A Look at the Smallest Circuit[1]

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The United States Court of Appeals for the First Circuit, which encompasses Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico, is small not only in terms of the geographic area it encompasses, but more important, it is the regional circuit with the smallest number of judgeships. Indeed, for many years, it had only three judgeships—the same size as regular

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United States court of appeals panels.

Because of its small size and caseload, the First Circuit has not received much attention. Receiving far more attention have been the "old" Fifth Circuit before it was divided, because of its importance in the implementation of school desegregation; the District of Columbia Circuit (D.C. Circuit), considered by many to be the nation's preeminent administrative law court; the Seventh Circuit, because the University of Chicago law professors on the court have brought a law-and-economics approach to it; and the Ninth Circuit, the nation's largest, because of efforts to divide it and because of the Supreme Court's reversal of its decisions.

Yet it should be added that the courts of appeals are little known, even within the communities where their headquarters (or other) courthouses are located. Thus coverage of the First Circuit's rulings is relatively minimal, even in the *Boston Globe*, thought to be the premier paper in that city. Likewise, the *New York Times* publishes little about the Second Circuit. An exception may be the extended treatment the Ninth Circuit has received in the *Los Angeles Times*, although San Francisco is where that circuit has its headquarters. While the First Circuit's architecturally prominent new building on Boston Harbor has attracted much attention, and some have suggested that the court sought to have it constructed because the judges felt their court was unknown, its presence has not led to greater media coverage of the court—although architecture critics may have had a field day writing about its design.[3]

Not only is it important to know something about the court of appeals in the circuit in which we live, but knowing something about this smaller court will help flesh out what public law scholars are beginning to learn as they have shifted their attention more towards the United States Courts of Appeals. To provide at least an initial picture of the Court of Appeals for the First Circuit, this article presents information about a number of aspects of that court, including the sources of its cases, its use of judges who are not regular members of the court, its treatment of rulings appealed from the various districts (and agencies), its use of en banc rehearings, and aspects of its interaction with the United States Supreme Court. Greatest attention will be paid to the first of these elements—the source of the court's cases.

More specifically, for those cases brought to the Court of Appeals for the First Circuit, this article will examine the following: the proportions which come from each district, in relation to district population; the proportions, again by district, of published opinions which constitute circuit precedent, and so-called "unpublished" dispositions which are not precedential; participation in three-judge panels by the circuit's own senior judges, district judges from

3. Thanks to John Brigham for raising this matter.

within the circuit, and visiting circuit and district judges from outside the circuit; the court's dispositions of cases, that is, the proportion affirmed or receiving some other treatment; cases decided by the court en banc, both in terms of the districts from which they come and their voting alignments; and cases which, after the court's decision, are accepted and decided by the Supreme Court, in terms of the districts from which they came, whether the First Circuit's ruling is upheld, the Justices' votes in those cases, and whether the Justices accept the district court's position rather than that of the court of appeals.

In this exploratory article, the approach will be basically descriptive, and the article is guided under no particular theory. Instead, the purpose is to lay out basic information. The author collected the data used here from the official reporters and Westlaw.[4] For the court's published opinions and unpublished dispositions, there has been no systematic sampling of cases over a long period. Instead, the author undertook coding of aspects of all cases for certain relatively recent periods, with certain types of data recorded only for some portion of the periods studied. However, data searches provided longer-term information about en banc rulings, and data were also available over the longer term about cases heard by the Supreme Court. To some extent, the data used are a result of "targets of opportunity."

I. DISTRICT DOMINANCE

Although it seems there has not been concern that one district (each covering a state or commonwealth) within the First Circuit has dominated the court, some exploratory analysis of some aspects of such possible dominance is undertaken here. In this article, we do not reach analysis of case law and doctrine to determine dominance on particular legal issues, but instead use a variety of measures to present information about numerical aspects of district dominance.[5]

In looking to see whether one district dominates the First Circuit, one would expect that Massachusetts would occupy the dominant position, but actually many cases come from the District of Puerto Rico, and even the less-populated states (Maine, New Hampshire, and Rhode Island) contribute important cases.

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4. I am indebted to Richard Irving, Law Librarian in the Dewey Graduate Library, University at Albany, for his assistance in searching for en banc cases.

5. For the author's previous examination of state dominance and district dominance (in circuits in which some states have multiple districts), *see* Stephen L. Wasby, *State Dominance of a Circuit: An Exploration*, paper presented to Pacific Northwest Political Science Association, Bend, Oregon (Oct. 19-21, 2006) (regarding the Ninth Circuit); Stephen L. Wasby, *State Dominance of a Circuit: An Exploration*, paper presented to Midwest Political Science Association, Chicago, Illinois (Apr. 12-15, 2007) (regarding the Ninth Circuit); Jolly A. Emrey & Stephen L. Wasby, *State Dominance of a Circuit: An Exploration*, 32 S. ILL. U. L.J. 545 (2008) (regarding the Seventh Circuit).

Population figures for the components of the circuit provide the baseline from which we work. We then look at the appellate caseload derived from each district (and from other sources) and finally at the sources of the court's output.

A. Population

The region of the First Circuit contained almost fourteen million people as of the 2000 Census. Almost half (46.3%) lived in Massachusetts, and the next largest component of the circuit was Puerto Rico, which had over one-fourth (27.8%) of the population. None of the three remaining states contained as much as 10% of the circuit's population, with Maine and New Hampshire having 9% each and Rhode Island 7.6%. (See Table One)

TABLE ONE
Population of First Circuit (2000)

District	Population	Percentage of First Circuit Population
Maine	1,274,923	9.1%
New Hampshire	1,235,786	9.0
Massachusetts	6,349,097	46.3
Rhode Island	1,048,319	7.6
Puerto Rico	3,808,610	27.8

B. Appellate Caseload

The population statistics provide a baseline for comparison with the cases brought to the Court of Appeals for the First Circuit from each of its districts. Data used here are from the Federal Court Judicial Caseload Statistics, which use years ending on March 31. For each of the five years ending in 2006, the number of cases filed in the court of appeals ranged from less than 1700 cases to over 1900. If original proceedings, bankruptcy cases, and appeals from administrative agencies are excluded, the number of cases from each district ranges from the high 1400s through the high 1500s. (See Table Two) Of particular note is the portion of immigration appeals, which start at a low of 3.2% of appellate filings in Statistical Year ("SY") 2002 (54 cases) but then jump to 7.6% for SY 2003 and 8.1% for SY 2004 (140 and 140, respectively) and then further increase to over 11% for SY 2005 and SY 2006.

