



ARTICLE

Percolation's Value

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Abstract. Few legal metaphors enjoy more prominence than that of a legal issue “percolating” through the lower courts until the Supreme Court is ready to resolve it. Just two Terms ago, for example, the Court declined to answer a question presented in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, reasoning that further percolation would aid it in developing the scope of constitutional protections for a woman’s right to choose. In *Trump v. Hawaii*, Justice Clarence Thomas wrote to express dismay that nationwide injunctions are “preventing legal questions from percolating through the federal courts.” Similarly, Justice Neil Gorsuch wrote in *Department of Homeland Security v. New York* that nationwide relief undermines “the airing of competing views that aids [the] Court’s own decisionmaking process,” a view shared by many critics of the lower courts’ use of nationwide injunctions in recent years. A common presumption is that percolation is valuable.

This Article questions that presumption. Its thesis is that, at best, percolation’s benefits will outweigh its costs under limited and contingent conditions—conditions not likely to replicate themselves across a broad range of cases. In advancing that thesis, the Article makes four contributions to the literature on federal court practice and procedure. First, as a historical matter, it shows that interest in percolation’s value is a relative latecomer to the jurisprudential scene. Second, as an analytical matter, it distinguishes between informational and institutional accounts of percolation’s value. Informational accounts highlight percolation’s potential to provide useful information to enhance the Court’s decisionmaking as to a particular legal issue. Institutional accounts, by contrast, see the percolation process as beneficial to the effective functioning of the federal court system as a whole. With this important but largely unrecognized distinction in mind, the Article makes a third contribution by showing that both accounts are subject to significant limitations. In particular, both the informational and institutional accounts of percolation’s value are highly issue-dependent and context-specific. Therefore, as a prescriptive matter, this Article makes a fourth contribution by highlighting a set of practices that the federal courts or Congress might adopt in response to the limited nature of percolation’s informational and institutional benefits.

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Table of Contents

Introduction	365
I. The Practice of Percolation	371
A. The History of Percolation	372
B. Percolation Today	379
1. The Supreme Court's certiorari practice.....	380
2. Nationwide injunctions.....	381
3. Nationwide class certification.....	383
4. Nonmutual collateral estoppel.....	384
5. Multidistrict litigation	385
6. Patent litigation.....	386
C. The Costs of Percolation.....	387
II. Percolation's Informational Value.....	389
A. Crowdsourcing.....	390
B. Factual Debiasing.....	395
C. Experimentation	398
D. Audience Reactions.....	402
E. Signaling	404
III. Percolation's Institutional Value.....	409
A. Percolation and Engagement	410
B. Percolation and Lower Courts' Decisionmaking Capabilities.....	414
C. Percolation and Supreme Court Nondecision.....	416
D. Percolation and Reciprocal Legitimation	419
IV. Percolation's Future	423
A. Issue-Specific Evaluation.....	423
B. Transparency	425
C. Percolation Without the Costs?.....	426
Conclusion.....	432

Introduction

Few legal metaphors enjoy more prominence than that of a legal issue “percolating” through the courts. The underlying image is intuitive and appealing: Like crude and granular liquid seeping through a purifying filter, a difficult legal issue becomes clearer, cleaner, and more refined as more lower courts have the chance to weigh in on its merits. When at last the time comes for the Supreme Court to resolve that question for itself, the prior percolation of the issue will help the Justices render a decision that is especially thoughtful and well-informed. The process has its costs, to be sure: Issue percolation can yield delay, repetitive litigation, nonuniformity, and prolonged uncertainty about the content of the law. But proponents of the process maintain that those costs are often outweighed by the benefits that percolation provides. Percolation, the argument goes, has *value*. And the federal courts would do well to take its value into account.

This is by no means a merely academic idea. Much to the contrary, the Supreme Court and its individual Justices have adverted to percolation’s value in decisions about matters of federal court practice and procedure. Just two Terms ago, in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, for instance, the Court justified its decision not to address one of the questions presented by pointing to its “ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals,”¹ with Justice Clarence Thomas stating more explicitly that “further percolation may assist our review of this issue of first impression.”² Similarly, in *Maslenjak v. United States*, decided in 2017, Justice Neil Gorsuch noted in his separate opinion that “the experience of . . . thoughtful colleagues on the district and circuit benches” can aid the Court by “yield[ing] insights (or reveal[ing] pitfalls).”³ In *Trump v. Hawaii*, Justice Thomas wrote separately to express his concern that nationwide injunctions were “preventing legal questions from percolating through the federal courts,”⁴ and more recently, in *Department of Homeland Security v. New York*, Justice Gorsuch similarly worried that such injunctions undermined “the airing of competing views that aids this Court’s own decisionmaking process.”⁵ And Justice Ruth Bader Ginsburg once maintained that “periods of ‘percolation’ in, and diverse opinions from, state and federal

1. 139 S. Ct. 1780, 1782 (2019) (per curiam).

2. *Id.* at 1784 (Thomas, J., concurring).

3. 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment).

4. 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

5. 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

appellate courts may yield a better informed and more enduring final pronouncement by this Court.”⁶

At the same time, and as other judges and commentators have maintained, percolation’s value is neither obvious nor uncontested. Writing in 1986, then-Associate Justice William Rehnquist argued that percolation “makes very little sense in the legal world in which we live.”⁷ Three years earlier, Justice Thurgood Marshall had similarly questioned “those of my colleagues who agree with me [on the merits] but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem.”⁸ Scholars too have questioned whether “meaningful percolation occurs” when the Court waits for intercircuit conflicts before granting petitions for certiorari.⁹ And they question whether, if percolation does occur, it really confers the concrete benefits that are often attributed to it.¹⁰ The question of percolation’s value, one might say, has itself been percolating for quite some time.

It is against this backdrop that we offer our own account of percolation’s value—an account that offers several contributions to the existing literature. Our overall take is a qualifiedly skeptical one. Without discounting the possibility that *some* instances of percolation might confer benefits that exceed their costs, we are not convinced that, as a general matter, the Supreme Court

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6. *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); *see also* *Dodd v. United States*, 545 U.S. 353, 371 (2005) (Stevens, J., dissenting) (noting that “[b]ecause of the need for percolation, and the time it takes for cases to come to this Court from the courts below, it seems unlikely” that the Court would hold that a new rule of constitutional law applies retroactively within one year of issuing the new rule itself).
 7. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986).
 8. *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from the denial of certiorari).
 9. Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 748 (2018).
 10. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 60 (1994) (“[T]he overall value of issue percolation in the lower courts for ultimate Supreme Court rulemaking has commonly been exaggerated.”); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 634 (1989) (“As applied to judicial interpretations of federal statutes, ‘percolation’ is a euphemism for incoherence.”); Henry J. Friendly, *The Second Circuit, 1970 Term—Foreword: The “Law of the Circuit” and All That*, 46 ST. JOHN’S L. REV. 406, 407 (1972) (suggesting that percolation has little to contribute to Supreme Court resolution of particular questions of federal law). There is, moreover, widespread agreement that percolation has concrete costs, including doctrinal uncertainty and nonuniformity in the rule of federal law. *See, e.g.*, Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689 (1990); *see also* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 306 (2005) (noting that “the idea of percolation is in substantial tension with the rule of law”); *infra* Part I.C (describing costs associated with the percolation process).

should go out of its way to ensure that multiple lower courts offer answers to legal questions that the Court already intends to decide.¹¹ Thus, for instance, we reject the idea that the need to foster percolation generally provides a good reason for denying certiorari on (or otherwise declining to decide) an issue that the Court would otherwise be inclined to take on. Nor do we think that the potential effects on the percolation process should weigh as a significant factor in ongoing debates concerning nationwide injunctive relief,¹² nationwide class certification,¹³ multidistrict litigation,¹⁴ and other procedural questions that implicate the ability of multiple lower courts to opine on legal questions prior to Supreme Court review.¹⁵ At best, we think, percolation's benefits will outweigh its costs under limited and contingent conditions—conditions not likely to replicate themselves across a broad range of cases.

We begin our analysis by tracing the history of the percolation metaphor itself—a history that, as best we can tell, existing legal scholarship has not yet set forth in any detail. We show in Part I that courts' and commentators' own interest in percolation's value is a relative latecomer to the jurisprudential scene. Indeed, for several decades after 1891, when Congress authorized the Court to exercise certiorari jurisdiction over decisions of the federal courts of appeals, conventional wisdom emphasized the values of *comity* and *uniformity* as primary desiderata of lower-court decisionmaking¹⁶—values in stark tension with the independent, conflict-generating style of decisionmaking on which effective percolation depends.¹⁷ Having considered that history, we then

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11. For a discussion of the Supreme Court's modern percolation-related practices, see notes 25-29 and accompanying text below.
 12. *See, e.g.,* L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011) (“[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals.”); *see also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1107 (2018) (“Nationwide injunctions can also stymie the development of the law and the percolation of legal issues in the lower courts.”).
 13. *See, e.g.,* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (noting that “nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court’s docket,” and opining that a federal court “should take care to ensure that nationwide relief is indeed appropriate in the case before it”).
 14. *See, e.g.,* Andrew D. Bradt & Zachary D. Clopton, Essay, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 N.W. U. L. REV. 905, 918-19 (2018) (arguing that multidistrict litigation is “an antipercolation device” because “all potentially percolating cases . . . [could be] consolidated and resolved in the MDL court”).
 15. *See infra* Part I.B (describing these and other doctrinal contexts in which the question of percolation's value has relevance).
 16. *See infra* Part I.
 17. *See infra* Part II (discussing informational accounts of percolation's value).

turn to the present day, highlighting the various ways in which the question of percolation's value continues to carry practical relevance, not just in the most evident sense of guiding the Court's own certiorari practice but also in the subtler sense of informing debates about procedure and remedies across all levels of the federal court hierarchy.

With the stakes of the question on the table, we then catalog and consider a variety of different arguments that might be made in percolation's favor. We begin in Part II with the standard and oft-stated suggestion that percolation enhances Supreme Court decisionmaking by conferring *informational* value.¹⁸ In particular, we outline five different ways in which percolation might generate useful information for the Court to consider when taking on a question for itself. Several of these informational accounts, we argue, founder not so much on the idea that percolation may produce information of value to the Court, but rather on the idea that percolation is *uniquely* capable of doing so. Much to the contrary, many of the ideas, insights, facts, and signals to which percolation might give rise are the same ideas, insights, facts, and signals that the Court would in any event confront when perusing the litigants' submissions, amicus briefs, and outside commentary that a decision to grant certiorari on the issue is likely to generate on its own. This rebuttal, to be sure, does not apply to the entirety of the informational case, and we do acknowledge that percolation might sometimes manage to yield information that the Court would otherwise have trouble obtaining. But it highlights an important defect in the conventional account of percolation's value, one that seems particularly glaring within our current informational age.

Having considered and largely rejected these informational arguments, we then ask in Part III whether percolation might have value wholly apart from its oft-presumed ability to improve the Court's resolution of particular legal questions. In particular, we consider four different *institutional* accounts that see the percolation process as beneficial to effective functioning of the federal court system as a whole. First, we consider the suggestion that percolation might help to create more occasions for the Court to engage directly with the work of the lower courts, thus facilitating a healthy and comity-enhancing

18. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (noting that percolation might “yield a *better informed* and more enduring final pronouncement by this Court” (emphasis added)); *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., respecting the denial of the petitions for writs of certiorari) (“I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date.”); Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998) (arguing that percolation will improve the Court's resolution of particular legal issues by offering it “well-reasoned opinions” of lower courts and “a record of the consequences of different legal regimes”); see also *infra* notes 147-50 and accompanying text (collecting additional sources).

intra-branch dialogue between the Court and its subordinates.¹⁹ Second, we consider the possibility that percolation might help to improve the lower courts' own decisionmaking capabilities by ensuring that they have access to the sorts of difficult and high-profile cases that are most likely to sharpen their adjudicative skills.²⁰ Third, we consider the possibility that the Justices' own belief in percolation's value might help to incentivize the Court to maintain a beneficial noninterventionist posture toward issues that the lower courts can and should resolve themselves.²¹ And finally, building on the recent work of Neil Siegel,²² we consider the complex ways in which percolation might help to legitimate a controversial and politically sensitive Supreme Court decision, particularly under circumstances in which the Court can point to widespread lower-court consensus as indicative of that decision's legal validity.²³ These institutional rationales, we conclude, all carry some surface-level appeal. But, like their informational counterparts, they are subject to significant limitations.

We conclude in Part IV with suggestions about how courts and commentators ought to handle percolation-related issues going forward. In particular, we argue that percolation's value is simply too contingent and context-specific to support any generalized presumption in its favor. We also argue for more transparency from the Court when it comes to its own certiorari practice; in particular, we contend that, when the Court denies certiorari for percolation-related reasons, it ought to provide both *ex ante* guidance regarding the sorts of information (or noninformational benefits) it hopes for percolation to produce and, eventually, some form of *ex post* accounting of how, if at all, a completed instance of percolation facilitated its ultimate resolution of the issue. Finally, we consider an alternative means by which the Court might solicit additional lower-court input on a question it is poised to decide. More specifically, rather than subject that question to additional rounds of repetitive and costly lower-court litigation, the Court might instead simply utilize a certified-question procedure to gather the lower courts' viewpoints during the pendency of a case already before it.

That is the Article's analysis in a nutshell. But before proceeding further we want to emphasize two important points. The first has to do with the scope of the question we are considering. In particular, we take pains to distinguish throughout this Article the particular question *whether percolation has value*

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. See *infra* Part III.C.

22. See Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1186 (2017).

23. See *infra* Part III.D.

from the broader question of *how actively (or passively) the Supreme Court ought to exercise its supervisory role over the lower courts*. As we explain further below, the Court can “decide not to decide” an issue for a number of different reasons; one of those reasons, to be sure, might stem from the Court’s sense that the issue needs to “percolate” further in the courts below.²⁴ But the Court might also decline to hear that issue because (1) it regards the issue as unimportant; (2) it wants to delay resolution until a different time (for example, a nonelection year); (3) it thinks that the decentralized resolution of that issue at the lower-court level is tolerable (and perhaps even desirable); or (4) it is generally loath to meddle in the lower courts’ business. Thus, our suggestion that percolation has limited value does not necessarily imply that the Court should assume a more interventionist posture in policing for lower-court error or dictating the content of federal law. Even where percolation fails to provide a good reason for Supreme Court nondecision, numerous other considerations might still militate in its favor. What we ultimately wish to consider, in other words, is the question whether the Court would have good reason to await decisions from multiple lower courts before deciding an issue that the Court itself is already bound to decide.

The second point has to do with the nature of our methodological approach. Many of the arguments we consider depend on empirical questions that cannot be definitively resolved here. We offer hypotheses as to what the answer to these questions might be, but we do so well aware that informed speculation is by no means the same thing as quantitative measurement and that more work needs to be done in establishing (or falsifying) the hypotheses we set forth. Thus, while we are skeptical that percolation carries significant value across wide categories of cases, we recognize the need for further empirical inquiry. Our aim, in other words, is simply to identify, categorize, and cast some doubt on the central premises on which the case for percolation’s value would ultimately have to rest.

24. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-13 (Yale Univ. Press 2d ed. 1986) [hereinafter BICKEL, *THE LEAST DANGEROUS BRANCH*] (developing an account of the so-called “passive virtues” associated with Supreme Court practices that either avoid or forestall decision on the merits of unresolved constitutional questions); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40-42 (1961) [hereinafter Bickel, *Passive Virtues*] (similar); see also Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 110-11 (2007) (noting that “postponing decision to a less sensitive time may be precisely the point of the Court’s wise invocation of justiciability as an avoidance mechanism,” but arguing that “postponement may be of little value”).

I. The Practice of Percolation

Percolation is the practice of awaiting multiple lower courts' answers to a legal question that the Court is bound to decide. In the modern era, Supreme Court Justices have described this practice and debated its wisdom. By 1959, Justice John Marshall Harlan noted that "it [was] by no means unknown for the Court to grant the writ to consider an issue which at an earlier time it had refused to review."²⁵ And by the 1970s, the Justices were publicly debating percolation as a reason to delay deciding an issue. Writing in 1986, then-Associate Justice Rehnquist criticized the practice of denying certiorari to await percolation as "very strange."²⁶ More recently, Chief Justice John Roberts discussed the practice of denying certiorari to permit more lower courts to decide an issue before the Court takes it up.²⁷ And more recently still, Justice Ginsburg discussed the Court's percolation practice in highly salient, controversial cases.²⁸ As Justice Ginsburg summarized the practice in one of her opinions, in "many instances" the Court has "recognized that when frontier legal problems are presented, periods of 'percolation' . . . may yield a better informed and more enduring final pronouncement by [the] Court."²⁹ According to the Justices, then, percolation is a frequent and important practice.

It is also a modern one. The practice of percolation is a twentieth-century innovation. From 1891, when the Court's certiorari jurisdiction began, until 1985, when Justice John Paul Stevens lamented a practice of percolation on the decline, there was no extended discussion of the subject of percolation in the *United States Reports*.³⁰ Until the 1950s, leading treatises on Supreme Court practice stated that the Court would grant certiorari "as of course" when presented with a conflict between two federal courts of appeals.³¹

25. John M. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 113 (1959).

26. Rehnquist, *supra* note 7, at 11.

27. Transcript of Oral Argument at 38, *Shapiro v. McManus*, 136 S. Ct. 450 (2015) (No. 14-990), 2015 WL 8065428.

28. Mark Walsh, *Supreme Court Taking on Big Issues That Have Been Percolating for a While*, ABA J. (Sept. 1, 2019, 2:00 AM CDT), <https://perma.cc/2UFF-DJD6> (reporting that Justice Ginsburg explained that the Court likes to let issues percolate in lower courts when possible).

29. *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

30. *See California v. Carney*, 471 U.S. 386, 396-401 (1985) (Stevens, J., dissenting).

31. REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 322 (Richard F. Wolfson & Philip B. Kurland eds., rev. ed. 1951); *see also* ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE: JURISDICTION, PROCEDURE, ARGUING AND BRIEFING TECHNIQUES, FORMS, STATUTES, RULES 101 (1950); Robert L. Stern, Comment, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 465-66 (1953).

“[U]niformity of decision,”³² rather than further percolation, was paramount.³³ It was only in the second half of the twentieth century that percolation became a valorized, though much-debated, practice.

Though historically associated with the Court’s certiorari practice, the problem of percolation arises in multiple doctrinal contexts today. Recent developments within the Article III courts, particularly the explosion of nationwide injunctions,³⁴ have made this problem ripe for reconsideration. And the problem bears special importance, given percolation’s familiar and well-documented costs.³⁵

A. The History of Percolation

The idea that courts may learn from each other over time is a familiar feature of commentary on the common law process. Typical is then-Judge Cardozo’s statement that “[i]n the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.”³⁶ By learning from past opinions, the theory goes, courts work the common law pure.

The notion that the Court should allow issues to percolate is of more recent vintage. Until the 1950s, the Justices seemed more concerned with resolving conflicts promptly to ensure the uniformity of federal law.

The history of percolation begins with Congress’s restructuring of the federal judicial system in 1891. In that year, Congress enacted the Evarts Act, which created a standing appellate body for each of the nine circuits.³⁷ For the Justices, that meant discretionary certiorari jurisdiction over decisions of the courts of appeals as well as no more riding circuit.³⁸ Senator William Evarts,

32. See ROBERTSON & KIRKHAM, *supra* note 31, § 322.

33. Waiting for a conflict between two courts of appeals to develop allows some percolation, of course, but not the full percolation praised by its staunchest defenders. See *Carney*, 471 U.S. at 399-401 (Stevens, J., dissenting).

34. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 428-45 (2017) (tracing the history of federal courts’ use of national injunctions).

35. See *infra* Part I.C (cataloging the costs of percolation).

36. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

37. Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826. Until 1891, “the Supreme Court was in practice the only federal appellate court” because Congress had not created intermediate appellate courts between the district courts and the multidistrict circuit courts. Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229-33 (1979).

38. See Linzer, *supra* note 37, at 1231-36; Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1753-54, 1754 n.4 (2003) (discussing circuit riding, the “system of sending Supreme Court Justices around the country to serve as judges of the various federal circuit courts”); see also Act of Mar. 3, *footnote continued on next page*

the principal proponent of the 1891 reforms, recognized the possibility of conflict among the circuit courts of appeals and argued that the Court's certiorari jurisdiction would suffice to "make a finality on such subjects as we think in their nature admit of finality."³⁹ Such subjects might include cases in which a federal claim had been upheld in state court, and Congress amended the Judicial Code in 1914 to permit Supreme Court review in such cases.⁴⁰ By 1925, with the enactment of the "Judges Bill," Congress had settled more or less on the current framework for the Supreme Court's appellate jurisdiction.⁴¹

Then, as today, the Court's certiorari jurisdiction could be invoked to ensure uniform federal law.⁴² As the Court put it in 1897, this power "will be sparingly exercised."⁴³ One reason it might have been sparingly exercised was that the Court could trust in comity among the federal courts of appeals.

