

## ARTICLES

### UNIFORMITY, INFERIORITY, AND THE LAW OF THE CIRCUIT DOCTRINE

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## I. INTRODUCTION

The purpose of the federal courts is two-fold: to secure the supremacy of federal law—including enforcement of individual rights—when state courts might be hostile to the federal claim<sup>1</sup> and to ensure the availability of an alternative, unbiased tribunal when state courts might be hostile to out-of-state litigants.<sup>2</sup> A necessary corollary of supremacy is uniformity in the interpretation and application of federal law throughout the United States.<sup>3</sup> The provision of federal courts as mere alternative tribunals for state-law claims, however, involves minimal concern for uniformity.<sup>4</sup> The current

1. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 280-81 (1996); Eugene Gressman, *The Constitution v. The Freund Report*, 41 *GEO. WASH. L. REV.* 951, 952 (1973); see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. REV.* 205, 246-50, 247 n.134 (1985) [hereinafter, *Neo-Federalist View*].

2. Wythe Holt & James R. Perry, *Writs and Rights, “clashings and animosities”*: *The First Confrontation Between Federal and State Jurisdictions*, 7 *LAW & HIST. REV.* 89, 95-96 (1989); see generally Wythe Holt, *“To Establish Justice”*: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 *DUKE L.J.* 1421, 1427-29 (1989) [hereinafter *“To Establish Justice”*]; POSNER, *supra* note 1, at 281-82.

3. Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 *COLUM. L. REV.* 157, 159 (1953).

4. In diversity cases, the *Erie* Doctrine requires the application of state law, rather than general federal common law, under the reinterpreted Rules of Decision Act. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71-79 (1938). The debate about *Erie*’s application beyond diversity cases is outside the scope of this Article. See, e.g., Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 *MICH. L. REV.* 311, 316 (1980).

caseload of the federal courts of appeals consists primarily of federal constitutional and other federal question cases;<sup>5</sup> diversity cases now make up a small portion of the docket.<sup>6</sup> Accordingly, the federal courts should be structured to promote reasonable uniformity of decision.

The geographic organization of the federal courts, however, favors regional over national concerns, rendering these courts ill-suited to promote uniform interpretation of federal law. The outcome of the majority of federal courts of appeals cases will be the same no matter which circuit decides them<sup>7</sup> because in many cases both “the law and its application alike are plain.”<sup>8</sup> Even after such cases are set aside, “[w]hat is left is a substantial number of cases whose outcome is not foreclosed and which could be decided either way.”<sup>9</sup> It is not surprising that these “hard” cases may be decided differently either within a given circuit or between circuits.<sup>10</sup> Professor Mary Garvey Algero states that “federal appellate courts each year render decisions that are in conflict with the decisions of other federal appellate courts, despite the fact that they are interpreting the same federal laws or constitutional principles. These conflicting decisions have resulted in the creation of approximately two to three thousand ‘circuit splits.’”<sup>11</sup> Moreover, “[a]ctual conflicts . . . are not the measure of the total problem; potential conflicts, the persevering possibility of differences

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5. Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System*, 14 MISS. C. L. REV. 349, 383-84 (1994) (noting that federal question cases “represent the fastest growing single segment of civil cases” and accounted for 48% of civil filings in 1990); see also ERWIN CHERMERINSKY, FEDERAL JURISDICTION 271 (5th ed., 2007).

6. In the year ending March 31, 2009, diversity cases made up less than 6% (2,618 of 45,941 cases) of the all court of appeals cases that had originated in the federal district courts. ADMIN. OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2009 32, 34, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/B07Mar09.pdf>. In the same year, there were 20,175 federal question cases. *Id.*

7. Cf. Arthur D. Hellman, “*The Law of the Circuit*” Revisited: *What Role for Majority Rule?*, 32 S. ILL. U. L.J. 625, 627 (2008) [hereinafter *Majority Rule*] (discussing panel composition).

8. *Id.* (quoting Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L.J. 218, 222 (1961)); see also Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617, 619 [hereinafter *Inflation, Malfunction*] (noting that some business before the federal courts is “routine, even trivial”).

9. *Majority Rule*, *supra* note 7, at 629.

10. See generally Caleb Nelson, *Statutory Interpretation and Decision Theory: Judging Under Uncertainty: An Institutional Theory of Legal Interpretation*, Adrian Vermeule, 74 U. CHI. L. REV. 329, 358 n.52 (2007); see also Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141, 1154 (2006) (noting that “hard” cases, involving strong precedent on both sides, often generate circuit splits).

11. Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 606 (2003) (discussing circuit splits that have arisen over time and not been resolved).

developing, often have a broader impact.”<sup>12</sup>

This problem is inherent in the geographic and decisional structures of the courts of appeals. The courts of appeals function today as largely independent adjudicatory bodies, each developing a “law of the circuit.” All lower federal courts are bound to follow Supreme Court precedent, but when the Court has not decided an issue with clarity, the courts of appeals sometimes reach divergent results.<sup>13</sup> The regional structure of the courts of appeals, together with the law of the circuit doctrine, values intracircuit consistency over national uniformity.<sup>14</sup> Decisions are rendered by panels of three judges; en banc decisions are rare.<sup>15</sup> To promote intracircuit consistency, the “prior panel rule” or “rule of interpanel accord” holds that the decision of any panel binds the court of appeals itself and the district courts within the circuit.<sup>16</sup> Courts of appeals decisions, however, do not

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12. See Algero, *supra* note 11, at 622-23 (quoting Comm’n on Revision of the Fed. Court Appellate Sys. Structure & Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 207 (1975)).

13. For example, U.S. Law Week reported sixty-five circuit splits as “recently noted” in 2008 and sixty-eight more during 2009. *Circuit Splits Recently Noted in Law Week*, 76 THE UNITED STATES LAW WEEK NO. 38 1606, 1606-08 (2008), 77 THE UNITED STATES LAW WEEK NO. 2 1031, 1031-32 (2008), 77 THE UNITED STATES LAW WEEK NO. 13 1206, 1206-08 (2008), 77 THE UNITED STATES LAW WEEK NO. 25 1398, 1398-1400 (2009), 77 THE UNITED STATES LAW WEEK NO. 29 1464, 1464 (2009), 77 THE UNITED STATES LAW WEEK NO. 33 1528, 1528 (2009), 77 THE UNITED STATES LAW WEEK NO. 38 1608, 1608 (2009), 77 THE UNITED STATES LAW WEEK NO. 42 1676, 1676 (2009), 77 THE UNITED STATES LAW WEEK NO. 46 1740, 1740 (2009), 78 THE UNITED STATES LAW WEEK NO. 1 1012, 1012 (2009), 78 THE UNITED STATES LAW WEEK NO. 4 1060, 1060 (2009), 78 THE UNITED STATES LAW WEEK NO. 8 1127, 1127-28 (2009), 78 THE UNITED STATES LAW WEEK NO. 12 1192, 1192 (2009), 78 THE UNITED STATES LAW WEEK NO. 16 1260, 1260 (2009), 78 THE UNITED STATES LAW WEEK NO. 20 1323, 1323-24 (2009). Not all such splits are of equal magnitude or persistence. J. Harvie Wilkinson III, *If It Ain’t Broke . . .*, 119 YALE L.J. ONLINE 67, 69 (2009), <http://yalelawjournal.org/images/pdfs/840.pdf>; see also Stephen L. Wasby, *How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 SETON HALL CIR. REV. 119, 123-24 (2005). Regarding intercircuit conflicts, see generally Arthur D. Hellman, *Never the Same River Twice: The Empires and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81 (2001) [hereinafter *Never the Same River Twice*]; Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 [hereinafter *Light on a Darkling Plain*]; Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995) [hereinafter *By Precedent Unbound*].

14. See generally Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1574 (2008) (noting that various “judicial practices are at odds with uniformity,” specifically including the “lack of intercircuit stare decisis”).

15. En banc decisions are not reflected in statistical tables prepared by the Administrative Office of United States Courts. A Westlaw search run by the author on June 22, 2010, revealed fewer than 100 en banc decisions in calendar year 2009. This figure comports with earlier research. See, e.g., Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 831 (1993) (reporting approximately ninety en banc hearings per year in the years 1982-1991).

16. See *Hart v. Massanari*, 266 F.3d 1155, 1171-72 (9th Cir. 2001); see also Jeffrey O. Cooper

bind any other court of appeals or district court.<sup>17</sup> Thus, the key decisional structures of the courts of appeals emphasize the law of the circuit rather than uniform federal law.<sup>18</sup> The Supreme Court, exercising discretionary review only, resolves relatively few intercircuit conflicts.<sup>19</sup> The result is a systemic lack of capacity for uniform development of federal law.

The Constitution of the United States mandates only that the lower federal courts be “inferior” courts.<sup>20</sup> The geographic and decisional structures of the courts of appeals presumably implement this imperative. Curiously, discussions of restructuring the courts of appeals have been silent about the impact of the inferiority requirement.<sup>21</sup> Neither the Evarts

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& Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 721 (2000). Each circuit has adopted this rule in caselaw. *Id.* at 721 n.91.

17. See FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 8-9 (1993); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817, 824-25 [hereinafter *Inferior Courts*] (linking duty to obey precedent to existence of supervisory jurisdiction, which does not exist among coordinate courts of appeals); Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686-87 (1984) (“no court of appeals is bound to respect the decision of another on an issue of federal law”); *id.* at 702 (noting that the Evarts Act “assumes that courts of appeals are competent to decide questions of federal law correctly and mandates that they do so, subject only to review by the Supreme Court”). *But see* Rochelle Cooper Dreyfus, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 791 (2004) (noting that one circuit may determine that another circuit reached the right result).

18. See Nelson, *supra* note 10, at 358 n.52; Note, *Securing Uniformity in National Law: A Proposal for in [sic] the Courts of Appeals*, 87 YALE L.J. 1219, 1224-25 (1978) (describing the law of the circuit rule as the “concomitant” of division of the courts of appeals into geographic circuits).

19. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 622 (2009); *see also* Larry D. Thompson, *Adrift on a Sea of Uncertainty: Preserving Uniformity in Patent Law Post-Vornado Through Deference to the Federal Circuit*, 92 GEO. L.J. 523, 577 (2004). *But see* Frost, *supra* note 14, at 1569-70 (stating that “seventy percent of [the] Court’s plenary docket is devoted to addressing legal issues on which lower courts have differed,” including cases raising “matters that are close to trivial” and asserting that the “assumption in federal courts scholarship” that uniformity of interpretation as a desirable goal is “overstated and undertheorized”).

20. U.S. CONST. art. III, § 1. *Cf.* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 649 (2004) [hereinafter *Article I Tribunals*] (noting that the “requirements of unity, supremacy, and inferiority provide a textual predicate for a variety of structural features of the Article III judicial department”).