Massachusetts is definitely the dominant district in terms of appellate caseload within the First Circuit, accounting for around one-third of all cases and for roughly two-fifths of the cases appealed from the districts (excluding

administrative agency appeals and original proceedings).[6] Puerto Rico is next, accounting for somewhat more than one-third of the cases from the districts. Maine's proportion of cases from districts exceeded 10% only once (11.2% in SY 2005) while otherwise ranging from 7.7% to 9.7%. New Hampshire and Rhode Island vie for having the lowest percentage of cases brought to the First Circuit from the districts, New Hampshire's caseload proportion ranging between 6-8%, and Rhode Island's proportion ranging from a high 7% to a low 9%.

TABLE TWO*
Appellate Filings (2004-2006)

	2002	2003	2004	2005	2006
Maine	115 (7.7%) 6.9%	141 (18.9%) 7.6%	143 (9.7%) 8.3%	171 (11.2%) 8.9%	132 (8.8%) 7.1%
N.H.	96 (6.4%) 5.8%	117 (7.4%) 6.3%	121 (8.2%) 7.0%	118 (7.7%) 6.2%	98 (6.5%) 5.3%
Mass.	62 (41.7%) 37.2%	635 (40.0%) 34.4%	578 (39.4%) 33.5%	602 (39.4%) 31.5%	610 (40.7%) 32.9%
R.I.	134 (9.0%) 8.0%	122 (7.7%) 6.6%	116 (7.9%) 6.7%	131 (8.6%) 6.8%	139 (9.3%) 7.5%
P.R.	524 (35.2%) 34.9%	574 (36.1%) 31.1%	510 (34.7%) 29.6%	506 (33.1%) 26.5%	518 (31.6%) 28.0%
FROM DISTRICTS	1,490	1,589	1,723	1,528	1,497
Bankruptcy	35	36	19	31	27
Agency ---BIA	82 54 [3.2%]	153 140 [7.6%]	164 140 [8.1%]	260 222 [11.6%]	239 219 [11.8%]
Original	60	65	72	93	89
TOTAL	1,667	1,844	1,723	1,912	1,852

*The percentages in parentheses to the right of the numbers are the proportion of cases from the districts alone. The percentages under the numbers are the proportion of the total caseload. The "BIA" (Board of Immigration Appeals, including immigration appeals from other entities) is a subset of the "Agency" cases. The percentages in brackets are the proportion of total cases that come from the BIA.

If we compare only the appeals that come directly from the districts with the districts' populations, we find that Puerto Rico accounts for a greater proportion of appeals than of population—from 6 to 9% more—while Massachusetts regularly accounts for 6 to 7% of the appeals less than would be equivalent to its proportion of the population. New Hampshire's proportion of appeals is also less than its proportion of population, and while Maine has a pattern of two years in which the proportions of cases and population are nearly identical, the proportion of appeals is higher than population for two years and lower for one. Rhode Island also has caseload proportions roughly equal to population proportions for two years, but its proportion of cases exceeds that of population for three years.

6. *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics: March 31, 2008, Appendix Table B (Appeals Commenced, Terminated and Pending), (Washington, D.C. 2008), *available at* http://www.uscourts.gov/caseload2008/tables/B00Mar08.pdf (last visited Oct. 28, 2009).

Of course, the Court of Appeals for the First Circuit can (and must) decide only those cases brought to it, and if a certain proportion of its dispositions are from a particular district, that is because those cases were appealed. However, cases are not appealed from all of the circuit's districts in identical proportions, so a district's proportion of the circuit's appellate caseload may vary from its proportion of district court filings. That leads us to compare, for 2005-2006, the filings of appeals with the combined civil and criminal filings and terminations in the district courts.[7] Here we find Massachusetts' clear dominance in terms of district court filings—it accounts for almost half those in the circuit—but this proportion exceeds its proportion of appellate filings (roughly two-fifths). The appellate filings from Puerto Rico (one-third plus), however, are not only higher than its proportion of population, as just noted, but are much higher than its proportion of district court filings (roughly one-fourth). Both Maine and Rhode Island have roughly the same proportion of district court filings as appellate filings, and New Hampshire has a higher proportion of district court filings and particularly of terminations than its proportion of the circuit's appellate caseload. (See Table Three)

TABLE THREE
Filings in the Districts

	Civil Filings		Criminal Filings		Combined Filings	
	2005	2006	2005	2006	2005	2006
Maine	521 (7.7%)	448 (7.3%)	202 (16.5%)	208 (14.5%)	723 (9.1%)	656 (8.7%)
N.H.	504 (7.5%)	490 (8.0%)	71 (5.8%)	293 (20.5%)	575 (7.2%)	783 (10.3%)
Mass.	3,306 (49.0%)	3,213 (52.3%)	400 (32.7%)	346 (13.5%)	3,706 (46.5%)	3,559 (47.0%)
R.I.	828 (12.3%)	580 (9.4%)	114 (9.3%)	139 (9.7%)	942 (11.8%)	718 (9.5%)
P.R.	1,591 (23.6%)	1,408 (22.9%)	336 (27.5%)	445 (31.1%)	1,927 (24.2%)	1,853 (24.5%)
TOTAL	6,750	6,139	1,223	1,430	7,973	7,569

The cases that come before the First Circuit involve a wide range of federal questions, extending from violations of federal criminal law to securities and tax issues, employment discrimination claims, and the environment, as well as

7. *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics: March 31, 2008, Appendix Table C (Civil Cases Commenced, Terminated and Pending), (Washington, D.C. 2008), *available at* http://www.uscourts.gov/caseload2008/tables/C00Mar08.pdf (last visited Oct. 28, 2009); Administrative Office of the United States Courts, Federal Judicial Caseload Statistics: March 31, 2008, Appendix Table D (Criminal Cases Commenced, Terminated and Pending), (Washington, D.C. 2008), *available at* http://www.uscourts.gov/caseload2008/tables/D00CMar08.pdf (last visited Oct. 28, 2009).

the maritime cases one would expect from a littoral circuit. Decisions of federal administrative agencies like the National Labor Relations Board (NLRB), appeals from Social Security disability rulings, and petitions from aliens seeking review of denials of asylum or of deportation orders regularly appear on the docket. There are also state law questions raised in diversity-of-citizenship cases and attached as pendent state claims to federal claims. Some districts may produce more of certain types of cases; one would expect, for example, that Connecticut, in the Second Circuit, would produce a large number of insurance cases, because of Hartford's presence as a major insurance center. It remains for further study the extent to which certain types of cases come more from Massachusetts than from, say, Rhode Island. However, initial observation suggests a significant number of appeals from Puerto Rico involve claims that a government employee has been improperly discharged on the basis of political party affiliation.