Prior to the Evarts Act's revamping of the federal judiciary, federal judges had looked to comity in order to ensure uniformity of federal law. No less an authority than Justice Joseph Story had, when riding circuit, invoked comity to defer to a prior decision of another circuit judge in litigation involving patents.⁴⁴ Discussing this practice of comity among the circuit courts shortly after the 1891 reorganization, the Eighth Circuit described it as "a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action."⁴⁵

In *Mast, Foos & Co. v. Stover Manufacturing Co.*, decided in 1900, the Court summarized this practice of comity:

Comity is not a rule of law, but one of practice, convenience and expediency. . . . [A] judge is bound to determine [cases] according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity

1911, ch. 231, § 289, 36 Stat. 1087, 1167 (eliminating the older "circuit courts of the United States").

39. 21 CONG. REC. 10,222 (1890); *see also* Linzer, *supra* note 37, at 1235.

40. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790.

41. *See* Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 936-42.

42. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575 (2008) ("Seventy percent of the Court's caseload involves questions that have divided the lower courts, and the presence of a circuit split greatly increases the chances of having certiorari granted.").

43. *Forsyth v. City of Hammond*, 166 U.S. 506, 514 (1897).

44. *See* *Washburn v. Gould*, 29 F. Cas. 312, 317 (C.C.D. Mass. 1844) (No. 17,214).

45. *Shreve v. Cheesman*, 69 F. 785, 790 (8th Cir. 1895); *see also* *Mayo v. Chelmsford* (The Chelmsford), 34 F. 399, 402 (E.D. Pa. 1888) ("It seems more important that the rule should be uniform and certain than that it should be consistent with principle.").

comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law.⁴⁶

Thus, the Court made clear that, though not a binding rule of law, comity among the lower courts was nevertheless a valuable means of ensuring uniformity of decisions.⁴⁷ Comity of this sort was particularly important in patent litigation, as the Court itself suggested,⁴⁸ but it was by no means limited to patent cases. Rather, in a variety of federal-question cases, including those involving admiralty,⁴⁹ real property,⁵⁰ customs and tariffs,⁵¹ taxation,⁵² and jurisdiction,⁵³ the circuit courts and thereafter the circuit courts of appeals invoked comity to defer to other courts' decisions in the interests of uniformity.⁵⁴

46. 177 U.S. 485, 488-89 (1900).

47. Early commentators, including Felix Frankfurter, cited *Mast, Foos & Co.* for the proposition that one court of appeals is not bound by another's precedents, leading one commentator to argue for a single court of appeals in patent cases. See Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: Part IV; Federal Courts of Specialized Jurisdiction*, 39 HARV. L. REV. 587, 618 (1926) (noting “the freedom of circuit courts of appeals to disregard each other” (citing *Mast, Foos & Co.*, 177 U.S. 485)); Note, *The Desirability of a Single Court of Patent Appeals*, 18 HARV. L. REV. 217, 217-18 (1905) (noting that the Supreme Court in *Mast, Foos & Co.* “declared that no obligation rests on one circuit to follow an adjudication in another” (citing *Mast, Foos & Co.*, 177 U.S. 485)); see also, e.g., Note, *Res Judicata in Patent Cases*, 25 HARV. L. REV. 649, 649-50 (1912) (noting that “the circuit courts are not bound by each other's precedents” (citing *Mast, Foos & Co.*, 177 U.S. 485)).

48. See *Mast, Foos & Co.*, 177 U.S. at 489 (discussing a “number of well-considered cases in the Circuit Courts and Circuit Courts of Appeals,” each involving patent disputes).

49. See, e.g., *The Chelmsford*, 34 F. at 402 (concluding, in a dispute involving a right to a maritime lien, that the court was “constrained to adopt the rule . . . established in the several districts in which these cases arose” because “[i]t seems more important that the rule should be uniform and certain than that it should be consistent with principle”).

50. See, e.g., *Shreve*, 69 F. at 790 (labeling comity among courts of “co-ordinate jurisdiction” a “principle of general jurisprudence”).

51. See, e.g., *Hill v. Francklyn & Ferguson*, 162 F. 880, 881 (3d Cir. 1908) (concluding that comity “[i]n suits of this character” counsels that a prior decision by another court of appeals, “unless clearly erroneous, should be followed” in a subsequent “similar suit”).

52. See, e.g., *McCoach v. Phila. Tr., Safe Deposit & Ins. Co.*, 142 F. 120, 121 (3d Cir. 1905) (deferring to a decision of the Second Circuit based upon “comity” and “the ground that in suits of this character uniformity in the judgments of the several Courts of Appeals is especially important”), *aff'd mem.*, 205 U.S. 539 (1907).

53. See, e.g., *In re Aspinwall's Estate*, 90 F. 675, 676 (3d Cir. 1898) (“[U]niformity of decision amongst the several courts of appeals upon such a jurisdictional question seems to us to be of paramount importance.”).

54. The newly created courts of appeals' statements about comity were not always consistent, however, with some courts of appeals suggesting that prior practices of deference among the circuit courts did not extend to circuit courts of appeals. See Arthur March Brown, *Comity in the Federal Courts*, 28 HARV. L. REV. 589, 603 (1915) (noting “diversity in some of the utterances of the Circuit Court of Appeals” after 1891

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Writing in 1915, Arthur March Brown canvassed comity within the lower courts and concluded that there was a significant, though not unvarying, practice of affording comity to prior decisions.⁵⁵ While that was particularly true in patent litigation, where the value of uniformity is obvious, it was not limited to that context.⁵⁶ As Brown summarized the state of affairs, while some circuit courts of appeals insisted on a litigant's right to "independent consideration and judgment,"⁵⁷

there has been no diversity of action. The independent and uncontrolled judgment which in a few instances has been asserted has led to no conflict of decision. On the whole, probably none is to be apprehended. The system of federal Courts of Appeals is still young. It may be trusted, as time goes on, to work out a policy of harmonious action among the coördinate jurisdictions.⁵⁸

While Brown understated the degree of disagreement among federal judges as to the strength and scope of the principle of comity,⁵⁹ particularly following

but arguing that there had been "no diversity of action"; see also *Nat'l Cash Reg. Co. v. Am. Cash Reg. Co.*, 53 F. 367, 370 (3d Cir. 1892) (explaining that the practice of circuit courts to give "controlling effect" to prior judgments in patent matters where "the patent, the question, and the evidence are the same in both suits . . . cannot be extended to this court," but that the court of appeals would "attentively consider[]" the "decisions of the several circuit courts").

55. Brown, *supra* note 54, at 603.

56. See *id.* at 596.

57. *Heckendorn v. United States*, 162 F. 141, 143 (7th Cir. 1908).

58. Brown, *supra* note 54, at 603. Frankfurter was less sanguine, though he noted that, at least with respect to patent litigation, "diversity of decisions upon a single patent in different circuits was a basis for granting certiorari." Frankfurter, *supra* note 47, at 619.

59. While federal judges and commentators described comity as a general principle of jurisprudence, see *supra* notes 45-46, judicial opinions often emphasized subject-matter-specific reasons for the practice, such as in cases involving the interpretation of particular federal statutes, jurisdictional questions, and patent-related rules, see, e.g., *Erie R. Co. v. Russell*, 183 F. 722, 725 (2d Cir. 1910) (explaining, in a case involving the Federal Safety Appliance Act, that "were the question to be decided free of authority, a majority of the court" might decide differently, but "in view of the desirability of uniformity in the decisions of the courts of the different circuits in interpreting *this act*, we feel it is our duty to follow [a prior] decision [of the Eighth Circuit]" (emphasis added)); *In re Aspinwall's Estate*, 90 F. 675, 676 (3d Cir. 1898) (emphasizing the importance of uniformity in jurisdictional matters); *Beach v. Hobbs*, 82 F. 916, 919 (C.C.D. Mass. 1897) (opining that "considerations [of comity] have a special importance as applied to a solemn and well-considered judgment of any circuit court of appeals with reference to a patent"), *aff'd in part, rev'd in part*, 92 F. 146 (1st Cir. 1899); *Off. Specialty Mfg. Co. v. Winternight & Cornyn Mfg. Co.*, 67 F. 928, 928-29 (C.C.E.D. Pa. 1895) (explaining that lower courts generally afford "respectful" consideration to each others' determinations of questions of law but that, in patent cases, circuit courts afford "conclusive effect" to prior judgments "wherever the patent, the question, and the evidence are the same in both suits, not on the ground of comity alone, but with the practical and salutary object of avoiding repeated litigation and conflicting decrees" (citing *Wanamaker v. Enter. Mfr. Co.*, 53 F. 791 (3d Cir. 1893); and *Nat'l Cash Reg.*, 53 F. 367)). Commentators emphasized the need for uniformity in patent litigation after the

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the creation of the circuit courts of appeals,⁶⁰ it is nevertheless clear that a preference for comity and uniformity underwrote important features of federal court practice in the decades before and after the 1891 reorganization of the federal judiciary.

Comity among the courts of appeals is not conducive to percolation, of course. In an opinion from 1900 that now appears prescient, the Seventh Circuit critiqued comity as “pernicious” and unnecessary because “a prompt and healthy exercise” of the Supreme Court’s appellate jurisdiction “is more likely to follow inconsistency of decisions in the courts of appeals than a harmony of rulings brought about by considerations of deference or comity.”⁶¹ But in an era when the Court’s institutional role was less focused than it is today on settling national controversies, the comity framework made a good deal of sense, even if percolation had little part to play in it.

During the first few decades after the 1891 reforms, the Court did not suggest that percolation was one of the reasons to deny certiorari. It pointed, rather, to the relative importance of the legal issue, the possibility of burdening the Court’s docket, and the need to resolve conflicts among the lower courts.⁶² Similarly, early commentators did not discuss percolation when describing the Court’s certiorari jurisdiction under the Evarts Act. In an 1891 address to Yale Law School, which was reproduced in the first volume of the *Yale Law Journal*, the president of the American Bar Association focused on the importance of uniformity of federal law and error correction by the Court in cases involving commerce.⁶³

Until the 1950s, commentators consistently characterized the Court’s practice as one of granting certiorari as a matter of course when there was a conflict between two federal courts of appeals. The idea of “tolerable conflicts,”⁶⁴ which today is central to the practice of percolation, had not yet appeared in the cases or the commentary. Instead, faced with an important conflict, the Court typically granted certiorari, at least according to reported

1891 reorganization of the federal courts. See Edmund Wetmore, *Patent Law*, 17 YALE L.J. 101, 106-07 (1907) (lamenting that, “[p]rior to the creation of our Circuit Courts of Appeals, ... a degree of uniformity was attained in the construction and application of our patent laws that has not since been possible”).

60. See *supra* note 54.

61. *Welsbach Light Co. v. Cosmopolitan Incandescent Light Co.*, 104 F. 83, 85 (7th Cir. 1900).

62. *Forsyth v. City of Hammond*, 166 U.S. 506, 513-15 (1897).

63. Comment, 1 YALE L.J. 32, 32-33 (1891) (reproducing an address by Simeon E. Baldwin, president of the American Bar Association).

64. See William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983) (“I think there is already in place, and has been ever since I joined the Court [in 1956], a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question.”).

cases discussing the grounds for certiorari.⁶⁵ Moreover, the Court continued to cite *Mast, Foos & Co.* favorably for the proposition that an “earlier decision may by comity be given great weight in a later litigation,” though it began to stress that an earlier decision “is not *res adjudicata*.”⁶⁶ As for commentary, in 1936,⁶⁷ and again in 1951,⁶⁸ a leading treatise reported that the Court could be expected to grant certiorari in the face of a well-presented conflict between two courts of appeals. As another treatise put it: “One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions . . . regardless of the importance of the particular issue. Hence the Court does not feel itself very free to deny review in the face of a square and irreconcilable conflict”⁶⁹

By the 1950s, however, the Court’s contemporary practice of tolerating conflicts had begun to emerge. In 1950, Justice Felix Frankfurter discussed the “ripening” of a legal issue in the lower courts, or what we would now label “percolation.”⁷⁰ In 1951, a practitioner comment in the *Harvard Law Review* reported that the Court was denying certiorari despite acknowledged conflict among the circuits.⁷¹ The author concluded that these cases “may well represent a new policy.”⁷² According to Justice William Brennan, there was already a policy of percolation “in place” when he joined the Court in 1956.⁷³ When, in 1959, Justice Harlan described the Court’s certiorari practice to an Australian audience, he explained that the Court would “sometimes” deny certiorari “even where a ‘true’ conflict may be said to exist.”⁷⁴

It was not until later, however, that the modern conception of percolation clearly crystallized. During the 1950s, there appears to have been little or no discussion of “percolation” as such. But by the 1970s, commentators were discussing “percolation” in connection with the perceived crisis of workload in the federal judiciary. The Hruska Commission, which proposed the creation of

65. See, e.g., *Ex parte Wagner*, 249 U.S. 465, 468-69 (1919).

66. *Triplett v. Lowell*, 297 U.S. 638, 642 (1936) (citing *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900)), *overruled in part by* *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971); see also *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 35 (1929) (discussing the “doctrine of comity, constituting a rule, not of law, but of practice, convenience and expediency” (citing *Mast, Foos & Co.*, 177 U.S. at 488)).

67. See ROBERTSON & KIRKHAM, *supra* note 31, § 292 (1936).

68. *Id.* § 322 (Richard F. Wolfson & Philip B. Kurland eds., rev. ed. 1951).

69. STERN & GRESSMAN, *supra* note 31, at 101.

70. *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of the petition for writ of certiorari).

71. Stern, *supra* note 31, at 466 (discussing cases in which the Court denied certiorari even though the courts of appeals or the respondent acknowledged the conflict).

72. *Id.* at 470.

73. See *supra* note 64.

74. Harlan, *supra* note 25, at 112.

a new centralized court of appeals to relieve the burden on the Supreme Court, discussed the costs and benefits of percolation in its 1975 report.⁷⁵ The Commission noted the costs of awaiting Supreme Court resolution of an issue: “In many cases there are years of uncertainty during which hundreds, sometimes thousands, of individuals are left in doubt as to what rule will be applied to their transactions.”⁷⁶ At the same time, however, the Commission explained, there are issues as to which percolation has the informational value of improving the Supreme Court’s decisionmaking.⁷⁷ And, “[a]s to these, there may be reason to avoid premature adjudication by a tribunal whose decisions are nationally binding.”⁷⁸ Responding to the Commission’s proposal, Judge Leventhal highlighted his contemporaneous discussion of the value of percolation in *Dellinger v. Mitchell*.⁷⁹ The Commission’s report and proposal were central to the debate about percolation in the ensuing decade.⁸⁰

By the 1980s, the Justices were debating percolation in both academic journals and judicial opinions. Discussion of the practice using the term

75. See COMM’N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 14-15 (1975), reprinted in 67 F.R.D. 195 (1975) [hereinafter HRUSKA COMMISSION REPORT]; see also Harold Leventhal, Book Review, 75 COLUM. L. REV. 1009, 1017 (1975) (reviewing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973)).

76. HRUSKA COMMISSION REPORT, *supra* note 75, at 14, 67 F.R.D. at 219. The Commission quoted the testimony of Dean Erwin Griswold of the Harvard Law School, who opined that “the gain from maturation of thought from letting the matter simmer for a while is not nearly as great as the harm which comes from years of uncertainty,” at least with respect to questions of interpretation of the Tax Code. *Id.* at 14-15, 67 F.R.D. at 219 (quoting 1 HEARINGS BEFORE THE COMMISSION ON THE REVISION OF THE FEDERAL COURT APPELLATE SYSTEM: SECOND PHASE 201 (1974)).

77. *Id.* at 14-15, 67 F.R.D. at 219.

78. *Id.*

79. Leventhal, *supra* note 75, at 1017 (quoting *Dellinger v. Mitchell*, 442 F.2d 782, 788 (D.C. Cir. 1971)); *Dellinger*, 442 F.2d at 788 (“[T]he addition of another view at the intermediate level on an issue of national consequence and highest significance provides a different focus that is not necessarily an evil but may, on the contrary, serve like a stereopticon to enhance depth perception.”); see also Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 908 (1975) (“There are advantages in multiple judicial input on issues. This is a concept of feedback, of a simmering or percolating effect.”).

80. See, e.g., Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 692-93, 699 (1984) (discussing the debate about the Hruska Commission’s recommendations, including with respect to percolation); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 315 (1983) (discussing the Hruska Commission’s recommendations in light of the value of percolation); Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1729 n.81 (1978) (discussing the costs and benefits of percolation in light of the Hruska Commission’s report).

“percolation” first appears in the *United States Reports* in 1985, when Justice Stevens argued that his colleagues had failed to allow an issue of constitutional criminal procedure sufficient time to percolate among the state courts.⁸¹ Writing in 1986, then–Associate Justice Rehnquist questioned the practice.⁸² So too did Justice Marshall in *Gilliard v. Mississippi*, in which a black defendant challenged the constitutionality of a death sentence handed down by a white jury.⁸³ Referring to both *Gilliard* and other similar cases in which the Court had also denied certiorari, Justice Marshall questioned “those of my colleagues who agree with me that the use of peremptory challenges in these cases presents important constitutional questions but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem.”⁸⁴ This practice of percolation, Justice Marshall argued, rested upon a mistaken and misapplied “States-as-laboratories metaphor” from the Court’s federalism jurisprudence.⁸⁵ Nevertheless, the percolation metaphor would continue to gain traction. By 1991, in his empirical study of the Court’s practice, H.W. Perry explained that “Justices like the smell of well-percolated cases.”⁸⁶

B. Percolation Today

Today, debates about percolation are relevant to a variety of federal court practices and procedures. In addition to holding a prominent place within debates about the Supreme Court’s certiorari jurisdiction, percolation has appeared in debates about nationwide injunctions, class certification, collateral estoppel, multidistrict litigation, and patent litigation.

81. See *California v. Carney*, 471 U.S. 386, 399-400, 400 n.11 (1985) (Stevens, J., dissenting) (arguing that “[p]remature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles,” and that “[c]onsideration of this matter by the lower courts in a series of litigated cases would surely have facilitated a reasoned accommodation of the conflicting interests” (quoting *Estreicher & Sexton*, *supra* note 80, at 716, 719)).

82. Rehnquist, *supra* note 7, at 11 (“If we were talking about laboratory cultures or seedlings, the concept of issues ‘percolating’ in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live.”).

83. See 464 U.S. 867, 867 (1983) (Marshall, J., dissenting from the denial of certiorari).

84. *Id.* at 869.

85. *Id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting)).

86. H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 230 (1991).

1. The Supreme Court's certiorari practice

The practice of percolation bears a close relationship to the Supreme Court's Rule 10, which provides that the Court will consider whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" when deciding whether to grant certiorari.⁸⁷ In keeping with this practice, the Court sometimes denies certiorari on the ground that the issues raised by a case would benefit from further percolation in the courts below.⁸⁸

For a concrete example, consider the Roberts Court's recent denial of certiorari on one question presented in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*⁸⁹ Specifically, the Court denied certiorari on the question whether a state may make it a crime for a doctor to provide an abortion when she knows that her patient has decided to have an abortion for various reasons prohibited by state law.⁹⁰ The Court pointed to its "ordinary practice" of awaiting a conflict among the courts of appeals before granting certiorari.⁹¹ Justice Thomas wrote separately to emphasize that "[t]he Court's decision to allow further percolation should not be interpreted as agreement with the decisions below," in which the courts had held the challenged state laws

87. SUP. CT. R. 10(a).

88. Percolation's value also might affect one's views regarding statutory restrictions on the Court's discretionary jurisdiction. Some federal statutes, for instance, require the initial adjudication of certain federal questions by three-judge district courts, whose judgments are thereupon appealable as of right to the Supreme Court itself. See 28 U.S.C. § 1253. That arrangement obviously compromises the Court's own ability to promote percolation; once a particular issue gets decided by a three-judge district court, that issue *must* go straight to the Court, regardless of whether the Court might prefer to wait for additional lower-court decisions on the same issue. Recently, during oral argument in *Shapiro v. McManus*, Chief Justice Roberts articulated this concern directly, noting that the appeal-as-of-right procedure was "a serious problem because there are a lot of cases that come up in three-judge district courts that would be the kind of case . . . that we might deny cert in, to let the issue percolate." Transcript of Oral Argument at 38, *Shapiro v. McManus*, 136 S. Ct. 450 (2015) (No. 14-990), 2015 WL 8065428; see also Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 108 (1996) (noting that "[t]he direct appeal from district courts minimizes opportunities for the percolation of legal issues among the lower courts, which can inform the Court's eventual disposition of an issue"). In other words, the extent of percolation's value has a direct bearing on the extent to which Congress ought to provide for immediate appeals as of right to the Supreme Court itself.

89. 139 S. Ct. 1780 (2019) (per curiam).