21. Caminker notes that the “foundational question” of the “appropriate role of inferior courts within a judicial hierarchy” has “received surprisingly little attention.” Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 3 (1994) [hereinafter *Precedent and Prediction*]; *see* FED. JUDICIAL CTR., *supra* note 17, at 5 (beginning by describing the federal judicial system as a “pyramid” that seems to assume, but does not mention, the inferiority requirement). Thomas Baker mentions inferiority only briefly. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE

Act nor any other federal statute expressly authorizes development of a law of the circuit doctrine. Rather, the doctrine's origins are traceable to statutory ambiguity and to the Supreme Court's interpretation of the Acts of 1891 and 1911.<sup>22</sup> Arguably, this doctrine maintains the "inferiority" of the courts of appeals by limiting the geographic reach of their decisions. The question is whether this apparent concession to inferiority is worth the decrease in uniformity.

This Article considers whether Congress or the Supreme Court could reverse the law of the circuit doctrine. Part I explores the importance of uniformity in federal law. Part II considers the extent to which a desire for uniformity has shaped the structure of the federal court system. Part III considers how the evolution of the courts of appeals as independent regional adjudicatory bodies affects the uniformity objective. Part IV examines the attributes of superior and inferior courts, and applies these criteria to the current courts of appeals. Part V examines the tension between uniformity and inferiority as determinants of the decisional and geographic structures of the federal courts of appeals. This Article concludes that either Congress or the Supreme Court could abolish the law of the circuit doctrine without running afoul of the inferiority mandate.

## II. THE IMPORTANCE OF UNIFORMITY IN THE INTERPRETATION OF FEDERAL LAW

The importance of uniformity in federal law has long been assumed but is not free from debate. The Constitution does not explicitly ground federal legislative powers in a need for uniformity, except with respect to naturalization and bankruptcy.<sup>23</sup> As for uniformity in the interpretation of federal law, Professor Amy Coney Barrett notes that Article III says nothing about uniformity.<sup>24</sup> Professor Akhil Reed Amar believes that Article III does not require uniformity,<sup>25</sup> "as the permissibility of vesting unreviewable jurisdiction in the various lower federal courts demonstrates."<sup>26</sup> Recently, Professor Amanda Frost has argued that it is unreasonable to claim that varied interpretations of federal law are

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U.S. COURTS OF APPEALS 3 (1994). My own prior work does not mention inferiority. See generally Martha J. Dragich, *Once A Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WISC. L. REV. 11 (1996).

22. See *infra* Part III.C.

23. U.S. CONST. art. I, § 8, cl. 4.

24. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 356 (2006).

25. *Neo-Federalist View*, *supra* note 1, at 210-29.

26. *Id.* at 263.

automatically problematic.<sup>27</sup> Some federal judges have argued that “percolation” is a good thing.<sup>28</sup> A recent article notes “a surprisingly large variance in the importance that individual Justices attach to achieving uniformity in the application of federal law.”<sup>29</sup>

The weight of commentary, however, favors uniformity. Judge Henry J. Friendly calls uniformity “the most basic principle of jurisprudence.”<sup>30</sup> Professor Evan H. Caminker writes that “[b]oth the Constitution’s framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process.”<sup>31</sup> According to Professor Caminker, “scholars . . . disagree as to whether Article III *requires* a federal judicial structure capable of securing uniformity of interpretation [of federal law, but] nearly all recognize the *wisdom* of this objective.”<sup>32</sup> In other words, a need for uniformity inheres in the fact that “the ultimate function of the Supreme Court is to maintain the supremacy and uniformity of the Constitution and laws of the United States.”<sup>33</sup>

Justice Joseph Story long ago pointed out that federal courts are necessary for the vindication of federal rights. Story stressed

[t]he importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges . . . in different states[] might

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27. Frost, *supra* note 14, at 1588-89. Frost concedes, however, that “[e]nsuring the uniform interpretation of federal law has long been considered one of the federal courts’ primary objectives . . . .” *Id.* at 1568.

28. See, e.g., J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 929-30 (1983); Wilkinson, *supra* note 13, at 69. But see Joseph F. Weis, Jr., *Nine Divided by Three: A Formula for Unification?*, 15 J.L. & POL. 445, 448 (1999); see also *Precedent and Prediction*, *supra* note 21, at 60 (stating that value of percolation is overstated).

29. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Courtesy: Jurisprudential Consideration in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 435 (2004).

30. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982); see also Joseph F. Weis, Jr., *The Case for Appellate Court Revision*, 93 MICH. L. REV. 1266, 1269 (1995) (calling “federal law uniformity” a “fundamental concept”). Judge Joseph F. Weis, Jr. of the Third Circuit served as Chairman of the Federal Courts Study Committee. See REP. OF THE FED. CTS. STUDY COMM. 193 (Comm. Print April 2, 1990).

31. *Precedent and Prediction*, *supra* note 21, at 38.

32. *Inferior Courts*, *supra* note 17, at 849 (emphasis added). But see CHERMERINSKY, *supra* note 5, at 272 (calling uniformity rationale “problematic”).

33. Gressman, *supra* note 1, at 952; see also Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and National Law*, 82 HARV. L. REV. 542, 543, 551-52 (1969) (discussing doctrinal stability); Leonard Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960).

differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.<sup>34</sup>

Similarly, Justice John Paul Stevens wrote in 2000:

[T]he [Antiterrorism and Effective Death Penalty Act of 1996] directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If . . . a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law *in a uniform way*, we are convinced that Congress did not intend the statute to produce such a result.<sup>35</sup>

Justices Story and Stevens commented specifically on the problems that would attend inconsistent *state* court interpretations of federal law. Today, the lower federal courts themselves also render inconsistent rulings on matters of federal law.<sup>36</sup>

Professor James E. Pfander explicitly links the need for uniformity with the structure of the federal judiciary:

[T]he departmental judiciary was designed to enforce [individual rights under federal law] *on a uniform basis throughout the nation* . . . .

. . . As a consequence, all adjudicatory bodies must act within the boundaries set by the Supreme Court, and all must give effect to the uniform rules of federal law that the Court prescribes. The familiar pyramid that has come to characterize today's judicial department results not from the haphazard legislation of Congress, but from the

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34. *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816) (speaking of the federal question, ambassador, and admiralty heads of jurisdiction).

35. *Williams v. Taylor*, 529 U.S. 362, 389-90 (2000) (plurality opinion) (emphasis added).

36. *See supra* notes 11-12.

constitutional requirements of unity, supremacy, and inferiority.<sup>37</sup>

On the other hand, Professor Richard L. Marcus notes that the concept of the law of the circuit is “inevitable” under the structure established by the Evarts Act.<sup>38</sup>

Both Congress and the Supreme Court recognize the value of uniformity in federal law. Congressional enactments as well as Supreme Court decisions provide many illustrations. For example, federal constitutional and statutory law has come to govern many aspects of life,<sup>39</sup> taking state law out of the mix under the terms of the Supremacy Clause and the Rules of Decision Act. Additionally, *Testa v. Katt* establishes that federal statutes, duly adopted, apply in all states regardless of a state’s disagreement with the federal policy.<sup>40</sup> Federal law may preempt state law either across an entire field or to the extent of an actual conflict.<sup>41</sup> Professor Judith Resnik argues that the “presumption against preemption is waning along with the presumption of the concurrency of state and federal regulation.”<sup>42</sup> Professor Frost concedes that “Congress is more likely to enact legislation in areas where uniformity is particularly important.”<sup>43</sup> Arguably, one of Congress’s purposes in creating administrative agencies was arguably to “creat[e] greater uniformity in regulatory law” pursuant to federal statutes.<sup>44</sup> As several scholars have noted, the enactment of the Class Action Fairness Act of 2005<sup>45</sup> apparently deviates from *Erie*’s mandate to apply state law by directing to the federal courts class action

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37. *Article I Tribunals*, *supra* note 20, at 695-97 (emphasis added). *See also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (noting that the federal judiciary is a department, “not a batch of unconnected courts”).

38. Marcus, *supra* note 17, at 686.

39. *See, e.g., Neo-Federalist View*, *supra* note 1, at 268 (noting that “[m]uch previously-local law has been federalized or constitutionalized”); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1944 (2008) (noting that “[b]etween the 1960s and the 1990s, Congress enacted legislation creating more than 400 new federal causes of action”); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 329-30 (1967).

40. *See generally*, *Testa v. Katt*, 330 U.S. 386 (1947).

41. *See, e.g.,* Donald L. Doernberg, *Judicial Chameleons in the “New Erie” Canal*, 1990 Utah L. Rev. 759, 777-78, 807-08 [hereinafter *Judicial Chameleons*]; Wright, *supra* note 39, at 329-30.

42. Resnik, *supra* note 39, at 1953. “Only one pre-New-Deal statute . . . contains explicit preemption language . . .” *Id.* at 1954. By contrast, during a recent five-year period Congress enacted thirty-nine statutes containing preemption provisions, including some in areas often thought “to be core ‘state’ arenas.” *Id.*

43. Frost, *supra* note 14, at 1598.

44. Note, *supra* note 18, at 1222.

45. Act of Feb. 18, 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as 28 U.S.C. §§ 1332(d), 1453, 1711-15).

“cases of ‘national importance’ that arise from state-based causes of action and that affect the national economy.”<sup>46</sup> And the Supreme Court has allowed for the development of “genuine” federal common law in cases where there is a dominant federal interest.<sup>47</sup>

Federal question cases are—now more than ever—“widely viewed as the most important component of the federal courts’ workload.”<sup>48</sup> If federal question jurisdiction is required to secure the supremacy and uniformity of federal law,<sup>49</sup> the federal courts must be organized in a manner that facilitates achievement of these objectives. This Article proceeds from the premise that uniformity is, and always has been, an essential determinant of the structure of the federal courts.

### III. UNIFORMITY AND THE DESIGN OF THE FEDERAL COURTS

Possibilities for divergent interpretations of federal law abound in a system that both creates multiple lower federal courts and authorizes state courts to adjudicate federal questions. Since 1789, Congress has been committed to a model of decentralized access to the lower federal courts.<sup>50</sup> Decentralizing access, however, does not necessarily equate with devaluing uniformity in decision-making any more than centralized decision-making inevitably produces uniformity of result. But “the concepts of centralization and uniformity are intimately connected.”<sup>51</sup> Professors Craig Allen Nard and John F. Duffy argue that uniformity may be achieved either through a “centralized decision-making authority” or through a decentralized decision-making process “governed by a uniform statutory scheme.”<sup>52</sup> The courts of appeals have evolved from merely decentralized

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46. Resnik, *supra* note 39, at 1945; *see also* Geoffrey C. Hazard, Jr., 156 U. PA. L. REV. 1629, 1629 (2008); Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2136-38 (2008).