II. JUDGES

Who decides these cases? It was noted above that the Court of Appeals for the First Circuit at one point had only three active-duty judges, but that was changed when the Omnibus Judgeship Act of 1978 added judgeships to all of the circuits.[8] The First Circuit now has six judgeships, that is, "lines" for active-duty judges.

Court of appeals seats are informally allocated among the states in the circuit, with the understanding that each state (in the case of the First Circuit, the same as each district) would receive at least one. With six judgeships at the present time, as of 2009, the Court of Appeals for the First Circuit had only five active-duty judges, as no one had been appointed to replace Judge Bruce Selya, from Rhode Island, when he assumed senior status.[9] Judges from Massachusetts held two of the five active judgeships—new Chief Judge Sandra Lynch and her predecessor as "Chief," Michael Boudin—while one each came from Maine (Judge Kermit Lipez), New Hampshire (Judge Jeffrey Howard), and Puerto Rico (former Chief Judge Juan Torruella). In addition to Judge Bruce Selya, the court's senior judges during the most recent years were Judge Conrad Cyr, with chambers in Bangor, Maine, who retired from service on March 31, 2008; former Chief Judge Levin Campbell, with chambers in Boston, who retired from service on December 31, 2008; and Judge Norman

8. *See* Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978).

9. On October 6, 2009, President Obama nominated Judge O. Rogeriee Thompson to the United States Court of Appeals for the First Circuit. Judge Thompson, a graduate of Brown University and Boston University School of Law, currently serves on the Rhode Island Superior Court. She was the first African-American woman on that court.

Stahl, who had come to the court from New Hampshire.[10]

The small number of judges on the court—small even if the senior judges are included—may facilitate greater collegiality, which in turn may help explain the low frequency of separate opinions (concurrences or dissents). However, we must be careful not to overestimate the extent to which small size means a "happy family," as tension within small groups can be considerable, particularly when the members of the group interact constantly. A clash of personality overlaid with differences in ideology can lead to considerable friction, and many court of appeals judges of a certain vintage refer to the high tensions in the D.C. Circuit when both Warren Burger and David Bazelon were members of that court. One must, however, be careful not to assume that ideological disagreement means intracourt tension; at times, the greatest personal animosities (and there is no reason to believe that such exist on the present First Circuit) exist between jurists who are like-minded but simply very different in temperament; likewise, friendships often extend across ideological lines.

Mention of the D.C. Circuit leads to another point. The First Circuit hears oral argument primarily at one location, Boston, while also sitting twice a year in San Juan, Puerto Rico, but not all the judges are in residence at Boston. Like other circuits (except for the D.C. and Federal Circuits), the judges have their principal chambers at various locations—some at circuit headquarters but, as noted above, some elsewhere, with the latter coming to Boston for oral argument. One might suggest that the fact that the judges are *not* "on top of each other" all the time may actually facilitate collegiality and may reduce the possibilities that they will become, as was once said of the Justices of the Supreme Court, "nine scorpions in a bottle."

In addition to the use of its senior judges, the First Circuit, like all but one other court of appeals (the Seventh Circuit), makes use of district judges from within the circuit sitting by designation, and it also avails itself of the services of visiting judges—court of appeals judges and district judges from outside the circuit, almost all of whom are senior judges.

District judges are designated to sit with the court of appeals for two reasons. Initially, it is to assist in socializing the district judges into the work of the body that will review their work; the appeals court may well feel that if the district judges sit as appellate judges, they will come to learn what the appeals court expects of them. More generally, it is to assist the court of appeals with its ever-burgeoning caseload. Of course, the district judges have to attend to

10. Judges whose participation is reflected in the cases analyzed in this paper, particularly in connection with the examination of the court's en banc rulings and its cases that the Supreme Court heard, include former Chief Judge Frank Coffin (Maine), Hugh Bownes (New Hampshire), Bailey Aldrich (Massachusetts), and former Chief Judge, now Justice, Stephen Breyer (Massachusetts).

their own trial dockets, which serves as a limit on the frequency with which active-duty district judges are asked to sit with the court of appeals. Visiting judges from other circuits—whether district judges or court of appeals judges—who have taken senior status have greater flexibility in where they sit, and they do not usually carry a full caseload "at home." The presence of both district judges and out-of-circuit visitors is thought by some to be problematic because they come with different identities, and the latter potentially bring with them the law of the circuits from which they come.

To the extent that district judges from within the circuit sit with the court of appeals, the development of "vertical collegiality" is assisted, just as it is through events like the circuit judicial conference, a gathering of all judicial officers and lawyer representatives. This collegiality is further assisted by the fact that many court of appeals judges had earlier served on the district court.[11]

For the set of published opinions appearing in Volumes 450 through 488 of the *Federal Reporter, Third Series* (covering a portion of 2007, and including some 362 cases), in forty-two cases a district judge from within the First Circuit was a member of the panel; for sixty-seven cases, the panel contained a visiting circuit judge; and for another twenty-six cases, a visiting district judge was on the panel. For Volumes 475 through 488, covering fifty cases, the panel included one of the First Circuit's own senior circuit judges,[12] who in twelve of those cases sat with another judge who was not an active First Circuit judge. In four cases each, there was a visiting senior district judge, a visiting senior circuit judge, or a district judge from the First Circuit.