90. *Id.* at 1782. Specifically, the statute at issue in *Box* criminalized a doctor's performing an abortion when she knows the patient's decision was made "solely because of the race, sex, diagnosis of Down syndrome, disability, or related characteristics" of the fetus. See *id.* at 1783 (Thomas, J., concurring).

91. *Id.* at 1782 (majority opinion).

unconstitutional.⁹² As Justice Thomas put it, “[a]lthough the Court declines to wade into these issues today, we cannot avoid them forever.”⁹³

What are the justifications for this familiar practice? The answer is not the so-called “passive virtues.”⁹⁴ Debates about percolation arise in multiple doctrinal contexts, not just in the Court’s denials of certiorari. And percolation has not been a matter of concern in those justiciability doctrines—such as standing, mootness, ripeness, and so on—that Alexander Bickel focused on in developing his canonical account of the virtues of deciding not to decide.⁹⁵ Most importantly, an exercise of the passive virtues may allow the Court to “stay[] its hand” as to a controversial legal issue in one case so that it may preserve its institutional legitimacy to resolve a *different* and equally, if not more, controversial legal issue in another case.⁹⁶ By contrast, percolation matters only with respect to the resolution of the issue to be percolated.

2. Nationwide injunctions

Percolation’s value may matter long before a case comes to the Court. Whether and to what extent the value of percolation should shape the scope of injunctive relief in the lower courts remains an open question. Federal courts sometimes refer to percolation when considering whether to grant so-called “nationwide” or “universal” injunctions.⁹⁷ One court of appeals has cautioned that “nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals.”⁹⁸

Recent developments have put the value of percolation front and center in debates about injunctive relief in federal courts. Federal courts are increasingly willing to grant nationwide injunctions, particularly in cases against the federal government.⁹⁹ In particular, state litigation against the federal

92. *Id.* at 1783, 1792 (Thomas, J., concurring).

93. *Id.* at 1793.

94. See Bickel, *Passive Virtues*, *supra* note 24, at 40-42.

95. See *id.* at 42-47.

96. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 24, at 70.

97. See *Va. Soc’y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (contending that the issuance of a nationwide injunction “would ‘substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue’” (quoting *United States v. Mendoza*, 464 U.S. 154, 160 (1984))).

98. *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

99. Scholars have debated whether nationwide relief is a recent innovation or has historical roots in nineteenth- and early-twentieth-century practice. Compare *Bray*, *supra* note 34, at 437-45 (arguing that the practice of nationwide injunctions is a recent

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government has fueled the explosion of nationwide injunctions. In recent years, states have brought a bevy of politically controversial public-law actions requesting nationwide injunctive relief against the federal government.¹⁰⁰ Many of these cases have involved nationwide preliminary relief and the possibility of accelerated Supreme Court review.¹⁰¹

Critics of nationwide injunctions have several concerns, one of which relates directly to the percolation process. Specifically, the concern is that nationwide relief in the lower courts, particularly nationwide preliminary injunctions, interferes with the percolation process.¹⁰² Rather than having the benefit of varying court of appeals decisions based upon multiple records, the Court may instead review a single grant of preliminary relief and effectively decide a legal issue of nationwide importance without a well-developed sense of the consequences of its decision.¹⁰³

The Court itself has suggested that percolation bears upon the proper scope of injunctive relief. In warning against relief broader than the “extent of the violation established,” the Court has noted the potential epistemic benefits

one), with James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1349-55 (2020) (arguing that the English and American histories of equity call into question the claim that nationwide injunctions are a recent development), Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924 (2020) (arguing that “Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century”), and Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2097 (2017) (arguing that nationwide relief is a “regular feature” of federal remedies). We do not enter that debate except to note that there is agreement that recent trends have put the debate about nationwide injunctions front and center in discussions of federal remedies. Compare Sohoni, *supra*, at 922-23 (discussing the recent debate), with Bray, *supra* note 34, at 419 & n.6 (same).

100. See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1301-02 (2019).

101. See *id.*

102. See, e.g., Bray, *supra* note 34, at 462 (“A world of national injunctions is one in which the Supreme Court will tend to decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.”); Frost, *supra* note 12, at 1107-09 (discussing but not embracing the criticism). Defenders of nationwide injunctions argue from principles of equity and the need for meaningful relief. See, e.g., Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 58, 63-64 (2017) (responding to Bray, *supra* note 34, and arguing that “the Chancellor would be proud” of nationwide injunctions that protect vulnerable individuals from domination by national actors); Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51 (2017) (responding to Bray, *supra* note 34, and arguing that “preventing irreparable harm” is a “core purpose[.]” of nationwide injunctions); Frost, *supra* note 12, at 1090-115 (arguing, based upon a cost-benefit analysis, that nationwide injunctions may be desirable but that percolation “should inform” a lower court’s assessment of whether to issue such relief).

103. Bray, *supra* note 34, at 461-62.

of percolation.¹⁰⁴ As the Court put it in *Califano v. Yamasaki*, overbroad injunctions might “have a detrimental effect by foreclosing adjudication by a number of different courts” and thus depriving the Court of “the benefit of adjudication by different courts in different factual contexts.”¹⁰⁵

The future of the nationwide injunction is very much open. The Court last weighed in on the scope of nationwide injunctive relief in *Trump v. International Refugee Assistance Project*, one of the travel-ban cases.¹⁰⁶ It held that the lower-court injunction swept too broadly because the “concrete burdens” on the individual and state plaintiffs did not justify an injunction barring enforcement of the Trump Administration’s travel ban against foreign nationals lacking any “bona fide” connection to the United States.¹⁰⁷ The Court did not address percolation’s value in thus tailoring the nationwide injunction, but instead appeared concerned about the proper scope of injunctive relief.¹⁰⁸

3. Nationwide class certification

The Court has addressed the problem of percolation as it arises in class actions in particular. In *Califano*, the Court reviewed two consolidated cases concerning class certification and held that a district court may certify a nationwide class and grant injunctive relief against a federal agency.¹⁰⁹ Under Federal Rule of Civil Procedure 23(b)(2), the district courts certified a nationwide and a statewide class of beneficiaries, respectively, in suits alleging that the Social Security Administration had reduced benefits without adequate notice and an opportunity to be heard.¹¹⁰ The Court held that Congress had not exempted actions under section 205(g) of the Social Security Act from class treatment under Rule 23 and that the district courts were within their discretion to certify the challenged classes.¹¹¹

In so holding, however, the Court did caution that certification of nationwide classes interferes with percolation. It pointed out that “nationwide

104. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

105. *See id.* The guiding principle, the Court explained in *Califano*, is whether the scope of injunctive relief is necessary to afford “complete relief to the plaintiffs.” *Id.*

106. 137 S. Ct. 2080 (2017) (per curiam).

107. *Id.* at 2087-88.

108. In his separate opinion, Justice Thomas argued that the Court had not sufficiently narrowed the scope of injunctive relief, which, he reasoned, “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Id.* at 2090 (Thomas, J., concurring in part and dissenting in part) (emphasis omitted) (quoting *Califano*, 442 U.S. at 702).

109. 442 U.S. at 706.

110. *See id.* at 688-90.

111. *See id.* at 700-02.

class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges.”¹¹² By reducing percolation in this way, the Court continued, such actions would depart from the generally “preferable” approach of “allow[ing] several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts.”¹¹³ Thus, while percolation’s value did not on its own justify the “extreme position” that a “[nationwide] class may never be certified,” it did at least provide a reason for federal courts to “take care to ensure that nationwide relief is indeed appropriate” and that class certification “would not improperly interfere with the litigation of similar issues in other judicial districts.”¹¹⁴

4. Nonmutual collateral estoppel

The question of percolation’s value also arises within preclusion doctrines. In *United States v. Mendoza*, the Court pointed to percolation’s value in holding that there is no nonmutual collateral estoppel against the United States.¹¹⁵ Sergio Mendoza, a citizen of the Philippines and a World War II veteran, petitioned for naturalization under the Nationality Act, arguing that although the statute had expired by its own terms prior to his petition, the Immigration and Naturalization Service had denied him due process in depriving him of an opportunity to file a timely petition.¹¹⁶ As it happened, the federal government had litigated and lost the due process issue in a prior case involving other Filipino veterans of World War II.¹¹⁷ Relying upon that prior decision, the lower courts barred the federal government from relitigating the due process issue.¹¹⁸

On appeal, the Court reversed for several reasons. Much of the Court’s opinion distinguished the federal government from a private litigant for collateral estoppel purposes.¹¹⁹ But the Court also emphasized the percolation process. Routine nonmutual collateral estoppel against the government would

112. *Id.* at 702.

113. *Id.*

114. *Id.* at 702-03.

115. *See* 464 U.S. 154, 159-60 (1984).

116. *Id.* at 155-57.

117. *See id.* at 157 (citing *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 951 (N.D. Cal. 1975)).

118. *Id.* at 157-58.

119. *See id.* at 159 (“We have long recognized that ‘the Government is not in a position identical to that of a private litigant,’ both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates.” (citation omitted) (quoting *U.S. INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam))).

frustrate the Court's practice of waiting for conflicts to develop before resolving a particular issue.¹²⁰ That practice, the Court explained, allows for the crowdsourcing of solutions to a thorny legal problem: "Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."¹²¹

5. Multidistrict litigation

Percolation's value may also bear upon the use of multidistrict litigation (MDL), particularly in public-law cases. The MDL statute provides that civil actions involving common questions of fact "may be transferred to any district for coordinated or consolidated pretrial proceedings"¹²² by a panel of seven circuit and district court judges known as the "Judicial Panel on Multidistrict Litigation,"¹²³ or "JPML" for short.¹²⁴ Once the MDL judge has concluded pretrial proceedings, the transferred cases are remanded to the originating district courts for trial.¹²⁵ By centralizing the resolution of common questions in pretrial proceedings, the MDL process aims to avoid unnecessarily duplicative efforts by federal district court judges around the country and to encourage global settlement.¹²⁶

Much like the certification of a nationwide class by a single district court, the MDL process centralizes resolution of legal issues and thus may interfere with percolation. Andrew Bradt and Zachary Clopton argue that courts should not use the MDL process in public-law cases in part because the costs of doing so are likely to outweigh the benefits.¹²⁷ Among those costs is the loss of

120. *Id.* at 160 ("[I]f nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari.")

121. *See id.* Scholars have argued that the Court's denial of nonmutual collateral estoppel in cases against the federal government is inconsistent with its approval of nationwide classes in cases involving federal regulation, on the theory that the "same structural considerations" arise in both types of cases. *See, e.g.,* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 621-22 (2017).

122. 28 U.S.C. § 1407(a).

123. *Id.* § 1407(d).

124. For an overview of the MDL statute's operation, including the authority of the JPML, see Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 785-91 (2012).

125. *See* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 39-40 (1998).

126. *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1263, 1270 (2017).

127. Bradt & Clopton, *supra* note 14, at 922-23 (positing that the "quality of justice may improve with even a little bit of percolation in the lower courts," and arguing that
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percolation. As they describe it, MDL could function as “an antipercolation device” in public-law cases insofar as “all potentially percolating cases [could be] . . . consolidated and resolved in the MDL court.”¹²⁸

6. Patent litigation

Patent litigation provides yet another area in which debates about percolation's value are prominent. The debate, in a nutshell, is whether percolation improves patent law. Pointing to the Federal Circuit's near-exclusive jurisdiction over initial appeals in patent law cases,¹²⁹ scholars have suggested that the development of patent law has become ossified and captured by interest groups.¹³⁰ One solution to this problem (if indeed there is a problem) would be for the Supreme Court itself to be more active in taking patent cases.¹³¹ Another possibility would be to end the Federal Circuit's near monopoly on patent appeals by involving other circuit courts of appeals in the resolution of patent disputes.¹³² Thus, the problem can be framed as one of specialization or as one of a lack of percolation.¹³³ The debate about percolation's value within patent law has more or less mirrored the debates about percolation's value in other areas, with scholars debating the “tradeoff between uniformity and getting it ‘right,’”¹³⁴ although the specialization of the Federal Circuit raises additional considerations that do not apply across various other contexts in which percolation's value has relevance.¹³⁵

“even if the benefits of percolation are weak, the countervailing costs to efficiency from foregoing consolidation are not significant either”). The MDL device is a major feature of federal litigation today: Approximately 40% of civil cases in the federal courts today are given MDL treatment. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168 (2018). But the problem of percolation in public-law MDLs should not be overstated. The majority of MDLs involve private-law claims. See Bradt & Clopton, *supra* note 14, at 914-15.

128. Bradt & Clopton, *supra* note 14, at 919.

129. See 28 U.S.C. § 1295(a)(1); see also John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 664 & n.32 (2009).

130. See, e.g., Golden, *supra* note 129, at 659.

131. See *id.* at 659-60.

132. See Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U.L. REV. 1619, 1629 (2007).

133. See Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 508 (2013) (“[T]he experience of the Federal Circuit suggests that in the absence of percolation, much can go awry.”).

134. *Id.* at 509.

135. See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 25-52 (1989) (highlighting concerns related to, among other things, the Federal Circuit's “pro-patent bias” and complexities in defining the scope of the Federal Circuit's jurisdiction). Percolation's value may also carry relevance for debates
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C. The Costs of Percolation

Of course, if percolation were a costless practice, then the debates about its value would be of little consequence. But percolation is not costless. The existing literature has discussed these costs at length, and we have little to add to its list. Judges and scholars have argued that percolation has three types of costs: (1) undermining the rule of law, (2) increasing compliance costs due to regulatory uncertainty, and (3) increasing the amount and cost of litigation over particular legal issues.

Some critics have focused on rule-of-law values, including protection of individual rights and equal treatment. In *Gilliard v. Mississippi*, recall, Justice Marshall argued that the Court “shrinks from its constitutional duty” to say what the law is when it postpones consideration of an issue even though a majority of the Court “suspects that [constitutional] rights are being regularly abridged.”¹³⁶ That *Gilliard* was a death penalty case particularly underscored the potential injustice that arose from awaiting percolation: “If we postpone consideration of the issue much longer,” Justice Marshall reminded his colleagues, “petitioners in this and similar cases will be put to death before their constitutional rights can be vindicated.”¹³⁷ Percolation, in short, can threaten

among administrative law scholars regarding the appropriateness of applying different levels of deference to administrative agencies at different levels of the judicial hierarchy. Aaron-Andrew P. Bruhl, for instance, has advocated for a “hierarchically variable” regime of judicial deference to agency action, with lower courts embracing a more deferential set of review standards than the Supreme Court itself. See Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 730-31, 763 (2013). Building on Bruhl’s basic idea, we have also suggested in prior work that the so-called “major questions” exception to *Chevron* deference should apply only at the Supreme Court level, while the federal circuit and district courts ought never to withhold *Chevron* on grounds of majorness alone. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 779-80 (2017). These proposals, however, would entail the potential cost of undermining percolation, and opponents of these proposals have cited the need for percolation as a reason to avoid the sorts of hierarchical variation that these proposals prescribe. See, e.g., Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 270-76 (2015) (worrying that the Bruhl proposal would undermine the ability of lower courts to “create circuit splits on issues that generate reasonable differences of opinion” and thus give the Supreme Court “the benefit of the broad range of views and perspectives that were expressed or developed while the issue was working its way up the judicial ladder”); Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 159-61 (2017) (criticizing the Coenen-Davis proposal on the ground that it would reduce percolation regarding the proper scope and substance of the major questions exception). Thus, while the question of percolation’s value is by no means dispositive of the issue, it may end up affecting one’s overall receptiveness toward the possibility of varying deference standards across different levels of the judicial hierarchy.

136. 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from the denial of certiorari).

137. *Id.*

the rule of law by creating nonuniformity in the treatment of a particular legal issue and inequity in the treatment of similarly situated rightsholders.¹³⁸

Among percolation's critics on the bench, perhaps none was so pointed as then-Associate Justice Rehnquist in a 1986 article. He argued that percolation had little upside for the judiciary but a significant downside for individual litigants. As he put it, "[i]f we were talking about laboratory cultures or seedlings, the concept of issues 'percolating' in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense."¹³⁹ But percolation within the federal judicial system is not merely senseless, Rehnquist argued; it is costly. "It is of little solace to the litigant who lost years ago in a court of appeals decision to learn that his case was part of the 'percolation' process which ultimately allowed the Supreme Court to vindicate his position," or so Justice Rehnquist lamented.¹⁴⁰ According to Judge Friendly, percolation is all but pointless: "If a case involves questions of federal law of such importance as to be reviewed by the Supreme Court, the views of the court of appeals count, and should count, for little."¹⁴¹ Therefore, rather than wait for federal questions to percolate, the Court should "make more use of its power to grant certiorari before decision in the court of appeals."¹⁴²

Some scholars have been equally scathing in pointing out the costs of percolation. Daniel Meador focused on the costs to regulated parties: "The percolation that produces intercircuit inconsistencies and incoherence may provide intellectual stimulation for academicians, but in the world of human activity it works costly inequities."¹⁴³ Similarly, Paul Bator argued that "percolation is not a purposeful project" but rather "just a way of postponing decision."¹⁴⁴ Postponing Supreme Court resolution of a legal issue creates unpredictability for those seeking to comply with their legal duties.¹⁴⁵ Moreover, the percolation process increases the costs of such compliance as well as the administrative costs of running the judicial system, particularly insofar as the percolation process by definition demands additional

138. See, e.g., Rehnquist, *supra* note 7, at 11 ("Two thousand years ago Cicero observed that the law is not 'one thing at Rome and another at Athens, one now and another in the future.'" (quoting *Wilson v. McNamee*, 102 U.S. 572, 574 (1881))).

139. *Id.*

140. *Id.*

141. Friendly, *supra* note 10, at 407.

142. *Id.*

143. Meador, *supra* note 10, at 634.

144. Bator, *supra* note 10, at 690.

145. See, e.g., *id.* at 689 ("[P]erpetuating uncertainty and instability during a process of percolation exacts important and painful costs.").

litigation.¹⁴⁶ While the percolation process is happening, regulated parties and regulatory beneficiaries alike await a definitive resolution and face the compliance and opportunity costs of making decisions in the face of legal uncertainty.

In short, the significant costs of percolation suggest that percolation needs a significant justification. The next Part begins to consider whether the practice of percolation can be justified.

II. Percolation's Informational Value

Arguments about percolation's value typically center on the process's ability to enhance the substantive quality of the Supreme Court's decisions. These accounts emphasize percolation's ability to generate useful *information* for the Court when it decides an issue. Absent percolation, these arguments go, the Court risks rendering decisions that are incomplete, ineffective, unconsidered, or deficient in some other way; when, by contrast, the Court embraces percolation, it is better positioned to reach sound, effective, or otherwise "correct" resolutions of the issues it confronts. These arguments thus see percolation as working to the benefit of the Court's resolution of particular legal issues. Indeed, we do not think it is a stretch to say that existing discussions of percolation's value have focused predominantly on these informational benefits,¹⁴⁷ with judges and commentators regularly training their focus on the extent to which percolation might (or might not) provide "worthy grist for the High Court's mill."¹⁴⁸

These discussions, however, have tended to elide the different ways in which percolation might (or, again, might not) inform the Court's decisionmaking.¹⁴⁹ In this Part, we contribute to the existing literature by defining more precisely the different *types of information* that percolation might contribute to the Court's deliberations.

146. Friendly, *supra* note 10, at 407 (noting the costs of an "unduly long period required for the determination of issues that may affect large numbers of cases in the lower courts").

147. A notable exception is Doni Gewirtzman's thoughtful and illuminating discussion of the topic, which does not concern itself exclusively with informational rationales. See Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 488, 493 (2012) (emphasizing that "percolation has value regardless of whether it improves Supreme Court decision making").

148. Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 793 (1993).

149. Cf. Dorf, *supra* note 18, at 65 n.358 (quoting various informational defenses of percolation and noting that "[i]t is not entirely clear . . . whether the experimentation these commentators envisioned would have consisted of doctrinal innovation, the sort of direct assessment of consequences of different legal regimes advanced here, or both").

Specifically, we think there are five types of informational contributions that percolation might make. First, percolation might confer informational value by way of *crowdsourcing*, with lower-court judges offering illuminating ideas, arguments, and analytical frameworks that the Court itself might choose to draw upon. Second, percolation might provide the valuable informational function of *factual debiasing*; that is, it might aid in the resolution of a legal question by casting it against multiple, different factual backdrops. Third, percolation might confer informational value by way of *experimental data*, with lower courts “testing out” different resolutions of an issue and thereby allowing the Court to learn something about each resolution’s “on-the-ground” consequences. Fourth, percolation might yield useful information about *audience reaction*, as the public responds positively or negatively to lower courts’ different resolutions of the issue at hand. And finally, percolation might facilitate useful forms of *signaling*, with the discrete conclusions of lower-court cases operating to support various inferences about the merits or complexity of the shared issue that they concern.