47. *Judicial Chameleons*, *supra* note 41, at 778-82.

48. CHEMERINSKY, *supra* note 5, at 271; *see also* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83 (noting that “if diversity jurisdiction had never existed in the past, Congress almost certainly would not create it today”); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 25, 29 (1980). For a contrasting view of the caseload mix in the early years of the federal courts, *see* John P. Frank, *Historical Basis of the Federal Judicial System*, 13 L. & CONTEM. PROBS. 3, 24 (1948) (indicating caseload in Tables II & III).

49. Chemerinsky disputes both premises. CHEMERINSKY, *supra* note 5, at 271-72.

50. *Cf.* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1634 (2007) (comparing centralized decision-making in Federal Circuit with decentralized decision-making in the regional circuits).

51. *Id.* at 1627-28.

52. *Id.* at 1674. The current Federal Circuit is an example of a centralized decision-making authority for patent law; it was created expressly for the purpose of promoting uniformity. *Id.* at

access points into independent adjudicatory bodies within the federal court system. The question remains whether these highly independent adjudicatory bodies, even when deciding cases pursuant to a unitary (i.e., federal) statutory scheme, will achieve the desired degree of uniformity.

#### A. FACTORS INCREASING CAPACITY FOR UNIFORMITY

Several structural features of the federal court system tend to promote uniformity in the interpretation of federal law. First and foremost is Congress's decision to create lower federal courts and gradually to invest them with federal question jurisdiction (rather than relying on state courts for the initial adjudication of federal questions).<sup>53</sup> Closely related is the provision for Supreme Court review, albeit now discretionary, over both lower federal court decisions<sup>54</sup> and state court decisions on questions of federal law.<sup>55</sup> According to Professor David E. Engdahl, Congress "[r]ecogniz[ed] the disruptive potential of inconsistent *state* court dispositions of cases within the scope of article III subject matter jurisdiction, [and thus] made it possible for *all* such cases to be determined in *some* federal court."<sup>56</sup> The scope of Supreme Court appellate jurisdiction has expanded over time to include, for example, review of federal criminal cases<sup>57</sup> and review of state court decisions upholding a federal right.<sup>58</sup> In

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1620. The enactment of federal patent laws (and the concomitant displacement of any state patent laws) is an example of what Nard & Duffy call "federalized uniformity"—uniformity achieved pursuant to a "uniform" statutory scheme. *Id.* at 1674.

53. Cf. David E. Engdahl, *What's in a Name? The Constitutionality of Multiple Supreme Courts*, 66 IND. L.J. 457, 465 (discussing proposals to commit all litigation to "state courts, with only a single national tribunal to review certain classes of cases"). Engdahl views the 1789 Act's solution as imperfect in that the failure to consolidate review in a *single* federal court impedes achievement of uniformity in federal law. *Id.* at 494.

54. See Ratner, *supra* note 33, at 184-88.

55. *Id.* at 188-201.

56. Engdahl, *supra* note 53, at 494. Professor Engdahl's statement is part of the long-running debate about the extent of Congress's power to control the jurisdiction of the federal courts; that debate is beyond the scope of this Article. See Wythe Holt, *Federal Courts as the Asylum to Federal Interests: Randolph's Report, the Benson Amendment, and the Original Understanding of the Federal Judiciary*, 36 BUFF. L. REV. 341, 343 (1987) [hereinafter *Federal Courts as the Asylum*] (stating that Framers on both sides of the issue "operated within an understanding that every person whose claim fell within article III, section 2 of the Constitution should be able to obtain some sort of federal judicial relief if the claim was valued above a minimum amount"); see also Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 958 (1964) [hereinafter *The Overloaded Fifth Circuit*] (quoting the Judicial Conference as having recognized that "the courts created by Congress constitute a composite unit of the Government and are designed, intended, and expected to administer justice throughout all of the United States").

57. John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 514 (2000) (noting that such jurisdiction did not exist in the nineteenth century). Uniformity would seem to be particularly important in the matter of federal criminal convictions and sentencing.

addition, the Supreme Court requires that lower federal courts follow Supreme Court precedent, even if outdated or illogical.<sup>59</sup> The Supreme Court's Rule 10 provides that one factor favoring the grant of certiorari is the presence of an intercircuit conflict.<sup>60</sup> These features provide some indication of a desire for uniformity in the interpretation of federal law. Congress's most recent action regarding the structure of the federal courts—the creation of the Federal Circuit in 1981—rejected regional decision-making in favor of national uniformity in specific subject areas.<sup>61</sup>

### B. FACTORS DIMINISHING CAPACITY FOR UNIFORMITY

Several structural choices and other historical developments with respect to the federal court system may appear to contradict the asserted importance of uniformity. First and foremost, the Constitution does not mandate the creation of lower federal courts. If none were created, all cases would be heard originally in the state courts. The only mechanism for securing uniformity then would be by Supreme Court review. That mechanism might have seemed sufficient in the late eighteenth century, but even so, the First Congress acted with dispatch in creating the lower federal courts. Other examples—including the creation of multiple lower federal courts, the failure to provide for general federal question jurisdiction, the elimination of “general” federal common law, and the “percolation” theory—can be explained on grounds other than lack of concern with uniformity.<sup>62</sup>

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58. See *Neo-Federalist View*, *supra* note 1, at 262-63.

59. *Inferior Courts*, *supra* note 17, at 862 n.195, 869 n.234 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

60. Frost, *supra* note 14, at 1631. Professor Frost argues that “uniformity has taken over the Supreme Court's agenda,” and that “the presence of a conflict remains by far the most important criteria [sic] in the Court's case selection.” *Id.* at 1630-32.

61. 28 U.S.C. § 41 assigns appeals from “all federal judicial districts” to the Court of Appeals for the Federal Circuit. See 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, 608-09 (1989) [hereinafter *A Challenge to Judicial Architecture*] (discussing creation of Federal Circuit and other earlier, subject-matter courts); Thompson, *supra* note 19, at 529 (noting that Congress created the Federal Circuit because it had “determine[d] there [was] a special need for nationwide uniformity” in patent law). Thompson notes that the Supreme Court's 2002 decision in *Vornado* partially undoes Congress's preference for uniformity by allowing regional circuits rather than Federal Circuit to decide patent counterclaims. *Id.* at 576. But see Nard & Duffy, *supra* note 50, at 1626 (discussing “whether the creation of the Federal Circuit has produced an excessive degree of uniformity and concentrated power” as opposed to more decentralized decision-making found in the regional courts of appeals).

62. Chemerinsky & Kramer, *supra* note 48, at 84 (describing “seeming departures from the goal of uniformity . . . as concessions to practicality”).

## 1. CREATION OF MULTIPLE LOWER FEDERAL COURTS

Congress's decision in 1789 to create multiple district and circuit courts might be taken to indicate a lack of concern with consistent interpretation and application of federal law, especially given that the decisions of these courts would be final in many cases.<sup>63</sup> Other features of the original design counteract this view. In fact, Congress has always provided some mechanism for promoting uniformity among the lower federal courts. Early on, the number of justices on the Supreme Court varied according to the number of circuits in existence at the time, with two justices originally drawn from each circuit.<sup>64</sup> The need to draw justices from the various circuits assured representation of various states and regions of the country in all Supreme Court decisions<sup>65</sup> and prevented one state or region from dominating the others in the development of federal law. Permanent assignment of justices to each circuit was intended to minimize confusion that would result if justices rotating through the circuits reached inconsistent decisions.<sup>66</sup> With or without permanent assignments, the early involvement of Supreme Court Justices in most trials facilitated the consistent application of federal law.<sup>67</sup> This structure, it was hoped, would lessen the need for litigants to take appeals to the distant Supreme Court and thus would settle national law more quickly.<sup>68</sup>

Moreover, the "possibility of disuniformity due to divergent decisions of these several federal courts might have seemed less substantial in that

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63. See, e.g., *Neo-Federalist View*, *supra* note 1, at 263 (noting that "arising under" jurisdiction was rooted not in uniformity but in the importance of protecting individual rights"); Engdahl, *supra* note 53, at 493 (describing creation of "several federal tribunals, with final jurisdiction in many cases").

64. See Engdahl, *supra* note 53, at 501; see also F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 667-70. The direct link between the number of circuits and the number of justices was broken in 1866 when Congress reduced the number of justices to seven. CHEMERINSKY, *supra* note 5, at 21. The current assignment of each justice as the "circuit justice" for one or more circuits is much looser. 28 U.S.C. § 42 provides that the Justices "shall from time to time be allotted as circuit justices among the circuits . . . . A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit." 28 U.S.C. § 42 (2006).

65. See Hessick & Jordan, *supra* note 64, at 669. Cf. *Federal Courts as the Asylum*, *supra* note 56, at 352-54 (comparing system of assigning justices to ride circuit in their "home" circuits to a rotational system).

66. Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 BUFF. L. REV. 301, 311-12 (1987) [hereinafter *Enemies*] (noting the unavailability of appeal to the Supreme Court from inconsistent rulings in cases involving less than the required amount in controversy for an appeal).

67. *Id.* at 308.

68. *Id.* at 312-13; see also *To Establish Justice*, *supra* note 2, at 1488-89.

era, before law *making* by judges was plainly acknowledged . . . .”<sup>69</sup> In other words, the greater competence and impartiality attributed by Congress to federal judges provided ample assurance that federal judges around the country would correctly “find” and apply the existing law. Thus, uniformity of decision would ordinarily result even in a system of multiple courts because the law itself was regarded as having a fixed content.

## 2. PAUCITY OF GENERAL FEDERAL QUESTION JURISDICTION

Article III authorizes federal jurisdiction in a wide range of cases. The first-listed head of jurisdiction encompasses “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>70</sup> Professor John P. Frank describes as a “mystery” why “the Congress of 1789 provide[d] that *appellate* jurisdiction should be sufficient in federal question cases while there should be trial court jurisdiction in diversity cases.”<sup>71</sup> Until 1875, original federal question jurisdiction was lacking as a general matter, although it was provided for specifically in some federal statutes.<sup>72</sup> There was little federal law at the time to serve as the basis for “arising under” jurisdiction, and it may have appeared to Congress unnecessary to implement that jurisdiction in 1789. Even after 1875, federal question jurisdiction is presumed to be concurrent with that of the state courts.<sup>73</sup>

The 1789 Act’s “jurisdictional choice” against implementation of federal question jurisdiction need not indicate that “the standardization of federal law was low on a list of original federal court values.”<sup>74</sup> To the contrary, the desire for uniformity was so strong that even diversity jurisdiction itself was enacted in large part to “protect[] national-market interests.”<sup>75</sup> National economic policy, Professor Sherry argues, was, like foreign policy, a “federalized subject that must be protected from individual

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69. Engdahl, *supra* note 53, at 493. Moreover, the Supreme Court’s appellate jurisdiction was incomplete with respect to oversight of federal law in that it did not allow review of federal criminal cases from the lower federal courts. See RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 33 (Robert C. Clark et al. eds., 6th ed. 2009).