Such "extra" judges also helped decide cases resulting in non-precedential decisions. In the forty-four cases appearing in Volumes 135 through 141 of the *Federal Appendix,* a judge from one of these categories sat in fifteen cases (and a senior circuit judge and visiting district judge sat in the same case); of the cases decided in Volumes 167 through 180, there was either a district or visiting judge in five of the twenty-five cases; and for the fifty cases in Volumes 196 through 211, nineteen cases had either one of the First Circuit's senior circuit judges or a visiting circuit court judge (with three cases having both).[13]

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11. Except for its two newest members, Judges Howard and Lipez, plus Senior Judge Coffin and former Chief Judge Breyer, all had served as U.S. district judges. Chief Judge Michael Boudin had, however, served as a district judge not in the First Circuit but for two years in the District of Columbia. Judge Lipez had served on the Maine Supreme Judicial Court.

12. In one case, there were two senior First Circuit judges.

13. *See* JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 5 (2000) (hereinafter FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES). The Federal Judicial Center study counts district judges from within the circuit as "visitors," counter to the terminology used here. The study's data shows that for 1994 through 1998, all types of "visitors" participated in 13% to 25% of appeals, with an average of 18% per year.

When district judges from within the circuit sit with the court of appeals, a potential problem is that, while they do not sit in appeals from their own rulings, they might be scheduled to sit on appeals from their own districts. This is thought unwise, as it puts the district judge in the position of having to overrule his or her own colleague and thus could prompt the district judge to pull punches or, if the panel does reverse the district court, to be destructive of collegiality back at the district court. When, in such a situation, the district judge sitting by designation writes for the panel, the potential fallout is even more severe. This is one reason why the D.C. Circuit, which contains only one district, does not use district judges sitting by designation. In circuits with an extremely dominant district, avoiding the situation may be extremely difficult, which is why there are instances in the Second Circuit in which cases from the Southern District of New York (Manhattan) are heard by a panel containing a Southern District of New York judge.

Although one might think, despite data presented below showing the predominance of the District of Massachusetts, that dominance would not be such that the First Circuit would be faced with this situation, we do find instances where it happens.[14] In one such case from Massachusetts, with District Judge Robert Keeton (from that district) writing for the majority, the only active circuit judge on the panel dissented.[15] In another case from Massachusetts, involving a consent decree as to jail conditions, in which Judge Keeton had been the trial judge, Judge Andrew Caffrey of that district was a member of the First Circuit panel.[16] And in another case from the District of Massachusetts, a challenge to a state law requiring disclosure of cigarette ingredients, the majority was composed of Judge Patti Saris from that district and an out-of-circuit senior district judge, with an active First Circuit judge on the panel in (partial) dissent. [17] In this instance, the problem may have resulted from recusal of several circuit judges—probably for ownership of tobacco stocks—as the resulting en banc court had only three judges. Massachusetts was, however, not the only district as to which this phenomenon occurred. A case from Puerto Rico was heard on appeal by a panel containing another judge

14. No systematic search was made, but a number of cases became quite obvious if one compared the district of the judge sitting by designation with the district of the case's origin.

15. *See* Langton v. Hogan, 71 F.3d 930 (1st Cir. 1995). Judge Keeton was joined by senior judge Hugh Bownes; the dissenter was Judge Michael Boudin.

16. *See* Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561 (D. Mass. 1990), *aff'd on basis of district court opinion*, 915 F.2d 1557, 1990 WL 152385 (1st Cir. Sep. 20, 1990), *vacated and remanded sub nom.* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).

17. *See* Philip Morris Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001) (before panel of District Judge Patti Saris, Senior District Judge William Schwarzer of the Northern District of California, and Circuit Judge Bruce Selya (concurring in part, dissenting in part)), *vacated and rev'd en banc*, 312 F.3d 24 (1st Cir. 2002) (before en banc court of circuit judges Juan Torruella, writing for the panel; Bruce Selya, concurring in the judgment, and Kermit Lipez, dissenting).

from the District of Puerto Rico.[18]

III. OUTPUT

A. Published Opinions

If cases brought to the First Circuit on appeal constitute the court of appeals' input, then what about its output? We look first at published opinions, whichare more important than so-called "unpublished" dispositions because the published opinions constitute circuit precedent, whereas the other dispositions, while now citable to the court, are non-precedential. If a district accounts for a higher proportion of a circuit's published opinions than its unpublished dispositions, rulings in that district's cases can be said to have made a more important contribution to the law.

For cases reported in the *Federal Reporter, Third Series*, Volumes 405 through 435 (covering part of 2005 into 2006) and Volumes 440 through 488 (covering part of 2006 and into 2007), Massachusetts is the dominant district, with Puerto Rico not far behind. (See Table Four) What is noteworthy is that Massachusetts's proportion of published opinions somewhat exceeds its proportion of appellate filings in the circuit, while Puerto Rico's proportion is, overall, somewhat less. For Volumes 405 through 435 of the *Federal Reporter, Third Series*, Massachusetts accounts for 37.8% of all published opinions, and for 44% of those in cases coming from the districts (that is, excluding those from the agencies), while Puerto Rico accounts for just over one-fourth of all published opinions (26.2%), and 30.5% of those are from the districts. For the subsequent period, covering volumes 440 through 488 of the *Federal Reporter, Third Series*, the proportion of published opinions from Massachusetts is slightly lower, and that from Puerto Rico slightly higher, so that Massachusetts' proportions are close to its proportions of appellate filings, while Puerto Rico comes in slightly above that proportion.[19]

B. "Unpublished" Dispositions

Starting in the 1970s, the United States Courts of Appeals, which are forced, as mandatory jurisdiction courts, to decide all cases brought to them, began to use non-precedential dispositions. We refer to such decisions as "unpublished" because for some years after the courts began to use them, they were not

18. *See* PFZ Properties, Inc. v. Rodriguez, 739 F. Supp. 67 (D.P.R. 1990), *aff'd*, 928 F.2d 28 (1st Cir. 1991) (before panel of circuit judges Campbell and Cyr and District Judge Fuste of the District of Puerto Rico sitting by designation).