As should become evident, while we do not regard any of these rationales as altogether meritless, we think they at most support the conclusion that percolation carries informational value under limited and contingent circumstances. Percolation’s informational value is often (though not always) likely to be insubstantial—or at least not high enough to outweigh its countervailing costs. Our conclusion thus casts doubt on the suggestion that percolation delivers enough in the way of informational value to justify its status as an “ordinary” aspect of federal court practice.¹⁵⁰

A. Crowdsourcing

Legal questions are harder for courts to work through when writing on a blank slate. For that reason, the Court might prefer to see how lower courts navigate a difficult legal issue before confronting the issue for itself. Percolation allows that. The process can be seen as facilitating an extended, nationwide brainstorming session about the best way to tackle a given legal problem, yielding a fulsome menu of arguments, analyses, insights, and decisional frameworks for the Court to draw upon when resolving a specific issue.¹⁵¹ Call this the *crowdsourcing* argument for percolation’s informational value.

150. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam).

151. See, e.g., Estreicher & Sexton, *supra* note 80, at 719 n.148 (noting that percolation usefully places before the Court “a range of verbal formulations for a rule”); Gewirtzman, *supra* note 147, at 482-83 (noting that percolation allows the Court to “internaliz[e] the benefits of the deliberation that occurs among lower courts as they respond to one another’s decisions”); Wald, *supra* note 148, at 793 (suggesting that percolation allows the Court to benefit from the “wide diversity of skills, experience,
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Of course, the Court, like any other institution tasked with doing difficult work, can benefit from the assistance of outside parties.¹⁵² But the central difficulty for the crowdsourcing argument stems from the fact that the Court already receives ample such assistance whenever it chooses to grant certiorari.¹⁵³ For any issue the Court “decides to decide,” there is likely to be a bevy of litigants, advocates, officials, scholars, and other experts standing ready to communicate varying, useful perspectives for the Court to consider.¹⁵⁴ Thus, while the absence of percolation might leave the Court bereft of lower-court opinions concerning the issue at hand, the Justices will still have before them a healthy stack of litigants’ briefs, amicus briefs, law clerks’ memos, and scholarly analyses that offer numerous different ideas for the Court to make

and backgrounds represented by [lower court] judges”); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 929 (1983) (suggesting that percolation provides “the raw material from which to fashion better judgments”); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 331 (2006) (suggesting that percolation allows the Court to consult “the considered judgments of a number of jurists”); Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 152-53 (2013) (noting that percolation can enable the Court to “learn more about the underlying issue by allowing other lower courts to make their own independent judgments”); *see also* *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (suggesting that “diverse opinions from[] state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court”); *California v. Carney*, 471 U.S. 386, 400-01 (1985) (Stevens, J., dissenting) (“To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law. Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves ‘whatever is pure and sound and fine.’” (footnote omitted) (quoting CARDOZO, *supra* note 36, at 179)).

152. *Cf.* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 848 (1994) (noting, in a related context, the “disadvantage of deliberating in solitude”). *But see* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 3-4 (2009) (highlighting certain grounds for skepticism of the idea that decisionmaking processes systematically benefit from the inclusion of more participants).
153. There is another problem too. As Dan Epps and Will Ortman have noted, there is no guarantee that multiple lower courts will render truly independent judgments about the issue being percolated. Epps & Ortman, *supra* note 9, at 748; *see also* Vermeule, *supra* note 152, at 32 (noting that “[p]recedential cascades are no mere possibility”).
154. Consider amicus briefs, for example. According to a recent overview of the relevant studies, “[n]inety-eight percent of U.S. Supreme Court cases now have amicus curiae [briefing],” with approximately 800 briefs filed every Term and “with the marquee cases attracting briefs in the triple digits.” Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016). This volume of amicus briefing reflects a recent increase. *See id.* (noting that there has been “over an 800% increase from the 1950s and a 95% increase from 1995” (footnote omitted)).

use of when crafting its own resolution of the issue at hand.¹⁵⁵ As Evan Caminker put the point some twenty-five years ago, “the independent judgment of inferior courts will not likely bring to the Supreme Court’s attention arguments and approaches that would not otherwise present themselves either upon the Justices’ (or their clerks’) reflection, through briefing by litigants or amici curiae, or through scholarly commentary.”¹⁵⁶ We think, if anything, that Caminker’s observation is even more compelling today.¹⁵⁷

Thus, if percolation is to matter in a crowdsourcing-related sense, it must be because the lower courts are capable of offering a distinctively useful form of crowdsourcing. We can think of two potential reasons as to why this might be the case.

First, lower-court judges might bring to the table a uniquely valuable *decisional attitude*. Especially as compared to litigants and their allied amici, this argument would go, lower courts embrace (or at least aspire to embrace) the ideal of impartiality when articulating their positions on difficult legal questions. Article III judges, at least, have life tenure, and, like their state

155. Indeed, as Jeffrey Fisher and Alli Larsen observe, the “crowdsourcing”-type resources available to the Justices today go well beyond traditional briefs and publications. See Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85, 87 (2019) (noting that “[i]f indeed law students (and hence recently-graduated law clerks) are now taught to ‘Google’ a case before beginning any assignment, every pending case at the Court will generate a treasure trove of results for them—certainly not restricted to submissions on the docket” (footnote omitted)).

These practices, as Fisher and Larsen take care to point out, raise legitimate concerns about transparency and procedural fairness. Of particular concern is the possibility that the Justices end up deciding a case based on insights and ideas set forth in a resource about which the parties were unaware (and thus had no opportunity to address). See, e.g., *id.* at 116-23 (highlighting ways in which “[v]irtual briefing” can “circumvent” the adversarial process). But that concern, in our view, does not provide a reason to prohibit (or even discourage) reliance on the sources themselves. Rather, like Fisher and Larsen, we think concerns about procedural fairness are best addressed by means of rules requiring disclosure and transparency from the Justices about the sources on which they intend to rely. See *id.* at 134-36 (proposing that the Justices adhere to a sort of “notice and comment” procedure designed to ensure that “all voices know where the conversation is headed and what matters the most to the decision-makers”).

156. Caminker, *supra* note 10, at 56. Caminker also then noted that the amount of crowdsourcing necessary to canvass the range of available options was not especially great, given that “there quite frequently exists a relatively small number of readily identifiable, plausible interpretations of precedent and sensible doctrinal constructs.” *Id.*

157. See Fisher & Larsen, *supra* note 155, at 109 (noting that “the Justices’ questions and concerns—once focused exclusively on the advocates or maybe amici—are now being crowdsourced to a wider group, an elite group of legal professionals, in a context completely outside the traditional briefing rules”).

counterparts (whether elected or appointed), they do not represent clients and are bound by various ethical rules that limit their ability to benefit financially from the decisions that they make. All that being so, one might argue, lower courts are comparatively less likely to have an axe to grind when opining about the law and are thus less likely to distort their reasoning in the service of doctrinally irrelevant considerations. Lower-court crowdsourcing might thus prove distinctively valuable to the Court on the theory that lower-court opinions—unlike, say, the run-of-the-mill adversarial brief—emerge from the crucible of neutral and objective decisionmaking and therefore set forth the “best” versions of the arguments the Court might consider.

There might be something to this idea, but the distinction strikes us as largely overdrawn. For one thing, although many party briefs and amicus briefs reflect an unabashedly adversarial tone, various other materials of relevance to a nonpercolated issue (online commentary, amicus briefs in support of neither party, and so on) would also reflect the ostensibly impartial judgments of their own respective authors.¹⁵⁸ But even accepting that lower-court opinions carry an air of neutrality that no other airing of legal viewpoints could capably provide, we are skeptical that effective crowdsourcing requires a healthy dosage of “neutral” materials. Effective crowdsourcing, it seems to us, is simply a matter of getting a lot of different ideas out of a crowd, regardless of the extent to which the crowd consists of motivated reasoners. To be sure, the crowdsourcing exercise would falter if all members of the crowd shared the *same motivations*: Important ideas, arguments, possibilities, and so forth might well fall through the cracks if the relevant materials uniformly reflected the same objectives, ideology, or worldview. But the adversarial nature of legal practice already helps guard against that possibility, ensuring that the Justices encounter divergent viewpoints and positions on a legal question before definitively resolving it. And when the crowd generates a diverse and wide-ranging set of ideas for the Court to consider, it seems to us beside the point whether the ideas themselves derive from zealous advocates or neutral deliberators. Consequently, even if lower-court opinions reflect a greater degree of neutrality and impartiality than do other extrinsic materials that the Court will already be poised to consider, we are not sure that these opinions’ neutrally posited viewpoints would do much to enhance the value of the information base that the Court has before it.

158. To be sure, even ostensibly neutral reflections about the law might inevitably derive from entrenched ideological priors, such that, say, a law professor’s blog post is just as likely to reflect a hidden political agenda as a litigant’s brief is to reflect an open adversarial one. But if that hypothesis is true, then it would cast doubt on the objectivity of lower-court opinions as well—opinions that, at the end of the day, are shaped by the worldviews, ideologies, and methodological commitments of their authoring judges.

A better argument for judicial opinions' distinctive crowdsourcing value would point to the lived experience of lower-court judges: Judges, by virtue of being judges, might carry a distinctive *perspective* that is difficult to find among their nonjudicial counterparts, and the Court might therefore have special reason to seek out judges' own thoughts about judging—that is, matters that relate specifically to their craft. The idea is not that judges are inherently smarter or more knowledgeable about the law;¹⁵⁹ rather, it is that judges, through their work as judges, might acquire an especially refined sense of how resolutions will “play out” within the courts that they administer. And if this is true, percolation offers the only means by which the Court can solicit its frontline officers' thoughts and concerns about different potential resolutions that they, in turn, will help to implement. Just as a violinist might have useful things to say about the “playability” of a passage that a composer might pen, so too might lower-court judges have useful things to say about the administrability and workability (or lack thereof) of a doctrinal framework that the Court might choose to employ.

This argument strikes us as plausible, but its ultimate persuasiveness will depend a lot on the nature of the question presented. The argument has the most purchase, we think, as applied to issues of trial and appellate procedure—issues that uniquely implicate the lived experiences of lower-court judges. But these issues represent only one subset of the universe of issues that the Court decides, and for many of those issues, judges themselves are not likely to offer a uniquely valuable or relevant perspective. Judges qua judges, for instance, are less well situated than law-enforcement officers to weigh in on the ways in which a rule might affect policing practices; they are less well situated than legislators (and legislative counsel) to weigh in on how a rule will affect lawmaking processes; they are less well situated than agency officials to weigh in on how a rule will affect their regulatory policy; they are less well situated than employers to weigh in on how a rule will affect their hiring practices; they are less well situated than community members and representatives to weigh in on how a rule will affect their communities; and so forth. Lower-court judges, in other words, might be uniquely well situated to opine about the potential effects of rules that affect the administration of courts, but many of the issues the Court decides do not directly implicate those concerns.¹⁶⁰

159. We cannot empirically disprove such an assertion, but we are skeptical that this would be the case. Simply put, the judicial selection process strikes us as too randomized, contingent, path dependent, and politically infused to reliably separate the wheat from the chaff in this way.

160. A further distinction one might draw between lower-court opinions and other external sources is that lower-court opinions carry the *procedural* virtue of stemming from an ordered and deliberate exercise of the adversarial process. That is, before issuing final opinions, lower-court judges typically read briefs, hear arguments, deliberate, revise, rewrite, and so forth, all with the knowledge that what they produce

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B. Factual Debiasing

Apart from its ability to facilitate beneficial crowdsourcing on an unresolved question of law, percolation might also provide the valuable informational function of casting an unresolved legal question against multiple, different factual backdrops. Federal courts decide legal questions in the course of resolving concrete “cases or controversies,” each of which arises from a particular set of circumstances involving a particular set of parties.¹⁶¹ Thus, even where multiple lower courts render judgments on the same legal issue, the opinions that they generate will often involve materially different fact patterns. In and of itself, that sort of factual variation might prove useful to the Court’s own handling of the percolated issue. If, as then-Judge Posner once put it, “a difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases,”¹⁶² then percolation serves the important informational function of helping those “factually different cases” emerge.

Why might the presence of factual variation lead to the making of higher-quality legal decisions? The most plausible suggestion, recently offered by Rochelle Dreyfuss, has to do with framing and anchoring effects.¹⁶³ When a court renders a generally applicable decision by reference to a single factual record, the particular facts comprising that record might fail to represent the full range of circumstances that the decision itself will govern. That is, when the Court uses a single case *A* as a vehicle through which to announce a broader doctrinal rule, the lack of percolation might “distort the judges’ thinking,” causing the Justices to incorrectly assume that future cases subject to the rule will resemble case *A* as well.¹⁶⁴ Put differently, if the Court announces its new

will operate as precedent in future cases. The same cannot be said of, say, the stray blog post capturing a legal commentator’s quick reactions to a pending case or perhaps even the random amicus brief thrown together right before a filing deadline. That distinction, however, strikes us as overdrawn: Without doubt, *some* external sources may not reflect the degree of care and deliberation that goes into a lower-court opinion, but other such sources may well match, if not exceed, those opinions in that respect. More importantly, to the extent some external sources suffer on account of a rushed and haphazard production process, their defects will be noticeable and the Justices can discount their significance accordingly.

161. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968) (explaining that the case or controversy requirement “limit[s] the business of federal courts to questions presented in an adversary context”).

162. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985); *see also* *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (referencing “the benefit of adjudication by different courts in *different factual contexts*” (emphasis added)).

163. Dreyfuss, *supra* note 133, at 524-25.

164. *See id.* at 524 (citing Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 901-05 (2006)).

rule with the facts of case *A* first and foremost in mind, then the rule itself might prove a clumsy fit with the large number of future fact patterns to which it will also apply. Percolation, by contrast, would give the Court the opportunity to consult *multiple* fact patterns that implicate the issue under review—namely, the fact pattern of the case currently before the Court along with the fact patterns of the prior relevant cases that different lower courts had the opportunity to decide. Thus, rather than fall prey to the distortive effects of case *A*'s own particular facts, the Court can render its decision against a somewhat more representative sample of the practices and interactions that its new rule is likely to affect. Percolation might “reduce the salience, anchoring, and framing effects of the reviewed case and thus diminish cognitive distortion.”¹⁶⁵

All of this makes sense in theory: One can certainly draw a plausible thread from (1) the occurrence of percolation to (2) the adjudication of factually distinctive cases at the lower-court level to (3) reduced fact-based distortion at the Supreme Court itself. Even so, we think the argument is subject to at least three important limitations.

To begin with, percolation will reduce distortion only if the Court itself chooses to pay attention to the facts of previously decided cases. A huge number of prior decisions on an issue will not make a difference in this respect if the Justices choose not to educate themselves about the earlier cases, and the temptation to ignore them might well be hard to avoid, particularly when the Justices must already train their focus on the facts of *the case they have chosen to decide*. Percolation's occurrence, that is, might prove to be a necessary but not sufficient condition for the elimination of factual distortion; in order for the mechanism to work, the Court must make the additional, conscious choice to immerse itself in the facts of other cases not actually before it.¹⁶⁶

Second, and conversely, percolation's occurrence might not always prove a necessary condition for valuable debiasing of this sort. Just as outside parties and commentators might provide valuable forms of crowdsourcing during the pendency of a Supreme Court case, so too might they provide a valuable perspective on the types of fact patterns that a contemplated holding might affect. Their contributions, to be sure, cannot offer anything akin to a formal retrospective judgment against the backdrop of an established factual record. But they can at least offer a prospective *illustration* of interactions and behaviors that might end up falling within the ambit of a potential resolution of the question presented. Individuals and interest groups that are not parties

165. *Id.* at 526; cf. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 942 (2009) (discussing the importance of factual context and narrative framing for the development of law).

166. See *infra* text accompanying notes 222-23.

to a Supreme Court case can explain how its resolution of the underlying issue might turn out to affect them. And in conveying this information to the Justices, they might often manage to enrich and diversify the overall factual record for the Justices to consider.¹⁶⁷

Finally, even where we can assure ourselves that (1) percolation represents the only effective means of diversifying the factual record, and (2) the Justices will in fact familiarize themselves with the facts of prior lower-court cases, we might still wonder whether the game is worth the candle. The factual-debiasing argument is premised on the idea that the Court *must* use a single, factually distinctive (and potentially nonrepresentative) case as a vehicle for articulating a one-size-fits-all rule to govern a wide-ranging set of future factual scenarios. But the need for factual debiasing exists only to the extent that the Court plans to use a single fact pattern as a means of articulating a holding of generally applicable scope. If the Court instead chooses to decide a case before it by reference to that case's own distinctive facts, then the case's own facts will have a far less distortive effect. By taking things "one case at a time," that is, the Court could alleviate the concern that framing and anchoring effects will yield distortive outcomes, as it will have built into its own holding significant leeway and flexibility for future factual tailoring. If the doctrine itself permits the rendering of narrow, case-specific decisions, then the Court's own holding is less likely to saddle lower courts with the task of fitting the round peg of a generally applicable doctrinal rule into the square hole of an unanticipated set of factual circumstances.¹⁶⁸

In sum, then, the factual-debiasing argument certainly identifies a plausible mechanism through which the rendering of multiple lower-court decisions can pave the way for a more informed Supreme Court decision. But the argument's persuasiveness hinges on three important (and, we think, not

167. Take the amicus briefing in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), which involved the federal government's legal obligations to pay its contractors (in both cases, Native nations). Appearing as amicus curiae, the United States Chamber of Commerce filed briefs enriching the overall factual record by showing how government contracts work across a variety of industries and contractual settings and arguing that a ruling for the United States would destabilize government contracting generally. See Brief of Amici Curiae the Chamber of Commerce of the United States of America et al. in Support of the Cherokee Nation & Shoshone-Paiute Tribes, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (Nos. 02-1472 & 03-853), 2004 WL 1386408; Brief of the Chamber of Commerce of the United States of America & National Defense Industrial Ass'n as Amici in Support of Respondents, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) (No. 11-551), 2012 WL 1132333.

168. Here again we think it is important to distinguish between percolation's value and the more general value of Supreme Court passivity. A passive style of judging at the Court may well result in more percolation, but that does not tell us that the percolation of those unresolved issues is valuable in and of itself.

especially prevalent) conditions. Specifically, the need for factual debiasing will justify percolation only to the extent that (1) the Justices have both the ability and the desire to apprise themselves of (and not lose sight of) the facts of lower-court cases not directly under review; (2) the Justices *lack* the ability to diversify the factual record by way of amicus briefing, outside commentary, and other contemporaneous communications about a would-be decision's potential effects; and (3) the Justices cannot instead simply render narrow rulings that respond to the particular facts of each case before them.

C. Experimentation

A third means by which percolation might confer informational value involves not so much ideas and insights but rather hard data about outcomes. Percolation, it might be argued, is a form of *experimentation*: Simply put, when lower courts decide the same issue in different ways, they sometimes end up generating data on the real-world consequences that would follow from different doctrinal resolutions of that issue.¹⁶⁹

Consider Justice Sonia Sotomayor's dissenting opinion in *Perry v. New Hampshire*.¹⁷⁰ That case concerned the constitutionality of evidence generated from suggestive identification procedures, raising the question whether the Constitution always required criminal courts to prescreen such evidence before admitting it at trial.¹⁷¹ An eight-Justice majority declined to adopt such a bright-line rule, worrying that it would unduly interfere with state courts' administration of criminal trials.¹⁷² But to Justice Sotomayor, the majority's

169. For prior allusions to this idea, see, for example, Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898 (1974) (suggesting that circuit splits “sometimes perhaps ought to be endured while judges and scholars observe the respective workings-out in practice of the conflicting rules”); Estreicher & Sexton, *supra* note 80, at 727 (suggesting that within some areas of the law, such as trial procedure, “circuit-by-circuit experimentation” might allow “the Court [to] observe the practical effects of varying legal rules”); Dorf, *supra* note 18, at 65 (raising “the possibility that the passage of time during which there is a circuit split creates a record of the consequences of different legal regimes”); Gewirtzman, *supra* note 147, at 482 (“Before the Court chooses to nationalize a particular constitutional rule, it gets . . . the opportunity to use lower courts as smaller ‘laboratories’ for experimentation to assess the rule’s consequences.” (footnote omitted) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of the petitions for writs of certiorari))).

170. 565 U.S. 228 (2012).

171. *Id.* at 231-33; see also *id.* at 240 (noting that Perry was advocating for “a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances”).

172. In particular, the majority noted that requiring reliability review in connection with all suggestive identification procedures would “involve trial courts, routinely, in
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concerns about procedural intrusiveness were overblown, given that “[t]here ha[d] been no flood of claims in the four Federal Circuits” that had adopted the bright-line rule.¹⁷³ In other words, as Justice Sotomayor pointed out, the bright-line rule about which the majority fretted had already been tried out, and the results had not been disastrous. For Justice Sotomayor at least, prior percolation of the issue had yielded important factual information relevant to the proper resolution of the case. *Perry* thus illustrates one way in which lower-court decisionmaking might generate data for the Court to consult when choosing between various potential resolutions of an issue.