70. U.S. CONST. art. III, § 2. This is the “federal question” head of jurisdiction.

71. Frank, *supra* note 48, at 28 (emphasis added).

72. CHEMERINSKY, *supra* note 5, at 272.

73. *Id.* at 268.

74. Frost, *supra* note 14, at 1572. Professor Frost argues that the Constitution’s grant of jurisdiction “not only [over] cases ‘arising under’ federal law, but also . . . over interstate and international disputes in cases devoid of federal questions, suggest[s] that the federal courts were not to be primarily concerned with resolving disagreements over the meaning of federal law.” *Id.* at 1571.

75. Sherry, *supra* note 46, at 2136-37.

state obstruction.”<sup>76</sup>

Likewise, the first Congress’s decision to limit Supreme Court review of state court decisions to those *rejecting* a federal claim of right was part of the delicate balance of power between the federal government and the states. Given the premise that state courts would be grudging in their recognition of federal rights, it was thought that if a state court recognized a federal claim there was little need to worry about its misinterpretation of or hostility towards federal law.<sup>77</sup> Only when the state court rejected the federal claim was there an urgent need for federal court involvement to protect the values of supremacy and uniformity.<sup>78</sup>

Moreover, the country and the courts have changed markedly since 1789,<sup>79</sup> and the first Congress’s jurisdictional choices have been adjusted. Congress enacted general federal question jurisdiction 135 years ago and authorized Supreme Court review of all state court decisions necessarily based on federal law in 1914. These enactments reflected that “the lower federal courts ‘ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.’”<sup>80</sup> The predominance of federal question cases in current federal court caseloads reflects the vital importance of uniform interpretation of federal law. Indeed, today “we are seeing efforts to generate a more exclusive form of nationalism based on assertions of a need for uniformity that are made in Congress, in agencies, and by the Supreme Court.”<sup>81</sup>

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76. Sherry, *supra* note 46, at 2136.

77. Ratner, *supra* note 33, at 185-86. *See generally Neo-Federalist View, supra* note 1, at 263 (arguing that Supreme Court review is “rooted not in uniformity but in the importance of protecting individual rights.”). Of course, individual rights ought to be protected uniformly across the country.

78. *See* FALLON ET AL., *supra* note 69, at 25, 30; Frost, *supra* note 14, at 1617; Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 521 (1954); Edward A. Hartnett, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison Marbury Errors?*, 20 CONST. COMMENT. 283, 285 (2003); Ratner, *supra* note 33, at 184-86.

79. *See, e.g.,* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 56-65 (1928); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 548-51; Mishkin, *supra* note 3, at 717 n.67.

80. FRANKFURTER & LANDIS, *supra* note 79, at 65 (emphasis added).

81. Resnik, *supra* note 39, at 1968.

### 3. THE REQUIREMENT TO APPLY THE “LAWS OF THE SEVERAL STATES”

#### a. Diversity Cases Versus Federal Question Cases

Neither the Rule of Decision Act nor *Erie* negates the importance of uniform interpretation of genuine federal law.<sup>82</sup> Congress’s decision in 1789 to require federal courts to apply “the laws of the several states . . . *in cases where they apply*”<sup>83</sup> may appear to discount the need for uniform law across the country. The *Erie* case makes clear, however, that the state-law requirement applies in diversity cases.<sup>84</sup> Diversity cases by definition do not raise federal questions; rather, they “involv[e] state-law actions and defenses.”<sup>85</sup> Article III permits diversity cases to be heard in federal court only because there is a federal interest in providing a neutral alternative forum to (presumably) biased state courts.<sup>86</sup> These cases do not implicate the need for uniformity in the interpretation of *federal* law.<sup>87</sup> Thus, to point to *Erie* as a refutation of the need for uniformity on federal questions is mistaken.

Moreover, as interpreted prior to *Erie*, section 34 of the Judiciary Act of 1789 *promoted* uniformity, albeit not in the application of *federal* law, across the nation. Professor Wilfred J. Ritz argues that the “law of the several states” refers to the law of the states collectively, that is, to the general law *common* to all the states and not to the law of any particular state.<sup>88</sup> *Swift v. Tyson* interpreted the Rules of Decision Act to require federal courts in diversity cases to apply state statutes but not state common law decisions on point.<sup>89</sup> At that time, commercial law was considered distinct from both federal and state law,<sup>90</sup> separate from and transcending

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82. Cf. *Judicial Chameleons*, *supra* note 41, at 810-11.

83. Judiciary Act of 1789, § 34, 1 Stat. 73, 92 (emphasis added).

84. See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

85. Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 614 (2008).

86. TONY FREYER, HARMONY & DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 20 (1981); see also Westen & Lehman, *supra* note 4, at 313, n.9.

87. Frost, *supra* note 14, at 1603.

88. WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 140-41 (Wythe Holt & L.H. LaRue eds. 1990); see also Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Claxton*, 72 TEX. L. REV. 79, 106-08 (1993); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514-15 (1984).

89. *Swift v. Tyson*, 41 U.S. 1, 19 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Federal courts also were required to defer to state court decisions construing state statutes. *Id.*

90. FREYER, *supra* note 86, at 93. The question, according to Justice Story, was “whether [state decisional law on the adequacy of consideration] is obligatory upon this court, if it differs

the particular authority of any jurisdiction.<sup>91</sup> Thus, the Supreme Court was of the view that

the true interpretation of the 34th section [of the Judiciary Act of 1789] limited its application to state laws, strictly local, that is to say, to the positive statutes of the state . . . . It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, . . . especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial law to govern the case.<sup>92</sup>

State decisional law was not to be ignored, but neither was it binding on federal courts.<sup>93</sup> Instead of simply applying existing state precedents, federal courts would examine for themselves the available sources of law—including the general common law—and choose the best rule.<sup>94</sup> Over time, the theory held, all conscientious judges would tend to come to the same conclusion and law would become more uniform. The Court concluded in *Swift* that “[i]n the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail.”<sup>95</sup> The contrary New York decisions at issue in *Swift* were viewed as aberrations from the “general” law rule and thus incorrect under the jurisprudential theory of the time. *Swift*’s rule was intended to serve the national objective of developing *uniform* commercial law, not to create distinctly *federal* law.<sup>96</sup> *Swift* allowed *federal courts* to exercise independent judgment in identifying the appropriate principles of “general”

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from the principles established in the general commercial law.” *Swift v. Tyson*, 41 U.S. 1, 18 (1842); see also Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 623-34 (2007) [hereinafter *The Unseen Track*].

91. FREYER, *supra* note 86, at 97; see *Swift*, 41 U.S. at 19 (“The law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world.”).

92. *Swift*, 41 U.S. at 18-19; see also *The Unseen Track*, *supra* note 90, at 623-24 (discussing the body of “general commercial law” as common law).

93. FREYER, *supra* note 86, at 33.

94. *Swift*, 41 U.S. at 18. Justice Story noted that “the decisions of courts [do not] constitute laws. They are, at most, only evidence of what the laws are . . . . They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, ill-founded, or otherwise incorrect.” *Id.*

95. *Id.* at 22 (citing cases from several states and England).

96. *Id.* at 20-22. Cf. Green, *supra* note 85, at 618 (stating that *Swift*’s flaw lay “not . . . in applying federal general common law to state causes of action” but rather in “allowing federal judges to make law with too much discretion and too little Congressional guidance.”).

or “universal”<sup>97</sup> law upon which to base a decision, thus displacing state courts exercising the same function.<sup>98</sup>

The demise of natural law, and the rise of legal positivism in its place, “more than anything else . . . doomed the doctrine of *Swift v. Tyson*.”<sup>99</sup> The notion that a body of “general” law existed apart from the authority of any jurisdiction gave way to the view that judges, like legislators, make positive law.<sup>100</sup> With general law “effectively banished to the past,” only two sources of law remained: state and federal.<sup>101</sup> Thus, “for diversity purposes state decisional law became indistinguishable in authoritativeness from state statutory or constitutional law, which [the Rules of Decision Act] had always commanded the federal courts to use.”<sup>102</sup> The *Swift* regime had failed to produce the desired uniformity precisely because the decisions of federal courts in diversity cases were not binding on the state courts, which continued applying their own rules.<sup>103</sup> Furthermore, as the states began to regulate many activities by statute, *Swift* gradually lost its power to produce uniformity via the common law.<sup>104</sup>

#### b. Genuine Federal Common Law

*Erie* overruled *Swift* with the declaration that there “is no federal *general* common law,” meaning that federal courts are not empowered to select or create common law rules of decision—“whether they be local in their nature or ‘general’”—on matters reserved to the states.<sup>105</sup> If the subject matter is outside any power of Congress to regulate, there is no legitimate federal interest in uniformity.<sup>106</sup> But judicial power is understood

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97. FREYER, *supra* note 86, at 3.

98. FREYER, *supra* note 86, at 15.

99. *The Unseen Track*, *supra* note 90, at 614.

100. FREYER, *supra* note 86, at 47, 85-86; *see also* CHEMERINSKY, *supra* note 5, at 327.

101. *The Unseen Track*, *supra* note 90, at 624.

102. *Id.* at 626; *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938).

103. *See The Unseen Track*, *supra* note 90, at 622-23. While the national interest in uniform commercial law persists even today, the mechanisms for securing it have shifted from federal court decision-making to other lawmaking devices such as states’ enactment of uniform laws and state court decisions following the *Restatements*. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

104. *See generally* FREYER, *supra* note 86, at 74.

105. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

106. *Cf. Judicial Chameleons*, *supra* note 41, at 809 (noting that the “need for uniformity [relied on by the majority in *Clearfield Trust v. U.S.*] apparently escaped Congress’ attention”). Various commentators make the point that Congress could have regulated the matter in dispute in *Erie* pursuant to Article I powers; it simply had not chosen to do so. *See, e.g.*, Green, *supra* note 85, at 612 (conceding that Congress lacks power to regulate the “purely intrastate, noncommercial matters” involved in some diversity suits, but stating that *Erie* itself is not such a case); *id.* at 627.

to be co-extensive with the legislative power.<sup>107</sup> The modern, more expansive view of Congressional powers<sup>108</sup> creates a large arena for federal court (interstitial) lawmaking, with a concomitant need for uniformity in that endeavor.