19. For published opinions of cases from the mainland districts, Massachusetts accounts for over three-fifths in each period—63.3% and 62.9% respectively.

published in the *Federal Reporter* and, indeed, were available only in slipsheet form at a few locations such as court libraries. While they eventually became available online and were then published in a new reporter, the *Federal Appendix*, they remained non-precedential. These decisions are crucial, because in some circuits, they constitute upwards of 80% of appellate dispositions on the merits.

TABLE FOUR
Dispositions

Published Opinions

		405-435 F.3d	440-488 F.3d
Massachusetts	% of All	140/370 (37.8%)	180/527 (34.1%)
	Without Agency Cases	140/318 (44.0%)	180/440 (40.9%)
	% of Mainland Cases	140/221 (63.3%)	180/286 (62.9%)
Puerto Rico	% of All	97/370 (26.2%)	154/527 (29.2%)
	Without Agency Cases	97/318 (30.5%)	154/440 (35.0%)

"Unpublished" Dispositions

		123-147 Fed. Appx.	167-180 Fed. Appx.	196-211 Fed. Appx.
Massachusetts	% of All	19/89 (21.3%)	5/24 (20.8%)	12/50 (24.0%)
	Without Agency Cases	19/66 (28.9%)	5/14 (35.7%)	12/44 (27.3%)
	% of Mainland Cases	19/40 (47.5%)	5/9 (55.5%)	12/27 (44.4%)
Puerto Rico	% of All	26/89 (29.2%)	6/24 (25.0%)	17/50 (34.0%)
	Without Agency Cases	26/66 (39.4%)	6/14 (42.9%)	17/44 (38.6%)

The First Circuit makes considerably less use of such dispositions, however. For example, in 1998, when the national average was that 28% of rulings were published, over half (51%) of those in the First Circuit were published,[20] and the proportion of cases resulting in published opinions had not fallen as far as in other circuits.[21] The proportions of such rulings from each district are of interest. In three periods covered by *Federal Appendix*, Volumes 123 through 147 (part of 2005), 167 through 180, and 196 through 211 (parts of 2006), which are within, but not identical to, those covered by the published opinions examined above, the portion of unpublished Massachusetts dispositions is

20. *See* FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES, *supra* note 13, at 19 (Table 11).

21. *See id.* at 21 (Table 13). The First Circuit published 61% of its rulings in 1987; six years later, in 1993, the proportion actually increased slightly (to 62%), before falling to the just-noted 51% in 1998.

distinctly lower than its proportion of published opinions. This indicates that Massachusetts's role in producing the law of the circuit is especially important, while Puerto Rico, for example, accounts for a much higher proportion of non-precedential dispositions than of published opinions. (See Table Four) This high proportion of non-precedential dispositions indicates that the judges of the appeals court panels, as they regularly decide on a case-by-case basis whether or not to publish rulings, decide that cases from Puerto Rico are less likely to contribute to the growth of the law. One possible reason why the judges may decide to publish dispositions in Puerto Rico cases less frequently may be the island's special commonwealth status and different legal background, which may make a number of the cases from Puerto Rico less applicable more generally to other districts in the circuit.

In all three periods examined, Massachusetts accounts for approximately one-fifth of all unpublished dispositions issued by the court of appeals in two periods, and just under one-fourth in the third (21.3%, 20.8%, and 24.0%, respectively). Puerto Rico's figures, in comparison, are not only higher but exceed one-third (34%) in the last period. If cases from the agencies are excluded, Massachusetts accounts for 28.9%, 35.7%, and 27.3%, respectively, of all unpublished dispositions, while Puerto Rico's proportion is at or above 40% in the first two periods and is close to that level (38.6%) in the third period.[22]

C. En Banc Decisions

Among court of appeals opinions, where a ruling by a normal three-judge panel becomes the law of the circuit, particularly significant in creation of that law of the circuit are those cases which are heard, or more likely reheard, en banc. En banc rulings have special status as circuit precedent; no panel is supposed to rule counter to an en banc ruling, and only another en banc court may change it. Here we consider whether en banc rulings come disproportionately from a single dominant district. One might also suggest that cases in which rehearing en banc is denied, but in which at least one judge files a dissent from that denial of rehearing, are particularly important, and it would be useful to know whether such cases originated in particular districts. However, very few such cases exist, making analysis difficult.[23]

From 1983 to 2007, the First Circuit sitting en banc handed down forty-four

22. As to such dispositions in cases only from the mainland districts, Massachusetts accounts for 46.2%, 55.5%, and 61.4%.

23. A search produced only six instances from 1995 through 2007. If the court has considered whether to take a case en banc, and the active judges voting decide not to rehear it en banc and no one files a dissent, we do not have a public indication that the judges considered the case important.

rulings.[24] That Massachusetts was particularly dominant as to these especially important rulings is evident from its accounting for over half of them—54.5% of all and 57.1% if agency appeals are excluded. Puerto Rico, by contrast, accounts for a far smaller proportion of en banc rulings (18.2% of all) than of its proportion of overall cases in the circuit. Puerto Rico's proportion of en banc rulings is also well under its proportion of all published rulings—panel and en banc taken together. Rhode Island is the only other district to account for more than 10% of the en banc decisions (11.4% of all). (See Table Five)

TABLE FIVE
En Banc Rulings (1983-2007)

District	Number of En Banc Rulings
Maine	2 (4.5%)
N.H.	3 (6.8)
Mass.	24 (54.5)
R.I.	5 (11.4)
P.R.	8 (18.2)
Other	2 (2.5)
TOTAL	44

IV. SUPREME COURT

As the rulings of the United States Supreme Court are the "law of the land" and are thought more important than rulings of the courts of appeals, it should be of interest to know, as to cases which come to the Supreme Court from a particular circuit, from what districts in the circuit they come. In short, does one district hold, or increase, a dominant position because a higher proportion of its cases go to the Supreme Court? This is true even if the circuit court of appeals does not produce many cases that the Supreme Court accepts for review, but, apart from the very large Ninth Circuit, most circuits have only a few cases reviewed by the Supreme Court each term. Of course, the First Circuit, being especially small, has had only a very small number of its cases heard and decided by the Supreme Court—only thirty in the 1991 through 2008 terms, inclusive (in one of those cases, certiorari was dismissed as improvidently granted). With so few cases going from the First Circuit to the Supreme Court—less than two per term, except for the 2008 term which had

24. *See* FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES, *supra* note 13, at 22 (Table 14). The Federal Judicial Center study indicates that from 1994 through 1998, there were eleven en banc rehearings–only one in 1994 and none in 1995, but three or four in each of the other years.

four[25]—and with the court of appeals taking few cases en banc—again roughly two annually, the three-judge panel is the last step for almost all litigants.