Even so, we think that this experimentation-based rationale will be persuasive under a limited set of circumstances. To start with the most obvious point, real-world data will often prove immaterial to the merits of the legal questions the Court confronts. For the current Court in particular, many of whose members describe themselves as constitutional originalists and statutory textualists,¹⁷⁴ legal questions are often reduced “to an exercise in following semantics and syntax[] or to a determination of historical facts.”¹⁷⁵ Whatever the merits of this approach, the important point for our purposes is to emphasize how little legal relevance it accords to facts concerning the on-the-ground effects of different interpretive positions. To the extent that the Justices really do draw a stark contrast between the question of “what the law is” and the question of “what the law should be,”¹⁷⁶ they would not care about the question whether one interpretive position yields better results than

preliminary examinations” and entail “a vast enlargement of the reach of due process as a constraint on the admission of evidence.” *Id.* at 244.

173. *Id.* at 262 (Sotomayor, J., dissenting).

174. See, e.g., *Arizona v. United States*, 567 U.S. 387, 439–40 (2012) (Thomas, J., concurring in part and dissenting in part) (arguing that the doctrine of obstacle preemption “is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation . . . that roams well beyond statutory text”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) (“The text of the law is the law.”); Ryan Lovelace, *Neil Gorsuch: Scalia’s Views on the Constitution Aren’t “Going Anywhere on My Watch,”* WASH. EXAM’R (Nov. 16, 2017, 11:53 PM), <https://perma.cc/N5B6-AN39> (reporting that Justice Gorsuch said that “[o]riginalism has regained its place at the table[,] . . . textualism has triumphed[,] . . . and neither one is going anywhere on my watch” (third and fifth alterations in original)). But see Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1279 (2020) (presenting an empirical study of Supreme Court opinions finding that “the Court, and its textualist Justices in particular, regularly employ pragmatic reasoning as well as supposedly neutral textualist tools”).

175. Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 345 (2014).

176. See also *infra* note 177; cf. *About Us*, FEDERALIST SOC’Y, <https://perma.cc/3LD7-FX4W> (archived Oct. 27, 2020) (noting that the society “is founded on the principle[] that . . . it is emphatically the province and duty of the judiciary to say what the law is, not what it should be”).

another.¹⁷⁷ But that, of course, is precisely the question that experimentally derived data would help to inform. And if the question is unimportant, then so too are the data.¹⁷⁸

Furthermore, even where percolation-provided data might end up making a legal difference, the data may be difficult to interpret.¹⁷⁹ The world is replete with confounding variables, and the Court will often be unable to draw simple, direct linkages between different judicial decisions and different fact patterns on the ground.¹⁸⁰ Such measurement problems, to be sure, will not always be insuperable. Particularly with respect to questions of trial- and appellate-court procedure, one can imagine straightforward ways of comparing the immediate effects of different types of rules.¹⁸¹ And even where the analysis gets more complex, the Court might be able to rely on the assistance of scholars, statisticians, and institutions like the Federal Judicial Center. Oftentimes, however, we think that meaningful inferences of any sort will be exceedingly difficult to draw. Imagine, for instance, trying to rely on a circuit-by-circuit

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177. See, e.g., *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) (“That leads us to the government’s final redoubt: a policy argument. But as the government knows well, courts aren’t free to rewrite clear statutes under the banner of our own policy concerns.”); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (“This Court is not free to substitute its preferred economic policies for those chosen by the people’s representatives.”); *Burrage v. United States*, 571 U.S. 204, 218 (2014) (“But in the last analysis, these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written—even if we think some other approach might ‘accor[d] with good policy.’” (quoting *Comm’r v. Lundy*, 516 U.S. 235, 252 (1996))).
178. See Caminker, *supra* note 10, at 59 (expressing skepticism at the assumption that “Justices actually monitor and compare the actual operation of divergent lower court rules, particularly when the Court’s interpretive methodologies frequently eschew the relevance of such empirical data” (footnote omitted)).
179. See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 875 (2014) (questioning “whether the Court could reliably discern which of several competing interpretations is generating better consequences,” and noting that “the fact that the lower courts are divided and the law uncertain might dampen the extent to which consequences manifest themselves”).
180. It is in this respect quite telling that Justice Sotomayor’s *Perry* dissent made no effort to actually quantify the *number of claims* being processed within the four circuits that embraced her preferred evidentiary rule. Indeed, the only support she provided for her assertion that there had been “no flood of claims” was a citation to the four lower-court opinions that had adopted the rule itself. See *Perry v. New Hampshire*, 565 U.S. 228, 262 (2012) (Sotomayor, J., dissenting). Distilled to its essence, then, the “data” on which Justice Sotomayor relied amounted to not much more than an impressionistic sense that the sky had not fallen within the First, Second, Sixth, and Ninth Circuits. That might have been a useful insight at the margins, but it hardly seems to us the sort of make-or-break discovery that sheds meaningful, clarifying light.
181. Cf. Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 440 (2013) (suggesting that “[t]he courts of appeals have both the ability and incentive to monitor and use evidence about the consequences of different appealability rules since these consequences are mostly internal to the courts”).

comparison of crime rates in an effort to evaluate the claim that a proposed rule of Fourth Amendment doctrine would frustrate law-enforcement efforts. Even if one noticed disparities between circuits with the rule in place and those without it, one would still need to control for a host of other variables that might account for any noticeable differences in the data—for example, changes in individual behavior, changes in law-enforcement methods, changes in prosecution priorities, changes in data-gathering methods, or perhaps even changes in other doctrinal rules.¹⁸² In many instances, in other words, different lower-court rulings may well yield different real-world effects, but those effects may still prove unascertainable or unilluminating.¹⁸³

We tentatively highlight one other difficulty for the experimentation rationale. Under some circumstances, ethical considerations might militate against the intentional deployment of percolation for experimental purposes. To take an admittedly extreme example, suppose that the Court expressly encouraged the thirteen circuits to “try out” different approaches to a question of criminal procedure—say, procedures for decisionmaking about the death penalty, or procedures for stop-and-frisk programs—for the purpose of generating data about conviction rates and sentencing severity. That sort of decision, in essence, would call for an exercise in the ethically fraught area of human-subjects research, weighed down by the added difficulty that its “subjects” never consented to participate in the experiment.¹⁸⁴ To be clear, we are not suggesting that all such experiment-inviting decisions from the Court would run afoul of ethical norms, and we do not in any event purport to have worked out a framework for evaluating the ethical appropriateness of judicially initiated forms of doctrinal experimentation. But we do want to suggest that some attempts to percolate for experimental purposes might end up running afoul of baseline notions of human dignity and procedural fairness,

182. In addition, there would remain the challenge of separating cause from effect. Imagine, for instance, that the reduced incidence of, say, wire-fraud cases induced some circuits to adopt rule *A*, whereas the elevated incidence of wire-fraud cases induced other circuits to adopt rule *B*. Under those circumstances, the circuit-by-circuit disparities would tell us nothing about which of the two rules was more likely to increase (or reduce) the incidence of wire fraud going forward.

183. That would be especially true insofar as the Court found itself hesitant to rely upon and appeal to sophisticated empirical analyses. *Cf.* Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 5629801 (Roberts, C.J.) (describing a statistical measure of partisan gerrymandering as “sociological gobbledygook”).

184. *Cf.* 45 C.F.R. §§ 46.101(a), .111(a) (2019) (laying out restrictions for approval by institutional-review boards for research involving human subjects conducted by federal agencies and recipients of federal funding).

even where the experiment might itself be capable of generating useful and informative results.¹⁸⁵

D. Audience Reactions

A fourth informational rationale stems from the basic descriptive premise—observed within both legal and political-science literature—that the Court cares at least somewhat about how its opinions will be received. This might be true in the general sense that the Court strives not to veer too far from where public opinion stands on a given issue¹⁸⁶ or in the more particularized sense that the Justices seek approval from a smaller set of legal and political “elites.”¹⁸⁷ Either way, percolation might confer value by giving the Justices a preview of how the relevant audience might react to different possible resolutions of an issue before it. By cross-referencing lower-court decisions against the different public reactions that those past opinions engendered, the Court might help to ensure that its audiences will positively react to the resolution it selects.¹⁸⁸

We do not think this argument ultimately succeeds. Putting to one side the normative question whether the Court ought to decide cases in a manner that

185. See *Gilliard v. Mississippi*, 464 U.S. 867, 873 (1983) (Marshall, J., dissenting from the denial of certiorari) (arguing against a percolation-based denial of certiorari on the ground that “[w]hile this Court attends the Brandeisian experiments in a handful of state courts, criminal defendants in Mississippi and numerous other States have no legal remedy for what a majority of this Court agrees may well be a constitutional defect in the jury selection process”); *id.* (“Under the circumstances, I cannot abide by further delay.”); see also *id.* at 869 (questioning the appropriateness of using the “States-as-laboratories” metaphor to “justify this Court’s abstention from reaching an important issue involving the rights of individual defendants”).

186. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14–15 (2009) (noting that, “over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people”); see also ANNA HARVEY, *A MERE MACHINE: THE SUPREME COURT, CONGRESS, AND AMERICAN DEMOCRACY* 5 (2014) (suggesting, based on a study of “the Supreme Court’s constitutional rulings on federal statutes between 1953 and 2004,” that the Justices “appear to be extraordinarily deferential to [elected branch] preferences, in particular to the preferences of majorities in the House of Representatives”).

187. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516–17 (2010).

188. See, e.g., Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 59 (2016) (suggesting that “‘percolation’ in the lower courts is one way that the Court can monitor legal developments and *social responses* to divisive issues” (emphasis added)); cf. also Gewirtzman, *supra* note 147, at 488 (suggesting that “percolation can help facilitate and shape the development of public attitudes, and, hence constitutional law, during a prolonged period of public contemplation and deliberation”).

conduces to either popular or elite preferences, we are skeptical that percolation is in fact necessary to provide new or meaningful information about audience reactions.

Consider the variable of *general public opinion*. The problem here is twofold. First, most issues the Court decides are not likely to generate significant public reactions in one direction or another.¹⁸⁹ When lower courts render decisions on those issues, their decisions will provoke even less public discussion and debate.¹⁹⁰ Thus, even to the extent the Court wanted to decide a low-salience case in accordance with popular preferences, percolation is unlikely to give it much information as to what those preferences are.

With high-salience cases, by contrast, the problem gets flipped on its head. Lower-court opinions on such issues may well provoke identifiable public reactions,¹⁹¹ but the reactions are unlikely to tell the Court anything it does not already know. The general public undoubtedly harbors strong feelings about the courts' handling of abortion restrictions, the Affordable Care Act, the President's latest executive order on climate-change policy, and other hot-button issues, but the public's views on most of those subjects are already the subject of extensive reporting and empirical study. We suppose it is conceptually possible that the lower courts might end up handling one of these issues in a manner that reveals an important and until-that-point-overlooked truth about public sentiment, but we regard that possibility as more theoretical than real.

But suppose instead that the Court cared more about the reactions of legal and political elites.¹⁹² These individuals pay attention to even the lower-salience cases, and their views in high-salience cases will not always align with

189. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 64 (2006) (attributing to the Court a generally “low-salience agenda,” which “lies some distance from the nation’s”); see also Barry Friedman, *Opinion, Great Controversy Is Usually the Exception for the Supreme Court*, N.Y. TIMES: ROOM FOR DEBATE (updated July 7, 2015, 4:36 PM), <https://perma.cc/AH5T-N3KE>.

190. See Coenen & Davis, *supra* note 135, at 810 (“Lower court decisions—precisely because they are lower court decisions—typically command far less public attention than do Supreme Court decisions.”).

191. For example, some lower-court decisions concerning the constitutionality of same-sex marriage restrictions made front-page headlines in major national newspapers. See, e.g., John Schwartz, *U.S. Marriage Act Is Unfair to Gays, Court Panel Says*, N.Y. TIMES (Oct. 18, 2012), <https://perma.cc/8C3B-DVKM>. The many constitutional challenges to the Affordable Care Act since its enactment have also made national news as they have moved through the lower courts. See, e.g., Abby Goodnough, *Obamacare Insurance Mandate Is Struck Down by Federal Appeals Court*, N.Y. TIMES (updated June 26, 2020), <https://perma.cc/3Q3Q-USBK>.

192. See Baum & Devins, *supra* note 187, at 1516-17.

more immediately identifiable indicators of general public opinion.¹⁹³ Percolation might thus allow the Justices to observe in real time elite reactions to lower-court opinions in speeches, writings, blog posts, tweets, and other communications. Thus, when it comes time to dispose of an issue for itself, the Court would have a good sense of how the resolution will play to the relevant elite audience.

Like the argument about crowdsourcing, however, this argument overlooks the extent to which legal elites can and do make their views known even after a case gets added to the Court's docket—either by directly filing amicus briefs that express their views on the case,¹⁹⁴ by generating print and online commentaries that the Justices and their clerks might read on their own initiative,¹⁹⁵ or perhaps even by communicating directly with the Justices through private conversations and correspondences.¹⁹⁶ Thus, the question again becomes whether percolation would add to the informational value that these materials already confer. And we do not think there will be many circumstances in which this is the case.

E. Signaling

A final informational rationale for percolation involves signaling effects. Lower-court results might themselves signal something about the merits and difficulty of an issue, even if they furnish no useful ideas for resolving the issue, real-world data on consequences, or previews of audience reactions.¹⁹⁷

193. See *id.* at 1570 (noting that “public opinion surveys provide extensive information on the opinions of highly educated people, the subset of the general population to which members of elite groups belong,” and that “[o]n some legal issues, people with high levels of education differ considerably in their opinions from people with less education”).

194. See *id.* at 1566 (noting that “[a]micus curiae briefs are one important form of communication from elite groups to the Court”).

195. See, e.g., Fisher & Larsen, *supra* note 155, at 107 (“It seems there is a growing sense that the Justices are keenly aware of the input and judgments coming instantaneously from blogs and other legal commentators.”); see also *id.* at 89 n.12 (“When asked whether he reads blog posts after certiorari grants, Justice Kennedy responded: ‘I have my clerks do it, especially with the ones when we’ve granted cert, to see how they think about what the issues are.’” (quoting Kevin O’Keefe, *Supreme Court Justice Kennedy on the Value of Law Blogs*, REAL LAWYERS (Oct. 10, 2013), <https://perma.cc/7XV5-PL7W>)).

196. See Baum & Devins, *supra* note 187, at 1520 (highlighting a remark from Justice Rehnquist that the Justices “talk to their family and friends about current events” (quoting William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986))).

197. We pause here to emphasize that we are evaluating percolation’s value *as it relates to the resolution of issues on their merits*, not as it relates to the question whether to grant certiorari in a case. We think it is probably true that multiple lower courts can usefully provide signals as to certworthiness. Cf. *Holmes Grp., Inc. v. Vornado Air Circulation*
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Even without consulting the lower-court opinions accompanying these results or the rationales on which they rest, the Justices might learn something important by tallying up and cross-referencing the results themselves.¹⁹⁸

Consider in this respect the Supreme Court's decision in *United States v. Tinklenberg*.¹⁹⁹ The case presented a question about a provision of the federal Speedy Trial Act, and it arrived at the Court from the Sixth Circuit, which—as Justice Breyer's majority opinion pointed out—had resolved that question in a manner that “every [other] Court of Appeals, implicitly or explicitly, has rejected.”²⁰⁰ The Court, Justice Breyer explained, was “impressed” with this fact, and it pointed to “[t]his unanimity among the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges” as “itself entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long period of time.”²⁰¹ The Court thus saw the lower courts' near convergence on (and long-term adherence to) the same result as an important signal of the wrongness of the position the Sixth Circuit had endorsed.²⁰²

Along similar lines, consider the Court's decision in *Wilson v. Layne*, which held that the defendant police officers had violated the Fourth Amendment by bringing “media or other third parties into a home during the execution of a warrant,”²⁰³ but which also held that the right had not been so “clearly established” at the time of the arrest as to warrant the denial of qualified immunity.²⁰⁴ In support of this latter conclusion, Chief Justice Rehnquist's

Sys., Inc., 535 U.S. 826, 839 (2002) (Stevens, J., concurring in part and concurring in the judgment) (“An occasional conflict in decisions may be useful in identifying questions that merit this Court's attention.”). But that point ultimately reduces to the relatively uncontroversial proposition that the Court has more reason to grant certiorari in the face of circuit splits than it does in the face of circuit uniformity. The question we want to consider here, by contrast, is whether percolation places an issue in a better posture for merits-based resolution if and when the Court decides to grant certiorari in the case.

198. See Dreyfuss, *supra* note 133, at 525 (noting that “[t]he varying decisions of the lower courts can be understood as furnishing a rating system” and that “[w]hile it would be wrong for the Supreme Court to simply adopt the most popular opinion, the Court can derive important information from the fact that several courts have confronted the same problem or resolved the same legal issue in similar ways”).

199. 563 U.S. 647 (2011).

200. *Id.* at 656.

201. *Id.* at 656–57.

202. See Bruhl, *supra* note 179, at 875–76 (noting that Justice Breyer's argument in *Tinklenberg* could be given “an evolutionary or Burkean spin: if a certain view has persisted over time in some or all jurisdictions, then it probably represents some degree of good sense and practical adaptation”).

203. 526 U.S. 603, 614 (1999).

204. *Id.* at 617.

majority opinion highlighted the fact that “a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages,” and it went on to note that “[i]f judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”²⁰⁵ Thus, as Eric Posner and Adrian Vermeule have noted, *Layne* treated “disagreement among appellate courts” as a “powerful indicator that the legal rules were not clearly established.”²⁰⁶

Finally, subtler (but equally powerful) forms of signaling might arise from the fact that the lower courts (and lower-court judges) have different “identities” and “reputations”—identities and reputations that might help to color their rulings in useful and informative ways. For example, if a traditionally libertarian lower-court judge has sided against a property owner on a Takings Clause claim, that particular judge’s against-the-grain decision may help to underscore the weakness of the claim itself.²⁰⁷ Some Justices may be on the lookout for results reached by lower-court judges who are regarded as experts in the case’s subject matter, or more generally regarded as especially thoughtful and careful jurists,²⁰⁸ and other Justices may be on the lookout for

205. *Id.* at 618.

206. Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 168 (2016). Somewhat problematically for Chief Justice Rehnquist’s position in *Wilson v. Layne*, and as Justice Stevens’s partial dissent pointed out, the circuit split on which he relied went to the question *whether damages were appropriate* in media-ride-along cases, not to the substantive question whether such ride-alongs did or did not violate the Fourth Amendment itself. The lower courts’ disagreement may well have evinced the difficulty of the qualified immunity question itself, but it did not necessarily evince anything about the difficulty of the question on the merits. *See Wilson*, 526 U.S. at 619 n.1 (Stevens, J., concurring in part and dissenting in part) (“It is important to emphasize that there is no split in Circuit authority on the merits of the constitutional issue.”).

207. More generally, and as is well supported by the political science literature, a signal that is “counter to [the sender’s] ideological predisposition” is likely to carry significant informational value. Lucia Manzi & Matthew E.K. Hall, *Friends You Can Trust: A Signaling Theory of Interest Group Litigation Before the U.S. Supreme Court*, 51 LAW & SOC’Y REV. 704, 709-11 (2017); *see also* Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 551 (1985) (demonstrating that a “biased source” of advice may have value in part due to its “potential to reveal an unexpected recommendation”); *cf.* Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 ECONOMETRICA 1431, 1450 (1982) (noting that “there may be a good case for presuming that direct communication is more likely to play an important role, the more closely related are agents’ goals”).

208. *See, e.g., Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 276 (2010) (Stevens, J., concurring in the judgment) (defending the merits of a judge-made rule of securities law by reference to the fact that the rule was endorsed and shaped by Judge Henry Friendly, who “did more to shape the law of securities regulation than any other in the country” (alteration omitted) (quoting Louis Loss, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1722, 1723 (1986))).

results reached by lower-court judges that they regard as like-minded “epistemic peers.”²⁰⁹ All of these signals can be interpreted simply by cross-referencing the outcome reached against the reputation of the institution (or person) who reached it. And such signals might in turn help the Justices formulate, interrogate, or at least validate their own preliminary positions.