The Rules of Decision Act and the *Erie* decision together set up a complex relationship between state law and federal law. But that does not mean either that there is no federal common law<sup>109</sup> or that there is no need for uniformity in federal law. The presence of a “dominant federal interest” rebuts the presumption that state law applies—and, in fact, “demands displacement of state law.”<sup>110</sup>

On the very day it decided *Erie*, the Supreme Court also decided *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, a case involving apportionment of water of an interstate stream that was the subject of an interstate compact.<sup>111</sup> The dispute implicated interstate boundaries; the Court applied federal common law as the rule of decision.<sup>112</sup> According to Professor Craig Green, the “Court saw no need to reconcile *Erie*’s holding” with *Hinderlider* because the latter was not a case involving a state law claim or defense.<sup>113</sup> On the contrary, this case presented the kind of interstate dispute that “was a reason for establishing federal courts in the first place.”<sup>114</sup> Professor Donald L. Doernberg explains *Clearfield Trust* similarly.<sup>115</sup> The “desirability of a uniform rule”<sup>116</sup> governing federal

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107. See CHEMERINSKY, *supra* note 5, at 277.

108. See Bradford R. Clark, *Erie’s Constitutional Source*, 95 CAL. L. REV. 1289, 1298-99, n.67 (2007); Klass, *supra* note 79, at 577; Mishkin, *supra* note 3, at 157; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 980 (2000) [hereinafter *Trial as Error*]; Howard M. Wasserman, *Jurisdiction, Merits, and Non-Exant Rights*, 56 U. KAN. L. REV. 227, 268 (2008).

109. *Judicial Chameleons*, *supra* note 41, at 761 (arguing that “federal courts have considerable common law powers”); see also Green, *supra* note 85, at 632 (asserting that “federal common law’s doctrinal influence would trace an upward trend after *Erie*, with a peak during the Warren Court”). But see CHEMERINSKY, *supra* note 5, at 327 (stating that *Erie* “simply wiped from the books” a “huge body of federal common law”).

110. *The Unseen Track*, *supra* note 90, at 645.

111. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

112. *Id.* at 110.

113. Green, *supra* note 85, at 622.

114. *Id.* at 621; see also *Milwaukee v. Illinois* 451 U.S. 304, 312-15 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-26 (1964); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 365-66 (1943). In *Sabbatino*, the Supreme Court permitted the use of a federal rule in an area of national concern (foreign relations). *Sabbatino*, 376 U.S. at 424-26. Congress later changed the specific rule to be applied, but did not look to state law to supply the rule. *Id.* This Congressional action suggests that the Supreme Court was right to look for federal law; it just got federal law wrong. *Id.*

115. *The Unseen Track*, *supra* note 90, at 649 (noting that “there was federal power . . . to determine the rights and obligations [federal commercial paper] created”).

commercial paper created a dominant federal interest.<sup>117</sup> The application of federal procedural rules enacted pursuant to the Rules Enabling Act is also a dominant federal interest and is within federal power for that reason.<sup>118</sup>

Thus, conventional wisdom to the contrary notwithstanding, “*Erie* led to the emergence of a federal decisional law *in areas of national concern* that is truly uniform because, under the Supremacy Clause, it is binding in every forum . . . . [*Erie*] opened the way to what . . . we may call specialized federal common law.”<sup>119</sup> This specialized or genuine federal common law, though judge-made, is quite unlike the general federal common law “created on *Swift*’s authority [and] not authoritative for supremacy purposes.”<sup>120</sup>

#### 4. PERCOLATION THEORY

Another persistent argument against a uniformity imperative rests on the claimed *benefits* of divergent rulings. The claim is that “percolation” of issues through the lower courts improves the eventual decision of the Supreme Court on difficult issues.<sup>121</sup> Professor Caminker describes the process this way:

[A]s an open legal question filters through the judicial system from the bottom tier upward, lower courts frequently will provide differing analyses and reach different conclusions. By the time the issue “percolates” up to the Supreme Court, the Court’s judgment can be informed by and reflect lessons gleaned from independent legal analyses performed by the lower courts.<sup>122</sup>

Justice Stevens espoused the theory, stating that

the existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . . It would be better, of course, if federal law could be applied uniformly in all federal courts,

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116. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

117. *The Unseen Track*, *supra* note 90, at 650.

118. *Id.* at 646-47, 651.

119. Friendly, *supra* note 103, at 405 (emphasis added); see Westen & Lehman, *supra* note 4, at 370 n.174 (discussing the distinction between general and specialized federal common law); see also *The Unseen Track*, *supra* note 90, at 652.

120. *The Unseen Track*, *supra* note 90, at 661-62.

121. Cf. *Precedent and Prediction*, *supra* note 21, at 54 (describing the theory that the quality of Supreme Court decision-making would be diminished in the long run if the Court were deprived of the “benefit [of] a national dialogue among the lower federal courts over the optimal development of the law”). Caminker rejects this theory. See *id.* at 55-61. But see Nard & Duffy, *supra* note 50, at 1621-23.

122. *Precedent and Prediction*, *supra* note 21, at 54.

but experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.<sup>123</sup>

This statement, however, expresses a willingness to tolerate conflict only temporarily to give the Supreme Court the benefit of several decisions when it is ready to decide the case and settle the law. It does not countenance truly persistent variation among the circuits.<sup>124</sup>

As Justice Byron White frequently pointed out, the premise that the Supreme Court will settle the law no longer holds in most instances.<sup>125</sup> Noting that the Court had “on several occasions” declined “to resolve [a] persistent conflict among the lower federal courts,” Justice White stated flatly that “[t]here is nothing to commend having habeas corpus available in some Circuits and not in others.”<sup>126</sup> Under his view, in cases where “some persons are being protected or being sanctioned by the Federal law and others are not[,] . . . this Court has a special obligation to intercede and provide some definitive resolution of the issues.”<sup>127</sup> The Evarts Act structure depends on the ability of the Supreme Court to do so. Absent that condition, the “appropriate amount of ‘percolation’ of issues” among the circuits is an open question.<sup>128</sup>

The enactment of federal statutes governing an increasing array of issues—pursuant to Congress’s expansive power under the Commerce Clause<sup>129</sup>—itself indicates a desire for uniformity of federal law across the country. Especially when a federal statute preempts state law, Congress has chosen to minimize percolation or experimentation on the issue.<sup>130</sup>

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123. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982). A recent article laments the unavailability of “percolation” regarding patent law issues by virtue of the assignment of such cases exclusively to the Federal Circuit. Nard & Duffy, *supra* note 50, at 1502, 1645-46, 1660-61 (describing the adverse effects a lack of dialogue among peer courts has on the development of common law).

124. Cf. *Precedent and Prediction*, *supra* note 21, at 71 (noting that the “precedent model’s requirement that all courts stick with [established] precedent”—even if “there is solid, probative data suggesting the Supreme Court will overrule its prior decision” when the case comes to the Court—“ensures perfect consistency”).

125. See, e.g., *Metheny v. Hamby*, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari).

126. *Id.* at 913-14.

127. *Id.* at 914-15 (noting that Court in that Term had granted certiorari in twelve conflict cases and denied certiorari in sixteen others).

128. Cordray & Cordray, *supra* note 29, at 403.

129. See Green, *supra* note 85, at 613.

130. See generally, Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L.

Professor Daniel J. Meador puts it bluntly: “As applied to judicial interpretations of federal statutes, ‘percolation’ is a euphemism for incoherence.”<sup>131</sup> Furthermore, as Professor Caminker notes,

District or circuit courts might offer unique contributions when discussing region-sensitive areas of law such as environmental law and labor law, for which, perhaps, the needs and burdens of federal law would be felt quite differently in varying geographic regions. . . .

[But] [e]ven in such contexts, . . . inferior court judgments [may not] significantly influence ultimate Supreme Court rulings very often. . . . Justices . . . frequently employ interpretive methodologies, such as plain-language interpretation or originalism, for which contextual assessments concerning how a rule will play out in a given region . . . have little if any relevance.<sup>132</sup>

The very use of such methodologies suggests a prevailing view that there is one right answer and that all courts to consider the issue should reach the same result.<sup>133</sup>

The “percolation” theory sometimes overlaps with the “states-as-laboratories” theory.<sup>134</sup> According to Justice Stevens, “the fact that many rules of law differ from state to state is at times one of the virtues of our federal system.”<sup>135</sup> Though undoubtedly true, that statement is inapposite to the question whether conflicts among the circuits on matters of dominant federal interest should be tolerated. The states serve as “laboratories” for matters within their powers, not on matters of federal concern.<sup>136</sup>

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REV. 1, 130 (2004) (“The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation.”).

131. *A Challenge to Judicial Architecture*, *supra* note 61, at 634.

132. *Precedent and Prediction*, *supra* note 21, at 58-59.

133. *See generally*, WILLIAM N. ESKRIDGE, ET AL., *CASES & MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 792 (4th ed. 2007) (noting that, under the “new textualism” approach, the Supreme Court has more often found statutes to have a “plain meaning” and has “tended to be more dogmatic about whether there is any ambiguity in statutes”). Ironically, the notion that there is a “right answer” echoes the jurisprudential attitudes of the *Swift* era, which held that judges merely found existing law.

134. *Cf. Precedent and Prediction*, *supra* note 21, at 56 (referring to percolation in the lower federal courts). Caminker describes the idea “that divergent inferior court rulings are desirable because they create real-world experiments that can help Supreme Court Justices determine the workability and desirability of various legal rules governing a particular issue” as “more true in theory than in practice.” *Id.* at 59. Furthermore, percolation is thought to be appropriate only when there is no Supreme Court precedent dictating the result. *Id.* at 61.

135. Stevens, *supra* note 123, at 183 (citing opinion of Justice O’Connor in *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 773-75 (1982)).

136. *But see* Wilkinson, *supra* note 13, at 69. There is some evidence that the states themselves desire uniformity even on particular subjects within their purview. Examples include the states’

#### IV. THE EVOLUTION OF THE COURTS OF APPEALS AS INDEPENDENT REGIONAL ADJUDICATORY BODIES

##### A. ORIGINAL DESIGN

Article III, Section 1, of the United States Constitution vests the judicial power of the United States in “one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish.”<sup>137</sup> While Article III extends the federal judicial power to a broad array of disputes encompassed within the nine listed heads of jurisdiction, the Supreme Court is given original jurisdiction only in “Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.”<sup>138</sup> In all other cases in which federal jurisdiction is authorized, the Supreme Court’s jurisdiction is appellate only.<sup>139</sup>

Congress acted almost immediately, through the Judiciary Act of 1789, to create lower federal courts empowered to decide cases outside the original jurisdiction of the Supreme Court.<sup>140</sup> The Judiciary Act represents a compromise “between those who wished to confine the federal power within narrow limits and those who wished to vest in the federal courts the full judicial power which the Constitution authorized.”<sup>141</sup> Accordingly, Congress vested the federal courts “with narrow jurisdiction,” nowhere “close to encompassing the full extent of the judicial power described in the Constitution.”<sup>142</sup> General federal question jurisdiction, although authorized

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“independent[] adopt[ion]” of “parallel statutes” on a wide range of issues, and the efforts of “state and local officials [to build] transjurisdictional networks” that are “rooted in states yet reach[] across them.” Resnik, *supra* note 39, at 1958-59, 1964. Professor Resnik notes that these developments “can produce a great deal of overlap across states rather than the variety of policies presumed through images of . . . the states as laboratories.” *Id.* at 1965.