Within the small set of cases the Supreme Court has heard from the First Circuit, the dominance of Massachusetts is extremely clear, as it accounts for half of the thirty cases taken by the Supreme Court. New Hampshire and Maine have four cases each, Rhode Island, three. (See Table Six)

Also of note, however, are the cases in which the Supreme Court granted certiorari, vacated the court of appeals decision, and remanded—referred to as issuing a "GVR order"—in light of its 2005 ruling in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*[26] (the latter from the First Circuit, taken directly from a ruling by the U.S. District Court for Maine) that the mandatory nature of the Federal Sentencing Guidelines was unconstitutional, although judges could treat the Guidelines as advisory. Immediately after that ruling, the Supreme Court issued GVR orders for more than twenty "*Booker* cases" from the First Circuit. Of those cases for which the district of origin could be determined, one-third were from Massachusetts, and with the exception of one case from Rhode Island, the others were evenly distributed across Maine, New Hampshire, and Puerto Rico.

TABLE SIX
Supreme Court Cases Originating in Each District (1991-2008)

District	Number of Supreme Court Cases
Maine	4
N.H.	4
Mass.	14 (46.7%)
R.I.	3
P.R.	2
Other	3
TOTAL	30

V. DISPOSITIONS

In this section, we examine three types of outcomes. The first is how the First Circuit, whether sitting in its regular panels or en banc, treats the districts

25. *See* Carcieri v. Salazar, 129 S. Ct. 1058 (2009) (Indian trust lands); Locke v. Karass, 129 S. Ct. 798 (2009) (union fees in litigation); Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788 (2009) (Title IX and Sec. 1983); Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008) (preemption and fraud as to "lite" cigarettes).

26. 543 U.S. 220 (2005) (consolidating appeals from Seventh Circuit and First Circuit).

and agencies from which its cases come. The second, part of our further look at en banc dispositions, deals with whether the en banc court comes out the same way in cases as did the panel that first heard the case. We also look here at other aspects of the court's en banc rulings. The third part is a portion of our examination of the relationship between the First Circuit and the Supreme Court. There we look at the extent to which the rulings of district courts or agencies from which the cases came to the court of appeals are ultimately upheld.

A. Affirmance and Reversal

For the first part of this examination, we look at the court of appeals' treatment of published opinions and then at its unpublished dispositions. Because an appeals court must decide all cases brought to it, we would expect the rate at which the court affirms the rulings of the lower courts and administrative agencies to be considerably higher than the affirmance rate for cases that reach the U.S. Supreme Court. In addition, because court of appeals rulings in which unpublished dispositions are issued are thought to be more routine cases, we would expect the affirmance rate to be higher for them than for published (and thus precedential) opinions.

We find that, in the published opinions released by the Court of Appeals for the First Circuit, a very high proportion of lower court (or agency) rulings are upheld: two-thirds for volumes 405 through 414 of the *Federal Reporter, Third Edition*, and four-fifths for volumes 440 through 488 of the *Federal Reporter, Third Edition.* This includes not only affirmances, but also orders enforcing agency orders; denials of petitions to review agency rulings, particularly in immigration cases; and dismissals of appeals, which have the effect of preserving the ruling from which an appeal has been taken. Another small portion (14.5% and 6.2%, respectively) are "split verdicts"—that is, the court affirms in part and reverses in part, or affirms in part and vacates in part. However, if we include these with outright reversals, we find that one-third (32.5%) of the earlier set and one-fifth (19.5%) of the larger set of cases are overturned in whole or in part. By comparison, only a *very* small portion of "unpublished" dispositions receive a judgment other than affirmed. For dispositions available in Volumes 123 through 141 of the *Federal Appendix*, the First Circuit affirmed (or did the equivalent of affirming) in almost 90% of lower court or agency rulings, and the proportion is at the 95% level for Volumes 167 through 180 and Volumes 196 through 211 of the *Federal Appendix*.[27]

Not reported here are a number of important data elements relating to how

27. We must be cautious in using these proportions because the number of cases is relatively small.

well cases from particular districts and rulings by individual judges fare in the appeals courts. One is whether some judges are overturned more than others. We know, from anecdotes and fragmentary evidence from other courts, that there is variation in the rate at which some district judges are reversed by the court of appeals. Indeed, court of appeals judges come to examine the work of some district judges more closely, just as the Supreme Court pays particular attention to court of appeals rulings written by specific judges.

As suggested earlier, cases are not appealed from all districts at the same rates, and the rulings of some individual judges may be appealed more frequently. This may be particularly true if lawyers are aware that the court of appeals is more likely to reverse those judges. If one or more district judges were to be reversed far more frequently than their colleagues, lawyers who watch such patterns would be more likely to appeal the rulings of those district judges.

Knowing that information would be imperative for a complete picture of the extent to which rulings of particular districts and judges are left undisturbed in the court of appeals—that is, are either not taken there on appeal or are appealed and affirmed.

Data concerning whether some districts fare better than others in the First Circuit are not presented here, nor are data on the differences in rates at which individual judges are affirmed. From court of appeals decisions, one could say how well the First Circuit treats individual judges and districts in those cases which are brought to the court of appeals and decided there, although that data analysis is not carried out in this paper. Because there are so few reversals, spread over many judges, it would, in any event, be difficult to find much variance in the rates at which the judges are reversed. In addition, obtaining the more complete picture of the extent to which districts' rulings are left undisturbed is far more difficult and requires going beyond the published reporters. Doing this for individual judges is exceptionally difficult. For districts, one cannot easily match aggregate statistical data for district courts with that for the courts of appeals. For example, cases terminated in the District of Massachusetts in 2005 are not necessarily the same cases the First Circuit decided from the District of Massachusetts in that year, nor can one assume that the 2005 district court dispositions are those cases the appeals court decided in 2006, although some "lag" between district court decision and appellate court termination must be allowed.

