of a case. It is an act of greater creativity to select a case for rehearing en banc, as the court did with *Cece*. En banc rehearings are rare events in the Seventh Circuit, and clerk interviewees confirmed for me that the *Cece* case was understood to be a big deal within the court when it happened. One interviewee noted that several judges were upset about the unusually large number (four) of en banc cases on the court's docket that year.³

³ Former clerk, Seventh Circuit Court of Appeals. Interview with the author. 4 April 2016.

An even greater intensity of creative activity follows, when the judges grapple with the intertwined legal issues that were, in their judgment, important and controversial enough to merit hearing en banc. The chaotic conversation that emerges in the oral argument is designed to facilitate a deep reconsideration of the issues in the case, setting aside the terms in which it was decided the first time around. Judges also go into the process understanding that the precedents set by an en banc court carry added weight, which presents opportunities and risks to judges. They can shape the law most decisively in these cases, but on the other hand, the unintended and unanticipated consequences of their holdings may prove burdensome to them in the future. This chapter explores the range of factors bearing on judicial framing choices, and I characterize all such framing choices as “caught in the tension between unreflected habitual action and acts of creativity.”

The pragmatist approach to the explanation of action allows us to make sense of some aspects of judicial reasoning that in other accounts remain within a black box. For example, in Phillips and Grattet’s study of judicial decision making in hate crime law, the processes by which judges arrive at new meanings for legal concepts is mostly out of view. We learn from Phillips and Grattet that judges’ formulations of hate crime statutes become more “economical and formulaic” over time and that this is an indicator that legal ideas are settling (Phillips and Grattet 2000, 595). We also learn that settling in this area of law has been rather uneven (589). The pragmatist concepts of habit and creativity allow us to enrich observations like these with an account of how judges articulate the crucial questions and how they move difficult legal questions towards settlement.

6.3. Cece v. Holder

6.3.1. Issues and questions in the case

Cece v. Holder raises issues that are at the leading edge of asylum law jurisprudence (notwithstanding that asylum is a relatively sleepy area for jurisprudential developments, where Supreme Court interventions are uncommon, as we saw in chapter 4). The en banc majority in *Cece* frames the question in the case as follows: “are young Albanian women living alone a ‘particular social group’ within the meaning of the asylum statute?” They answer “yes,” and in the course of the argument they also indicate that Cece’s asylum claim would have survived some few variations in the formulation of the “particular social group” at issue. Most significantly, they mark an interpretive disagreement with the Sixth Circuit as follows: “we disagree with the Sixth Circuit’s conclusion in *Rreshpja v. Gonzales*, that a social group of ‘young (or those who appear to be young), attractive Albanian women who are forced into prostitution’ does not constitute a social group because it is circularly defined by the fact that it suffers persecution” (773 F.3d 672). In his en banc dissent, Frank Easterbrook (who, along with Daniel Manion, was in the majority in the original panel decision) objects to this framing of the question and argues that the relevant putative group was the one that Cece had offered in her brief to the appellate court: “young Albanian women in danger of being trafficked as prostitutes” (773 F.3d 681). The majority opinion recognizes at the outset that the case offers the court an opportunity to intervene in several unresolved issues in asylum law, which is likely a large part of the reason why the en banc rehearing was granted: “complexity surfaces when we try to define terms such as persecution and ‘social group’—the latter of which has perplexed this court and others, and is in the spotlight again in this case” (773 F.3d 666).

The continued unsettledness of the meaning of “particular social group” was underscored by an en banc case heard in the same year in the Ninth Circuit (*Henriquez-Rivas v. Holder*, 9th Cir. 2013, 707 F.3d 1081). That case asks whether witnesses who testify against gang members in open court are eligible for asylum protection as a “particular social group.” Meanwhile, the position of Albanian women fearing targeting by traffickers as a challenging case for the application of asylum law was underscored by the near-simultaneous appearance of several other cases in the Courts of Appeals raising similar or identical claims: *Rreshpja* in the Sixth Circuit in 2005 and two cases in the Second Circuit in 2013 and 2014: *Gjura v. Holder* (502 Fed.Appx. 91) and *Paloka v. Holder* (762 F.3d 191).

The interlocking asylum law issues raised in *Cece* could become crystallized as particular questions in a variety of different arrangements, and there is no principle of law or logic that fully determines how the judges will identify the questions at issue or the order in which they will address those questions. Those choices, which might turn out to be determinative for the resolution of the case, are determined by other factors. One way to parse the issues in the case is in the set of seven questions below:

- (1) From what specification of “particular social group” should the court begin its analysis: the claim given by the petitioner in her brief, the claim assessed by the lower court or some other claim?
- (2) How much discretion does the court of appeals have to redefine the “particular social group” at issue, if there are multiple contending claims that have been raised in earlier proceedings or if the prior specifications were misaligned with the facts of the case?
- (3) What is meant by the BIA’s “immutability” and “social visibility” standards for the identification of a social group? Specifically:

- How does the BIA’s “immutability” standard apply to a characteristic like age, which is beyond individual power to control but by definition temporary?
- How does “social visibility” apply to groups that are self-identifying but may not have external markers of their group membership (e.g., union members or homosexuals)?
- How does “social visibility” apply to groups that are not self-identifying but are typically classifiable by their external features (e.g., young women)?

(4) Are either or both of these BIA standards deserving of deference from the Court of Appeals as permissible constructions of the asylum statute?

(5) Is there a legally relevant distinction between “being young” and “appearing young”?

- As the case is argued, this question becomes unavoidable for the court. At least at one stage in the proceedings, the petitioner identifies “young” as one of the features of her proposed social group. But as Easterbrook’s dissent points out, Cece presented an expert who defined “young” as “16 to 26 or 27”—a definition that would exclude Cece herself.

(6) How are the intentions of human traffickers relevant to the definition of the group of people who are their targets?

(7) What standard of review should the court in this case apply to the holding of the BIA?

This list could be reformulated, expanded or condensed in a variety of ways. There are also procedural and jurisdictional grounds on which *Cece* might have been decided before the court even reached the substantive issues schematically outlined here. The point of the above list is not to present a definitive ordering or accounting of what was at issue in the case but rather to illustrate that just how the issues in the case are partitioned and the order in which questions are

asked and answered matters for how the case will come out. For example, certain answers one could give to question (1) would make question (5) moot. Question (1) opens up subsidiary inquiries in cases where the case was poorly briefed or where the lower court decision was poorly written. Questions (3) and (4) are clearly distinct questions, but they have a recursive relationship. One cannot decide whether “social visibility” is a permissible construction of the statute without at least a preliminary inquiry into what it means and what the statute means, but one could conclude that a requirement of “social visibility” is very far removed from the statute and hence not a permissible construction of the statute before conducting a thorough inquiry into just what “social visibility” means. The depth of inquiry required in response to both questions (3) and (4) is dependent on how one has responded to the other question. The result is that we can sometimes find judges engaged in factual and conceptual inquiries that seem radically open to different theoretical frames, sources of law and types of evidence, with compelling and tightly argued legal claims available to support more than one final judgment. Judges may end up talking past one another in oral arguments and in their written opinions.

6.3.2. The importance of framing decisions in *Cece*

Just how much framing choices can influence the outcome of a case will depend on the empirical and legal complexity of the case. A more complex case is likely to provide more points of entry for analysis and correspondingly a wider range of possible ultimate outcomes. In my interviews, I tried to probe how clerks think about framing decisions through presentation of vignettes. Using real cases from the U.S. and Canadian courts, I asked interviewees about a variety of different “particular social group” claims and how they would have assessed the claims when they were working in the courts. Sometimes I asked them to consider only the narrowly defined “particular social group” in the case (e.g., the “tattooed youth” claim in the

Sixth Circuit's *Castellano-Chacon*). Other times I presented a brief summary of facts in the case and a series of questions presented in the case as defined by the court, including but not limited to the particular social group question, and I asked them how the case would have come out.

This vignette study met with limited success. Many clerks were reticent to take a position on a hypothetical case, particularly one presented only in outline and without accompanying briefs. Some demurred from my questions by saying that it was never the clerk's role to decide how cases should come out. From those who were willing to respond to the questions, the most notable finding was that they were often unwilling to accept that the "particular social group" question ever *could* be definitively fixed as the question in a case, even when I asked them to assume it for the purposes of argument. The following lengthy exchange is the clearest example from my interview data of how readily clerks would sometimes reframe the issue in a (hypothetical) case. The decisive moment where the clerk reframes my proposed inquiry into a different inquiry is bolded in the text below. The entire extended exchange gives a clearer sense of the clerk's resistance to accepting a fixed framing of a single issue from the case:

Clerk: I feel like most of the cases we dealt with would be accepted or rejected based on the well-founded fear of persecution question [instead of the particular social group question], and if somebody is a member of the gang, or a former member of the gang, maybe you would look and say, "is there a well-founded fear of persecution," because that's a much easier inquiry that doesn't create precedent that could trip things up later. It lets you create a narrower decision.

Interviewer: Right. So it seems to me that there's still a very clear analytic distinction between those two questions. Is there, in this case, a fear of persecution, and is the group that's claiming protection a particular social group, in the meaning of the statute –

Clerk: That's right.

Interviewer: Which – they both need to be addressed. But do I understand what you're saying to be that there might be a preference to focus your attention on the one question that might be better in the long term for the court, because it's not going to be confusing and not going to create a potentially difficult precedent?

Clerk: Well, right. If somebody has no well-founded fear of persecution, then you don't need to go and get into the more complex question of, are they part of a cohesive social group or not, which, you know, can affect a lot of people.

Interviewer: Right. Would you worry, dealing with a case like this, about the potential

for motivated reasoning, that you would be too eager to find no well-founded fear of persecution, in order to avoid dealing with the messy “particular social group” question?

Clerk: No, I don't think you would have – I don't think it's a question of motivated reasoning. I think it's just a question of addressing the narrower question before addressing the broader question. [...]

There's going to be a lot more information in the record that's accurate about whether that person has a well-founded fear of persecution than there will be information about whether their social group is cohesive. It requires fewer judgment[s]. [...]

Interviewer: So, **imagining the hypothetical where every other condition is satisfied and the case is going to turn on the particular social group question, how would you think about somebody** who is bodily tattooed, former member of a gang, **claiming persecution on the grounds of membership in the particular social group, “tattooed youth”?**

Clerk: Well, I think it depends – again – to me, it seems like the less important question. Like, is it – for example, has the government adopted a policy of extrajudicially murdering all the people who have those tattoos, right? If yes, it would seem that having those tattoos is therefore grounds for asylum, because you're otherwise going to be murdered by your government under a governmental policy. If it's just that people in your neighborhood don't really like people with those tattoos and they might, you know, spit at you because somebody with one of those tattoos, you know, hurt someone in that family before, you know, that seems like it's less of a well-founded fear of persecution, and it's just sort of a consequence, you know, of associating with people that did bad stuff before.⁴

The clerk in this exchange is explaining that many cases present multiple issues and that judges generally follow an ordering of questions that prioritizes narrower questions over broader ones and logically prior questions over logically consequent ones. At the same time, however, he acknowledges the existence of two legally distinct questions presented in the case—in the exchange, “It seems to me that there's still a very clear analytic distinction...”; “That's right”—but then refuses to be bound in his response to keep the two questions analytically separate.

Similar if less lucid exchanges occurred in interviews with several other clerks. The lesson I take from these is that the clerks are likely making substantial framing decisions in cases where multiple issues or latent questions are present. Other things equal, we should expect clerks and judges alike to tend towards conservatism in their framing of questions in cases, such that

⁴ Former clerk, Ninth Circuit Court of Appeals. Interview with the author. 29 August 2015.

they set up cases to be decided on a narrow ground, presenting answers to as few distinct legal questions as possible when they do so. Many judges express an explicit preference for this type of judicial minimalism in public commentary. But it is also possible for political interests or other interests to override this preference for minimalism and rigorous logical ordering.

6.3.3. Factors shaping the identification of questions presented in a case

I identify six basic factors that might impact how judges identify and order the “questions presented in a case.” I address them in turn below, first in outline and then with a review of what the available evidence can tell us about how the Seventh Circuit judges applied them in the *Cece* case. Nothing can be extrapolated very far from a single case study, but I use *Cece* as a source of clarifying examples and as a model to demonstrate how multifaceted the process of constructing a question (or multiple questions) from a case can be.

(1) First, as I have already begun to discuss, in many judges’ chambers *clerks* have a role to play in the framing of a question from a case. A standard task for clerks in judges’ chambers is to produce an initial “bench memo” summarizing the case and the issues it raises for the judge. My clerk interviewees across all Circuits consistently described this practice. In many chambers, clerks produce first drafts of opinions for their judges. At the Supreme Court, clerks also play a role in identifying which cases the court should agree to hear, through the cert pool (discussed in chapter 4). In each of these three roles, the clerks guide judges’ attention to certain issues in cases. The drafting/editing division of labor between clerks and judges that is standard in some chambers provides the widest scope for clerks influence in framing questions. As Edward Lazarus observed in his controversial exposé of the work of clerks in chambers of the Supreme Court:

There is a world of difference between writing and editing. The process of writing imposes an irreplaceable discipline on the process of reaching a fully considered

decision. Finding the specific words to defend a tentative legal conclusion forces the author into a constant reexamination and reevaluation of previous beliefs. It exposes unforeseen strengths and weaknesses in an argument. [...]

Editing the draft of a clerk...is an act of relative disengagement that naturally tends toward excessive deference to the original author (Lazarus 1998, 272).

Lazarus goes on to speculate, in a fashion convincing at least in the abstract, about just how such a writing-editing relationship will affect the knowledge products (i.e., the written opinions) of the courts. He focuses on the tendency of clerk-written, judge-edited opinions to exhibit a lack of self-confidence, manifest in opinions that are “littered with legal jargon and further leadened by excessive and arcane footnotes—hallmarks of the youthful drafter’s ill-wed combination of ‘hubris and self doubt’” (Lazarus 1998, 272).⁵

It is unlikely that clerks will introduce clear-cut errors of law into judicial decisions—for example, allowing a case to be decided on the merits when there are procedural defects that should cause it to be dismissed. There are several safeguards against such an outcome, including the judge’s oversight and the work of lawyers for each side advocating their interests. But once a clerk has structured the empirical and legal inquiry into a case in bench memos and initial drafts of an opinion, a judge who confines himself to an editing role will find it much more difficult to revisit the clerk’s framing decisions.

As for the role of clerks in framing the issues in *Cece*, the Seventh Circuit clerks I spoke with on average described a smaller role for themselves than clerks in other Circuits. Some said that their judges made a point of drafting and editing all their own opinions, relying on clerks

⁵ More controversially, Lazarus also attributes enormous influence and often baldly political motivations to the Supreme Court clerks. Such claims should be read very skeptically. Lazarus was himself a clerk, and he is not able to offer much beyond the authority of experience to support his strongest claims about the centrality of the clerks’ role in decision making. From my interviews I found no evidence, overt or implicit, that the Courts of Appeals clerks have influence or motivations to match what Lazarus describes in the Supreme Court. His account of clerk-written opinions weighed down by “hubris and self doubt,” on the other hand, has corroboration by at least one Court of Appeals judge (Miner 2013, 528).

only for bench memos and fact-checking research. It is also likely that the clerks' role will diminish in a case deemed especially important on the court's docket, because the judges themselves will pay extra close attention to such cases. Once it was scheduled for rehearing en banc, *Cece* became one of those especially visible and important cases, so it seems unlikely that the clerks played a very large role here.