137. U.S. CONST. art. III, § 1.

138. U.S. CONST. art. III, § 2, cl. 2. The Judiciary Act of 1789 excepts from the Supreme Court’s exclusive original jurisdiction cases where a state is a party and the suit is between the state and its own citizens or citizens of other states or aliens. Judiciary Act of 1789, § 34, 1 Stat. 73, 92.

139. U.S. CONST. art. III, § 2, cl. 2.

140. Judiciary Act of 1789, § 34, 1 Stat. 73, 92. On the debate about whether Congress was required to create lower federal courts in order to ensure the availability of some federal tribunal with jurisdiction over all the heads of jurisdiction listed in Article III. See *Neo-Federalist View*, *supra* note 1, at 210-29.

141. Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 4, 27 (1965) (noting that the 1789 Act “had protected the states and the role of their judiciaries through its failure to provide the circuit courts with trial jurisdiction over private civil litigation arising under the Constitution and the laws of the United States and through its stringent restrictions on diversity suits to be tried in federal courts”); see also *Enemies*, *supra* note 66, at 303; Alison L. LaCroix, *The New Wheel in the Federal Machine*, 2007 SUP. CT. REV. 345, 358-61 (2007).

142. Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court*, 34 WASH. & LEE L.

by Article III, was not implemented. Even so, the “First Congress created federal courts as the chief . . . tribunals for enforcement of federal rights.”<sup>143</sup>

The 1789 Act was “unusually intricate and complex.”<sup>144</sup> While the Act constituted three courts, the federal courts originally comprised a two-tiered system.<sup>145</sup> The original design provided for one trial (in either the district or circuit court)<sup>146</sup> and usually one appeal (to either the circuit court or the Supreme Court).<sup>147</sup> The district courts served as trial courts in specified categories of cases, while “circuit courts” exercised broader trial jurisdiction as well as limited appellate jurisdiction.<sup>148</sup> Although the district courts and circuit courts exercised differing jurisdiction and functions, the circuit courts did not exist as distinct entities,<sup>149</sup> and the Act created no circuit judges.<sup>150</sup> The circuit courts were staffed by ad hoc combinations of district judges and Supreme Court justices.<sup>151</sup> In theory, no circuit court

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REV. 1043, 1045 (1977). Congress allocated to the district courts original jurisdiction over minor federal crimes, admiralty and maritime cases, and a few other causes of action. Judiciary Act of 1789, § 9, 1 Stat. 73, 76-77. The 1789 Act allocated to the circuit courts original jurisdiction (concurrent with state courts) over civil cases at law or in equity where the amount in controversy exceeds \$500 and the United States is the plaintiff, or an alien is a party, or the parties are of diverse citizenship, and exclusive original jurisdiction over serious federal crimes. Judiciary Act of 1789, § 11, 1 Stat. 73, 78-79. See RITZ, *supra* note 88, at 65-66.

143. CHEMERINSKY, *supra* note 5, at 499 (quoting *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963)).

144. *Enemies*, *supra* note 66, at 302.

145. Because the Act provided for three courts, some scholars characterize the original design as having three tiers. See, e.g., James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 19 (2008) [hereinafter *Judicial Compensation*] (noting, however, that the 1789 Act provided for only two types of judicial officers: Supreme Court Justices and district court judges). The description of the system as having only two tiers reflects the fact that the circuit courts functioned sometimes as trial courts and other times as final appellate courts. There was no real intermediate appellate function under the 1789 Act. See Marcus, *supra* note 17, at 686 n.57.

146. Ritz contrasts this system with that of the state courts of the time, which provided for successive trials of the entire case (rather than appeal to higher court). RITZ, *supra* note 88, at 27-28. According to Ritz, the theory of this practice was that because law was thought to be “found” and not “made,” a multiplicity of judges and juries to find the law (and facts) would lead to the correct result. *Id.*

147. See RITZ, *supra* note 88, at 68-70 (noting that Supreme Court could not review a case tried in the district court and reviewed by the circuit court, except by way of an extraordinary writ).

148. See, e.g., *Enemies*, *supra* note 66, at 305-06.

149. RITZ, *supra* note 88, at 6, 10 (noting that in many states a single corps of judges sat at different times in different “courts” and that many courts had both trial and appellate functions).

150. *Neo-Federalist View*, *supra* note 1, at 262. The office of circuit judge was created and the first such judges were authorized by Congress in 1869. ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 50 (1987).

151. *Neo-Federalist View*, *supra* note 1, at 262 (noting that the constitutional protections afforded to Supreme Court and district court judges are identical and “each judge—regardless of status—[was] given an equal vote” on circuit court decisions). Originally, Congress provided for

decision (trial or appellate) could be rendered without the participation of at least one Supreme Court justice.<sup>152</sup>

Article III and the Judiciary Act called for review in the circuit courts by writ of error;<sup>153</sup> the purpose of such an appeal was simply to provide a second look.<sup>154</sup> Circuit courts had little occasion or responsibility to develop federal law. Instead, they applied existing case law and statutes or “found” the applicable law from general common law principles, using accepted methods of the time.<sup>155</sup> By contrast, the Supreme Court’s review was generally limited to questions of law.<sup>156</sup> This structure suggests that it was up to the Supreme Court in all cases to declare the law.<sup>157</sup>

Thus, the appellate function of the circuit courts under the 1789 design

six justices and three circuits, but Congress soon reduced the number of justices required to sit on each circuit court from two to one. RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 4, 8 (2d ed. 1994). The district court judge had no vote on appeal from his own decisions. RITZ, *supra* note 88, at 65 (citing 1789 Act § 4); *see also* William A. Fletcher, *Congressional Power Over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III*, 59 DUKE L.J. 929, 945 (2010).

152. *Enemies*, *supra* note 66, at 337 (stating that “1793 Act required at least one circuit [i.e., Supreme Court] justice for any substantive decision”); *id.* at n.148 (describing how 1793 Act amended 1789 Act); *see also* RITZ, *supra* note 88, at 66. Moreover, Ritz notes that the 1789 Act preserves the involvement of Supreme Court justices at both circuit court and Supreme Court levels by allowing the justice who participated in the trial at circuit court to vote in the appeal of the case to the Supreme Court. *Id.*; *see also* LaCroix, *supra* note 141, at 384.

153. Section 22 of the Judiciary Act of 1789 provides that “final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, . . . may be reexamined, and reversed or affirmed in a circuit court, . . . upon a writ of error.” Judiciary Act of 1789, § 22, 1 Stat. 73, 84-85; *see also* RITZ, *supra* note 88, at 65. Admiralty cases were treated differently. Section 21 allows review by appeal rather than by writ of error. § 21, 1 Stat. 73, 83-84. Ritz explains that “appeal” allowed review of both facts and law. RITZ, *supra* note 88, at 67.

154. RITZ, *supra* note 88, at 67.

155. *See* Hart, *supra* note 78, at 505 (citing *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 370, 388 (1893)), in which the Supreme Court described a tort law question as “one of general law, to be determined by a reference to all the authorities, and a consideration of the [underlying] principles”). Hart discussed the meaning of term “laws of the several states”:

By common consent the “laws” of a state included valid state statutes and constitutional provisions in matters of substantive right. They came quickly to include also interpretations of these enactments by the state’s own courts and, in addition, decisional rules of the state courts on matters . . . which were felt to be of peculiarly local concern. . . .

. . . In the nineteenth century view this other kind of [unwritten commercial] law was no doubt still state law, but state law of a kind which federal courts were as competent to ascertain as state courts, if not more competent.

*Id.* *Swift v. Tyson*, 41 U.S. 1 (1842), embodies this view of the commercial law as “general” law.

156. Judiciary Act of 1789, §§ 22, 25, 1 Stat. 73, 84-87; *see* RITZ, *supra* note 88, at 67-69. As noted above, Article III, § 2, cl. 2 itself authorizes the Supreme Court to exercise “appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.” U.S. CONST. art. III, §2, cl. 2.

157. RITZ, *supra* note 88, at 28-30.

bore little relation to their role in the federal court system today.<sup>158</sup> Through at least the middle of the nineteenth century, both circuit boundaries and the number of circuits changed frequently as the country grew.<sup>159</sup> Congress's willingness to change circuit boundaries highlights the structural insignificance of the circuits other than for convenience in convening courts around the country. There was no concept resembling the law of the circuit doctrine because the circuit courts were not lawmaking courts. Indeed, the design of the circuit courts as ad hoc tribunals<sup>160</sup> rendered these courts unsuitable for any law-making function.

### B. THE EVARTS ACT

The Evarts Act created a third tier, interposing true intermediate courts of appeals between the district courts and Supreme Court.<sup>161</sup> Regional circuits have always been part of the federal courts' structure, but only since enactment of the Evarts Act have circuit boundaries defined separate and independent courts. It is not clear whether there was a Congressional consensus at the time of the Evarts Act as to the lawmaking powers of the new intermediate appellate courts. Congress was focused primarily on the need for increased capacity for error correction,<sup>162</sup> and still believed the Supreme Court could handle the lawmaking function for the federal courts.<sup>163</sup> It is clear, however, that the Act's sponsors were concerned with uniformity of decision under federal law.

When Senator Evarts first presented the Senate Judiciary Committee's

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158. LaCroix, *supra* note 141, at 361 ("One need only consider the lack of a circuit-court bench, the relative autonomy of the district courts, and the absence of the type of firm appellate hierarchy that exists today to grasp how different the federal courts of 1789 were from those of today."); *see also A Challenge to Judicial Architecture*, *supra* note 61, at 640-42.

159. SURRENCY, *supra* note 150, at 38-40. Circuit boundaries solidified around 1869, the year in which Congress created the office of circuit judge and authorized the appointment of one circuit judge in each circuit. *Id.* at 40; *see also FRANKFURTER & LANDIS*, *supra* note 79, at 32. The appointment of permanently assigned circuit judges may have given the circuit courts themselves a new aura of permanence and sense of independence. *Id.* at 76-80 (describing business of and dissatisfaction with circuit courts following enactment of the 1869 reforms).