Our response to the signaling argument should by now look familiar: Simply put, we think the Justices can often rely on substitute signals from actors other than the lower courts. Most important in this respect are amicus briefs, many of which, as Allison Orr Larsen and Neal Devins have shown, come from repeat players whose views the Court takes seriously.²¹⁰ If the vast majority of amici express support for resolution *A* and only a few for resolution *B*, that fact in itself might underscore the strength of *A* and the weakness of *B*. If, by contrast, the amici are evenly split, that might tell the Justices that the issue lacks a clear and obvious answer—itself a useful data point insofar as certain remedial or procedural questions turn on the overarching clarity of the law.²¹¹ And, finally, amicus briefs can sometimes send powerful signals in relation to the identities and reputations of their authors or signatories, as can be the case when the Court receives “surprising source” amici, authored by “entities that one would expect to be supporting the other side of the case.”²¹² Indeed, in contrast to judicial actors who generally

209. Cf. William Baude & Ryan D. Doerfler, Essay, *Arguing with Friends*, 117 MICH. L. REV. 319, 326-27 (2018) (distinguishing between disagreements between “methodological ‘friends,’” which can “involve[] the discovery of something new,” and disagreements between “methodological ‘foes,’” which “pretty much comes as ‘old news’ to the parties involved”).

210. See Larsen & Devins, *supra* note 154, at 1940-41. “Chief among those repeat players,” as Larsen and Devins note, “are the lawyers who serve in the Office of Solicitor General.” *Id.* at 1941; see also Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 72 (2005) (suggesting that “the solicitor general’s position in a case provides information to justices about the potential ideological impact of a case”); Larsen & Devins, *supra* note 154, at 1916-17 (noting that many major law firms have hired former Solicitors General and deputy solicitors general to lead their Supreme Court practices, that “a few nonprofit organizations,” such as the American Civil Liberties Union, “have begun building their own ‘in-house’ Supreme Court litigators,” and that “the Chamber of Commerce . . . has been on a hiring spree of Supreme Court law clerks recently”).

211. See also Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1415 (1997) (“It is no exaggeration to say that the Supreme Court has created so many doctrines requiring an inquiry about whether a right or power is ‘clear’ or ‘unclear’ that commentators can [hardly] keep track of them.”) (alteration in original) (quoting John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 771)). See generally Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497 (2019) (highlighting several doctrinal contexts in which this is the case).

212. See Dan Schweitzer, Practice Note, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 534 (2003) (quoted in Larsen & Devins, *supra* note 154, at 1954); see also Manzi & Hall, *supra* note 207, at 705 (hypothesizing and
footnote continued on next page

must offer a viewpoint on the issues that arise before them, repeat-player amici can also send useful signals by simply declining to file briefs in a given case. It might be a noteworthy development, for instance, if the American Civil Liberties Union declined to file an amicus brief on behalf of a criminal defendant, a high-profile Republican state attorney general declined to file an amicus brief on behalf of the Trump Administration, and so forth.²¹³

Thus, we think the signaling-based case for percolation—somewhat like the crowdsourcing case—must contend with the fact that substitute signaling devices will often already be available. The relevant question for the signaling rationale is not whether the lower courts are capable of delivering signals that might aid the Court's resolution of an issue; rather, it is whether those courts are the only relevant actors capable of doing so. And while there may be some instances in which percolation promises the only means of generating the signals the Justices need,²¹⁴ we are skeptical that this will often be the case.

* * *

In sum, we think that percolation's informational value will be substantial only when at least one of three conditions is present: (1) lower-court judges enjoy a distinctly beneficial perspective on an issue that litigants, amici, and commentators will not themselves share; (2) "experimental" data might

finding some empirical evidence for the proposition that "[a]micus briefs should be especially likely to influence justices when both conditions are present; i.e., a justice and brief filer share ideological preferences and the brief filer sends an unexpected ideological signal").

213. Consider in this respect a colloquy that occurred between Justice Kagan and former Solicitor General Paul Clement during oral argument in *Merit Management Group v. FTI Consulting Inc.*, a case concerning a provision of the Bankruptcy Code. Justice Kagan asked Clement (who was representing the respondent) whether he had any thoughts as to why the Solicitor General had not bothered to file an amicus brief in the case, to which Clement responded: "No, I don't have any particular thoughts, other than [that] I do think that, if what we were urging on you was really a catastrophe for the markets or something else, boy, I sure think the SG would be here . . . you know, waving at least a yellow flag." Transcript of Oral Argument at 61, *Merit Mgmt. Grp. v. FTI Consulting Inc.*, 138 S. Ct. 883 (2018) (No. 16-784), 2017 U.S. Trans. LEXIS 55, at *48. Clement continued: "To me, the amici that aren't here that speak even louder, though, are, frankly, the . . . financial institutions, stockbroker[s], [and] clearing agency amici. . . . I mean, if—if you had any thought that you were not fully protected by the Respondent's view as much as the Petitioner's view, I would think it would be worth your while to file an amicus brief." *Id.* at 61-62, 2017 U.S. Trans. LEXIS 55, at *48-49.
214. For example, to the extent that the "clearly established" prong of qualified immunity analysis turns upon the existence of a split among the lower courts, lower-court disagreement might be uniquely valuable to the Court when it asks whether a constitutional right is clearly established. See *supra* notes 203-06 and accompanying text. The Court might on that ground deny certiorari when confronted with a difficult question whether an official violated a clearly established right. But the Court might well reduce decision costs for the federal courts overall by instead granting certiorari and clearly establishing the law going forward.

sometimes be needed by, appropriately solicited by, and comprehensible to the Justices themselves; or (3) multiple lower-court decisions are uniquely capable of producing valuable signals to the Justices about the nature of the issue under review. Each of those circumstances probably does sometimes arise, but they are unlikely to arise with great frequency. That being so, the informational rationales do not in our view suffice to support any sort of presumption in percolation's favor, especially in light of the practice's well-known costs.

III. Percolation's Institutional Value

Most existing accounts of percolation's value have focused on the process's (in our view limited) ability to produce useful information regarding the appropriate disposition of an unresolved issue. In this Part we develop an alternative rationale for percolation, one that existing commentary has not thoroughly explored. Specifically, percolation might also carry *institutional value*, helping sustain important practices, structures, and relationships across all levels of the federal judiciary. While the informational account sees individual Supreme Court decisions as beneficiaries of the percolation process, these alternative, institutionally focused accounts see the process as beneficial to the functioning of the federal judiciary as a whole.

We can imagine four different (and not mutually exclusive) ways in which percolation might carry institutional value. First, percolation might facilitate valuable forms of Supreme Court *engagement* with the lower courts' opinions, increasing comity within the federal judiciary by giving lower-court judges an enhanced sense of buy-in to the Court's own work. Second, percolation might enhance the lower courts' own decisionmaking *capabilities* by facilitating lower-court access to important and high-profile legal questions and promoting competition among the lower courts. Third, percolation might indirectly incentivize useful instances of Supreme Court *nondecision* by providing the Court with a reason to defer resolution of questions that it is better off not deciding at all. And finally, percolation might facilitate a practice that Neil Siegel has recently described as *reciprocal legitimation*, through which the Court might attempt to enhance the legitimacy of its decisions by demonstrating to the general public that they are the product of widespread lower-court consensus.

This Part lays out those arguments in detail and evaluates them on the merits. As with the informational accounts of percolation's value, our overall takeaway is that none of these institutional accounts provides an especially strong justification for valuing percolation as an across-the-board measure.

A. Percolation and Engagement

When an issue percolates prior to reaching the Supreme Court, the Court will have the opportunity to engage with the ideas and arguments that the lower courts have set forth. We have already seen why, in most cases, these ideas and arguments will not provide much informational value to the Court. Even so, the Court's active engagement with the lower-court opinions might remain valuable in an institutionally relevant sense.

In particular, the act of Supreme Court engagement might help to promote the existence of a healthy dialogic dynamic between the Justices and their lower-court peers.²¹⁵ That sort of engagement would help to signal to the

215. In addition, one might argue that, as Doni Gewirtzman has maintained, percolation “creat[es] opportunities for deliberation within and between circuits,” *see* Gewirtzman, *supra* note 147, at 487, thus facilitating a valuable process of “intrabranch” dialogue and engagement in a horizontal rather than vertical direction. We are less sanguine about the extent to which this sort of “intercircuit” dialogue makes a meaningful difference. *Intracircuit* dialogue, after all, will always be present, both in the forms of district court decisions that respond to and engage with one another and appeals-court panel decisions that do the same. There is also the possibility for valuable dialogue between circuit courts and the state courts that they overlay, as facilitated, for instance, by the circuit courts’ practice of certifying state-law questions for state court guidance. *See, e.g.,* Guido Calabresi, Madison Lecture, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1300-02 (2003) (“I believe that whenever there is a question of state law that is even possibly in doubt, the federal courts should send the question to the highest court of the state, and let the highest court of the state decide the issue as it wishes.”). We think this sort of engagement is good and worth promoting, but we are not sure one needs on top of it the additional instances of *cross-circuit* engagement that might result from a percolation-heavy environment.

Gewirtzman suggests that percolation also facilitates *interbranch* dialogue between the courts and other branches of government. In particular, he suggests that “[c]onstitutional disputes that linger at the lower court level provide time for political stakeholders to mobilize support for their positions, gather and analyze information, exert pressure on elected branches of government to adopt different policy choices, and to fully consider the impact of different constitutional rules on particular constituencies.” Gewirtzman, *supra* note 147, at 487. In our view, however, the relevant variable here is not so much percolation but simply time and delay. In other words, the possibility for a healthy, interbranch dialogue on a constitutional question depends not on *how many* lower courts attempt to resolve the question itself, but rather on *how long* the Supreme Court waits before attempting its own resolution. What is more, it may be that under some circumstances, the Court is better able to generate the desired *interbranch* dialogue by rendering its own more highly salient resolution of the issue rather than waiting around for the lower courts to capture the other branches’ attention. *See* Coenen & Davis, *supra* note 135, at 809-10 (“Lower court decisions—precisely because they are lower court decisions—typically command far less public attention than do Supreme Court decisions.”); *see also* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1582-83 (2001) (highlighting various ways in which the Supreme Court can act to promote rather than preempt interbranch dialogue in response to the questions it decides).

lower courts that the Court values their opinions and cares about what they do, and it would help to signal to the general public that different units of the judiciary are “working together” toward some shared, collective end. These institutionally relevant benefits, moreover, need not be limited to cases in which the Court expressly agrees with everything the lower courts have done; indeed, engagement might be especially valuable in precisely those cases where the Justices take positions that depart from those of several lower-court judges. There is a difference, after all, between thoughtful disagreement and thoughtless bossing around. And the more often the Court engages actively with the lower courts’ output, the more persuasively the Court can present its decisions as the product of collegial collaboration rather than top-down command and control.²¹⁶ Thus, as Arthur Hellman has put it, “if the Court recurrently ignores the efforts of lower-court judges to address the issues on its docket,” then “[l]ower-court judges will no longer feel the spirit of goodwill and cooperation that comes from participation in a shared enterprise.”²¹⁷

Does the value of intrabranch engagement provide a strong basis for promoting percolation? In general, we think not. To begin with, one might question the extent to which this form of engagement carries material institutional benefits. Perhaps if taken to an extreme enough level, Supreme Court nonengagement with the lower courts—reflected, say, in the Court’s categorical refusal to acknowledge the lower courts’ existence—would lead to widespread disillusionment and disloyalty within the courts below. But beyond that minimal threshold, we are skeptical that the degree of the lower courts’ buy-in will correlate much with the degree to which the Court engages with or does not engage with the lower courts’ own work. In particular, the engagement argument posits an unrealistic and uncharitable view of lower-

216. Active engagement with lower-court opinions might redound to the Court’s benefit as well. The lower courts decide the vast majority of cases arising under the Court’s own precedents and—if sufficiently disillusioned with the Court’s own treatment of their work—hold the potential to introduce significant disruptions into the smooth and reliable functioning of the system as a whole. Supreme Court engagement might thus qualify as instrumentally valuable to the Court in the sense that it maintains some level of loyalty and allegiance on the lower courts’ part. The Supreme Court needs the lower courts to “buy in” to what it is doing, lest they begin to defy or undermine the Court’s own doctrinal initiatives. Cf. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 1013 (2000) (noting that “the lower courts largely are, and will remain, the ‘messengers’ and implementers of the Court’s will” and that “a greater willingness to think for themselves, to deviate from doctrine which does not make sense, and to try and impose doctrinal coherence on the Court’s work, would in practice limit the Court’s power to some extent”). And one might reasonably speculate that lower courts are more likely to maintain that buy-in when they are treated as something more than cogs in a machine.

217. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 436-37.

court judges' dispositions, hypothesizing that these judges so crave the Court's attention that they will rebel in response to any perceived signs of neglect. Perhaps there are a few lower-court judges who really do behave in that way, but we expect (and certainly hope) that they are more the exception than the norm.²¹⁸ And while increased engagement might alter public perceptions at the margin, we are skeptical that perceived intrabranch relations within the federal judiciary are a significant driver of the courts' public legitimacy.²¹⁹

But even if engagement does have some value in a comity-promoting sense, the engagement-based defense of percolation faces another difficulty—namely, that percolation itself is not necessary to foster meaningful forms of dialogue between the Court and its subordinates. The vast majority of the Court's cases fall within its appellate jurisdiction, meaning that even where an issue has not percolated, the Court will always have before it at least one lower-court decision (and usually two such decisions) with which to engage. To be sure, percolation increases the number of engagement opportunities per case;²²⁰ where several lower courts have opined on an issue prior to the Court's own resolution of it, the Court could (though typically does not²²¹) engage with all of those courts' opinions in the course of resolving the issue for itself. But why would that matter? What matters from an institutional perspective is the *overall* level and quality of Supreme Court engagement over the long haul. Even in a low-percolation environment, the Court would remain well situated to produce high levels of high-quality engagement over the course of an entire Term.

Indeed, just as a low-percolation environment is not necessarily a low-engagement environment, so too is a high-percolation environment not

218. Cf. Bhagwat, *supra* note 216, at 980-81 (highlighting several ways in which the lower courts have suffered a "gradual loss of power and status vis-à-vis the Supreme Court," while suggesting that "[o]n the whole . . . lower court judges are remarkably quiescent regarding, and even supportive of, the upward shift in rulemaking power within the federal judiciary").

219. *But see infra* Part III.D (highlighting one way in which perceived *substantive agreement* between the Court and lower courts might affect public perceptions of judicial legitimacy).

220. Cf. Clark & Kestelc, *supra* note 151, at 164 (finding, based on an analysis of 336 "unique legal issues that resulted in a conflict resolved by the Supreme Court" between 1985 and 1995, that when resolving circuit splits the Court has before it an average of 4.5 different circuit-court opinions of relevance to the issue under review). Of course, this finding cannot tell us to what extent this figure derives from the Court's own intentional efforts to *produce* percolation and to what extent the figure derives from other variables. But the figure is at least suggestive of the intuitive—indeed, ultimately definitional—proposition that intentional efforts by the Court to promote percolation of an issue will increase the number of on-point lower-court opinions with which the Court might subsequently choose to engage.

221. *See* sources cited *infra* note 222.

necessarily a high-engagement environment. That the lower courts have issued multiple opinions on an issue does not mean that the Court will thoughtfully engage with what those opinions have to say.²²² A Court generally disinclined to engage with lower-court decisions will not likely change its attitude simply because there exist more lower-court decisions to engage with. Rather, the critical variable is simply the Court's willingness to engage in the first place. That willingness may or may not exist, but its existence strikes us as unlikely to depend on whether percolation has occurred.²²³

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222. This observation draws some empirical support from Wayne Logan's recent work. See generally Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235 (2014) [hereinafter Logan, *House Divided*]; Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012) [hereinafter Logan, *Constitutional Cacophony*]. For example, in a survey of "Roberts Court cases reviewing state criminal procedure decisions" from the 2005 through 2012 Terms, Logan found that "[o]nly in a single instance did the Court forthrightly articulate and contextualize doctrinal variation among state and lower federal courts." Logan, *House Divided*, *supra*, at 248, 276. And in a separate survey of decisions from the 1981 through 2010 Terms, Logan found, among other things, that "[o]f the 138 Fourth Amendment merits opinions from the period, in only seventeen (in a majority, dissent, or concurrence) was there express acknowledgment of the existence of a federal circuit split"; that "[t]ypically, when the Court does acknowledge a split, it merely notes its existence"; and that, "[i]n lieu of analyzing the merits of respective circuit positions, the Court usually bases its jurisprudential outcomes on prior decisions or opinions of individual Justices." Logan, *Constitutional Cacophony*, *supra*, at 1167-68. These conclusions line up with the empirical findings of other scholars as well. See, e.g., Bruhl, *supra* note 179, at 915 (noting, based on a study of the Court's decisions from the 2010, 2011, and 2012 Terms, that "one finds invocations of the lower courts in about forty cases, or around one-sixth of the merits decisions," and that "[i]n around one-third of the cases invoking lower-court support, the discussion is brief and unelaborated"); Todd J. Tibieri, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 889-90 (1993) (finding from a survey of the 1988 Term that, out of 36 Supreme Court decisions on "percolated" statutory questions, only 13 such decisions included citations to lower-court opinions "for propositions important to [the] holding").
223. Perhaps an increase in the number of "per-case" engagement opportunities might still make a difference in the following sense: The greater the number of lower-court opinions of relevance to each issue the Court confronts, the higher the odds that *at least one* of those sources will receive sustained public attention from the Court. And if that were true, percolation might ultimately increase the *overall* number of opinions with which the Court engages over the course of an entire Term. Even by this metric, however, we are not sure the argument works, and, in fact, we could potentially imagine an argument running in the opposite direction. Perhaps, that is, the Court is more likely to engage with a lower-court opinion that is the focal point of everyone's attention rather than one of several cases that different litigants are relying on to different degrees; in other words, there might be an engagement-related downside to spreading the relevant lower-court sources too thin. Either way, the larger point is simply that the Court's overall attitude toward engagement is likely to matter far more than the number of decisions with which it might choose to engage.

In sum, although the engagement argument might carry surface-level plausibility, it ultimately does not withstand serious scrutiny. The extent of the Court's engagement with lower-court opinions seems both unlikely to matter much in a big-picture, institutional sense *and* unlikely to depend much on the extent to which percolation does or does not occur. If engagement is a value worth pursuing, proponents of engagement should simply pursue the strategy of advocating for more engagement across the board, rather than try to increase the number of lower-court opinions that the Supreme Court might choose to engage with when deciding a particular case.²²⁴

B. Percolation and Lower Courts' Decisionmaking Capabilities

As we have seen, the engagement-based account sees percolation's value as deriving from its ability to prompt healthy dialogue between the Court and its subordinates. But even if that dialogue never occurs, one might still see percolation as valuable insofar as it gives lower courts the opportunity to wrestle with complex and important legal issues. Here, percolation's value would lie in its potential to improve the lower courts' decisionmaking capabilities. Percolation might have value, the argument goes, simply because it helps ensure that the lower courts have ample access to difficult, interesting, and often high-profile cases. And that access might be valuable even where the Court, in deciding a percolated issue, ends up altogether ignoring everything the lower courts have said and done. What makes percolation worthwhile, on this view, is not so much an interactive engagement between the Court and its subordinates, but the lower courts' expanded opportunities to confront the most pressing legal questions of the day.

If the very hardest cases all enjoyed a fast track to the Supreme Court, then lower courts would find their dockets confined to "easier," humdrum cases.

224. Another version of the engagement argument might stress the relationship between the Supreme Court and the state courts. It might be that comity and respectful consideration are especially important in the federalism context. See Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309, 1309 (2015) ("Comity . . . features prominently in the law of American federalism . . ."). As to this possibility, our response is, again, that percolation does not necessarily lead to engagement, and engagement does not necessarily require percolation. And to the extent that the argument is concerned not so much with engagement as with the benefits of localism and diversity that federalism might provide, we think the issue is not so much one of percolation, but rather one of Supreme Court passivity. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 5 (2018) (referencing "the types of complications that sometimes arise in prematurely nationalizing constitutional rights and the occasional benefits that flow from measured restraint in refusing to do so"). And if passivity—that is, a pattern of systematic Supreme Court nonintervention in connection with issues that may arise before state courts—is the goal, then its proponents should defend that goal on its own terms. See *infra* Part III.C.

Under such circumstances, a renewed commitment to percolation might help to increase (or at least prevent the decrease of) the lower courts' own familiarity with and ability to decide the very hardest sorts of problems that come across their radar.²²⁵ In much the same way that major-league ballplayers might see their skills decline after a season in the sandlot leagues, so too might lower-court judges see their skills decline after confining themselves to an unending series of simple and straightforward questions. By ensuring that these courts receive a steady diet of hard and controversial cases, the Court may also be ensuring that those courts perform at the top of their game.²²⁶

Further reinforcing this idea is the possibility of healthy competition among circuits. Then-Judge Posner has suggested that federal courts may improve by competing to outperform each other on issues of federal law.²²⁷ And perhaps the lower courts will compete most vigorously against one another when taking on the hardest and most interesting cases. If so, increasing lower courts' access to cert-worthy issues would carry the further salutary effect of creating especially valuable venues for the desired forms of competition.