(2) Second, judges will rely on *habitual interpretive tools or methods of construction* to move from indeterminate to determinate understandings of the question presented in a case. Cases in which the question at issue is initially ambiguous call for judicial intelligence and a departure from habit into creativity. Following Dewey, I am using "intelligence" as a term of art here: it is the means by which the mind crystallizes processes into objects and by which "the confused situation takes on form" (Dewey 1950[1922], 180). Dewey argues that we rely on creative intelligence in situations that are too inchoate for other action orientations, such as normative value commitments or instrumental rationality, to provide clear guidance. Judges are in such a situation when they are faced with a case that they must decide while it remains a contested question what exactly the case is about and what will be at stake in the decision.

Even in a situation where intelligence is required, Dewey argues, habit continues to operate in the background to structure one's thought. For judges, this will mean recourse to some of the standard tools of statutory interpretation: favored canons of construction that may come more readily to mind and be more easily put to use than others, textual formalism if the judge has a general jurisprudential commitment to that approach, inquiries into legislative history if the judge has a general jurisprudential commitment to *that* approach, etc. For a judge who is prone to focus on policy implications as a guide to decision making, it will be easy to spot the potential policy problems that would arise if courts allowed social groups to be defined in terms of the

persecution they face—it would in principle give every persecuted person a social group claim that was valid by definition. For a judge who cares especially about the empirical grounding of judicial decisions, that practical concern about the consequences of a definition would likely fade into the background relative to the empirical question of whether women in Cece’s position really were subject to danger in present-day Albania. Having a high or low prior opinion of the BIA might also prime a judge to identify a harsher standard of review as the legally relevant one. Dewey maintains that ultimate outcomes are unpredictable in situations where actors rely on creative intelligence to define the situation and orient themselves to it. However, he is also quick to acknowledge that initially inchoate situations often do not remain in flux for long. They can become fixed and predictable quickly through the joint application of intelligence and familiar habits of thought. Both phases of this characterization are apt to describe the judicial decision making process, which subjects intensely complex and varied empirical and doctrinal issues to a routinized and ostensibly impersonal procedure to reach ultimate decisions.

The oral arguments in *Cece* lend empirical support to the Deweyan model of action. It is clear that the judges arrived at the oral arguments prepared with their own favored frameworks for understanding in mind. Cece’s lawyer got only 19 seconds into his prepared remarks before being interrupted by Judge Posner, who interjected with an unrelated hypothetical question that then becomes an extended theme of his questioning. Several of the challenges thrown up to Cece’s lawyer bore little relation to the line of argument that he was independently trying to make. For example, Judge Kanne raised a question about the intentions of Albanian human traffickers that led into the exchange between Posner and Judge Rovner, quoted above, over whether the traffickers’ intentions could be known by the court and who stands in a position of epistemic authority to make that judgment. The government attorney, meanwhile, got 39 seconds

into his prepared remarks before being interrupted by Judge Wood with a request that he redirect his entire argument: “But why do you focus so much on what the petitioner proposes, as a person just initiating the process, on a form that doesn’t really ask in any technical sense for a definition [of ‘particular social group’]?”⁶

It is commonplace for lawyers to lose narrative control in the context of oral arguments, even in the very first moments of stating their case. But two things are particularly striking about the *Cece* en banc argument. The first is the very broad range of framing approaches that the judges on the bench adopted and used to challenge the lawyers. It is relatively rare that it is even possible to take so many different approaches to defining what is actually at stake. The second striking feature of this case is that these preplanned lines of argument by the judges do not represent arguments that are fully fixed in advance. The judges’ prepared, habitual modes of thinking and acting appear to be defeasible in a case of this complexity. Kanne and Posner both opened with questions that convey skepticism about the petitioner’s claim, but both ended up voting with the majority to grant *Cece* asylum. Rovner’s interjection to cut off Posner’s extension of Kanne’s line of inquiry—“you’re not a woman, how would you know?”—is, rhetorically at least, the crucial creative turning point. Kanne’s line of inquiry never recovers the attention of the judges. Their inquiry becomes reframed around other, still inchoate issues in the case.

(3) Third, we can expect judges to rely on and respond to *availability heuristics*. If a judge has recently attended a lecture on international law and foreign relations, then those dimensions of asylum law may loom large for her as she aims to sort out the issues and the appropriate framing of a case. On the other hand, if she hears oral arguments in an asylum case

⁶ *Cece v. Holder*, en banc oral argument, minute 36:22. Case number 11–1989. Available <http://media.ca7.uscourts.gov>. Accessed 25 January 2015.

immediately after hearing arguments in another administrative law case, then the abstract doctrines governing of judicial review of agency decision making, which apply equally to asylum, labor relations law, environmental law and so on, may take precedence in her framing of the case. Experiments in cognitive psychology have shown that judges, as much as anyone else, are subject to cognitive biases in decision making (e.g. Kahneman 2011, 125–126). Gigerenzer’s model of ecological rationality makes the useful extension argument that heuristics are necessary in legal decision making and are therefore neither intrinsically good nor intrinsically bad (Gigerenzer and Engel 2006, 17–44). Judges facing complex framing decisions do not have infinite capacity to process and compare the different approaches that would be possible, and they must take shortcuts to reach “good enough” outcomes. Research in this line has produced insights that are closely related to Dewey’s idea that creative intelligence and habit are both necessary inputs to action in inchoate situations, and it has done so with more systematic empirical support.

The use of fast and frugal heuristics may be most obvious to an observer when it leads to wrong inferences or rests on incorrect premises. There is a clear example of this in the initial *Cece* hearing (prior to the en banc rehearing) and another one in the Ninth Circuit’s en banc oral argument in the case of *Henriquez-Rivas*. The judges have broad power to define what is at stake in a case and the proper mode of analysis, both through their control of the proceedings at oral arguments and through the performative quality of their written opinions. My examples here are two instances where heuristics fail to serve the judges well, because these instances throw the reliance on heuristics into especially stark relief. Nonetheless, the broader point from Gigerenzer still holds. Heuristics per se are neither a positive nor a negative feature of decision making under ecological constraints; they are simply necessary.

In the original *Cece* hearing prior to the en banc rehearing, Easterbrook makes two major factual errors that are never corrected in the record. He erroneously presumes that Albanian citizens can travel freely within the Schengen open borders area of the European Union, and he conflates the freedom to travel within the Schengen area with the freedom to relocate. It is unclear whether the petitioner's lawyer is moving to correct him or not, because Easterbrook rather forcefully insists on his point before eventually moving the conversation along to new ground:

Judge Frank Easterbrook: I have a relocation question. What's the significance of the fact that citizens of Albania can now travel freely, without the need for visas, anywhere in Western Europe?

Petitioner's counsel: Well, this wasn't before – that particular issue, whether they can do that or not, was not before the Board in this particular case –

Easterbrook: It's not an issue of whether they can do so, they can. Citizens of Albania can travel anywhere in the Schengen area, which means west of Russia and east of the United Kingdom. Anywhere. Without the need for a visa. Your client can relocate to Paris tomorrow. Without anybody's permission. What's the legal significance of that?

Petitioner's counsel: Well, even if that's correct, that she can relocate –

Easterbrook: It is correct. Just take it as given.⁷

Albania is not, and never has been, a member of the EU or the Schengen Agreement, and Albanian citizens derive no benefit from the agreement. Nor does Schengen provide a right to relocate across EU borders “without anybody's permission,” as Easterbrook asserts. It provides only a right to free travel. EU citizens are required to report their presence in a Schengen area country within a reasonable time, and their continued presence beyond three months is subject to conditions Easterbrook's factually incorrect claims during the *Cece* oral argument were legally consequential, because *Cece*'s claim to asylum was contingent on her lack of a reasonable and safe resettlement alternative elsewhere.

⁷ *Cece v. Holder*, oral argument, minute 7:15. Case number 11–1989. Available <http://media.ca7.uscourts.gov>. Accessed 20 June 2016.

There appears to be a similarly blatant factual error in *Henriquez-Rivas*, the Ninth Circuit’s important en banc “particular social group” case in the same year as *Cece*, albeit one with less immediate and obvious legal implications. Judge Martha Berzon, grasping for the significance of the “particular social group” language in legislative history, appears to date the Chinese Cultural Revolution, which began in 1966, to before 1951:

Judge Martha Berzon: Isn’t one’s instinct that – what were they talking about in 1951? What was the problem that the Swedish or Swiss delegate came up with when he added this language? I have to believe that this was – ’51, after there have been massive forced famines in the Soviet Union killing a lot of kulaks, rich peasants, and there was after that the Chinese Cultural Revolution in which people of certain social backgrounds were targeted, and there were slaves who were targeted, there were serfs who were targeted various times. I think that type of sociological structure really was the core of his concern. And how would they fit with the innate characteristics notion?⁸

The considerable power of heuristic reasoning to shape the framing of questions from cases is evident in these two exchanges. In both cases, the argument follows a particular course, focused on some problems and questions to the exclusion of others, as a direct consequence of the judges’ comments and the associations that they happened to call to mind in the moment of the argument. The heuristics that Easterbrook and Berzon rely on in these instances both rest on factual errors—it is therefore clear that Easterbrook’s and Berzon’s reliances on these particular heuristics were contingencies that would have been impossible to predict in advance.

My argument that judges will rely on heuristics, recent experiences and memories to inform their framing of questions should not be overinterpreted as a claim that judges will be especially likely to propagate law on the basis of factual errors—although the two exchanges above show that major factual errors plainly *are* at least possible and can direct legal discourse without being corrected. Neither of the factual errors is repeated in the final written opinions in

⁸ *Henriquez-Rivas v. Holder*, en banc oral argument, minute 10:05. Case number 09–71571. Available <http://www.ca9.uscourts.gov/media>. Accessed 20 June 2016.

these two cases. The errors may have been caught in the opinion drafting process after oral arguments, or the claims may simply not have resurfaced after oral arguments. My argument here is simply that availability heuristics are highly contingent and yet can be decisive over the direction that argument and the framing of a case will take. On that point, the second, factually sound availability heuristic that Berzon relies on is just as instructive as the factually defective one. She calibrates her thinking about what “particular social group” could mean to the example of expropriated kulaks and victims of famine in the USSR. There is no factual error there (the major famine was in Ukraine in 1932–33), but it is curious that she omits any reference to the European Jews and other victims of Nazi genocide during World War Two, groups that were far more obvious reference points for the drafters of the UN Convention. It is also consequential for her thinking that Berzon anchored on what the Swedish delegate at the UN likely meant by “particular social group” in 1951, rather than on what the U.S. Congress most likely meant in 1980 when it passed the Refugee Act.⁹ Berzon’s distinctive points of reference, for whatever reason she adopts them, set the court’s inquiry off in a direction different from the more standard reference point of the Jewish victims of the Holocaust as the paradigm of a “social group” protected under asylum law.

(4) Fourth, we can expect judges to *act strategically by thinking through how they want the case to come out and calibrating their approach to deciding the case accordingly*. Not every situation in which framing is open is a situation that is inchoate in Dewey’s sense. Sometimes the political stakes of a case are relatively clear at the outset, and the framing choices that would correspond to different strategic interests are correspondingly clear. Raising a procedural or

⁹ Many asylum law scholars have found significance in the drafting history of the UN Convention, specifically the fact that the PSG protected ground was a late addition, proposed by the Swedish delegate and passed on a voice vote without debate.

jurisdictional question at the outset of a case may be enough to prevent a case for a sympathetic petitioner from being decided on the merits—that approach might be favored by generally unsympathetic judges, in the asylum context as in other areas of law. In a speculative essay on the phenomenology of judging, Duncan Kennedy (1986) has argued that even when those technical recourses are not available, the process of research and decision making may allow political preferences or a judge’s other preferences (e.g., to dispose of the case quickly and maximize leisure time) to shape the outcome decisively. Direct empirical evidence with regard to the phenomenology of judging will almost always be beyond reach, but in specific cases and classes of cases, there is circumstantial evidence that offers clues as to when and how judges rely on framing as a strategic tool to shape their decisions. There is no strong evidence that such strategic framing is going on in *Cece*, but I return to this point in the next section of this chapter below.

(5) Fifth, we may find judges relying on *strategic use of ambivalence or multiple formulations of questions to head off potential objections*. This idea is most easily explained by leading with the example of *Cece*. The majority in *Cece* never finally puts to rest what precisely defined “particular social group” was at issue in the case or how to arrive at it. They are mostly consistent in their reliance on the framing of “young Albanian women living alone,” but they also acknowledge *Cece*’s alternative proposal of “young orthodox wom[e]n living alone” and the group considered by the Sixth Circuit, “young (or appearing young) attractive Albanian women targeted by traffickers.” At another key moment in the opinion they refer to “women who fear prostitution” as a social group, in order to make the point that “it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear and vulnerability” (733 F.3d

672). As for what those “underlying characteristics” are, at one point the majority appears to suggest that the group in question is constructed in a multistep process: “the broad immutable group that triggered social group status...young women in Albania, in Cece’s case—could be narrowed by other changeable but fundamental characteristics—living alone in Cece’s case” (733 F.3d 676). But in another context, they put the several characteristics that together constitute Cece’s claim on all fours, somewhat problematically implying that they are *all* “immutable,” even taken alone:

these women are linked by the persecution they suffer—being targeted for prostitution—they are also united by the common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone (733 F.3d 673).

These evasions of precisely what “particular social group” is at issue in the case seem to be efforts to head off Easterbrook’s criticism in dissent that Cece’s social group claim cannot succeed, because as Cece herself defines the group, she isn’t in it:

Whether the group is “young Albanian women in danger of being trafficked as prostitutes” or “young Albanian women who live alone,” Cece isn’t in it. Her own expert defined “young” as 16 to 26 or 27. Cece is 34. The basis for her claim of asylum is future risk; she does not argue that she suffered persecution before leaving Albania, so the fact that she is not a member of her own proposed group should be dispositive. (Perhaps Cece looks younger than her age and would be targeted by mistake, but she does not argue this) (733 F.3d 678).

Easterbrook attempts to cover his bases in his dissent, allowing for the possibility that Cece is the member of a differently defined particular social group that *would* meet the statutory requirements, while resisting the conclusion that this would be enough to rescue her asylum claim. The first step in Easterbrook’s argument is to ask, “where should the court look to identify the particular social group claim properly at issue?” His answer is that the court should look to the petitioner’s brief. The majority notably does not directly attempt to refute that initial step taken by Easterbrook. They never definitively answer the precise question, “where should the

court look to identify the particular social group claim properly at issue?” Instead, they allow their designation of the particular social group at issue to shift slightly across different formulations, treating “young,” “young or appearing young” and “living alone” as more or less interchangeable characteristics and as immutable characteristics. Judge Wood—a member of the majority—characterized the conflict of interpretations here as a question of whether Cece had changed her story too much for the court to be able to say that she had exhausted her arguments before the BIA, a prerequisite to getting judicial review at the Courts of Appeals:

Judge Diane Wood: If she had been arguing social group before the immigration judge and the Board and then she came to the Court of Appeals and said – as actually some of the Chinese people have done – said actually it’s religion, I am, you know, a Rastafarian and there’s huge persecution against Rastafarians in my country. Then we would say you didn’t exhaust that claim before the Board, you’ve changed your theory too much. Now Judge Easterbrook was looking at this situation and saying that the shifts that she had made fall in the category I’ve just described. The rest of us didn’t think so, the majority said no, you know, she’s been complaining about social group all along, she’s been complaining in particular about, you know, this prostitution business. Yes, she’s refined it, but not so much that it’s impeded the government’s ability to articulate and defend its position and whether it’s somewhat broader or somewhat narrower is really not something that’s a problem. But it really gets down to fairness for the adversary system and by the time you get to us, it is an adversary system and this exhaustion rule that’s binding on us.