160. *See generally A Challenge to Judicial Architecture*, *supra* note 61, at 603-06 (discussing effect of decision by constantly shifting panels); *Inflation, Malfunction*, *supra* note 8, at 641-42 (arguing that on a court without permanently-assigned judges, all of whom would sit on each appeal, the qualities of continuity, collegiality, institutional memory, loyalty, and stability are threatened).

161. Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 763 (2009).

162. *See Carrington & Cramton*, *supra* note 19, at 620.

163. *See* 21 CONG. REC. S10222 (Sept. 19, 1890) (remarks of Sen. Evarts); *see also Inflation, Malfunction*, *supra* note 8, at 644; Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L.J. 15, 19 (1989).

substitute bill to the full Senate for consideration and debate, he noted the “intolerable evil” of the backlog of cases pending before the Supreme Court.<sup>164</sup> Evarts then asked “how we should divide the appellate recourse so as to [reduce] the burden of the docket of the Supreme Court and also maintain . . . conditions of a just uniformity of decision.”<sup>165</sup> The creation of an intermediate tier of appellate courts, let alone the division of that tier into geographic circuits, was neither “obvious”<sup>166</sup> nor the only model considered.<sup>167</sup> Senator Evarts frankly acknowledged the objection that creating new “inter-appellate” courts would result in “diverse tribunals in geographical distribution” and therefore “all that we had secured heretofore by a uniformity of conclusions . . . upon great public questions by the appeals centering at once in the highest court . . . would be endangered.”<sup>168</sup> Senator Evarts’ objective was to craft a new structure to minimize that danger.

The question then was *how* to do it. Senator Evarts noted that the corresponding House Bill provided a two-step appellate process in all cases, first to the new courts of appeals and then to the Supreme Court.<sup>169</sup> Therefore, even in cases involving “constitutional and public questions,” the House Bill would have created a situation in which “diversities may arise in decisions upon these general and central propositions . . . by various determinations in these different circuits.”<sup>170</sup> The Senate substitute, by contrast, separated cases into two separate tracks for appeal. Cases that by “their very nature” involved “subjects of national importance” would continue to “go up directly to the Supreme Court, bypassing the circuit courts of appeal.”<sup>171</sup> This mechanism would “avoid all the difficulty of

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164. 21 CONG. REC. S10229 (Sept. 19, 1890); *see also* Carrington, *supra* note 33, at 542. Evarts himself had originally favored the idea of allowing the Supreme Court to sit in divisions, but became convinced that such a proposal was politically unpalatable. *See Inflation, Malfunction, supra* note 8, at 623.

165. 21 CONG. REC. S10221 (Sept. 19, 1890).

166. Note, *supra* note 18, at 1224.

167. FRANKFURTER & LANDIS, *supra* note 79, at 80-81 (describing variety of proposals offered).

168. 21 CONG. REC. S10221 (Sept. 19, 1890); *see also* Note, *supra* note 18, at 1235 (noting that Evarts originally preferred proposal to divide Supreme Court because he “foresaw that coordinate appellate courts attached to the trial courts would create conflict that no higher court could manage to resolve”); *see generally id.* at n.138.

169. 21 CONG. REC. H3409 (Apr. 15, 1980) (describing provisions of House bill).

170. 21 CONG. REC. S10221 (Sept. 19, 1890). Evarts described the necessity of two layers of appeal (assuming litigants desire final resolution by the Supreme Court) as one of the chief “mischiefs” of the House Bill. *Id.* The desire to avoid multiple appeals, especially in a distant forum, had long influenced federal court structure. *See* Engdahl, *supra* note 53, at 473-75 (discussing Framers’ decision whether to create lower federal courts).

171. 21 CONG. REC. S10222 (Sept. 19, 1890). In cases where federal jurisdiction turned solely upon diversity of citizenship, and in admiralty cases and cases under the patent, revenue, or

*even momentary diversities of judgment in these great questions*” in the new circuit courts of appeals.<sup>172</sup> The Senate version was enacted.

Two additional mechanisms in the Senate Bill “guard[ed] against diversity of judgment” in the various circuit courts of appeals.<sup>173</sup> First, the circuit courts of appeals were authorized to certify a question to the Supreme Court for instruction.<sup>174</sup> Second, the Supreme Court could summon any case finally determined by a circuit court of appeals to be sent for its review and determination.<sup>175</sup> These provisions, Evarts argued, “firmly and peremptorily make a finality [sic] on such subjects as we think in their nature admit of finality, and at the same time leave[] flexibility, elasticity, and openness for supervision by the Supreme Court.”<sup>176</sup> Moreover, in the years following 1891 there were only two circuit judges in each circuit; these two judges (accompanied by one other justice or judge) sat together on virtually all appeals in the circuit.<sup>177</sup> These conditions promoted stability, certainty, and predictability.<sup>178</sup> As enacted, then, the Evarts Act was attuned to the dangers of “diversities of judgment” and included mechanisms designed to promote uniformity.

The two-track system of appeals was maintained by the 1911 Act.<sup>179</sup> But the Judges Bill of 1925<sup>180</sup> made decisions of the courts of appeals final in many more cases and thus lessened the prospect of Supreme Court review. Shortly thereafter, the Supreme Court’s resolution of an anomaly in the statutory structure of the courts of appeals opened the way for development of the law of the circuit doctrine.<sup>181</sup>

### C. EVOLUTION OF THE CIRCUIT COURTS OF APPEALS AS INDEPENDENT REGIONAL TRIBUNALS

The new appellate courts of the 1891 Act were engrafted upon the existing federal court structure, and the circuit courts of the 1789 Act

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criminal laws of the United States, however, the decisions of the courts of appeals would be final. *Id.* The questions presented in these cases, Evarts argued, did not require Supreme Court review “except in the sense that there should be uniformity of decision.” *Id.*

172. 21 CONG. REC. S10221 (emphasis added).

173. *Id.*

174. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

175. *Id.*

176. 21 CONG. REC. S10222 (Sept. 19, 1890).

177. *Inflation, Malfunction, supra* note 8, at 642.

178. *Id.*

179. Compare Evarts Act, ch. 517, § 5, 26 Stat. 826, 827-28 (1891), with Act of March 3, 1911, ch. 231, § 238, 36 Stat. 1087, 1157.

180. Act of February 13, 1925, ch. 229, 43 Stat. 936.

181. *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326 (1941).

continued to exist. Probably for that reason, the new appellate courts, like the existing mixed-jurisdiction circuit courts, lacked a full permanent cadre of judges. The 1911 Act abolished the old circuit courts,<sup>182</sup> leaving only appellate jurisdiction in the intermediate federal courts. These two Acts left unanswered important questions about the new appellate courts. This section explores the developing relationships among regional circuits and among panels within a circuit.

### 1. INTERCIRCUIT COMITY

The Evarts Act does not specify what relationship exists among the coordinate courts of appeals. Independent regional courts of appeals were bound to issue decisions that came into conflict with decisions of other circuits. Where the courts of appeals' decisions were final (including many arising under federal statutes)<sup>183</sup> there was no prospect of Supreme Court review to resolve such conflicts.<sup>184</sup> In a case in which the Seventh Circuit refused to be bound by a prior determination of the Eighth Circuit, the petitioner for certiorari argued that one circuit "should have accorded [the prior decision of another circuit] the same force and dignity as is accorded to judgments of [the Supreme Court]."<sup>185</sup>

The Supreme Court instead declared that the obligation of one circuit to follow the prior ruling of another circuit is a matter of comity only,<sup>186</sup> and not of the "compulsion of stare decisis."<sup>187</sup> Comity, the Court said, "has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative."<sup>188</sup> Rather,

the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. . . . It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law.<sup>189</sup>

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182. Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

183. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

184. *Id.*

185. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900).

186. *Id.*

187. *Weis*, *supra* note 30, at 446.

188. *Mast, Foos & Co.*, 177 U.S. at 488.

189. *Id.* at 488-89; *see also* Maurice Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709, 721-22 (1975) (discussing a district judge's response to the lack of uniformity in decisions amongst the circuits).

Moreover, comity itself “has no application to questions not considered by the prior court.”<sup>190</sup> Thus, the obligation of one circuit to follow the decisions of another is minimal.

## 2. INTRACIRCUIT ACCORD

Another puzzle relates to the internal decisional structure of the courts of appeals. By its terms, the Evarts Act “created in each circuit a circuit court of appeals, which shall consist of three judges.”<sup>191</sup> Neither the Evarts Act nor the 1911 Act indicates whether it contemplated decisions by panels or en banc. An anomaly arose because while the 1911 Act authorized at least four circuit judgeships in several circuits,<sup>192</sup> it continued to *define* the circuit courts of appeals as three-judge courts.<sup>193</sup> In 1912, Congress provided that “it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit *from time to time* according to law.”<sup>194</sup> This requirement suggests that the 1912 Congress may have contemplated panels as the decisional units of the courts of appeals. There was no provision specifying how panels were to be constituted, or authorizing the full court to sit en banc. In any event, the courts of appeals long ago evolved into non-unitary tribunals, and Congress has ratified this development by continuing to add more judges to existing circuits rather than adding new circuits.<sup>195</sup>

Once the courts of appeals grew beyond three judges each and began to form panels to decide cases, inconsistency and uncertainty in the law of the circuit were bound to follow.<sup>196</sup> Cases arose in the Third<sup>197</sup> and Ninth<sup>198</sup> Circuits in which those courts sought to have all the judges en banc hear and decide a case calling a prior panel decision into question. If en banc review were not permitted, then the later panel would have two unpalatable choices: either acquiesce in the earlier panel decision it believed was wrong, or disagree and create an intracircuit split that only the Supreme Court

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190. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 489 (1900).

191. Evarts Act, ch. 517, § 2, 26 Stat. 826, 828 (1891).

192. Act of Mar. 3, 1911, ch. 231, § 118, 36 Stat. 1087, 1131; *see* Wechsler, *supra* note 142, at 1048.

193. Act of Mar. 3, 1911, ch. 231, § 117, 36 Stat. 1087, 1131.

194. Act of Jan. 13, 1912, ch. 9, § 118, 37 Stat. 52, 52-53 (emphasis added).

195. COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 13-14 (1998).

196. *Cf. Precedent and Prediction*, *supra* note 21, at 73-74 (noting that “*ex ante* uncertainty about which judges would actually make up the reviewing appellate court panel” makes it difficult for district courts to predict the results on appeal) (emphasis added).

197. *Comm’r v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940).