In short, the data from the Administrative Office of the U.S. Courts Federal Judicial Center is summary data for particular time periods, which makes examination of the history of particular cases impossible. For individual judges, the matter is more complicated yet, because available government data "masks" judges' names, and one would likely have to look at records in the individual districts. Additionally, more than one judge—not only a judge who authored the ultimate ruling—may have participated in a case in the district

court. It should be noted that, because of these difficulties, the scholar who carried out the most comprehensive study of the flow of cases from district court through the courts of appeals and to the Supreme Court had to "tag" each individual case and follow it through the judicial hierarchy.[28]

B. Panels and En Bancs

There are several reasons why a court of appeals decides to hear (usually rehear) a case en banc. With the formal rule that a panel ruling speaks for the entire court and that such a ruling may be overturned only by the en banc court, a court may rehear a case en banc to change circuit precedent when a majority of the court feels it necessary. Indeed, the judges on a panel may see the need for such reversal and may thus initiate a call to vote on whether to take the case en banc. However, most en banc calls come only after the panel has released its ruling.

When the senior judges of a court of appeals regularly sit in the court's panels, if those senior judges are "out of step" with the present majority view of the active judges, the panel majority may not "match" with the views of the majority of the court's active judges, the ones who vote on whether to take a case en banc. However, senior judges who were on the panel may—and in the First Circuit, do—sit on the en banc court. Indeed, senior judges were part of the en banc court in twenty-six of the forty-four en banc hearings the First Circuit held between 1983 and 2007, and in six of those cases, two senior circuit judges participated. When the court also uses district judges and visiting judges from other circuits, the circuit's own judges may also want to be sure that a case has the "stamp" of a majority of the court's own judges; that is, an en banc ruling may be used to validate the majority circuit position.

However, the most basic reason for an en banc call, which usually comes from within the court even if a party has filed an en banc rehearing petition, is likely to be simple disagreement between a majority of the court's judges and the panel as to the proper resolution of the case. In short, courts of appeals go en banc because it is thought the panel "got it wrong." For that reason, we would not be surprised to find that more en banc courts produce a different outcome than that reached by the panel. That is what we find for the forty-four en bancs starting in 1983. Of the thirty-eight cases for which both panel and en banc information is available,[29] in twenty (or more than half), the en banc

28. *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981).

29. This includes instances when the court goes en banc in a case before the panel issues a ruling, as well as those for which information is unavailable. When the court of appeals agrees to rehear a case en banc it often vacates the panel ruling, which then is removed from the official reporter. While many panel rulings are still available through Westlaw, some are not.

judgment is different from the panel's judgment, and two more produced a split result, with the panel overturned in part but upheld in part, while in fourteen (less than one-third for which information is available), the en banc court reaches the same outcome as the panel, although the reasoning of the en banc court may differ from that of the panel.

(1) Judges' Positions

We have earlier examined the extent to which the court of appeals sitting en banc comes to the same result as the panel which first heard the case, and we have also noted the participation of senior judges on the en banc court. We extend our analysis by looking at the votes cast by the individual judges to see whether the outcomes the judges favor are the same at the panel stage as when the court sits en banc. Although those who explain judges' behavior in terms of their political ideology (or attitudes) would expect consistency of position from panel to en banc, other factors may play a role. For one thing, in a three-judge panel, a judge not fully comfortable with the panel majority's view may not wish to take the time to write a dissent. For another, a member of a panel, even if unhappy with circuit precedent, may feel constrained to follow it, as panels are expected to do, but may also be willing to join in a call to take the case en banc or vote in favor of en banc rehearing,[30] and then, once the case is taken en banc, vote the judge's own inclinations.

(2) Vote Divisions

Before turning to whether judges are consistent from panel vote to en banc vote, something we can examine only when the en banc judges have also sat on the panel, we first examine the number of judges per en banc court and then look at the court's divisions. To the extent that only the more contentious cases are taken en banc, we might expect a relatively small number of unanimous en banc rulings. However, because a court may rehear some cases to resolve intracircuit conflicts or for "housekeeping" purposes—to eliminate precedents considered outdated—we might well find unanimous agreement inen banc courts.

First, we note that the number of judges on an en banc court ranges from three and four (one case each) to as many as eight (one case), but most First Circuit en banc courts are composed of five (eleven cases), six (thirteen cases), or seven (sixteen cases) judges. This variation results in large measure from senior judges' presence on panels—senior judges who sit on the panel for a

30. While a few courts of appeals publish the votes of judges on whether to rehear a case en banc, that is not true of the First Circuit; we lack any independent evidence as to who on the court issues a call to vote on going en banc or who votes which way on such a call.

case and then, once the case is taken en banc, become members of the en banc court. Not only is the variation in the number of First Circuit judges on its en banc court considerable, but it is also greater than would be found in en banc courts in other circuits where the numbers are more stable, in part because their larger "base size" means that adding one or two senior judges to the en banc court would cause proportionately less change in size.[31]

Of the en banc cases within the time studied, only one-fourth (eleven of forty-four) were unanimous, a smaller proportion that might be expected. In some of these cases, however, the judges did not unanimously support a single opinion of the court, as there were several concurrences in part and in the judgment. Among the non-unanimous cases, in seven there was only one dissent, but in twenty cases there were two dissents (six 3-2 divisions, six 4-2 divisions, and seven 5-2 divisions), and in one case, the court divided 3-3, thus affirming the lower court's decision—but separate opinions were written, unlike the usual situation with an evenly divided U.S. Supreme Court. Relatively few en banc rulings were decided by a margin of only one vote—in addition to the six 3-2 votes, there was the 2-1 division in *Philip Morris v. Reilly*[32] and there were two 4-3 decisions—and, in one case, although there was a four vote margin (6-2), disagreement as to the opinion left only a plurality rather than an opinion of the court.

(3) Consistency?