Interviewer: So it sounds like that does not put in place for you a hard and fast rule –

Judge Wood: No.

Interviewer: On where you would look for it in future cases.

Judge Wood: No, there really isn’t. And actually, we don’t have one in so many instances.¹⁰

The majority relies on this approach, but in their written opinion they do not make an explicit defense of their subjective evaluation that Cece’s social group claim throughout the proceedings has remained consistent enough to allow the government to “articulate and defend its position.” The messy empirical circumstances of the case and its procedural history make it difficult to present such an argument as a persuasive refutation of Easterbrook’s, in which no

¹⁰ Chief Judge Diane Wood, Seventh Circuit Court of Appeals. Interview with the author, 4 May 2016.

analogous subjective assessment is required. The majority adopts what is perhaps an easier route to their conclusion by allowing the particular social group at issue to remain somewhat in flux throughout the written opinion. There are other instances where the “particular social group” under consideration as a protected class is subject to similar conceptual slippage. See again the examples given in chapter 1, fn. 1.

(6) Sixth, and finally, the formulation of questions from cases will have a *relational quality*. As I argued in chapter 3, the fact that appellate judging is an activity conducted in concert with others will shape the expression of individual judges’ interests. The relational dynamic will interact with several of the factors already discussed in this list. Judges may be more or less emboldened to articulate a strategically motivated framing depending on who is sharing the bench with them. They may also have different availability heuristics structuring their thinking depending on who is on the bench with them—recall the discussion in chapter 3 of Kozinski’s outsize influence in the Ninth Circuit and his highly personal presentation of the issues in one asylum case. It is an empirical question just what relational dynamics between judges will lead to more or less settledness in the law. It will likewise be context-dependent whether relational dynamics prompt judges towards framing that is more or less generous to petitioners.

The relational dynamics in *Cece* are intriguing, although the evidence available in the public record doesn’t permit any especially bold inferences. One clerk interviewee commented to me that when the case was reheard en banc, it was well understood within the court that Judges Manion and Easterbrook, who were the majority votes on the original panel, were unmovable.¹¹ The en banc oral arguments support the idea of a collegial but firmly divided court. Easterbrook

¹¹ Former clerk, Seventh Circuit Court of Appeals. Interview with the author, 4 April 2016.

and Manion say very little, allowing the questioning to be dominated by Rovner (the dissenter in the initial panel), Wood (who seems throughout the hearing to be sympathetic to the petitioner's arguments), Posner and Kanne. The latter two, as noted above, initially pose questions that seem to bode ill for the petitioner's chances. Posner, as we have seen in chapter 3, has very little regard for the BIA and IJ and often seems very ready to reverse their rulings. In chapter 3 I also argued that Posner has positioned himself as an effective intellectual leader of the Seventh Circuit in asylum cases—more effective at building consensus with his colleagues than Kozinski in the Ninth Circuit. But the publicly available data do not allow us to infer anything very concrete about how those dynamics mattered for the outcome in *Cece*.

We are limited in what we can know about how judicial relations mattered in the specific context of *Cece*, but we can say in general that all of the judges, who have long, shared careers on the bench and likely have many professional and personal interests in common, will in general be affected in their framing of cases by the relational influence of their colleagues. The favored heuristic devices of Judge A, if she articulates them frequently enough, will come to exert some influence on how her colleagues frame cases. Clerks in the Seventh Circuit and several other circuits described long-established normative patterns of communication between chambers. Usually these patterns were described as homogenous throughout the court, but not always—some described judges whose inter-chambers ties were either especially close or somewhat distant. The motivated reasoning from how-I-want-it-to-come-out to framing may also be influenced by relations with others. Political preferences for outcomes are not formed in a vacuum, and those preferences may incorporate practices of favor trading among judges.

6.4. Standards of Proof Disputes: Examples of Judges' Strategic Framing Decisions

The oral arguments and written opinions of *Cece* provide a rich illustration of how judges produce questions from a complex case, although a single case study cannot tell us about the patterns or prevalence of particular kinds of judicial framing decisions. In this section I analyze how judges frame questions from cases with reference to a broader subset of my database, namely, the instances of *within-panel dispute over whether or not the petitioner has met the required standards of proof to gain asylum*. Most of these come in dissents, but some appear in the form of separate concurrences with the majority opinion. Interpretive disputes of this type are the most frequently occurring type of dispute in my inductively coded database (see again chapter 2, Figure 2.7). Two hundred and seven out of the 718 disputes I coded within and across panels and courts are within-panel disputes over standards of proof. These are instances where the judges disagree about whether undisputed facts in the case are sufficient to meet the agreed-upon legal standard. For example, if a petitioner has received two death threats over the phone over the course of 6 months and has had her car vandalized, judges may disagree as to whether that experience is sufficient to ground a “well-founded fear”—while expressing no disagreement about the credibility of the petitioner’s factual claims or about the meaning of “well-founded fear.” To give another example, a petitioner may present as evidence that they have been verbally abused with slurs stereotyping their physical appearance and their religion. Judges could disagree about whether this meets the requirement that a petitioner show that persecution is “on account of” their religion—while agreeing that the treatment rises to the level of persecution.

Meeting the required standards of proof in all phases of an asylum claim is a necessary but not sufficient condition for any petitioner to gain asylum. Thus, the relevant standards of proof will be a question presented by *every* successful asylum claim, and *any* asylum claim could

potentially fail on standards of proof grounds even if it succeeded in every other respect. However, only sometimes are standards of proof benchmarks explicitly evaluated in written opinions, and in only a subset of those cases do the petitioners' claims generate within-panel disputes. The decision whether or not to address standards of proof explicitly in a case therefore entails a choice about the framing and ordering of questions presented in a case, just as the question about how to identify the particular social group claim at issue entails a framing choice. I will argue below that the set of within-panel standards of proof disputes (hereafter SOP disputes) give us a broader view of factor (4) in the list from in the previous section: strategic framing decisions made by judges in order to reach a desired outcome known in advance.¹²

Many of the arguments in this dissertation have been made running away from the political ideology model of judicial behavior, although that well-established approach has been consistently present in the background. I noted in chapter 4 that the Supreme Court appears to be more directly political in its asylum decision making than the Courts of Appeals. I also pointed to political interest as a mediating factor in Courts of Appeals outcomes in chapter 3, when I identified Kozinski's relational jurisprudence in the Ninth Circuit as shaped by the approaches of his many socially liberal colleagues on the court. In the discussion of *Cece* above, I mentioned political interest and strategic framing as one among an array of factors that could shape the crystallization of cases into questions. In the latter part of this chapter, I finally focus on the set

¹² A committed legalist judge or scholar might object that there is no real discretion for judges in how they frame standards of proof questions and that whenever those questions are not explicitly raised in the written opinion, it is simply because the answers are clear and uncontroversial among the judges. But the rhetorical openness of the judicial opinion as a genre and the challenges of logically ordering questions in a complex case (see again the list on pp. 224–225) both give us cause to be skeptical of this position. It is probably right that a judge cannot ever hide a standard of proof issue entirely from view. But he or she *can* give it more or less scrutiny, and in complex cases like *Cece*, there is scope for judges to set broad precedents on other legal questions, regardless of how strong the petitioner's claim is against the requisite standards of proof.

of interpretive disputes that provide the clearest view of the relationship between the individual political interests of judges and the settledness of the law. The within-panel standards of proof disputes appear to include a high concentration of cases where the interpretive dispute is a product of judges acting strategically, in the way that strategic action is described in section 6.2 above: judges thinking through how they want the case to come out and calibrating their approach to deciding it accordingly. I make this argument on three grounds.

First is an observation that pertains to within-panel disputes in general rather than to within-panel SOP disputes in particular. It is more likely for a “split” judging panel composed of one Republican-appointed judge and two Democratic appointees *or* two Republican appointees and one Democratic appointee to generate an interpretive dispute than for judges within a 3-Democrat or 3-Republican panel to do so. This holds for the within-panel disputes captured in my dataset, and Epstein, Landes and Posner similarly find that split panel composition is a predictor of dissenting (2013, 272–274). Ninety-one percent of the cases generating within-panel SOP disputes were decided by “split” panels.¹³ If these disputes were generated at random within judging panels in asylum cases, we would expect that number to be 74%.¹⁴ Similarly, 94% of within-panel disputes over the meaning of “particular social group” or “political opinion” appear in split panels—a rate close to the 91% cited above for within-panel SOP disputes and well above the 74% baseline expected outcome. Judging panels are significantly more likely to

¹³ This percentage is calculated on a sample of 92 cases out of the 207 total. I examined panel composition for the entire population of cases decided outside of the 9th Cir. plus a random sample of 25 of the 137 cases from the 9th Cir.

¹⁴ The expected number of asylum cases decided by “split” panels (i.e., 1D/2R or 2D/1R panels) can be calculated from the number of Democratic and Republican appointees on each court by year, the number of total judges in a court by year and the total number of asylum cases heard by year. The total expected number of asylum cases heard by split panels across all Courts of Appeals and all years is $16101/21759 = 74\%$.

produce an SOP dispute if they are deciding within a panel where the political party affiliations of their nominating presidents are split.¹⁵

Second, the volume of SOP disputes in the courts has been resistant over time to Congressional attempts to *raise* the standards of proof required in asylum appeals. It is difficult to account for that without resort to the idea that judges are acting strategically. The core statutory definition of “refugee” has remained constant in U.S. law since the 1967 UN Protocol and the 1980 Refugee Act, but in two major pieces of legislation, Congress has raised the standards of proof that asylum seekers are required to meet. In IIRIRA (1996), Congress instructed Courts of Appeals judges that “the administrative findings of fact [in an asylum case] are conclusive *unless any reasonable adjudicator would be compelled to conclude to the contrary*” and any “decision that an alien is not eligible for admission to the United States is conclusive *unless manifestly contrary to law*” (my emphasis).¹⁶ In the REAL ID Act of 2005, Congress introduced the condition that “the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *a central*

¹⁵ I argued in chapter 5 that the set of PSG disputes—particularly those that occur across panels and across courts—reflect the existence of an intellectual problem for the courts that is not reducible to political interest or to other extra-textual factors. Percentages analogous to those cited above reinforce the point. Only 31% of intra- and inter-circuit disputes over the meaning of PSG and political opinion appear between a case with a majority opinion written by a Democratic appointee and a case with a majority opinion written by a Republican appointee—significantly *less* than the 51.7% that would be expected if these disputes were generated between dyads of cases at random from all the Courts of Appeals across all years. This finding further bolsters the rationale for the text-focused analysis in chapter 5 and highlights a distinction between the PSG disputes considered there and the SOP disputes at issue here. Ideological or political commitments appear to be the root cause of a larger proportion of SOP disputes than PSG disputes.

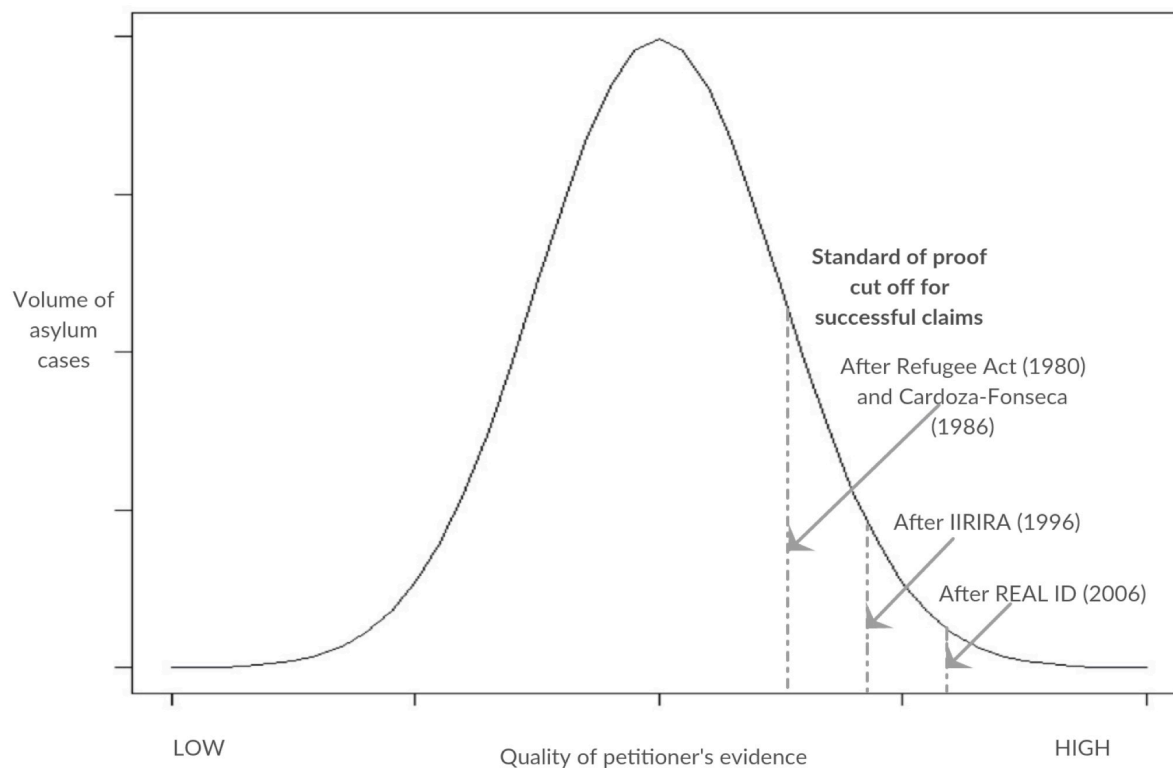
¹⁶ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*. Public Law 104–208. *U.S. Statutes at Large* 110, 3009.

reason for persecuting the applicant” (my emphasis).¹⁷ Before the REAL ID Act, the “centrality” of a protected ground to the threat of persecution had not been expressly considered as relevant to the petitioner’s claim.

Far less than half of the asylum claims that reach the Courts of Appeals in any given year result in a favorable outcome for the petitioner (see again chapter 3, Figure 3.4). Under the assumption that the strength of asylum seekers’ evidentiary claims is approximately normally distributed, we would therefore expect that each time Congress raises the standard of proof, the courts would be faced with a smaller volume of difficult borderline cases and would correspondingly generate a smaller number of interpretive disputes over standards of proof. Figure 6.1 gives a visual depiction of this expectation: with each ratcheting up of the standard of proof cut off for a successful claim, we would expect fewer instances where the judges are not in clear agreement about whether the petitioner has or has not met the standard of proof.

¹⁷ *REAL ID Act of 2005*. Public Law 109–13. *U.S. Statutes at Large* 119, 302. Title 1 § 101(a)(3)(B)(i).