There may be a grain of truth to these claims, but we are skeptical that they succeed. To begin with, both claims rely on speculative assumptions about the attitudes and abilities of lower-court judges. (For all we know, lower-court judges may not especially care about how they stack up against one another, nor do we have any concrete sense as to whether judges' skills would materially

225. A related argument is in some ways an inverted variation on an argument that Dan Epps and Will Ortman have recently advanced concerning the Court's own docket. Specifically, Epps and Ortman worry that the Court's near-exclusive focus on "important" cases leaves the Court with "limited information about how statutes, regulations, and even its own prior decisions play out in ordinary cases." Epps & Ortman, *supra* note 9, at 720. By the same token, one might worry that limited exposure to the "hard," cert-worthy questions the Court decides would render lower courts less well equipped to handle those sorts of cases if and when they confront them.

226. Along similar lines, and as Doni Gewirtzman has suggested, one might regard the lower courts' access to these sorts of cases as valuable to the extent that they help to "incentivize[] lower court judges to take their job more seriously." Gewirtzman, *supra* note 147, at 484.

227. POSNER, *supra* note 162, at 156 ("[J]udicial monopoly of a field of federal law eliminates competition in that field."); *see also* Gewirtzman, *supra* note 147, at 484 n.138 ("[A]ssuming lower court judges are incentivized by the potential for heightened prestige and national recognition, percolation improves the quality of appellate judging by creating competition among judges in different circuits to develop optimal rules."); Dreyfuss, *supra* note 135, at 25 ("Losing the tension produced by the percolation of ideas within the judiciary would, in addition, reduce [a lower] court's incentive to reason clearly or to write persuasively.").

decline after a period of prolonged exposure to easy and uninteresting cases.²²⁸) But whatever the truth of those speculations may be, the more significant problem stems from the assumption that percolation meaningfully increases the lower courts' access to interesting and consequential cases. The Court's own docket, after all, consists of far fewer than 100 merits-based cases per year²²⁹—not nearly enough to cover the seemingly endless array of difficult legal questions that continue to emerge in an ever-changing world. True, more percolation by the Court might make a difference at the margin—all else equal, it should increase lower-court opportunities to consider the particular *subset* of hard legal questions bound for eventual resolution by the Justices. But we think that, relative to the total number of “hard” legal questions that lower-court judges would do well to cut their teeth on, that particular subset is vanishingly small. Consequently, the skills-based case for percolation's value strikes us as ultimately unpersuasive as well.

C. Percolation and Supreme Court Nondecision

A third institutionally focused account of percolation's value appeals to the value of lower-court autonomy. The more the Court percolates, the less the Court decides, and, to some observers at least, the less the Court decides, the better for us all. Percolation, as Samuel Estericher and John Sexton have put it, “can allow the circuit courts to resolve conflicts by themselves, without Supreme Court intervention.”²³⁰ That fact in and of itself might give percolation value.²³¹

228. Perhaps, that is, learning how to be a good judge is less like training to become an elite athlete and more like learning how to ride a bike. Once the requisite skills are developed, minimal additional “practice” is required to ensure they remain in place.

229. During the 2018 Term, for instance, the Court rendered “full-opinion” decisions in seventy-two cases. See *The Supreme Court, 2018 Term—The Statistics*, 133 HARV. L. REV. 412, 412 tbl.I(A) & n.a (2019). More generally, the Court has over the past several decades seen a decline in the number of cases it decides each year, and “concern has grown over whether the Court is deciding too few cases and consequently leaving too many important cases and issues undecided.” See Frederick Schauer, *Is It Important to Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 77 (2009).

230. Estreicher & Sexton, *supra* note 80, at 699 n.68.

231. Paul Bator, a strong skeptic of percolation's value, once characterized percolation as “not a purposeful project” but rather “just a way of postponing decision in the hope that, in the meantime, we will learn something useful.” Bator, *supra* note 10, at 690. To Bator, of course, this point counted as a strike against the percolation process. But to a Bickelian adherent of the “passive virtues,” the close association between percolation and postponed decision might instead count as a strong point in its favor.

Obviously, the strength of this argument will depend to some extent on the strength of one's reasons for preferring Supreme Court nonintervention.²³² But let us simply stipulate for now that those reasons are good—that is, let us suppose that the Supreme Court does indeed do best by doing as little as possible. Even on that assumption, we think the value of Supreme Court nondecision does not provide strong support for the practice of percolation itself. The problem, in short, is that the argument confuses cause and effect. Percolation may well occur *as a consequence* of the Court's decision to let an issue play itself out in the lower courts; the less the Court decides, the more the lower courts will fill the void with separate and potentially different decisions of their own. But that isn't what gives value to the Court's decision not to decide. Rather, what makes that decision valuable is the Court's own noninvolvement in the case—noninvolvement that generates such potential benefits as the avoidance of substantively bad Supreme Court decisions, preserved judicial capital and reduced decision costs for the Court itself, and avoidance of intrusiveness and meddling in the lower courts' own affairs.²³³

232. We can think of a variety of reasons why issues might be better left for the lower courts to deal with on their own. Depending on one's ideological proclivities, for instance, one might anticipate the Court's own resolution of an issue to be substantively worse than at least some of the resolutions that would come from leaving the issue to a more ideologically heterodox set of actors. Less contingently, one might maintain that as long as a circuit split has not yet emerged on the issue, the issue simply isn't worth the Court's own time. See PERRY, *supra* note 86, at 127 ("All of [the Justices] are disposed to resolve conflicts when they exist and want to know if a particular case poses a conflict."). Or one might even occasionally regard circuit-to-circuit variability as a feature rather than a bug; that is, different solutions across different circuits might be desirable on the same sorts of grounds that differences among the laws of the fifty states can be desirable. See Frost, *supra* note 42, at 1611 (suggesting that "nonuniform interpretation of federal law . . . may even be desirable in some cases as a means of tailoring laws to accord with regional preferences").

233. A narrower version of the "nondecision" argument might proceed as follows: When the Supreme Court lets an issue percolate, it creates the possibility that the issue will "work itself out" in the courts below, thus obviating the need for a Supreme Court decision on the merits. Percolation thus helps the Supreme Court economize on decision costs by ensuring that the Court only ever hears issues on which the lower courts have split. Thus, for example, if the Court were to review the very first lower-court decision to have confronted an emerging legal question, the Court might end up expending resources on a question that it might actually not need to decide. If, by contrast, the Court were to let that issue percolate for a while, there is a possibility that *all* of the lower courts would converge on the same doctrinal solution, at which point any need for Supreme Court intervention would end up going away.

One problem with this argument is that it fails to consider the extent to which a preemptive decision by the Court, though costly to the Court itself, would in fact reduce decision costs for the system as a whole. By waiting to see whether a given issue "needs" Supreme Court resolution, the Court in effect forces all the lower courts to expend their own judicial capital on resolving what, for each of them, will be a case of first impression. Cf. Bator, *supra* note 10, at 690 (noting that the "uncertainty [percolation] engenders is itself a notorious breeder of litigation"). And it is unlikely

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These benefits accrue as a result of the Court's own noninterventionist stance, and these benefits do not depend on the number of different multiple lower-court decisions that come to occupy the doctrinal void. Here, then, percolation strikes us as a byproduct of, rather than a justification for, a practice whose (debatable) value is attributable to other things.

One potential response to this position is to contest the idea that the causal arrow runs in only one direction. In particular, this response would suggest that percolation does indeed help to promote lower-court autonomy in the sense that the perceived value of percolation sometimes gives the Court a reason to leave the lower courts free to work through issues on their own. A Court that either values or even simply pretends to value percolation has all the more reason not to decide issues preemptively, and if the Court's own belief in percolation's value helps the Court do that, then we should do what we can to sustain that belief going forward. Percolation would thus acquire value by means of a self-fulfilling prophecy, with its value deriving from the fact that, by believing percolation to be valuable, the Court is more likely to behave in a desirably passive manner.

This is not, we think, an argument we can fully refute. But we remain resistant to it. For one thing, although it may well be true that the Court has sometimes treated percolation as a reason to leave matters (temporarily) in the lower courts' hands,²³⁴ we cannot know the full extent to which percolation is functioning as a convenient excuse for nondecision rather than the actual basis for it.²³⁵ That is, percolation's role in promoting nondecision may be less substantial than first meets the eye; if we removed the perceived benefits of percolation from the equation, the same number of certiorari denials might

that the Court's own savings in judicial resources would exceed the systemwide expenditures of judicial resources that would result from the initial decision to let the issue percolate.

But the decision-costs argument ultimately suffers from a more fundamental flaw. Simply put, the argument does not actually provide a reason to value *percolation* in and of itself. It is undoubtedly true that the Court will expend fewer resources by choosing not to decide issues on which a circuit split has yet to emerge. But what produces the savings in resources is simply the decision to deny certiorari. Claiming that percolation has value because it enables the Supreme Court to decide fewer cases is just an unnecessarily indirect way of expressing the trivial point that the Court can decide fewer cases by deciding fewer cases.

234. Cf. Zachary Wallander & Sara C. Benesh, *Law Clerks as Advisors: A Look at the Blackmun Papers*, 98 MARQ. L. REV. 43, 64 (2014) (finding, on the basis of a study of past "cert pool" memos, "some empirical evidence that percolation matters to the Court in that the Court is more likely to grant cert to a petition for which the cert pool memo discusses many lower court judges and the reasoning they used in their cases").

235. At a minimum, however, it seems plausible to think that this is at least sometimes the case. See, e.g., Bhagwat, *supra* note 216, at 1006 (suggesting that the Justices use percolation "merely as an excuse for avoiding decision").

still occur, with no material effect on the (stipulated) value of reduced Supreme Court interference in lower-court affairs.

But even assuming that this skepticism is wrong and that a genuine belief in percolation's value sometimes motivates the Justices not to decide cases that they would otherwise be inclined to take, we remain hesitant about endorsing the position that proponents of lower-court autonomy should "talk up" percolation's value simply for the sake of either duping the Justices into acting passively or empowering the Justices to dupe others into accepting their intentionally pretextual explanations for the decisions not to decide. If a less interventionist Court is what we value, then a less interventionist Court is what we should promote; training our focus on percolation instead would be both needlessly indirect and problematically dishonest. Perhaps there are some circumstances in which we have good reason to pretend that some things have value in order to ensure that other, actually valuable things occur.²³⁶ But this particular area strikes us as one in which the generally better course is simply to advocate for the practice that one actually regards as important.

D. Percolation and Reciprocal Legitimation

A final institutional defense of percolation's value might stem from Neil Siegel's recent scholarship on the phenomenon of "reciprocal legitimation." Reciprocal legitimation, as Siegel explains, involves a "dialectical, side-by-side model of judicial interactions," through which the Court and the lower courts collaboratively work to accord legitimacy to doctrinal change.²³⁷ In its most straightforward form, the process of reciprocal legitimation begins with a suggestion from the Court that one of its decisions ought to enjoy an expanded scope, continues with multiple lower-court decisions giving the decision that expanded scope, and ultimately concludes with another decision from the Court that cites to the lower-court consensus as "authority for validating the expansion."²³⁸ Siegel cites as a paradigmatic example of the phenomenon the series of opinions that led up to the Court's formal recognition of a constitutional right to same-sex marriage.²³⁹ First, in its 2013 decision in *United*

236. The question of what circumstances would justify the strategic deployment of insincere arguments about percolation's value strikes us as a difficult one, but we do not deny the possibility that such circumstances exist. Cf. Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2315 (2017) (highlighting the possibility that "deviations from the obligation of judicial candor might be legally (as well as morally) justifiable or excusable in rare cases in which adherence to the obligation would clash with other legal norms and would have severely adverse consequences for legally cognizable values").

237. Siegel, *supra* note 22, at 1186, 1188.

238. *Id.* at 1186.

239. *Id.* at 1185-90.

States v. Windsor,²⁴⁰ the Court struck down the federal Defense of Marriage Act while “seem[ing] to imply”—without directly holding—that “state bans on same-sex marriage are at least as constitutionally problematic as the federal ban at issue in *Windsor*.”²⁴¹ Next, several lower federal courts cited *Windsor* as supporting the conclusion that state-level same-sex marriage bans violated the Fourteenth Amendment.²⁴² And finally, once one lower court—the Sixth Circuit—reached the opposite conclusion, the Court handed down its decision in *Obergefell v. Hodges*,²⁴³ which cited the large body of lower-court marriage-equality decisions (most after *Windsor*) as “confirming its own conclusion.”²⁴⁴ The Court in *Obergefell* thus “seemed to be trying to legitimate its controversial conclusion in part by portraying federal court decisions concerning same-sex marriage as if they were entirely independent of its decision in *Windsor*, when in all likelihood they were not.”²⁴⁵

To the extent that reciprocal legitimation is a good thing, it is not difficult to see how it might underlie an institutional argument in percolation’s favor. Of course, reciprocal legitimation and percolation are not the same thing, as Siegel himself makes clear.²⁴⁶ But percolation is at least a necessary precondition to a successful effort at reciprocal legitimation; without percolation, the Court would never be able to invoke multiple, supportive lower-court rulings in an attempt to enhance the legitimacy of its own decisions. From a reciprocal-legitimation standpoint, there is a material difference between the Court’s relying on a single lower-court holding for legitimacy-enhancing support and the Court’s instead relying on several, similar such holdings for that support. Put differently, the effectiveness of an exercise in reciprocal legitimation will positively correlate with the number of lower courts that respond to the Court’s nudging in the right way. And percolation helps ensure that the number will be high.

240. 570 U.S. 744 (2013).

241. Siegel, *supra* note 22, at 1190-91.

242. *Id.* at 1191-92. Siegel also notes that the Court further encouraged these efforts by both denying certiorari in the early lower-court marriage-equality cases and also by declining to stay lower-court judgments that required states to begin granting marriage licenses. *Id.* at 1193.

243. 135 S. Ct. 2584 (2015).

244. Siegel, *supra* note 22, at 1193-95.

245. *Id.* at 1185. Siegel finds another important example of the phenomenon “in the conduct of the Court that decided *Brown v. Board of Education*, the subsequent federal court decisions that expanded the scope of the Court’s holding in *Brown* to racial segregation in other public settings, and the Court’s unreasoned per curiam that validated the expansion.” *Id.* at 1186 (footnote omitted) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); see also *id.* at 1203-06.

246. See *id.* at 1226-27.

Thus, unlike the other institutional arguments we have considered, the reciprocal-legitimation argument posits a simple and straightforward connection between the institutional value to be sought (that is, enhanced public legitimacy of controversial decisions) and the prevalence of percolation itself. Even so, however, we are skeptical that the possibility of reciprocal legitimation does much to justify percolation as a generally valuable enterprise. This is so for two reasons.

First, as Siegel himself acknowledges, reciprocal legitimation is not an unalloyed normative good.²⁴⁷ On the one hand, the practice has value in that it might help the Court secure public acceptance of its decisions, especially where the underlying issues are salient and controversial enough as to raise concerns about official defiance.²⁴⁸ On the other hand, the practice involves a concerning lack of judicial candor, both with respect to initial, signal-sending decisions that only indirectly communicate the Court's true position regarding the issue at hand and with respect to the subsequent, consolidating decision that denies the Court's own role in creating the lower-court consensus said to justify the Court's doing what it had always intended to do.²⁴⁹ Whether or to what extent the legitimacy-related benefits of the practice outweigh its candor-related costs is a deep and complex question that we here lack the page space to analyze in full. But at a minimum, this question suggests that percolation's tendency to facilitate reciprocal legitimation cannot be unflinchingly accepted as a good rather than a bad thing.²⁵⁰

Second, even if reciprocal legitimation is normatively appropriate, percolation may not be especially effective at achieving it. One particular concern is that the lower courts will fail to follow the Court's lead, owing, perhaps, to a failure to pick up on the Court's initial signals or instead to a

247. See *id.* at 1231 (acknowledging that the practice “does potentially raise normative concerns”).

248. *Id.* at 1236 (suggesting that reciprocal legitimation is most justifiable when it helps “sustain[] the Court’s public legitimacy in the face of real threats of defiance or recriminations”).

249. *Id.* at 1231 (noting that “the Justices who participate in the process tend to compromise judicial candor in the service of protecting the Court’s public legitimacy”).

250. From the Court’s perspective, reciprocal legitimation may be an especially attractive strategy for developing what Jack Balkin has called “off the wall” arguments, that is, arguments that are far outside the mainstream of constitutional doctrine and discourse when first introduced but which may, over time, become “on the wall” through social-movement activism, acceptance by elite legal and political actors, and scholarly attention. See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <https://perma.cc/M9HU-L92T>. Percolation might be a mechanism to achieve this sort of legal development, but whether it is normatively attractive depends on one’s views of the particular legal issue at stake.

stubborn desire to ignore them.²⁵¹ Either way, percolation would end up undercutting rather than bolstering the Court's legitimacy-promoting ends, generating a cacophony of mixed decisions on an issue rather than a harmonious instance of lower-court consensus.²⁵² Relative to the prospect of simply issuing the desired decision in the absence of percolation, attempts at reciprocal legitimation might strike the Court as too risky to pursue.

In addition, even where the strategy proves successful, its legitimacy-promoting payoffs may be negligible. The payoffs will materialize only to the extent that members of the general public (1) notice the Court's reliance on a lower-court consensus; (2) do not notice that the lower-court consensus was the product of earlier nudging from the Court itself; and (3) treat the fact of lower-court consensus as a reason to accept the legitimacy of the Court's ruling. Obviously, one cannot know for sure how many people read and respond to Supreme Court decisions in this way, but we would be quite surprised if the number were significant enough to affect the Court's overall legitimacy in the eyes of the public. Certainly, that would be true with respect to the mine-run of cases that make up the Court's docket, but even for blockbuster cases like *Obergefell* we are skeptical that the Court's references to lower-court consensus had much of an impact on the opinion's public reception.²⁵³

All told, then, we think the reciprocal-legitimation argument succeeds at establishing a close connection between the percolation process and the pursuit of a potentially institutionally significant goal. But percolation derives value from reciprocal legitimation only if reciprocal legitimation is an enterprise worth engaging in. And although we agree with Siegel that there remains much more work to be done on this subject, our initial intuition is that, under most circumstances, reciprocal legitimation will prove a strategically ineffective or normatively questionable practice for the Court to consciously pursue. If so, then any attempt to promote percolation for the sake of promoting reciprocal legitimation would likely amount to a game not worth the candle.

251. The Court could reduce the risk by strengthening its signals, telegraphing even more clearly to the lower courts what it wants them to do. But the more the Court does this, of course, the less plausible it becomes for the Court to dissociate itself from the resultant lower-court consensus.

252. See Siegel, *supra* note 22, at 1237-38 (noting that, in deciding *Windsor* in the way it did, the Court "took the risk (even if a relatively modest one) that it would have to decide whether to rule in favor of marriage equality in the teeth of numerous federal court decisions reading *Windsor*" in the undesired way).

253. *But see id.* at 1203 (suggesting that an opinion's legitimacy-enhancing effects will depend on the decision's "perlocutionary force," which is a "matter of contingent causality that depends, among other things, upon how exactly the court speaks" (citing J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 109 (2d. ed. 1975))).

IV. Percolation's Future

To be clear, our conclusions regarding percolation's informational and institutional value are not categorically negative; some of the rationales we have identified sometimes prove persuasive, giving the Court a justification to allow some types of issues to percolate. It would therefore be too much to say that percolation has *no value*, just as it would be too much to say that courts should altogether ignore its (occasional) potential to yield salutary effects. At the same time, however, we do think that our account supports an approach to percolation that better reflects the quite limited nature of its informational and institutional benefits. This Part highlights three practices that, going forward, the Court should embrace in response to that reality.

A. Issue-Specific Evaluation

We have argued that neither informational nor institutional rationales justify a default and generalized presumption that percolation carries value. We do not agree, in other words, with those jurists and commentators who have assumed that there “are advantages in multiple judicial input on issues.”²⁵⁴ Nor, however, do we think that percolation is always without value.²⁵⁵

At most, the informational accounts simply show that percolation's epistemic benefits will arise under conditions that are limited and context-specific. The same is true of the institutional accounts as well. In sum, we have yet to identify an account of percolation's value that would justify the practice as presumptively worthwhile across a broad category of cases. More realistically, we think, percolation is most likely to be valuable on a sporadic and infrequent basis.

And that is how the Court itself ought to think about percolation when managing its own docket. Simply put, we do not think that generalized appeals to percolation's value—appeals, that is, to the abstract idea that a higher volume of lower-court decisionmaking on an issue will make that issue more conducive to effective Supreme Court resolution—will suffice to justify a decision by the Court to stay its hand in a particular case. Rather, any such decision should be justified by a more contextual evaluation of percolation's value in connection with *the particular underlying issue*. For example, the Court may wish to consider whether the issue is one on which lower-court judges—as opposed to litigants, amici, commentators, and other outside parties—enjoy a uniquely special perspective or expertise.²⁵⁶ The Court might wish to consider

254. Leventhal, *supra* note 79, at 908.

255. See Friendly, *supra* note 10, at 407 (doubting whether lower courts “have much to contribute” to the Supreme Court's resolution of questions of federal law).