What did judges on an en banc court do when they had previously sat on the panel whose ruling was being reheard? If we look at the outcomes of the cases, that is, whether the court of appeals affirmed or overturned the panel (or agency) ruling being reviewed, were these judges consistent in their positions? That is, did they support the same outcome, or did they take a different position in the en banc court from that they had taken on the panel?[33] Because we lack information about a number of panels, for almost half of the cases we cannot make such comparisons, and the number of judges per case for whom we can make the comparisons varies. This is because for a panel with, for example, a district judge and a visiting circuit judge, only one panel member could sit on the en banc court. However, for those cases where the evaluation can be made, we find that the judges appear to be consistent more than twice as often as they are inconsistent. In cases where the en banc court reaches the same outcome as

31. In the Ninth Circuit, the only one to use a "limited en banc panel" of less than the court's full membership, now the Chief Judge and ten other judges drawn by lot, the number of judges would be the same from one en banc to another, but the composition of the en banc court would change.

32. 312 F.3d 24 (2002).

33. A closer look at what the judges *said* in their opinions might lead to scoring them differently in some instances.

the panel, when we combine those who were in the majority in both panel and en banc ruling or dissented in both panel and en banc ruling, and, where the en banc court came out differently from the panel, where the judges either were in the majority in the panel and dissent in the en banc or vice-versa, we have forty instances in which the judges were consistent. A half-dozen cases could be added in which the judges were consistent in part, a result of split outcomes. By contrast, we find seventeen "inconsistent" votes. Most (fourteen) of those come when, in cases where the en banc court outcome differs from the panel outcome, judges in the panel majority place themselves in the en banc majority or dissent in both the panel and en banc.

C. Supreme Court

Most attention to the relationship between the courts of appeals and the United States Supreme Court deals with the rate at which the Justices overturn the courts of appeals. However, because the rulings which eventually reach the Supreme Court originate in district courts or in administrative agencies, it is also important to know how those district courts or agencies fared at the Justices' hands, even if the courts of appeals' rulings have intervened before the Supreme Court received the case.

Of the twenty-nine cases from the First Circuit in which the Justices handed down a written opinion (they dismissed another as improvidently granted), they affirmed the court of appeals in eleven (38%) and overturned its rulings in eighteen, over three-fifths of the total First Circuit cases (62%). The Court overturned cases from the District of Massachusetts, which accounted for almost half of the total cases, in roughly the same proportion. Five of the eleven affirmances were unanimous, and only five were decided by votes of 6-3 or closer. On the other hand, eight of the eighteen cases in which the First Circuit was overturned were by close votes (6-3, 5-3, or 5-4), while seven of the sixteen were unanimous. It may be of interest that, Justice Souter, one of the two former First Circuit judges serving on the Supreme Court during this period (but whose service on the First Circuit was so short that he wrote no opinions there) voted against the First Circuit's position a majority of the time (nine of twenty-six cases).[34] Justice Breyer, the other former First Circuit judge (and its former Chief Judge), who as a more recent appointee participated in fewer such cases (and recused himself in one First Circuit case which reached the Supreme Court after his appointment), supported the First Circuit in a majority of cases (eleven of eighteen), with three of his votes supporting the court of appeals coming in dissents.

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34. Of Justice Souter's votes, one in support of the First Circuit and one opposing its position were dissents.

(1) How Do the District Courts Fare?

When the Supreme Court grants review in First Circuit cases, the Court affirms (or overrules) the court of appeals at a rate not particularly different from the overall rate for cases from all the circuits together. The Justices' votes in those First Circuit cases have also been noted. We now look more closely at this set of cases, because it is important to know whether the district court where the cases were commenced or the court of appeals did better (or worse) in the Supreme Court. If the court of appeals reversed a district court ruling, and the Supreme Court reverses the First Circuit, we can say—independent of any "match" in the opinion language of the district judge and the Justices—that the district court came out ahead. On the other hand, if the court of appeals reversed the district court and the Supreme Court affirmed, the court of appeals' view prevailed.

Our examination shows that of the cases that went from the First Circuit to the Supreme Court and resulted in decisions there, in somewhat more cases the Justices in effect ruled counter to the district court rather than upheld its ruling. For cases from the District of Massachusetts, which, as noted earlier, account for the largest proportion of First Circuit cases heard by the Supreme Court, almost equal numbers of its rulings were upheld and overturned.

VI. SUMMARY

As the purpose of this article was to present basic data about a court about which little is known, there are no conclusions, grand or less grand, to be drawn. It may, however, be helpful to summarize some of what our exploration has revealed about the smallest of the nation's circuits, whose cases are decided by judges holding its six judgeships; several additional senior judges; district judges from within the circuit, who sit in more than 10% of the appeals court's cases; and out-of-circuit visitors, both circuit and district judges, who participate in roughly one-fourth of the First Circuit's cases.

We find that Massachusetts is the dominant district in the First Circuit, accounting for the largest proportion of the appellate caseload, although that proportion is less than the state's proportion of the circuit's population and less than the District of Massachusetts' proportion of all district filings in the circuit. Puerto Rico accounts for the next largest proportion of appellate filings; that proportion is greater than the commonwealth's proportion of population or of the circuit's district court filings. Making its dominance in relation to the law of the circuit clearer is Massachusetts' proportion of the circuit's published opinions, which constitute circuit precedent. This proportion exceeds the district's proportion of appellate filings, while Puerto Rico accounts for a smaller proportion of published rulings than of appellate filings. Massachusetts' position is particularly dominant with respect to the cases that the court of appeals decides en banc, as well as in the cases from the

circuit that the Supreme Court accepted for review and decided during its 1991 through 2008 terms.

The First Circuit affirms at a high rate the cases that come before it, doing so in upwards of two-thirds of its published opinions and in a majority of its "unpublished" (non-precedential) rulings. When the Court of Appeals for the First Circuit decides to rehear en banc a ruling by one of its three-judge panels, the en banc courts vary in size depending on the number of senior judges who were on the panel. In more than half of the cases, the en banc court reaches a result different from the panel's result, but most of the judges' en banc votes are consistent with the position they took in the panel. When cases reach the Supreme Court from the First Circuit, the court of appeals is reversed two-thirds of the time. This is roughly par with the Justices' overall rate of reversing lower courts, but we find that in half of the cases reaching the Supreme Court, the ruling initially reached by the district court is upheld.