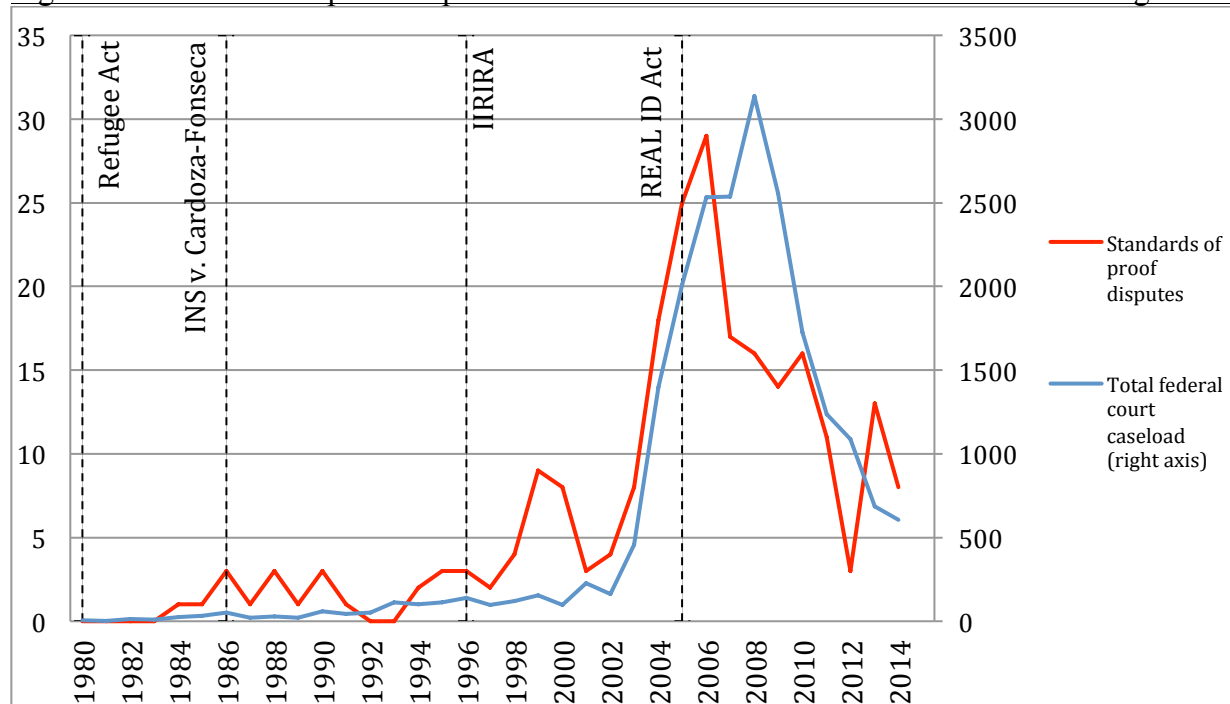
Figure 6.1. Idealized model of the standard of proof cut off for successful asylum claims



The empirical data show, however, that when Congress ratchets up the requisite standard of proof through legislation, it has no effect on the volume of SOP disputes in the Courts of Appeals (Figure 6.2 and fn. 18). The total volume of these disputes has tracked closely over time with the total volume of asylum cases in the Courts of Appeals—exactly what we would expect if SOP disputes represent arguments of convenience that are not truly responsive to what the law says. There is a modest dip in the rate of SOP disputes following the passage of the REAL ID Act, from 2007 to 2009, but thereafter the two trend lines align closely once again. The total caseload volume over time alone explains 74% of the variance in the volume of SOP disputes

across all years ($p < 0.0001$). Predictive power is not improved when we introduce period controls for the statutory changes introduced by IIRIRA and the REAL ID Act.¹⁸

Figure 6.2. Standards of proof disputes and total federal court caseload since 1980 Refugee Act



The third argument that SOP disputes primarily represent instrumental and politically motivated judicial reasoning rests on a reflection about the costs and benefits of the arguments typically available to judges. The fight over an asylum petitioner’s fate between sympathetic and unsympathetic judges can usually be waged on several different grounds: over the meaning of “persecution” and “well-founded fear,” over factual credibility, over the meaning of the causal “on account of” link or over the meaning of the protected categories “political opinion,” “particular social group” and so on. In many cases, procedural and jurisdictional hurdles to petitioners also provide plausible arguments that judges can invoke to reach a desired conclusion. But all of these strategies require relatively larger investments of time and cognitive effort than

¹⁸ In a multiple regression model with period controls ($P_1 = 1980-1995$; $P_2 = 1996-2004$; $P_3 = 2005-2014$), none of the period dummies are significant. $R^2 = 0.778$ and adjusted- $R^2 = 0.730$ in the period control model (versus R^2 of 0.738 in the single-variable model).

an SOP dispute, and they all come with the added disadvantage that they may spur unintended consequences down the line. To the extent that judges do act instrumentally, it is risky for them to tie themselves to elaborate or far-reaching conceptual arguments in order to engineer an outcome for one petitioner in one case. It cannot be assured that such arguments will serve the judge's interests in future cases. On the other hand, Courts of Appeals judges in asylum cases are empowered to make a nearly wholly subjective judgment about whether the relevant standards of proof have been met. These interpretive disputes are usually supported with little more than an *ex cathedra* statement by the judges that the standard of proof has or has not been met. There is minimal investment of time or cognitive effort required and no risk of binding oneself to conceptual arguments that may prove inconvenient later.

We can therefore expect that a claim about standards of proof will be the *first* resort of the judge who wants to rule against a petitioner in a *close* case without grasping for a more complex legal argument and also the *last* resort of the judge who wants to rule against a petitioner in a *strong* case and finds that no other, more technical argument will stand up to scrutiny. While it makes sense to posit some relation between political interest and interpretive disputes of many different types, the role of political interest will often interact with other factors and may be overshadowed by them. As I have proposed in earlier chapters, organizational rules and norms and the path dependency of judicial theory building from cases are particularly salient. In the within-panel SOP disputes, we have a set of disputes that are more likely than most other disputes to be *pure* expressions of political interest and how-I-want-it-to-come-out motivated reason (see Kennedy 1986).

For the above reasons, the relatively large set of within-panel SOP disputes is the best set of cases from within my dataset for examining the role of individual political preference in

determining case outcomes. There are several points that these cases add to our understanding of judging as a political act.

First, political motivation appears to be the primary cause of *many*, perhaps most, instances of interpretive disagreement within the courts, at least in asylum law. Recall that a within-panel SOP dispute is the modal dispute in my database. If I am correct in my argument that a large percentage of these disputes are manifestations of political disagreement, then political interest is a major cause of normative unsettledness in the law as well as an important driver of the substantive content of interpretive disputes. When disagreement is purely political, judges may take the least cognitively demanding route to reaching their desired outcome, which will often be a claim made on the basis of standards of proof. My evidence here lends empirical support to Kennedy's (1986) speculative argument that judges deciding cases in highly politicized areas of law will allow their political preferences to shape the course of their inquiry. Asylum is a politicized topic, and in instances where judges cannot agree on the outcome required by the law, they appear to be guided into disagreement by instrumental reasoning about how they want cases to come out. It should also be noted that while the number of such instances is large relative to the total number of instances of interpretive dispute in the courts, it is very small relative to the total number of cases the courts are deciding (see again chapter 3, Figures 3.2–3.3).

Second, the majority of expressions of politically motivated interpretive dispute in the federal courts are inconsequential for the doctrinal development of law. Within-panel SOP disputes are tied to the facts at issue in a particular case. They do not have the capacity to trigger more extended networks of dispute such as those analyzed in the previous chapters over the meaning of “particular social group,” “political opinion” and “well-founded fear.” There is little

scope for SOP disputes to shift the path of the law by the mechanisms described in the previous two chapters: the Supreme Court's production of ersatz clarity in the law and the incremental generalization between cases that courts rely on when adjudicating the meaning of complex statutory terms. To argue that SOP disputes are inconsequential for the development of doctrine is not, however, to say that they are altogether inconsequential for the legal system. Dissents within panels are often taken as a measure of politicization of the courts, and that association is reinforced when within-panel splits align closely with external markers of judges' political interests. If such splits are especially voluminous, they may erode the institutional legitimacy of the courts with the public.

This distinction between high volume, political disputes that have little influence on doctrinal developments (the SOP disputes discussed in this chapter) and the lower volume disputes that are not reducible to political conflicts and do more to shape doctrinal developments (the particular social group disputes discussed in the previous chapter) reemphasizes a point first made in the introduction: interpretive dispute in the law means different things in different contexts. This distinction between two different dispute types has policy implications for where and why we ought to care about limiting interpretive dispute among judges. Legislators and policy advocates who care primarily about consistency in the application of standards and eliminating opportunities for judges to enact their political preferences ought to look for oversight mechanisms to control the application of standards of proof assessments across cases. Historical experience shows that stricter statutory language does *not* decrease the volume of unsettled law around standards of proof questions, but perhaps other kinds of oversight or control over the Courts of Appeals dockets could. Legislators and policy advocates who care primarily about settling the law around the deepest and most complex questions of statutory interpretation

should encourage the institutional interventions that quash interpretive dispute: namely, narrow decisions that resist the judicial habit of generalization without empirical support (even in dicta), en banc and Supreme Court interventions to settle intra- and inter-circuit splits.

A third insight from the set of within-panel SOP disputes is that while political interest may be the largest single driver of interpretive dispute in the federal courts, it is also subject to strong limitation or amplification by the organizational features of the courts discussed in chapter 3. Finding against a petitioner on standards of proof grounds represents a minimally costly way for a judge to reach a desired outcome in many cases, so there is little reason for a judge *not* to dissent from his or her colleagues on those grounds if political interest is the only relevant factor. Therefore, any imbalance in how these disputes are distributed across courts will be evidence that other contextual conditions are overriding the judges' political interests. When we break down the distribution of within-panel SOP disputes by court, we find that the organizational patterns discussed in chapter 3 help to explain familiar disparities between the Second and Ninth Circuits.

Figure 6.3 shows the expected number of asylum cases heard by split panels (1D/2R or 2D/1R) across the Courts of Appeals, based on calculations from the proportion of Democratic and Republican appointees by court and by year. The Second Circuit has the largest expected number of asylum cases heard by split panels, and the Ninth Circuit has the second most—a consequence of the large volume of asylum cases heard by these courts and the balance of Republican and Democratic appointees on the bench over time.

Figure 6.3. Expected number of asylum cases heard by split panels

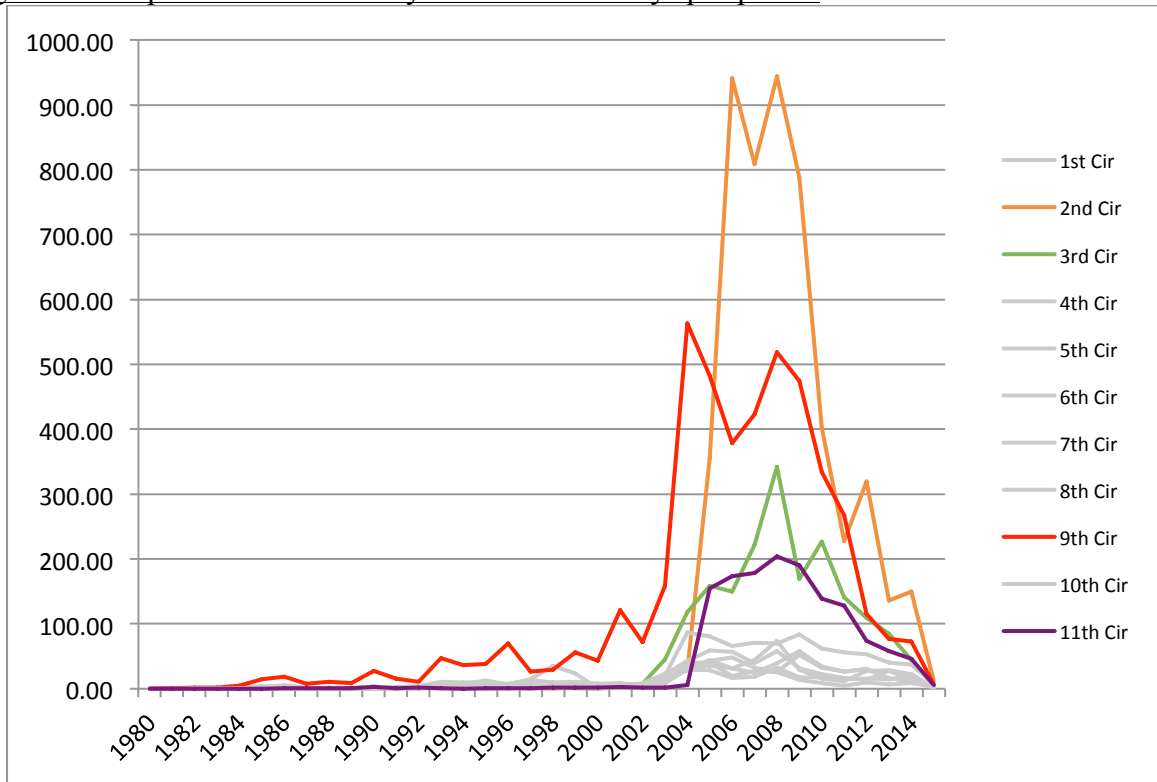


Figure 6.4. Expected versus actual contributions to standards of proof disputes within panels

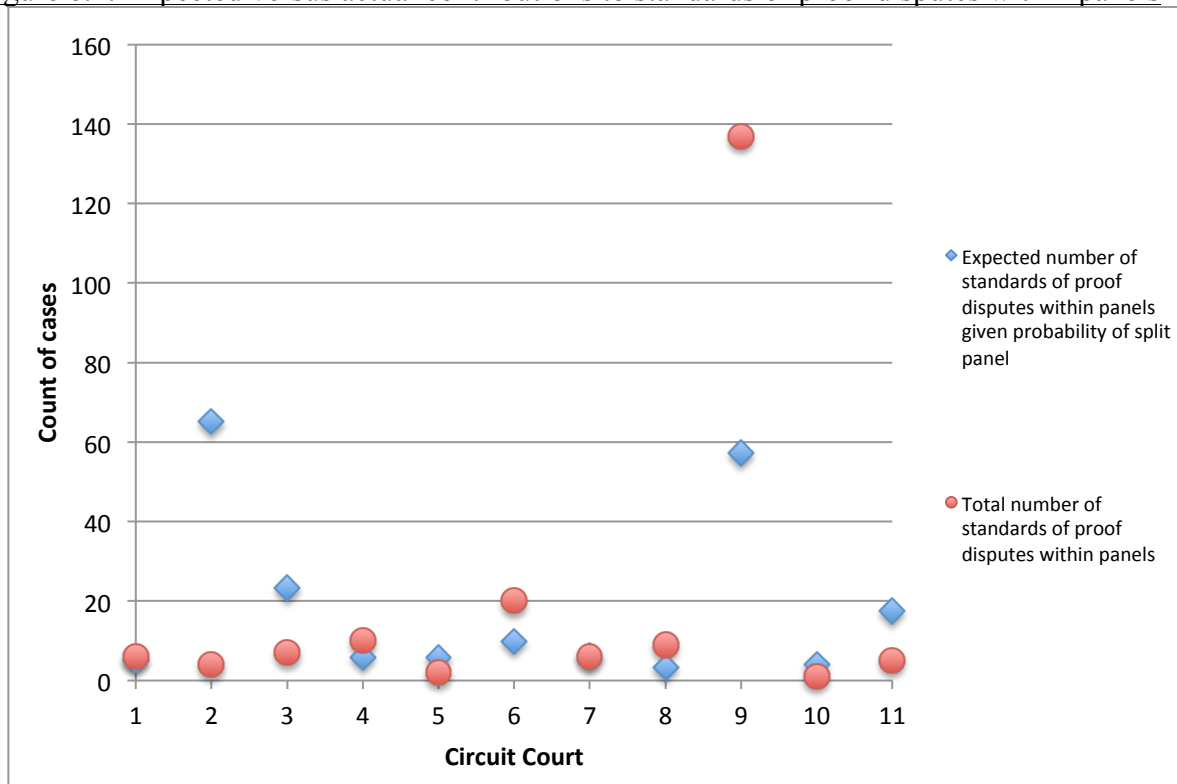


Figure 6.4 compares the actual production of within-panel SOP disputes by court with the distribution of those disputes across the Courts of Appeals that we would expect to find if they were purely a function of political splits within panels (assuming a fixed total number of within-panel SOP disputes). The Second Circuit far *underproduces* SOP disputes versus what would be expected, and the Ninth Circuit far *overproduces* SOP disputes.