256. See *supra* Part II.A.

whether the issue is one that both could depend on policy judgments about practical consequences and, when resolved differently by different courts, could yield accessible and informative data about what those consequences might be.²⁵⁷ And so forth. But what the Court should not do is simply assume that percolation will work its magic by reciting and trusting in platitudes about percolation's value.

A similar point holds for several of the other rules and practices that we canvassed in Part I.B.²⁵⁸ Thus, for instance, we have noted that some judges and commentators have cited to percolation's value as a reason to disfavor nationwide (or "universal") injunctions.²⁵⁹ But a percolation-based objection to nationwide injunctions *as a whole* must rest on an account of percolation's value that itself carries generalized scope—an account, in our view, that simply does not exist. To be sure, percolation's value might support a district court's refusal to enter a nationwide injunction when the informational or institutional benefits of percolation are likely to be high. But that is different from relying on a more abstract appeal to percolation's value as a means of supporting a generalized (or even categorical) rule against permitting any universal injunctions at all. So too for the rules concerning nonmutual collateral estoppel, class certification, and multidistrict litigation: Percolation's value might have relevance when it comes to deciding how to apply one of these rules in connection with a particular substantive issue.²⁶⁰ But with

257. See *supra* Parts IIA-C.

258. See *supra* Part I.B.

259. See, e.g., *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (worrying that nationwide relief preempts "the airing of competing views that aids this Court's own decisionmaking process"); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (expressing concern that nationwide injunctions "prevent[] legal questions from percolating through the federal courts"); *Bray*, *supra* note 34, at 462 ("A world of national injunctions is one in which the Supreme Court will tend to decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.").

260. Similarly, with respect to percolation within patent law, we think the question turns upon whether that subject matter presents issues for which percolation is likely to be valuable. Some scholars argue that patent law would indeed benefit from percolation. The near-exclusive jurisdiction of the Federal Circuit over patent appeals stands in the way of percolation, of course. But one interesting proposal suggests that the Court might be able to generate the benefits of percolation in patent law notwithstanding the existing centralization of patent appeals. John Golden has argued that the Supreme Court can play the role of the "prime percolator" in patent law by "generally confin[ing] its review of substantive patent law to situations where there is a substantial risk that Federal Circuit precedent has frozen legal doctrine either too quickly or for too long." Golden, *supra* note 129, at 662. While we express no opinion on this proposal's potential to improve patent law, we think this context-specific reasoning reflects precisely the sort of approach that the Court should take to percolation.

respect to broader questions about what those rules respectively should provide, the context-dependent nature of percolation's value makes it very difficult to treat an increase in percolation's prevalence as a reason for favoring or disfavoring a particular procedural change.

B. Transparency

Our second prescription follows naturally from the first. Just as the Court should assess percolation's value on a case-by-case basis, so too should the Court, when choosing to promote percolation of a given issue, make clear to others why it regards the percolation of that issue as something worth pursuing.

Consider again the Court's own certiorari practice. Most certiorari denials come unaccompanied by any explanation or even suggestion as to the reasons why certiorari is being denied.²⁶¹ But even when the Justices explicitly identify percolation as the reason for a certiorari denial, they almost always do so in abstract terms.²⁶² Beyond gesturing vaguely toward percolation's informational value, that is, these explanations have offered the lower courts little additional guidance as to how, in particular, the Justices believe that percolation will facilitate their resolution of the issue left unresolved.

This practice is problematic. To the extent that the Court genuinely seeks to leverage the percolation process to improve the quality of an anticipated future decision, the Court should identify the additional information it wants the lower courts to produce.

Suppose, for instance, that the Court has denied certiorari in a case presenting an unresolved issue, issue *X*, and suppose that it has done so on the theory that additional percolation of issue *X* will yield valuable additional information for it to make use of when ultimately resolving the issue for itself.²⁶³ Depending on the nature of issue *X* and the circumstances in which it has arisen, the Justices' instincts might be correct; under the right conditions, percolation of issue *X* could generate valuable information. But that outcome strikes us as far more likely to occur if the lower courts receive guidance regarding the particular type of information the Court seeks. For example, is

261. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 14-18 (2011) (describing the Court's existing certiorari practice).

262. See, e.g., *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) (referring to the "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals").

263. That is precisely what Justice Ginsburg argued the Court should have done in *Arizona v. Evans*. See 514 U.S. 1, 23 & n.1 (1995) (Ginsburg, J., dissenting) (arguing that the Court should have permitted percolation in order to "yield a better informed and more enduring final pronouncement by this Court").

the Court interested in crowdsourcing the development of a doctrinal framework, and, if so, what are the particular questions on which the Court hopes for additional lower-court input? Or is the Court looking for data on the real-world effects of one outcome or the other, or information about how different audiences feel about issue *X*? And if the latter, who is the relevant audience, and how should the lower courts go about provoking that audience's reaction? And so on. Ex ante guidance of this sort would help to ensure that percolation does not become an empty and unnecessarily costly exercise.

Of equal importance is what the Court says about percolation ex post. To continue with our example of issue *X*, suppose that, after percolation, the Court eventually confronts the issue and proceeds to resolve it in a particular way. If, in deciding the issue, the Court has relied on new information that the percolation process produced, the Court should make that fact clear and give credit where credit is due. If instead the attempted percolation made no difference, the Court should own up to that fact as well. To be sure, such an accounting cannot change anything that has already occurred, but it might render the Court and its subordinates better equipped to both evaluate and engage in a future percolation-related exercise under roughly similar circumstances.

A skeptic might point out that the Court will not always be able to provide specific ex ante guidance as to its goals in awaiting percolation or concrete ex post conclusions as to how much percolation achieved those goals. We do not necessarily disagree, but we think that is simply all the more reason to insist on transparency in the first instance. By forcing the Court to confront its uncertainty about percolation's value, a commitment to greater transparency might lead to better judicial decisionmaking about whether to pursue percolation at all. In particular, insisting on greater transparency may help deter the unnecessary percolation of issues that don't actually require percolation. If the Court can offer nothing more than platitudes in defense of a decision to percolate, then the Court should think twice about whether the benefits of that decision will in fact outweigh its costs.²⁶⁴

C. Percolation Without the Costs?

We offer our final proposal more tentatively, well aware that more work needs to be done in developing its details. But the gist of the idea is this: Given that percolation's value will often be limited, uncertain, or highly contingent, the Court should think about ways in which it might realize the benefits of

264. See Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 125 (2009) (contending that "more transparency about cert decisions would encourage both public and internal discussion" regarding the appropriateness of the Court's "cert criteria").

percolation while imposing fewer costs on the system as a whole. One such means of doing so would be to displace the existing *adjudication*-based model of percolation with something more along the lines of a *certification*-based model. That is, rather than solicit lower-court input via actual resolutions of additional Article III cases or controversies, the Justices could simply invite the lower courts to file submissions that relate to pending Supreme Court cases.

As traditionally practiced, percolation occurs as a byproduct of the lower courts' resolution of separate, individual cases. It thus brings with it all of the various costs to which the decentralized and repetitive adjudication of an issue can give rise.²⁶⁵ To even reach the point of opining on the underlying legal issue, a lower court must wait for a case that presents the issue to appear upon its docket. It must then proceed to steer the case toward some sort of disposition that yields an opinion on the merits while bearing the risk that some other development (for example, a settlement, a procedural default, or an emergent jurisdictional defect) will end up making the case go away. It then must issue an opinion that only might give rise to an appeal, and the appeal itself will require further briefing, argument, and opinion writing by an intermediate appellate court. The costs of this practice are obvious: (1) the expenditure of litigation costs; (2) the production of (temporarily) nonuniform law; (3) nationwide uncertainty about the final state of the law; and (4) an often quite lengthy delay that precedes the Supreme Court's resolution of the issue at hand.²⁶⁶ The practice also injects randomness into the times at which, facts against which, and judges with which the various lower courts end up engaging with the issue.²⁶⁷ All told, it furnishes an inefficient means of

265. See, e.g., *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from the denial of certiorari) (discussing how the practice of percolation may lead to unjust outcomes in particular cases); *Shreve v. Cheesman*, 69 F. 785, 790-91 (8th Cir. 1895) (discussing the costs of “unseemly conflicts” and loss of “uniformity of decision and harmony of action”); Meador, *supra* note 10, at 633-34 (“The percolation that produces intercircuit inconsistencies and incoherence may provide intellectual stimulation for academicians, but in the world of human activity it works costly inequities.”); Bator, *supra* note 10, at 690 (“[P]ercolation is not a purposeful project. It is just a way of postponing decision . . .”).

266. See *supra* Part I.C.

267. To be sure, the fact that a given practice generates random results may not always be a bad thing; under some circumstances, as Maxwell Stearns has noted, randomness may help to “avoid the most persistent forms of litigant path manipulation.” See MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* 198 (2000); see also Adam M. Samaha, *Randomization in Adjudication*, 51 WM & MARY L. REV. 1, 70-81 (2009) (highlighting additional potential justifications for the practice of randomized case assignment). Thus, for instance, the Court's largely unbounded discretion to decide whether to hear a given case may be beneficial insofar as it helps prevent strategic litigants from “manipulat[ing] the path of Supreme Court decision making.” STEARNS, *supra*, at 197. But as far as the usefulness of lower-court input is concerned, we think the Court would be more likely to receive useful input if

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generating information that might or might not assist the Supreme Court in resolving that issue at a later time.

If percolation's value were constant, categorical, and significant, these inefficiencies might not provide much cause for concern. But we have provided reason to doubt that this is the case; that is, given percolation's only limited and uncertain value, any attempt to percolate by means of additional litigation and adjudication carries with it the very real risk that the costs of the exercise will far exceed its benefits.²⁶⁸ Thus, we have good reason to ask whether these potential benefits can be realized in other, cheaper ways. If the answer to that question were yes, the question of percolation's value would take on lower stakes, and the Court's *ex ante* estimations of percolation's value would correspondingly assume less practical importance. Put another way, the lower the "costs" of percolation, the less it matters whether a particular instance of percolation was or was not worth pursuing in the first place.

So can the effective solicitation of lower-court input be done more cheaply? We think the answer is yes. In fact, we think such a procedure could be readily adapted from a practice that already exists within the federal court system. When the federal courts face a difficult question of state law, they sometimes choose to "certify" that question to the relevant state court rather than—as was previously the more common practice—putting the case before it on hold and instructing the parties to relitigate the case within the state court system.²⁶⁹ More specifically, the federal court simply invites the state court to opine on the certified question, at which point the state court can either decline the invitation or choose to express its views.²⁷⁰ With the state court's response in hand, the federal court can proceed to a final disposition of the case in which the issue was raised.

Similarly, imagine a system through which the Court could certify a percolation-worthy question to the lower federal courts before proceeding to

it were able to exercise a greater degree of control over the circumstances in which and the courts from which that input was received.

268. *See supra* Part. I.C (discussing the costs of percolation).

269. Indeed, the Court has cited state court certification procedures as preferable to the practice of *Pullman* abstention precisely because certification obviates the need for repetitive and time-consuming litigation in the state court system. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 76 (1997) (noting that, in contrast to *Pullman* abstention, certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response").

270. Some state courts reserve for themselves the ability to call for briefing and oral argument before submitting an answer to a certified question. *See, e.g., N.Y. Ct. App. R. 500.27(d)* (providing that the New York Court of Appeals "shall examine the merits presented by the certified question, to determine, first, whether to accept the certification and, second, the review procedure to be followed in determining the merits").

resolve that question for itself. The Court's position in doing so would not be precisely analogous to that of a state-law-certifying federal court of appeals: Among other things, the Court would certify the question to multiple courts (rather than just one), and it would not in any sense be bound by the answers it received.²⁷¹ But the underlying mechanics of the process would remain largely the same: Rather than initiate new cases in new jurisdictions for the sake of relitigating the same underlying issue, the Court and its subordinates would simply communicate directly with one another. And in so doing, the Court would often be able to generate a substantially greater number of lower court opinions, rendered roughly simultaneously and in a matter that consumes considerably fewer resources.²⁷²

But what about the benefits? Could "lower-court certification" still achieve the various benefits to which standard-form percolation might at least sometimes give rise? Overall, we think yes. As far as percolation's informational benefits are concerned, certification would permit an equally (if not more) effective method of crowdsourcing, signal sending, and perhaps even some prescreening for audience reaction. As for the institutional benefits, percolation by certification, we think, would be just as well situated (if not better situated) to further the engagement-related, capabilities-related, and reciprocal-legitimation-related values we have identified.

Indeed, of all the potential benefits that percolation might provide, we can think of only a few that a certification procedure would fail to recreate. First, unlike its adjudication-based counterpart, percolation by certification would *not* be capable of generating the sort of *experimentation*-based information that flows from the lower courts' real-world implementation of different potential

271. By contrast, and at least as a functional matter, once a state court has answered a question about the content of its own state's law, *Erie* would generally preclude the federal court from adopting a contrary view. *See, e.g.,* *Engel v. CBS, Inc.*, 182 F.3d 124, 125 (2d Cir. 1999) (per curiam) ("We receive the response to our certification 'bearing in mind that the highest court of a state has the final word on the meaning of state law,' and are bound to apply New York law as determined by the New York Court of Appeals." (citation omitted) (quoting *County of Westchester v. Comm'r of Transp.*, 9 F.3d 242, 245 (2d Cir. 1993) (per curiam))).

272. To be sure, there are numerous details to be worked out. For example, would the Court certify questions only to the federal courts of appeals, could it also certify questions to the U.S. district courts, and might it sometimes even bring state supreme courts into the fold? Would a court on the receiving end of a certified question allow for seriatim responses from all of its judges or instead provide a single opinion on behalf of the court itself, coupled with individual concurrences and dissents? Could the lower courts solicit further input from the parties before providing their responses to the certified questions? And so forth. These sorts of design decisions are obviously important and would have a major impact on the efficacy of any particular certification procedure. But these questions are not especially relevant to our point here, which is simply to demonstrate that such a procedure furnishes a plausible means of achieving most of percolation's benefits while avoiding its concomitant costs.

resolutions of the problem under review, nor would it succeed at achieving the *debiasing* function of casting an issue against different factual backdrops. (The experimentation rationale, recall, works only insofar as different resolutions of a percolated issue are actually *adopted* and implemented within different jurisdictions, and the factual debiasing rationale works only where the issue has arisen in multiple different cases with divergent real-world fact patterns.²⁷³) At the same time, however, we have already shown that the experimentation-based case and the factual-debiasing case for percolation will only rarely be compelling, so we do not anticipate many instances in which these comparative disadvantages would be particularly acute.²⁷⁴ But even to the extent there arises a genuine need for experimentation or factual debiasing, the mere availability of a certification procedure would not preclude the Court from pursuing percolation in its more traditional form. Even with a certification procedure in place, the Court would still have at its disposal the alternative, albeit more costly, mechanism of giving multiple lower courts the opportunity to adjudicate cases in full.

A further forgone benefit of relying on certification as an alternative to adjudication has to do with the institutional value of Supreme Court nondecision. We earlier speculated that percolation might have indirectly derived value insofar as its perceived value induces the Court to defer decisions on issues it would be better off not deciding at all.²⁷⁵ But if a certification procedure were in place, then the procedure's very availability would limit the Court's ability to decline adjudication on percolation-based grounds; the possibility of soliciting lower-court input via certification would undercut any argument that a certiorari denial is necessary to generate that input instead. Plausible as this concern might be, however, we do not think it strikes a fatal blow. In particular, we would simply reiterate our earlier position that we find the "nondecision" argument to posit a needlessly indirect mechanism for promoting Supreme Court passivity and that proponents of passivity should train their focus on the direct benefits of passivity itself. Indeed, if the certification procedure's availability turned out to undermine the Court's ability to make purely pretextual invocations of percolation's value, that would ultimately strike us as an additional point in favor of adopting a certification-based approach.

A final objection to our certification idea might invoke Article III. Could lower-court judges really get involved in another court's case without exceeding the scope of their constitutional powers? The objection seems obvious, but it is not clearly right. A "case or controversy" would exist in the

273. See *supra* Parts II.B.-C.

274. *Supra* notes 174-85 and accompanying text.

275. See *supra* Part III.C.

case that the Supreme Court has pending before it, so it's hard to see why other judges' participation in the case would somehow exceed the scope of the judicial power that Article III confers. We suppose an argument could be made that, in answering certified questions, lower-court judges would be improperly acting as if they were Supreme Court Justices, thus assuming a particular judicial function for which they were neither appointed nor confirmed. But that objection has not been successfully leveled at, say, district court judges that sit by designation on the courts of appeals or, for that matter, state court judges that answer the certified questions of their federal court counterparts. (Recall also Rule 19 of the Supreme Court's own rules, which allows lower courts to certify questions that *they* confront up to the Supreme Court itself—thus at least indirectly involving themselves in the Court's own case-selection process.²⁷⁶) And even if there were an Article III problem with having lower-court judges occasionally exercise the judicial power on behalf of the Supreme Court itself, we don't think the objection would apply to our proposal, given the important distinction between merely opining on a particular legal question (that is, all that the certified-question procedure would enable the lower courts to do) and fully and finally resolving the question (which would remain the exclusive prerogative of the Court).²⁷⁷

In sum, our proposed certification procedure might well offer a means by which proponents of percolation can have their cake and eat it too—capitalizing on most of the informational and institutional benefits that percolation is very occasionally capable of providing while at the same time avoiding the most obvious and significant costs to which the practice very commonly gives rise.

276. See SUP. CT. R. 19(1). To be clear, we take no position on whether this sort of procedure would comport with existing statutory limits on federal jurisdiction. We assume that such a procedure would need to be implemented by statute.

277. To this argument, one might offer another Article III–based rejoinder: The problem with the certification procedure is that it requires lower-court judges to issue advisory opinions—a practice inconsistent with *the lower courts' own* Article III obligation to decide concrete “cases or controversies.” That objection, however, would end up proving too much. Individual lower-court judges, after all, are already in the practice of incorporating nonbinding dicta into their own majority opinions and issuing separate concurrences and dissents that do not bind anyone to do anything. None of these practices has been held to violate the rule against advisory opinions, even though they all result in official judicial proclamations with only advisory effect. And if that is true of nonbinding statements that lower-court judges make about cases or controversies within their own circuits, we think it also ought to be true of nonbinding statements that lower-court judges make about cases or controversies pending before the Supreme Court. Put differently, we do not think one can sensibly construe the Article III prohibition on advisory opinions as a blanket ban on the public issuance of statements with only advisory effect. Rather, the bar is better understood to prohibit the giving of “advice” in the absence of a case or controversy that itself satisfies the justiciability-based prerequisites of Article III.

Conclusion

Our skepticism regarding percolation's value has more to do with means than ends. Indeed, there is much about the abstract idea of percolation that we find attractive and desirable. For example, the Supreme Court's willingness to promote percolation may bespeak modesty and humility about its own judicial capacity, highlighting a desirable willingness on the part of the Justices to look outwards for assistance in solving complex and controversial questions of law.²⁷⁸ Frequent percolation may well signify cohesiveness and integration across the federal judiciary as a whole, with the Court and its subordinates engaged in healthy dialogic interactions about what the content of federal law should be.²⁷⁹ And it might similarly signal a beneficial degree of patience toward and deliberateness about the questions the Court confronts, reflecting a minimalist rather than maximalist approach to the development of doctrine over time.²⁸⁰ In these and other ways, we think percolation's proponents are committed to salutary and important adjudicative goals.

But salutary and important as these goals may be, we do not think that their realization will often depend upon the deliberate promotion of repetitive and time-consuming litigation within the courts below. Percolation's informational benefits can very often be replicated (if not improved upon) by the bevy of briefs, commentaries, and conversations that accompany each Supreme Court case. And the various institutional benefits we have considered are, for the most part, readily realizable without recourse to percolation itself. Finally, even when the Court genuinely requires the distinctive input and engagement of lower-court actors, our proposed certification procedure would operate as a much more reliable, efficient, and comprehensive substitute. The percolation process may sometimes accompany or even give rise to desirable judicial practices and behaviors. But the process will less often represent the most efficient or effective means of bringing those practices and behaviors into existence.

278. See Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 W.M. & MARY L. REV. 667, 753 (2015) (advocating that the Justices embrace a model of “[a]poretic engagement,” according to which the Justices would “acknowledg[e] complexity and competing evidence”).

279. See, e.g., Gewirtzman, *supra* note 147, at 487 (noting that “[p]ercolation . . . reinforces the notion [of] dialogue within and across institutions”).

280. See Dorf, *supra* note 18, at 9, 65-69 (associating percolation with a model of “provisional adjudication,” through which the Court would “worry less about finding the ‘true’ meaning of authoritative texts, and instead—while sensitive to its own institutional limitations—would focus on finding provisional, workable solutions to the complex and rapidly changing legal problems of our age” (footnote omitted)).