The arguments already presented in chapter 3 provide the most compelling explanation for those disparities. Recall that the Second Circuit's rules and norms privilege the efficient processing of cases and encourage the avoidance of legal questions in asylum. Looking at the breakdown of SOP disputes by court, we can see that this Second Circuit tendency extends to the avoidance of politically motivated disagreement within panels, even when that disagreement can be expressed at minimal individual cost to judges. In the Ninth Circuit, meanwhile, we saw a tendency to eschew efficiency measures in processing asylum claims. That preference for elaboration of law over efficiency may encourage judges to voice disagreement over standards of proof within panels at a higher than expected rate, even accounting for the fact that SOP disputes are very low cost to judges. The particular influence of Kozinski's relational jurisprudence is also likely relevant again here. Kozinski's many challenges to his colleagues in asylum cases, which include charges of blatantly politicized decision making, are likely to lower the normative resistance in the court to the expression of political interest in the form of SOP disputes within panels.

6.5. Conclusion

My argument here, as in chapter 5, has focused on texts produced by judges and on the internal logic of those texts. In the first part of the chapter, I relied on pragmatist action theory, the literature on biases and heuristics in decision making and a single case study to explore

several factors that appear to play into how judges frame legal questions from complex and ambiguous cases. I identified six factors altogether: (1) reliance on clerks as opinion drafters; (2) recourse to habitually favored tools and methods of interpretation; (3) reliance on availability heuristics; (4) strategic action to get the case to come out as desired; (5) strategic use of ambiguity to escape potential objections; and finally (6) the interpersonal relational context in which judges make decisions, which shapes all of the preceding five factors.

In the second part of the chapter, I focused on one factor that influences framing decisions—namely, strategic action by judges to get the case to come out as desired. I argued that the existence of a large number of SOP disputes, appearing at a consistent rate over time in the case law record, is evidence that this kind of strategic framing is common relative to other triggers for interpretive dispute in the courts, although it appears infrequently relative to the total number of asylum cases decided in the Courts of Appeals.

The pragmatist model of action is the theoretical framework that underpins all of the analysis in this chapter. In the case analysis of *Cece* I referenced work by Kahneman and Gigerenzer on the use of availability heuristics in decision making, although I identified their experimental results as an empirical elaboration and clarification of Dewey’s basic idea that habit and creativity together guide action. In the latter part of the chapter, I argued that the judicial framing that takes place in the SOP dispute cases can be interpreted as highly strategic. This argument is also compatible with a pragmatist action theory framing. Even though pragmatism is often and fairly described as a critical response to instrumental action theories, it is not merely a theory of the “gaps” where instrumental action models lack explanatory value. In cases where judges appear to raise SOP disputes largely or entirely on the basis of strategic reasoning about how they want the case to come out, the pragmatist sees a situation where the

stakes are clearly defined and where the judge's linking of ends to means follows a straight and narrow course. In these cases, the judge's "end-in-view"—i.e., the judge's concrete plan of action that structures decisions in the present (Joas 1996, 153–154)—simply does not shift much over the course of deciding the case, although the pragmatist will maintain that it *could* have. Ends-in-view are often less fixed in the course of action than they appear to be in retrospect.

Pragmatism offers less descriptive parsimony or predictive power than a rational actor model or an action typology such as Weber's, but it makes up for these concessions with greater ability to describe a broader range of empirically observable human activity without reliance on uninformative residual categories (e.g., Weber's "affective action") or tautological post hoc identification of actors' ends to match their observed actions. In this tradition, my reliance on pragmatist action theory in this chapter is an effort to present a single theoretical framework that is adequate to describe both strategic and non-strategic framing decisions by judges.

Strategic framing choices by judges sometimes take much more intricate forms than the within-panel SOP disputes discussed here, which are by definition limited to a single interaction of a judging panel over the facts of a single case. More elaborate patterns of strategic action may be especially common at the Supreme Court, where the political stakes are especially high in many cases, and many cases are relatively unconstrained by statutes or prior case law. Future work could expand on the pragmatist approach to judicial action I have begun here by re-describing in pragmatist terms the elaborate strategic choices that Justices make in the Supreme Court context. As applied to complex strategic interactions over many cases and repeated interactions, Dewey's insistence that an end-in-view is a feature of the *present* and continually subject to change would produce a description of action significantly different from an account that applies fixed means-ends schemas to actors.

Another way that my analysis in this chapter could be developed in furtherance of pragmatist action theory would be to compare court cases to identify the conditions that allow for the fullest development of Deweyan intelligence and pragmatist creativity. I have already suggested that empirical and procedural complexity will give judges broader scope for their framing decisions and that uncertain political stakes will make it more likely that their ends-in-view will shift over time. These formulations could be elaborated and sharpened through comparative case analysis, especially with reference to the role of other actors in relation to judges: amici who suggest creative framings of legal issues that might not otherwise occur to the judges and the competing litigants. Pragmatist theorists have paid a great deal of attention to action *as* interaction, so there is a strong theoretical foundation on which to build. Because I have focused exclusively on judges as knowledge producers, the significance of other actors for the framing of legal questions in cases is a topic that remains clearly underdeveloped in this dissertation.

The argument in this chapter covers new ground but complements the findings in previous chapters. The analysis of the frequently recurring within-panel SOP disputes throws into sharper relief the distinctiveness of the PSG disputes discussed in chapter 5. The SOP disputes are interpretable as fairly simple strategic interactions, while the PSG disputes are not easily accounted in terms of strategic action. My finding that the Second Circuit underproduces and the Ninth Circuit overproduces within-panel SOP disputes (Figure 6.4 above) augments and contextualizes the findings in chapter 3. I argued there that organizational norms and rules play an important role in determining when judges will and will not engage with challenging legal questions. The role of organizations looks even more important following the analysis in this chapter, because from the distribution of SOP disputes we have evidence that organizational

norms can dampen or amplify judges' tendencies to express their strategic preferences for case outcomes in within-panel voting. In the conclusion, I discuss further how the findings of my several empirical chapters fit together and how they can be tested in new empirical domains in future research.

Chapter 7. Conclusion

7.1. Overview of Findings

This dissertation has examined the production of legal knowledge in asylum law cases in the U.S. federal appellate courts. More specifically, it has identified patterns and causes in the production of judicial interpretive disputes in those asylum law cases. I have found evidence that several social factors contribute to the production and settling or non-settling of interpretive disputes. A common theme running through my findings is that *close scrutiny and attention to legal questions tends to generate interpretive disputes and unsettled law*. Law tends to become and remain unsettled in areas *where judges focus their time and attention, whether their attention is being focused by their own conscious action or by broader social forces* such as small group dynamics, court norms and court rules. This finding is at odds with the basic expectation of legalism that conceptual elaboration of the law will provide greater clarity to legal rules and standards and hence translate into settled law. I have looked at contexts where disputes *do* appear as well as contexts where they *do not* (in the Second Circuit, in chapter 3; in reference to the statutory protected grounds of “race” and “religion,” in chapter 5). I have thereby mitigated the risks of reaching a conclusion biased by selection on the dependent variable, even though my data collection procedures have focused my attention primarily on areas of disagreement in the law rather than areas of settled agreement.

A second core expectation arises from the legalist model of the legal system: that the institutional hierarchy of the court system will facilitate the settling of law, regardless of the quality of reasoning present in high court decisions. I find that idea to be sound but in need of further elaboration. *When the Supreme Court issues a ruling that leaves part of a legal rule or standard deliberately vague, it can produce ersatz clarity in the law*. The lower courts will avoid

disputing the question answered by the Supreme Court directly, but disputes may emerge in the lower courts around related questions and/or the application of the Supreme Court's standard as a direct result of the persistent underlying lack of clarity (chapter 4).

Beyond challenging two basic legalist expectations, I have been able to assess the relative importance of several different social determinants of unsettled law in the asylum law context. I have found that *organizational rules and norms* structure engagement with legal questions, and *they can be designed so as to quash interpretive dispute almost completely* (chapter 3). My evidence for this is that the aggressive streamlining of asylum cases in the Second Circuit, together with the norms discouraging panel dissents that persist there, has eliminated almost all trace of unsettled asylum law within the Circuit. While there are no courts that place a positive value on persistent unsettled law, the example of the Ninth Circuit shows that unsettled law (particularly in the form of dissents within panels and disputes with sister Circuits) can be embraced as a necessary consequence of fulfilling other core value commitments. The lowered normative salience of unsettled law in the Ninth Circuit makes it more likely for disputes to arise and remain unsettled.

In organizational contexts where it does occur, the close engagement with legal questions that generates unsettled law is *most of the time driven by the choices of individual judges*. Individual decisions of this type tend to be *isolated* (i.e., occurring within panels and not spawning more extensive dispute chains), and when they occur they appear to be *frequently ideologically motivated* (chapter 6). Much therefore depends on the preferences of individual judges, but individual decisions to engage in interpretive dispute are *subject to significant dampening or amplification by organizational context*—interpretive disputes are overproduced in the Ninth Circuit and underproduced in the Second Circuit (chapter 6).

While all individual judges in the Courts of Appeals are capable of generating within-panel disputes that further their instrumental goals with respect to a single case, I identify a qualitatively different role for a very *few individual judges* who have the professional and social stature in the courts to *exert major influence on the development of jurisprudence in a given area of law* (chapter 3). In the asylum context, I focused on two such judges: Kozinski (Ninth Circuit) and Posner (Seventh Circuit). The comparison between them shows that judges' *jurisprudential interests are separable from political interests as well as from pure status competition* and may have separately identifiable effects on outcomes in judicial decision making. I stress that *those interests exist in reciprocal relation with the courts where they are based*. Kozinski's approach to asylum cases would not be the focal point of nearly as much conflict within the Ninth Circuit if he were surrounded by differently disposed colleagues. I have no account of the ultimate origins of the jurisprudential interests of particular judges that are strong enough to have a relational impact on their courts. Kozinski's approach to asylum cases may be informed (as he himself says it is) by his own childhood experience in the U.S. asylum admissions system, but that line of inquiry is beyond the scope of my argument.

The majority of instances of interpretive dispute are accounted for by a combination of (1) organizational rules and norms that guide or discourage judicial engagement with the law, (2) individual, ideologically motivated decisions to dispute and (3) the influential relational jurisprudence of a few charismatic judges. But the high volume of ideologically and relationally motivated disputes are in some respects less interesting examples of judicial knowledge production than the handful of extended networks of disputes that appear in the judicial record and have proven especially resistant to settling. I closely examined two such dispute chains that have arisen with reference to the statutory meaning of "particular social group" (chapter 5). Here

I found that a key *mechanism* by which stubborn disputes persist and create extended networks of dispute is *middle range theoretical generalization by judges* coupled with a lack of systematic empirical standards for the grounding of those generalizations (chapter 5). A corollary to this claim is that *the contingent ordering of cases in time* is another social determinant of settled versus unsettled law, beyond the role of organizations and individual actors.

The ordering of cases in time is not random. Litigants will shape their claims to try to conform to arguments that have succeeded in the past, and developments in international affairs generate closely related asylum claims in “waves.” However, litigation in asylum cases is less well resourced and less strategically sophisticated than in many other areas of law, and as we saw with respect to the “family” dispute chain in chapter 5, petitioners may continue to bring a specific claim over decades (in this case, “family as a PSG”) while the court’s disposition towards the claim remains unclear. In domains of law where there is more strategic litigation in play or where other exogenous factors very strongly determine the ordering of cases before the courts, more attention would have to be paid to these factors shaping the decision making context for judges.

I also find that judges have *opportunities for the expression of creativity in the formulation of questions out of cases* (chapter 6). The process of creative framing is an opportunity for judges to direct their attention towards or away from particular legal questions and in turn affect the settledness or unsettledness of law. *Framing choices can directly produce interpretive disputes* in the law, when judges disagree with one another in their written opinions about what the question at issue in a case actually is. The case of *Cece v. Holder* provides an example of this kind of unsettled framing (chapter 6), insofar as the majority and dissent in the en banc panel failed to agree on the parameters of the “particular social group” in which Ms.

Cece was claiming membership. Framing choices can *also indirectly produce interpretive disputes*, by guiding judicial attention towards or away from particular problems.

I used the case study of *Cece* to identify several factors that shape how judges will frame the questions in a case. Those factors were: (1) the role of *clerks* in drafting opinions, (2) *habitual interpretive practices and canons of construction*, (3) reliance on *availability heuristics*, (4) *strategic framing to reach a desired outcome*, (5) *strategic use of ambiguous framing to avoid challenges* and (6) *relationships among judges*. I argued that pragmatist action theory provides a powerful and flexible explanatory framework for understanding the process of framing, whether judges are operating with high or low autonomy to introduce creative reframings and whether they are acting instrumentally or not. The high and steady volume of within-panel disputes over standards of proof is the clearest indication of strategic action by judges producing unsettled law.

Aspects of these substantive findings are at odds with most social scientific scholarship on judicial decision making, which has treated individual judicial preferences as the primary social determinant of decision making outcomes and has treated the formal aspects of the law as external constraints on judges' preferences. The concept of ersatz clarity in relation to Supreme Court rulings, the relational jurisprudence of influential judges and my processual explanation of how dispute chains persist over time all relate directly to the formal content of the law. In my account, *judges' preferences are not formed in isolation from the law on the books, and judicial knowledge production must be understood in terms of both law on the books and the social factors that direct judicial attention towards certain problems and away from others*.

I argued in the introduction that judicial decision making presents a rich ground for sociology of knowledge analysis because the knowledge work that judges do is so highly

structured at many different levels. The formal rules of law and the restriction on the courts to adjudicate only “cases and controversies” produce narrowly defined knowledge problems for judges to address. Judicial engagement with those knowledge problems is then structured by the court’s case processing procedures and by the ritualized processes of oral arguments, voting and opinion writing. Normative and institutional forces—the norm of deference to precedent, the institutional hierarchy of the court system, court-specific norms of collegiality—impose softer but still highly consequential constraints. The analysis in this dissertation has vindicated my opening argument that judicial decision making is especially well suited as empirical material for the sociology of knowledge. The 718 interpretive disputes I coded have provided evidence of how these multiple social forces shape decision making outcomes and have allowed me to identify the relative importance of these several social forces. One important drawback of this approach, however, is that the lessons that can be applied outside the asylum context are not obvious. Some aspects of my argument generalize more readily than others. I take up this issue of generalizability below.

7.2. Generalizability and Directions for Future Research

My empirical chapters present a holistic picture of judicial dispute generation and settling in asylum law cases in the U.S. Courts of Appeals. This account should be useful on its own terms for scholars who are interested in the role of the courts in the immigration system and the role of judges in constructing the categories of persons who enjoy the legal protections of asylum: “particular social groups,” racial groups, religious groups, political groups and nationalities. For readers who are more interested in future directions for research in sociology than in the asylum law context per se, this section addresses the generalizability of my argument

to other domains of law and other empirical contexts in the sociology of knowledge. I address the generalizability of my several core arguments in turn.

(1) My account of *how court rules and norms structure dispute generation* is framed around the basic choice judges must make between *efficiency* in case processing and *elaboration of law*. These two value commitments are widely attested in judges' writings, and they are not specific to the asylum context. The necessity of making tradeoffs between the two is a feature of all the Courts of Appeals and applies across all substantive domains of law, as a basic consequence of the heavy caseload in the Courts of Appeals.

Cohen (2002) has written the most extensive analysis of Courts of Appeals decision making that is explicitly focused on how the courts as organizations affect judicial work and case outcomes. As I have done here, Cohen treats "access to justice" as the key fixed value orientation of Court of Appeals personnel and argues that judges are compelled to weigh efficiency in case processing against procedural elaboration.¹ He reaches the same conclusion I do: that court norms and case processing models influence decision making outcomes. He finds, as I do, that the Ninth Circuit court personnel have cultivated a special sense of responsibility in their court to demonstrate the viability of a single court administering law over a vast territorial expanse (Cohen 2002, 153–155). Cohen's study is based on two thousand hours of ethnographic observation and 36 interviews with judges across three Courts of Appeals (the Seventh, Ninth and DC Circuits). His parallel account adds significant weight to my finding as to how court organization matters. Because sociology of knowledge rather than organizational sociology has

¹ "The threat of bureaucratization is that time pressure and organizational complexity will force judges to emphasize administration at the expense of adjudication and ultimately will cause a decline in the quality of the judicial product" (Cohen 2002, 1). Cohen also identifies other core trade-offs in the task of appellate judging, such as the balance between autonomy of the judicial role and interdependence between judges and lawyers (2002, 70).

been my primary framing for this study, I have not developed an exposition of the organizational culture of the courts to nearly the extent that Cohen has.

One significant difference between Cohen's account and mine, and a promising topic for future research, is the issue of how court organizational practices interact with specific domains or substantive areas of law. I have taken pains here to describe the Second Circuit's treatment of immigration cases as an organizational approach that in at least some respects will *not* be generally applicable to the Second Circuit at large. Because the Second Circuit has imposed the burdens of increasing efficiency so heavily on its immigration docket, it has not privileged efficiency so highly in other domains of law. Cohen's account marks several important differences in the organizational models of the Seventh, Ninth and DC Circuits, and he marks a few differences in the work organization between chambers within a single court, but *domain of law* is not a significant variable in his account.

A corollary to my argument about the role of organizations is that the trade-off between efficiency and elaboration of law becomes more acute the heavier the caseload burden is in the courts. Caseload is a function of several variables, including Congressional legislation regarding access to the courts and the political process by which federal judges are appointed. When the party in control of the Senate opposes the President's agenda, it has become a routine practice for the Senate to delay or altogether block the President's appointments to the federal courts. This norm of obstructionism increases the burden of processing cases in the federal courts, while also making the courts appear more highly politicized—perhaps attracting more public scrutiny to their decision making and perhaps weakening norms within the courts that prevent judges from acting too blatantly on their own political interests. These pressures at least raise the possibility that organizational divergences like the one between the Ninth and Second Circuits will grow

wider and that court personnel will struggle ever more to settle legal questions while maintaining their public legitimacy as institutions able to provide access to justice.

The risk that knowledge production in the courts will suffer collateral damage in political power struggles between the Executive branch and Congress is an important direction for future research. Another important direction for future research is to look further at the organizational culture of the Ninth Circuit and how it is likely to change after the breakup of the Circuit that many of its judges have long seen as “inevitable” (e.g., O’Scannlain 1995). Deeper comparative contrasts between the Ninth Circuit and sister Circuits in their management of the tradeoff between efficiency and elaboration of law could help to clarify the Ninth Circuit’s likely path in the future.

(2) My account of *how individual judges generate within panel disputes in pursuit of particular outcomes for petitioners* finds external support from the empirical literature showing that judges’ political and ideological interests are predictive of judging outcomes. These empirical studies have ranged across all domains of law and all of the U.S. federal appellate courts, so the evidence is already in place that this finding of this dissertation generalizes well. Still, there is scope for further work. I have found in asylum that politically motivated interpretive disputes manifest most frequently as disputes over the application of standards of proof to particular cases, and I have found that the volume of disputes of this type does not depend on how severe the actual standard of proof imposed by Congress is. Applying the same analysis to other domains of law, we might be able to discover the specific legal questions that most often provide the formal bases for politically motivated dispute in the courts. This comparative work would identify the points in the law where judges as knowledge producers have the most scope to express their own instrumental interests without compromising the

integrity or external legitimacy of their knowledge system. On the basis of the asylum example, we might expect to find interpretive disputes in judging panels heavily concentrated around legal standards that are regularly decisive in cases but leave the judge with significant discretion in applying them to concrete cases: standards like whether a fear of persecution is “well-founded” or “objectively reasonable,” what a “reasonable person” or “reasonable jury” would do or expect, and so on. The patterns of interpretive dispute around these common statutory standards should be of interest to legislators, who are concerned with when and where they should afford judges discretion, as well as to sociologists of knowledge.

(3) In my description of *relational jurisprudence*, I identified a single illustrative contrast between two judges operating in two different courts. This contrast is specific to the asylum context, but there is reason to believe that the idea of relational jurisprudence will have applicability to other judges operating in other areas of law. The idea of relational jurisprudence has thematic similarities with the model proposed in Randall Collins’s *Sociology of Philosophies* (1998): that knowledge production is highly structured by network relations, particularly conflictual network relations, and that a very few actors have hugely outsized influence on the direction of a knowledge system’s development. As I have already noted in chapter 3, another good reason to suppose that relational jurisprudence is a concept with the potential to generalize is that close analyses of Supreme Court Justices’ careers have often focused on their individualized approaches to jurisprudence and their relational impact (see chapter 3, pp. 119–120).

Collins’s approach does not provide a perfect template for developing the concept of relational jurisprudence because there are basic differences between philosophy as a knowledge system and judge-made law. Key differences are the institutional constraints that exist on federal

judges (the authority of precedent and the hierarchy of the court system), their minimal opportunities for professional advancement, their concrete power to shape social relations writ large through their decisions and their distinctive “attention space” (Collins 1998, 38–39), which is constituted by a different audience from the audience for philosophical arguments. All of these factors would contribute to making network maps of judges’ relational jurisprudential commitments look different from the network maps Collins produces of philosophical influence and conflict (e.g., Collins 1998, 55–56). Nonetheless, Collins’s interactional model of knowledge production does provide a useful guide for a more comprehensive account of how influential individuals shape jurisprudence of courts and conflicts of interpretation in the law. Future research could build up from accounts of judges’ outsized relational impacts in one domain of law, such as I have provided here, to relational maps of how individual judges’ jurisprudential interests across a whole range of topics shape the division of labor and the focal points of interpretive conflict within courts. This could be done with respect to the Supreme Court alone or with respect to all the federal appellate courts—a much larger network of persons and legal issues and hence a much larger task. Because the Supreme Court so profoundly shapes the law that is applied in the lower courts, it would not make sense to build a Collins-style map of relational jurisprudence that aimed to be comprehensive across one or more of the Courts of Appeals but excluded the Supreme Court.

(4) My discussion of *dispute chains* in chapter 5 provides a solid foundation for further development and generalization even though, like my discussion of relational jurisprudence, I have developed it here with a focus on case studies specifically from the asylum context. In chapter 5 I aimed to show how the style of reasoning and writing by which judicial opinions are produced sometimes makes it difficult for judges to resolve disputes on the basis of the authority

of reason alone, without resort to institutional authority. I argued that judges' generalizations from cases can result in stubborn unsettledness in the law for at least two reasons: (1) judges lack clear standards for the incorporation of assertions and assumptions about the empirical world that fall outside of the factual record in a case and (2) the judicial focus on reconciling and extending precedents can create *more* unsettled law rather than less when judges operate with different frames of reference from case to case. We see dynamic (2) in action in both dispute chains I analyze in chapter 5. In the dispute over whether a "family" is a PSG, judges in *Estrada-Posadas* and *Mgoian* apparently fail to identify the existing contradictory precedents within their Circuit, while the judges in *Chen* refer to language in *Estrada-Posadas* as "dicta" when it is arguably essential to the holding. In the second order dispute chain between the Sixth and Second Circuits, the authors of both the *Castellano-Chacon* and *Koudriachova* opinions were concerned to reconcile tensions in the law over the same, very narrow question: was the *Acosta* standard compatible with the *Gomez* standard? But because the Second Circuit in *Koudriachova* adopted a decisional heuristic that did not apply to the Sixth Circuit in *Castellano-Chacon*—the need to interpret prior within-Circuit opinions as favorably as possible—the two courts reached opposite conclusions on that narrow question.

The tools of legal interpretation I discuss in chapter 5—reliance on precedent and several well-known canons of construction—are the standard tools of legal interpretation applied across all domains of law. It is, furthermore, obvious that judges' frames of reference when deciding cases will be variable in sometimes-consequential ways. No judge or clerk has a perfectly systematic view of the precedents of their own Circuit, much less the precedents of all the other Circuits and their points of disagreement. Differences in local perspectives will lead to conflicts of interpretation like the one between *Castellano-Chacon* and *Koudriachova*. The literature on

availability bias and other decision making heuristics allows us to refine further this common sense understanding. We should therefore expect to find similar patterns of dispute chain production to what we find in asylum across other areas of law.

The important avenue for future research here would be to develop an understanding of *what domains of law* and *what particular questions* tend to *generate interpretive dispute chains that are especially resistant to settling*. The methodological approach I have pursued in this dissertation can be applied to other areas of law: we can identify what areas of law are highly unsettled through Westlaw's Negative Case History index. On the basis of the work I have already done in asylum, I expect that domains of the law that require the classification of protected classes of persons will tend to generate dispute chains resistant to settlement, for analogous reasons to what we find in asylum. This is a line of comparative inquiry I plan to pursue in future work.

Title VII of the Civil Rights Act, which provides for equal opportunity in employment, is one example and an interesting contrast with asylum. Claims for protection on the basis of sex or gender classifications have advanced at different speeds and have generated different judicial interpretive disputes in these two domains of law. In asylum, all such claims must be advanced as "particular social group" claims, whereas in employment protection law, claims for protection on the basis of anything relating to sex, gender or sexuality are advanced as claims for protection on the basis of "sex." In Title VII, there is no residual protected category akin to "particular social group." In the contrast between the two areas of law, therefore, we can see how the

specificity of statutory language affects both the settledness of law and the scope of protection accorded to groups on the boundary.²

Another potentially fruitful comparison can be made to constitutional equal protection claims under the Fourteenth Amendment. In contrast to the asylum and employment protection contexts, are *no* explicitly designated protected classes in relation to the Fourteenth Amendment's promise of equal protection. In its first application of the law, the Supreme Court observed that "we doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the equal protection provision of the Fourteenth Amendment]" (*Slaughter-House Cases*, S.Ct. 1872, 83 U.S. 36). Since that time, Fourteenth Amendment equal protection litigation and jurisprudence has developed with close reference to particular social groups, extending well beyond African-Americans: the Chinese as a race (*Yick Wo v. Hopkins*, S.Ct. 1886, 118 U.S. 356), men (*Craig v. Boren*, S.Ct. 1976, 429 U.S. 190), women (*United*

² Title VII provides protection on the basis of race, color, religion, sex, or national origin. One line of interpretation that has developed in the courts under Title VII is that protection on the basis of "sex" extends to protection of gender non-conformists and transgender persons. The foundational reasoning in these cases in federal courts has been that discrimination against gender non-conformists and transgender persons amounts to "sex stereotyping" of what one's sexual self-presentation and gender identity ought to be and hence discrimination on the basis of sex. However, courts were initially resistant to this development: the vague statutory protection for "particular social groups" in asylum law provided more expansive protection for homosexuals and transgender persons when those cases first arose and generated less judicial interpretive dispute.

As of 2016, the legal justification for protection on the grounds of "sex" under Title VII is receiving renewed scrutiny. A Seventh Circuit case, *Hively v. Ivy Tech Community College* (830 F.3d 698; en banc rehearing pending decision) poses the question of whether claims for discrimination on the basis of homosexuality, which are "nearly indistinguishable" from gender non-conformity claims, are also viable under Title VII. An en banc decision is pending by the Seventh Circuit, and both the holding and the reasoning could have deep implications for the cognition of protected classes under Title VII. Rovner, the author of the initial panel decision, referred to a "jumble of inconsistent precedents" in the judicial treatment of homosexuals under Title VII (830 F.3d 706)—clearly a fertile ground for extending the analysis of interpretive disputes modeled here.

States v. Virginia, S.Ct. 1996, 518 U.S. 515) and homosexuals (*Romer v. Evans*, S.Ct. 1996, 517 U.S. 620). Claims for equal protection on behalf of non-citizens (*Plyler v. Doe*, S.Ct. 1982, 457 U.S. 202) and the poor (*San Antonio Independent School District v. Rodriguez*, S.Ct. 1973, 411 U.S. 1) have been brought unsuccessfully at the Supreme Court. There is a Supreme Court precedent for equal protection recognition for a “class of one” (*Village of Willowbrook v. Olech*, S.Ct. 2000, 528 U.S. 562), but in the large majority of cases, the courts have proceeded on the basis of consideration of groups. They have therefore treated the equal protection clause as presenting the same, basically sociological problem as the asylum statute and Title VII: what counts as a group that merits protection under this law?

Judges and the strategic litigators bringing Fourteenth Amendment claims in court have married a sociological mode of thinking to a classically liberal one by adopting the idea that “equal protection” is best understood as requiring that *groups of people defined by sociological qualities* like race, class, gender and nationality cannot as a class be deprived of *individual* rights. There are tensions in this approach, perhaps revealed most acutely in the bitter arguments that have arisen in affirmative action cases within and outside the courts. A close look at the legal reasoning and judicial disputes that appear in Fourteenth Amendment jurisprudence would deepen our understanding of how judges think about social group-ness in the absence of *any* statutory guidance.

(5) My discussion in chapter 6 of *how judges frame questions out of cases* is the section of this dissertation that contributes the most to sociological theory. I have shown that pragmatist concepts apply usefully to a context where we would not necessarily have expected them to apply. In the federal appellate courts, reasoning and decision making are collective, highly institutionalized and constrained by the law (both statutes and precedents). We might expect in

such a setting that there would be little room left for processual contingency or creativity in action, the focal points of pragmatist action theory. It is certainly true that the pragmatist social theorists have *developed* their distinctive approach with reference to far less structured social situations: expressions of religious ecstasy (James), children's play (Mead), political activity in the public sphere (Dewey) and casual conversation (Goffman), for example. I have shown in chapter 6 that we can still identify moments of creativity and argumentative alignments that shift significantly over time in the judicial deliberative process. I have also argued that the pragmatist theory of action is equally applicable to describing all types of judicial framing decisions, from the straightforward to the instrumental to the highly processually contingent—although the explanatory value add from a pragmatist approach is greatest for the latter group. The natural way to extend this argument for a sociological theory audience would be to assess what factors predict where creativity will have a large role in decision making outcomes. I am developing this argument in separate work, which examines the *Cece* case in contrast to other immigration cases.

(6) The last topic I will address in terms of generalizability and directions for future research is the *decision to define my objects of analysis as interpretive disputes within and between judicial opinions*. The judicial decision making process is strongly structured by interpretive dispute—that is, by where and how judges fight their interpretive battles, whether they do so by conscious choice or as a result of organizational and relational forces. In the empirical chapters of this dissertation, I have shown that framing a study of judicial knowledge production in terms of judicial interpretive disputes allows us to identify social determinants of knowledge production at many different levels of analysis. Knowledge production is a messy process, and empirical outcomes will often depend on the intersection of many factors at once. My data collection method has allowed me to avoid loading the dice on which factors will appear

most relevant, while still allowing me to reach substantive conclusions about when and why certain social determinants of decision making trump others.

Judicial interpretive disputes are easier to isolate in some domains of law than others. I focused this study on asylum in part because asylum presents a critical mass of interpretively rich, narrowly defined interpretive disputes. Two central factors contribute to that: the longevity of the asylum statute (which means that the same statutory language has been applied across many cases since 1980) and the openness of that language to interpretation and reinterpretation by judges, particularly the meaning of “particular social group,” “political opinion,” “well-founded fear” and the application of the standard of proof. The methodological approach outlined in chapter 2 will be most useful in application to other domains of law where these two conditions hold. Fourteenth Amendment equal protection jurisprudence, which I have mentioned already as a fruitful comparative context for asylum decision making, is one promising area for the application of this method. Another is antitrust law, where a series of quite vague and longstanding statutes—the Sherman Act (1890), the Clayton Act (1914), the Robinson-Patman Act (1936)—govern a body of law that is in practice primarily judge-made.

The mode of knowledge production in the judiciary makes it particularly easy to find a rigorous definition for “interpretive dispute,” and one can rely on the extensive indexing system in Westlaw for a consistent and reproducible coding of disputes. These useful qualities of judicial decisions as data are at the core of my argument for why sociologists of knowledge should pay attention to judges as subjects. Nonetheless, it is clear that beyond the context of judicial decision making, other realms of expert knowledge production are likewise heavily structured by where intellectual and material resources are directed and where conflicts arise. This comes through clearly in several landmark studies in the sociology of knowledge, including

Abbott (1988) on the professions, Collins (1998) on philosophy and Fourcade (2009) on economics. One area for useful future work might therefore be to develop a more flexible and widely applicable concept and measure of “interpretive dispute.” We will be best able to mobilize interpretive dispute as a core concept in sociology of knowledge studies when (1) the knowledge-producing activity in question is narrowly defined and constrained and (2) there is high quality data available and some replicable method of identifying instances of interpretive dispute.

I have struggled to identify other realms of expert knowledge production where those two conditions are met as fully as they are in the realm of judicial decision making. But even if the method applied here proves difficult to translate out of the domain of studies of judicial decisions, its development and application in the legal context could still prove useful to sociologists of knowledge working in other areas. My findings that ideologically motivated interpretive dispute will persist at a roughly constant rate no matter how textually narrow the decision making task given to judges is, but that organizational rules and norms can effectively quash interpretive dispute, suggest an order of priority for sociologists studying knowledge production in other realms. We should *first* look at the institutional and organizational level to determine where creativity and intellectual conflict are possible, *then* look to the motivations of actors and to the interactional level to understand how knowledge production processes work. Another potentially widely useful discovery is the mechanism of dispute-perpetuation I identified in chapter 5, which poses a challenge to Collins’s (1998) interaction ritual chain model. For Collins, the fundamental driver of intellectual conflict is competition for attention in a limited attention space. I have identified dispute chains that closely resemble some of Collins’s networks (see again chapter 5, Figures 5.2, 5.3, 5.6), but I have also found that judges become

entangled in those dispute chains despite a motivation to avoid conflict, a lack of any real incentive to draw attention to themselves via disagreement and a general consensus that ongoing interpretive dispute chains (especially intracircuit) are an institutional embarrassment. If we were to reexamine Collins's data with the mechanisms of dispute generation described in chapters 5 and 6 in mind, we might find evidence of similar dynamics at play among philosophers. Allowing these lessons to guide future research may help the field of sociology of knowledge to advance beyond its current fragmented state.

7.3. Asylum Admissions and Federal Court Functioning in Recent Political Discourse

Both asylum admissions and federal court functioning (specifically, the federal court appointments process) have been thrust into the center of national political discourse during the 2016 U.S. general election. My final remarks in conclusion are to take stock of those surprising developments, which came into full view only after my data collection was complete, and how they relate to my findings in this dissertation.

As of this writing, the 2016 U.S. presidential election has concluded, and Donald Trump prepares to assume the presidency. A pending Supreme Court appointment was one major point of partisan contestation in the election and admission policy for refugees was another. One of Trump's first acts of major significance in office will be to fill the Supreme Court seat left open by Antonin Scalia's death and held open by Senate Republicans, pending the outcome of the election. Astonishingly, several nationally prominent elected Republicans declared their party's nominee unfit for office but still pledged their votes to him, with the importance of the vacant Supreme Court seat as their common justification.³ Senate Republicans moved in lockstep to

³ Tracing the evolving and often contorted positions that Republican elites took on Trump's candidacy for the presidency became a media pastime. Texas Senator Ted Cruz most clearly articulated the exact position described above, calling Trump "utterly amoral" and pointedly

deny President Obama's nominee to the Court a hearing for over 300 days between Obama's nomination of DC Circuit Chief Judge Merrick Garland and the end of Obama's presidential term, although none of them ever advanced any serious argument that Garland was unqualified to sit on the Supreme Court. On the refugee admissions issue, Donald Trump campaigned on vague but aggressive promises to eliminate humanitarian refugee admissions, suggesting at various points a religious test for immigrant arrivals (more specifically, a blanket ban on admission of Muslims) or "extreme vetting" of arrivals on the basis of their regional background (for those from the Middle East especially) (Hjelmgaard 2016). Voters rewarded the Republican senators for their unreserved and unapologetic privileging of partisanship over longstanding norms of good governance, and they rewarded, or at least did not punish, Trump for his rejection of any regard for historical practice or precedent on the issue of humanitarian refugee admissions.

In light of these developments, it may be an inauspicious time to be arguing that the internal logic of judicial decision making deserves serious and sustained attention from social scientists. This latest evidence available from our national political discourse suggests that both appointments of judges and control of refugee admissions policy are grounds of zero-sum partisan warfare, where party control of Congress and the presidency and base appeals to identity

declining to endorse him in a major speech at the Republican National Convention. When Cruz finally did endorse Trump in an online statement, he cited Trump's likely Supreme Court nominees (against Hillary Clinton's) as the key rationale for his change of heart (Schleifer, Borger and Bash 2016). Former presidential candidate Mitt Romney adopted a similar stance, saying he "respects" Republicans who supported Trump because of the stakes at the Supreme Court and refusing to endorse any alternative candidate for the presidency, while also calling Trump "a con man, a fake" who "has neither the temperament nor the judgment to be president" (*New York Times* 2016; Caldwell 2016). New Hampshire senator Kelly Ayotte participated in Senate blockade of President Obama's Supreme Court nominee and expressed approval of Trump's proposed Supreme Court nominees, while maintaining that she would "support but not endorse" him for the presidency.

politics control outcomes much more than the logic of the law or the organizational features of the courts.

These developments in national politics *do* threaten to diminish both the content and the real-world impact of judicial knowledge work. The more that the Trump administration and subsequent presidential administrations succeed in placing on the federal courts judges who will reliably echo their own ideological preferences, and the more that policy debates on issues like asylum become polarized and simplified, the less the federal judiciary will be an interesting site to study the social life of ideas. Nonetheless, my arguments regarding what happened in asylum cases in the federal courts between 1968 and 2015 are not invalidated by the events of 2016. I will also argue that whatever unfolds in the next several years, the ground covered here is likely to hold important lessons for the future for those interested in court functioning from a normative perspective.

Notwithstanding the fights over asylum admissions and federal judicial appointments in the 2016 election, the set of asylum decisions I have analyzed here (all decided between 1968 and 2015) are mostly far removed from the front lines of domestic political contestation. The appointment of both Courts of Appeals judges and Supreme Court Justices has become steadily more politicized over time (with Supreme Court appointments far more politicized than Courts of Appeals appointments at every step). But the close scrutiny of prospective judges' and Justices' views in the appointments process has rarely if ever centered on immigration law, much less on asylum as a subdomain of immigration law. The most politically charged cases in my database are those decided in the DC Circuit and the Supreme Court (e.g. *INS v. Chadha*, with its implications for separation of powers doctrine, and the Haitian class action claims focused on procedural rights of refugees, all discussed in chapter 4). None of these most acutely political

cases are highly relevant to my analysis. They are not the cases that delve most deeply in the definition of statutory terms from the Refugee Act, nor are they cases implicated in especially illuminating or especially many interpretive disputes. *Those* cases—the ones implicated in extended dispute chains or otherwise central to my analysis—are generally not cases where powerful political interests are at stake. My discussion of contextual characteristics of PSG-disputing cases (pp. 181–185) bolsters this conclusion.

I have argued throughout this dissertation that the social determinants of judicial decision making I have identified here are not fixed in place. Court norms and rules change, and even the model of judicial reasoning—its reliance on precedent, canons of construction and so on—is subject to change over time, albeit at a slower rate. The determinants of judicial decision making in asylum *may* shift substantially under the weight of a Trump administration’s judicial appointments and immigration policies. Trump’s ascendancy to power was so surprising to practically all observers, and norm shattering in so many respects, that many developments in politics that once seemed outlandish now seem possible or even probable. There are already portents of how the new norms of politics will reverberate in the work of judges: *New York Times* Supreme Court reporter Linda Greenhouse has recently argued persuasively that Chief Justice Roberts’s silence on Senate inaction to fill vacant judicial seats is an indicator that even appeals for judicial independence are coming to be seen as partisan and instrumental—and that perhaps Roberts is less willing than his predecessors to defend judicial independence when it doesn’t serve his own political preferences (Greenhouse 2017).

If the model of judicial decision making in the federal courts does shift substantially in the near future, it will be a test of every analytical approach to understanding courts and decision making, including the “decision making as knowledge work” approach I have pursued here.

Dramatic changes in court functioning and judicial decision making outcomes independent of changes in the laws would, of course, favor realist arguments over and against legalist arguments. A move towards judges who are more subordinate to the political branches and more clearly instrumental in their decision making would make many of my arguments less applicable to the federal appellate courts.

In such a situation, my analysis could serve as a useful prop to *normative* argumentation even as it ceases to be a good analytic description of the world in 2017 and beyond. Outside observers who hope to see the courts as sites of objective judgment, independent of the political branches and constrained by the law, would need to describe court functioning in a way that has explanatory value while preserving the idealistic notion that logical consistency and statutory constraints play the role in shaping judicial decisions that they are supposed in principle to play. That need would compel them to search for a realist account that acknowledged the full force of political and instrumental influence in judicial decisions while still preserving the argument that judicial decisions can be meaningfully constrained by the internal logic of the law as a knowledge system.

I have aimed to hit that mark with the approach to understanding judicial decisions I have offered in this dissertation. As I put it above on p. 263, I have argued that judges' preferences are not formed in isolation from the knowledge system in which they operate. To put it yet again differently, I have offered a realist account of judging that treats the law as *foundationally* a knowledge system. It is a knowledge system that contains within itself inconsistent rules, methods and substantive conclusions—as well as some substantive conclusions that are simply erroneous as matters of fact. The system is subject to exogenous pushes and pulls, including organizational dynamics and temporal contingencies that bear little relation to the internal rules

that are “meant” to guide the development of law. Those internal rules can also be overridden in small and (less often) consequential ways by judges acting out their preferences. But notwithstanding all of that, I have described asylum adjudication in the federal courts as a system with enough integrity that these *external* influences can be subject to normative critique from an *internal* perspective—for example, by demanding clearer standards and more consistency in judges’ importation of empirical claims beyond the case record. While that normative, internal perspective is not my own, it will be a positive accomplishment of this work if it provides a point of leverage for scholars with different argumentative agendas.

Appendix A. Coding procedures in hard cases

The basic principle of my coding scheme has been to reflect as closely as possible the explicit, systematic understanding—the “logic” as it is sometimes called—of the law as understood by judges and lawyers. This principle has governed both the rules by which I identified legal disputes and the categories into which I coded them. Case law interpretive disputes can occur in several dimensions, and the coding difficulties that arise vary somewhat across these several dimensions. My search procedures in Westlaw are outlined in chapter 2. In this appendix, I give examples of how I have dealt with difficult and borderline cases in coding.

A.1 Coding panel disputes

When a separate opinion concurs in the judgment of the majority and disagrees only insofar as it finds it necessary to reach a legal question that the majority does not (or vice versa), I have not coded a dispute. These differences represent different interpretive approaches to a given case but not interpretive disputes per se. When such differences are developed into competing claims about the court’s jurisdiction in a case or its standard of review, I do code a dispute. In cases where a separate concurrence holds that the case is determined by a controlling precedent in the way that the majority argues but writes separately to express some doubt about the validity of that controlling precedent, I have not coded a dispute. In cases where a separate concurrence signals that it does not join in the majority reasoning in a particular section of the opinion but provides no information as to why, I have not coded a dispute—these cases signal the possible existence of an interpretive dispute, but no part of their semantic or pragmatic meaning actually amounts to a dispute. In the very small number of cases with one-line dissents that do not explain any part of the reasoning for the dissent (3 cases total in my database of pairwise disputes), I have coded a dispute as “not specified.” By dissenting, the authors of these

one-line opinions do signal their interpretive disagreement with the majority, even though they give us no information about it. This last set of cases is a trivial addition to my database and do not bear on my analysis.

The difficult coding decisions in instances of panel disputes arose when (1) the panelists did not agree in their characterization of the dispute or (2) there were multiple, overlapping disputes contained within the dissent or concurrence.

An example of a difficulty of type (1) is when the dissent argues that the majority has mischaracterized the weight of the evidence in the case—which I would code as “Standards of proof”—and the majority opinion explicitly challenges this characterization by the dissenting panelist by arguing that the dissenting panelist has misunderstood the standard of review that the court is supposed to apply, which I would code as “Procedural—standard of review.” This kind of coding difficulty emerges only with respect to panel disputes or the occasional questions that go back and forth between the Circuits more than once without reaching a resolution. For most interpretive disputes, the disputing (later in time) author has the opportunity to make the decisive formulation of the question. For this reason, I take the later formulation as my primary guide in coding disputes. In the case of panel disputes, that means the dissent or separate concurrence. In complicated opinions, particularly those where the main panel explicitly engages and attempts to refute the argument of the dissent or separate concurrence, I have aimed to give a single characterization of the dispute that is recognizable to both sides, even if that means the characterization loses some specificity. Where that is not possible (for example, where one side considers the dispute to be about standards of proof and the other takes it to be about standard of review, I have *either* coded two disputes *or* I have given precedence to the framing of the dispute given by the dissent/concurrence. The choice between these two options was made on a case-by-

case basis, depending on my assessment of the depth of the disagreement. If the panel insists, at length and in detail, that the dissent has erred in its construal of the court's standard of review, and the dissent insists, at length and in detail, that no reasonable observer could view the evidence in the record and come to the same conclusions as the panel, then I have coded two separate disputes. If the opinion and/or dissent are both relatively vague and cursory, acknowledging little more than that they disagree over whether remand of the case was appropriate, I have coded one dispute and allowed the dissent/concurrence to control the coding category.

The most complicated example of a difficulty of type (2) is the case of *Shi Liang Lin v. U.S. Department of Justice* (2nd Cir. 2007, 494 F.3d 296). The Second Circuit heard the case en banc, and the case generated two separate concurrences and a dissent, with Judge Sonia Sotomayor (now Justice Sotomayor of the Supreme Court) joining one concurrence and also authoring her own. Judge Guido Calabresi authored the dissent, joined by no other colleagues. In that messy setting, I ultimately coded five distinct disputes: two between Calabresi and the majority opinion, one between Calabresi and the two separate concurrences, two between the separate concurrences and the majority. Few panel disputes approach this level of complexity, but those that do are a useful reminder that inter-coder reliability would surely be imperfect following my procedures. There are subjective judgments to be made about lumping or splitting many-sided disputes.

A.2. Coding within-court abrogations and Circuit Court splits

Two difficulties arise here, and both are more acute than the difficulties involved in coding panel disputes. They are (1) distinguishing when disputes have and have not occurred and

(2) determining when a dispute is a repeated instance of a dispute that has already been made explicit in the case law record versus an appearance of a new dispute.

In determining when a dispute has or has not occurred, I am again guided by the presentational decisions of the (potentially) disputing court. Three examples may help to clarify the decisions I have made. Prospectively, a dispute arises between *Ezeagwuna v. Ashcroft* (3rd Cir. 2003, 325 F.3d 396) and *Lin v. U.S. Department of Justice* (2nd Cir. 2006, 459 F.3d 255) over the question, “are consular letters admissible as evidence in asylum cases on constitutional or on statutory grounds?” In the earlier case, the Third Circuit determined that such letters are admissible on Constitutional grounds. In the later case, the Second Circuit determined that such letters are admissible on statutory grounds, and did not reach the question of whether they are admissible on Constitutional grounds, following the legal principle that the courts should avoid unnecessary Constitutional adjudication. I have not coded this engagement as an interpretive dispute. The Third Circuit did not explicitly consider admissibility on statutory grounds, so we cannot know what they would have said about it, and the Second Circuit, following one of the standard artifices of legal reasoning, declined to “reach” the question that the Third Circuit did explicitly decide.

A second prospective dispute arises within the Ninth Circuit, between *Lim v. INS* (2000, 224 F.3d 929) and *Ruano v. Ashcroft* (2002, 301 F.3d 1155) over the question, “is an unfulfilled threat constitutive of past persecution?” Here again I have not coded the engagement as an interpretive dispute, following the presentation given by the Ninth Circuit panel in *Ruano*. The court found against the appellant in *Lim* even though he was threatened, finding that his experiences were not enough to establish past persecution. In *Ruano*, the court relied on *Lim* but found in favor of the appellant and justified the decision in part by distinguishing the case from

the facts presented by Lim. The appellant Ruano was, the court held, “closely confronted,” which made his past experiences different from Lim's in such a way as made a decisive difference to the law.

A third prospective dispute arises between *Luciana v. Attorney General of the U.S.* (3rd Cir. 2007, 502 F.3d 273) and *Ghazali v. Holder* (6th Cir. 2009, 585 F.3d 289) over the question, “is a ruling of frivolousness permissible in the context of an untimely asylum application?” This engagement I have coded as a legal dispute in my database, even though the engagement is limited. The Third Circuit panel found that the basis for the legal claim in the U.S. Code is “far from clear” and so does not lay out a detailed position that the Sixth Circuit could argue against. However, the Sixth Circuit in *Ghazali* argued against the limited reasoning and the conclusion of the Third Circuit at several paragraphs’ length and relies on foundational legal principles (*Chevron* deference and *stare decisis*) in an argument that makes it clear that the Sixth Circuit panel believed the Third Circuit had committed an error of law.

Now I turn to the issue of when a dispute is a repeated instance of a dispute that has already been made explicit versus an appearance of a new dispute. Sociologically, both phenomena are interesting. There are a few questions that become contested across multiple cases or multiple Circuits—for example, “is past persecution alone sufficient to ground a successful asylum claim, if it is severe enough?” On this question, the First, Eighth and Tenth Circuits line up on one side against Second and Seventh Circuits. The Fourth and Ninth Circuits produce decisions that argue both sides. Other cases express quite narrow disagreements that could be subsumed to broader disputes, but not without loss of information.

I have aimed to code every dispute in the most general terms possible without collapsing it to any other legal question that is not specifically addressed by the same cases. For example, I

encode separate disputes over the question, “Does service in a military organization count as membership in a particular social group that could ground an asylum claim?” (*Castañeda-Castillo v. Holder*, 1st Cir 2011, 638 F.3d 354 and *Gavilano Amado v. U.S. Attorney General*, 11th Cir 2013, 522 Fed.Appx. 602) and “Can attacks motivated by one’s military service be the basis for a well-founded fear of persecution on account of political opinion?” (*Chanco v. INS*, 9th Cir 1996, 82 F.3d 298 and *Abaya v. INS*, 9th Cir 2001, 2 Fed.Appx. 850). While both disputes concern whether military service can ground a claim to membership in a protected category for the purposes of an asylum claim, the distinction between protected categories (particular social group vs. political opinion) in the two dyadic disputes is both legally and sociologically relevant. I coded more abstract disputes over whether “particular social group” is defined by certain determinate features (“voluntary association,” “immutable characteristic,” etc.) separately and did not take them to be in direct contention with the less abstract question—“does service in a military organization count as membership in a particular social group”—of *Castañeda-Castillo* and *Gavilano Amado*.

A.3. Interpretive disputes between the Courts of Appeals and the Supreme Court

The coding difficulties in identifying interpretive disputes within the judicial hierarchy more closely resemble the difficulties in coding panel disputes than the difficulties in coding Circuit splits. The function of the judicial hierarchy is to overcome uncertainty about the answers to particular questions of law, and for that reason there are fewer oblique or ambivalent engagements between the Courts of Appeals and the Supreme Court. Notwithstanding occasional complex disputes within Supreme Court panels, Supreme Court opinions tend to provide very explicit and clear guidance on legal questions to the lower courts. The volume of cases and of

legal disputes is also much less between the Circuits and the Supreme Court than exists between the Circuits.

I have relied on Westlaw's negative case history indexing to identify 18 legal disputes between the Supreme Court and the Courts of Appeals. A single challenging coding decision merits mention here. A dispute arises between the Ninth Circuit and the Supreme Court in *Ventura v. INS* (264 F.3d 1150 and 537 U.S. 12) as to whether the Ninth Circuit erred by reviewing de novo the appellant's asylum eligibility. The Supreme Court determined that the answer was yes and reversed the Ninth Circuit decision, ordering that they should have remanded the case to the BIA for further consideration rather than conducting and concluding a de novo review. Later, precisely the same dispute manifested again in *Thomas v. Gonzales* (409 F.3d 1177 and 547 U.S. 183). The Supreme Court decision in *Thomas* holds, "the Ninth Circuit's failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal." One could identify the Supreme Court's decision in *Orlando Ventura* and the Ninth Circuit's decision in *Thomas* as constituting a dyadic dispute, which would require recognizing an entirely new dimension of dispute: "Lower court declines to follow Supreme Court decision." Evidently the Supreme Court, in their decision in *Thomas*, understood the Ninth Circuit *Thomas* decision in these terms. I have not coded this dispute, however. The Ninth Circuit in *Thomas* explicitly acknowledges the *Ventura* reversal and indicates that, by its own understanding, it is appropriately following the Supreme Court precedent. Whether or not this is disingenuous (as, again, the Supreme Court seems to imply with its curt summary reversal), I have not coded it as a separate interpretive dispute. The introduction of an entirely new category of dispute would introduce other complications to my analysis without clear payoff.

A.4. Strategy for networking disputes

Some of the most sociologically interesting interpretive puzzles are those that span more than one dyad of opinions. In these instances, sometimes a case A will clearly articulate a legal interpretive claim that is explicitly in dispute with several other cases but will not cite *every* other case that is anywhere implicated in the identical dispute. For instance, if cases B and C line up together against cases D, E and F on some legal question, case A may cite B, C and D but *not* cite E or F. The failure of the Ninth Circuit panel in *Estrada-Posadas* to cite the *Sanchez-Trujillo* decision on the question of whether a family is a particular social group—discussed in chapter 5—is one such example. Another example is the Ninth Circuit’s holding in *Rivera-Moreno*, made “notwithstanding” the Supreme Court’s *Elias-Zacarias* decision but in defiance (unstated) of what its sister Circuits had interpreted *Elias-Zacarias* to mean. In these instances, I have filled out a network of disputes by treating *Estrada-Posadas* and *Sanchez-Trujillo*, as well as *Elias-Zacarias* and *Rivera-Moreno*, as disputing dyads. I have *not* adopted this practice, however, for the Supreme Court memorandum opinions that overturn a lower court case “in light of” another opinion without elaborating any further (as an example, see *Ikharo v. Holder*, S.Ct. 2012, 132 S.Ct. 997). Filling out the network by linking each of these memorandum opinions into the network of disputing cases would distort the measures of inter-court dispute rates without adding any useful information.

A.5. General strategies for separating disputes into coding categories

My coding scheme consists of five broad categories of dispute and 17 more finely distinguished categories.

Figure A.1. Categories of dispute

-
1. Conditions for “well-founded fear”
 2. Designation of “persecution”
 3. Designation of “particular social group”
-

4. Designation of “political opinion”
Figure A.1, continued. Categories of dispute
5. Designation of “religion”
6. Statutory language—other
1–6: Whom does the statutory law protect?
7. Questions surrounding internal flight alternative
8. Questions surrounding resettlement
7–8: Who no longer needs protection?
9. Designation of “particularly serious nonpolitical crime,” etc.
10. Designation of “persecutor bar”
9–10: Who is not deserving of protection?
11. Standards for asylum and withholding of deportation distinguished
12. Standards of proof
11–12: What are the appropriate evidentiary standards?
13. Procedural—Chevron deference questions
14. Procedural—jurisdiction
15. Procedural—standard of review
16. Procedural—other
13–16: Procedural questions
17. Not specified

When there is a single dispute that is in turns presented as both a procedural and a substantive issue, I opt for the substantive coding.

The most finely distinguished codes are numbers (1)–(6) and numbers (13)–(16).

Disputes coded under (1) in the list above concern whether undisputed facts are sufficient to ground a “well-founded fear of persecution” (judges sometimes, but not always, refer to this standard as a two-part test where “subjective” and “objective” conditions must be met). For example, “when appellant has undergone female genital mutilation (FGM) in the past and claims well-founded fear, is there any basis to ground a future fear of persecution?” Disputes coded under (2) concern whether particular events (for example, being threatened with death over the phone, being roughly handled during a police interrogation) can amount to “persecution.” Disputes coded under (3) to (5) concern the designation of groups that can be said to be protected under the statutory law. A small number of disputes concern the interpretation of statutory

language but do not fall into one of the first five categories. For example, “is it appropriate to ‘precisely quantify’ the level of fear that would qualify as well-founded fear?” These cases are coded under (6) (“Statutory language—other”).

Several procedural issues arise continuously in these cases. “Standard of review” disputes concern whether the court has applied the correct evidentiary standard in a given case (for the purposes of most legal questions in political asylum law at present, “substantial evidence” must “compel” a reversal of the BIA holding if the appellate courts are to take any action). I distinguish these disputes from questions over *whether the undisputed facts meet the requisite standard of proof* (coded as “Standards of proof”) and also from *what standards of proof are required for refugee status determination and for withholding of removal* (coded as “Standards for asylum and withholding of removal distinguished”). “Jurisdiction” disputes concern whether the courts have authority to review particular cases and, in reviewing particular cases, whether they have authority to taken certain actions and review particular claims. “*Chevron* deference questions” concern whether the courts have accorded the appropriate deference to BIA holdings as required by the Supreme Court in *Chevron USA v. National Resources Defense Council*. I code all other procedural questions, including questions about whether proceedings have violated due process rights, under the residual category (16).

Appendix B. Asylum Law Timeline

	International law	U.S. legislation and executive orders	U.S. major cases (BIA and federal courts)	International political and humanitarian context
1945				World War Two ends
1946				
1947				
1948	UN Universal Declaration of Human Rights			
1949				
1950				
1951	UN Convention Relating to the Status of Refugees (U.S. not signatory)			
1952		Immigration and Nationality Act of 1952		
1953				
1954				
1955				
1956				
1957				
1958				
1959				
1960				
1961				
1962				
1963				
1964				
1965				
1966				
1967	UN Protocol Relating to the Status of Refugees			
1968	US becomes signatory to UN Protocol	Immigration and Nationality Act of 1965		Prague Spring
1969				
1970				

	International law	U.S. legislation and executive orders	U.S. major cases (BIA and federal courts)	International political and humanitarian context
1972				
1973				Military coup in Chile
1974				
1975				
1976				
1977				
1978				
1979				People's Republic of China introduces One-Child Policy Salvadoran Civil War begins
1980	Vienna Convention on the Law of Treaties enters into force	U.S. Refugee Act		
1981				Sandinista-Contra war begins in Nicaragua
1982				
1983				
1984	Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama UN Convention Against Torture (U.S. signs but does not ratify)		INS v Stevic (S.Ct.) Chevron USA, Inc. v. National Resources Defense Council (S.Ct.)	
1985			Matter of Acosta (BIA)	
1986			Sanchez-Trujillo v INS (9th Cir.)	
1987			INS v. Cardoza-Fonseca (S.Ct.)	

	International law	U.S. legislation and executive orders	U.S. major cases (BIA and federal courts)	International political and humanitarian context
1988			INS v. Abudu (S.Ct.)	
1989	UN Convention on the Rights of the Child			
1990				
1991				Collapse of Soviet Union Military coup in Haiti
1992		George Bush signs Kennebunkport Order mandating return of Haitian asylum seekers interdicted at sea	INS v. Elias-Zacarias (S.Ct.)	
			INS v. Doherty (S.Ct.)	
1993			Fatin v. INS (3rd Cir)	
1994				
1995			Ghaly v. INS (9th Cir)	
1996		Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)		
1997				
1998				
1999			INS v. Aguirre-Aguirre (S.Ct.)	
2000			INS v. Hernandez-Montiel (9th Cir)	

	International law	U.S. legislation and executive orders	U.S. major cases (BIA and federal courts)	International political and humanitarian context
2001				Sept. 11, 2001 terrorist attacks U.S.–Afghanistan War begins
2002			INS v. Orlando Ventura (S.Ct.)	
2003			Castellano-Chacon v. INS (6th Cir.)	U.S.–Iraq War begins
2004				
2005		REAL ID Act	Thomas v. Gonzales (9th Cir. en banc)	
2006			Gonzales v. Thomas (S.Ct.)	
			In re: C-A- (BIA)	
2007			Koudriachova v. Gonzales (2nd Cir.)	
2008				
2009				
2010		Refugee Protection Act (Senate bill introduced but not passed)		
2011				Arab Spring Syrian Civil War begins
2012			Cece v. Holder (7th Cir.) Gjura v. Holder (2nd Cir.) Henriquez-Rivas v. Holder (9th Cir.)	

	International law	U.S. legislation and executive orders	U.S. major cases (BIA and federal courts)	International political and humanitarian context
2013			Cece v. Holder (7th Cir. en banc) Henriquez-Rivas v. Holder (9th Cir. en banc)	
2014				
2015				
2016				
2017		President Trump signs two executive orders to limit immigration and refugee flows from several Muslim-majority countries. The first order is withdrawn; the second faces ongoing constitutional challenges in the federal courts.		

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