198. *Lang’s Estate v. Comm’r*, 97 F.2d 867 (9th Cir. 1938).

could resolve.<sup>199</sup> The Ninth Circuit's opinion in *Lang's Estate v. Commissioner* specifically noted that the three judges on the *Lang* panel disagreed with a prior Ninth Circuit decision cited by the Commissioner of Internal Revenue as precedent for *Lang*.<sup>200</sup> The *Lang* panel felt bound by the prior panel's decision even though the prior panel was divided. As a result, the *Lang* panel's decision to follow the prior split-panel decision effectively allowed two judges of the Ninth Circuit to "ma[k]e a precedent for the remaining five."<sup>201</sup> The Ninth Circuit found no authority for "hearing or rehearing by a larger number" of the court.<sup>202</sup> By contrast, the Third Circuit concluded under similar circumstances in *Commissioner v. Textile Mills Security Corp.* that it could sit en banc.<sup>203</sup>

The Supreme Court took the *Textile Mills* case to resolve the conflict. The Court decided in favor of the en banc procedure, commenting that "the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted."<sup>204</sup> The permanent assignment of more than three appellate judges to each circuit was a key fact in the Court's analysis, as there was no principled basis either for distinguishing among the available judges in constituting a court of three to decide the case or for "disenfranchising" any circuit judges from hearing the case.<sup>205</sup> Congress in 1948 codified the Court's authorization of both decision by three-judge panels and review by the court en banc.<sup>206</sup>

The result in *Textile Mills* led to the development of the law of the circuit doctrine.<sup>207</sup> Although the *Textile Mills* opinion does not say so, the

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199. See Carrington, *supra* note 33, at 580-81.

200. *Lang's Estate v. Comm'r*, 97 F.2d 867, 869 (9th Cir. 1938).

201. *Id.* Professor Hellman recently examined contemporary instances of the same phenomenon, noting that "[o]ne consequence of [panel adjudication in the courts of appeals] is that binding circuit law can be established by a panel whose views do not represent the views of a majority of the circuit's active judges." See *Majority Rule*, *supra* note 7, at 625.

202. *Lang's Estate*, 97 F.2d at 869.

203. *Comm'r v. Textile Mills Sec. Corp.*, 117 F.2d 62, 71 (3d Cir. 1940).

204. *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326, 334-35 (1941) (emphasis added) (footnote omitted).

205. *Id.* at 333.

206. Act of June 26, 1948, ch. 646, § 46, 62 Stat. 869, 871-72 (codified as amended at 28 U.S.C. § 46(b) – (c) (2006)). The statute allows decision by a panel of two judges only in case of emergency. *Id.*; see, e.g., *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 232 (2d Cir. 1998); *Murray v. Nat'l Broad. Co.*, 35 F.3d 45, 47 (2d Cir. 1994); *U.S. v. Mills*, 317 F.2d 764, 766 (4th Cir. 1963) (per curiam). The legislative history of the Federal Courts Improvement Act of 1982 reiterates the importance of three-judge panels. See S. Rep. No. 97-275, at 9 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 19. Regarding composition of panels, see generally Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. 547 (2009).

207. Carrington & Cramton, *supra* note 19, at 621.

import of that decision is to allow the court of appeals in each circuit to control the development of the law of that circuit. In *United States v. American-Foreign Steamship Corp.*, the Court explicitly acknowledged this effect. The Court stated that “the evident policy . . . was to provide ‘that the active circuit judges shall determine the major doctrinal trends of the future for their court.’”<sup>208</sup> The Court also quoted the following passage from an article by Judge Maris:

The principle utility of determinations by the courts of appeals in [sic] banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.<sup>209</sup>

Thus, each circuit now functions as an independent adjudicatory body that develops its own law. The courts of appeals are “adamant in their adherence” to the concept of their “precedential independence.”<sup>210</sup> The so-called rule of interpanel accord<sup>211</sup> solidifies the law of the circuit by requiring greater deference to decisions of other panels within the same circuit than to panel (or even en banc) decisions of other circuits.<sup>212</sup> The en banc procedure allows the full court<sup>213</sup> to resolve inconsistencies within the circuit.<sup>214</sup> Ironically, the en banc procedure became unwieldy as the courts of appeals grew in size and is now seldom used.<sup>215</sup> Other existing

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208. *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 690 (1960) (quoting Chief Judge Clark from the Second Circuit’s decision below, reported at 265 F.2d. 136, 155).

209. *Id.* at 689-90. Of course, there is division in many panel decisions, and en banc review of such split decisions is rare. See *Inflation, Malfunction*, *supra* note 8, at 643-44.

210. Weis, *supra* note 30, at 447 n.7, 447; see also Sheldon Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 477 (1968) (noting that courts of appeals judges hold different attitudes toward the precedents of other circuits, which are thought to vary in quality, than to precedents of their own circuit).

211. Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 959 (1994).

212. See Carrington & Cramton, *supra* note 19, at 580; Wright, *supra* note 56, at 973.

213. See 28 U.S.C. § 46(c) (2006) (referring to section 6 of PL 95-486, which enactment provides for “en banc” courts consisting of less than the full number of active judges of the circuit).

214. 28 U.S.C. § 46(c) authorizes en banc hearings. *Id.* This section is described as a “legislative ratification” of the *Textile Mills* decision. *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). *Textile Mills* itself authorizes the courts of appeals to address conflicts within the circuit. *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 334 (1941).

215. See *Majority Rule*, *supra* note 7, at 625; Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 325 (reporting that while federal courts of appeals decide

mechanisms to unify law within a circuit are also of questionable efficacy.<sup>216</sup>

However inadequate existing mechanisms to promote intracircuit uniformity may be, the purported necessity of unifying law *within* each circuit frees circuit judges of the responsibility to assure uniformity more broadly. There is no requirement that one circuit follow the decisions of another.<sup>217</sup> Conflicts develop among the circuits, though the magnitude, severity, and persistence of intercircuit conflicts are a matter of debate.<sup>218</sup> Federal appellate judges themselves disagree about both the seriousness of problems arising under the law of the circuit doctrine and their appropriate resolution.<sup>219</sup>

The Supreme Court can, of course, settle the law when the courts of appeals issue conflicting decisions; one ground for granting certiorari under the Supreme Court's Rules is to resolve an intercircuit conflict.<sup>220</sup> One commentator notes that "[a]s recently as the 1950's, the Supreme Court was expected to grant certiorari in all cases presenting a conflict of interpretation of federal law."<sup>221</sup> It is clear that the Supreme Court today

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27,000 cases on the merits each year, only about seventy-five cases per year are decided en banc).

216. See generally COMM. ON THE JUDICIARY, COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, H.R. Rep. No. 105-26 (1997) at 24 (discussing concern of judges, lawyers, and legal scholars with erosion of appellate decision making). But see Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 393-401 (2000) [hereinafter *The Unkindest Cut*] (dismissing as faulty arguments that large appellate courts are unable to monitor their decisions for consistency); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 543 (1989) [hereinafter *Jumboism and Jurisprudence*] (noting that while Ninth Circuit has "embarked on an ambitious program to maintain consistency[,] . . . the perception is widespread that inconsistency remains a major problem").

217. See *Precedent and Prediction*, supra note 21, at 54 (citing JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.401 (2d ed. 1993)).

218. See Frost, supra note 14, at 1569. Frost argues that many "circuit splits [concern] matters that are close to trivial," *Id.* at 1569, and "resolving lower court conflicts has become an unjustifiably significant portion of the Supreme Court's [agenda]." *Id.* at 1574. Frost further argues that varied interpretations of a federal statute "might better accord with a divided Congress' intentions and with differing regional preferences than would the adoption of a single, nationwide interpretation." *Id.* at 1570.

219. See *Majority Rule*, supra note 7, at 625-26 (discussing views of Judge Douglas H. Ginsburg of the District of Columbia Circuit and Judge James R. Browning of the Ninth Circuit).

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

221. Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 466 (1984); see also *Majority Rule*, supra note 7, at 625 (noting that "[i]n earlier times, the 'law of the circuit' did not matter all that much, because we could assume that important issues of federal law would be resolved by the United States Supreme Court").

actually resolves few such conflicts.<sup>222</sup> As a result, federal law is “balkanized,”<sup>223</sup> leaving litigants and practitioners without a “reliable basis for planning legal transactions or relationships.”<sup>224</sup>

To summarize, the Evarts Act’s adherence to the concept of regional organization and to the existing circuit boundaries inadvertently emphasized regional interests even though Congress’s avowed purpose was to provide increased capacity for *federal* lawmaking.<sup>225</sup> As the courts of appeals grew, the need to maintain intracircuit uniformity “prompted the invention of the law of the circuit and en banc procedure.”<sup>226</sup> Ironically, mechanisms for achieving uniformity now “are threatened by continued enlargement of the number of judges participating in the work of one court.”<sup>227</sup> Meanwhile, intracircuit uniformity comes at the expense of intercircuit conflicts. On uniformity grounds, both the current regional organization and the law of the circuit doctrine seem ripe for reconsideration. The next Part considers whether the Constitution’s “inferiority” mandate bars such action.

#### V. FACTORS DISTINGUISHING “SUPREME” AND “INFERIOR” FEDERAL COURTS

The Constitution’s establishment of “one supreme Court” and its provision that Congress may establish “inferior Courts”<sup>228</sup> together mean that Congress may not create additional “supreme” courts,<sup>229</sup> that it need not create inferior courts,<sup>230</sup> and that any courts it does create must in fact be inferior courts.<sup>231</sup> Professor Erwin Chemerinsky flatly states that “[a]ny

222. See *Majority Rule*, *supra* note 7, at 625; *Weis* *supra* note 30, at 447; Carrington & Cramton *supra* note 19, at 622.

223. Carrington, *supra* note 33, at 596. *But see* Thompson, *supra* note 221, at 468 (discussing theory that variability of federal law is desirable).

224. Carrington & Cramton, *supra* note 19, at 622; *see also* Arthur D. Hellman, *Breaking the Banc, The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 922 (1991) [hereinafter *Breaking the Banc*] (reciting Professor Hart’s view that a society in which people were “‘repeatedly subjected . . . to . . . inconsistent sets of directions . . . would suffer a nervous breakdown.’”). *See generally* Carrington, *supra* note 33, at 596-604 (discussing “intercircuit heterogeneity”).

225. Carrington, *supra* note 33, at 602.

226. *Cf. id.* at 584.

227. *Id.*

228. U.S. CONST. art. III, § 1.

229. Gressman, *supra* note 1, at 969-70.

230. *Neo-Federalist View*, *supra* note 1, at 212 (“Article III plainly imposes no obligation to create lower federal courts.”); *id.* at 229 (“[T]he federal judiciary must include one Supreme Court; other Article III courts may—but need not—be created by Congress.”).

231. See James E. Pfander, *Jurisdiction Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000) [hereinafter *Jurisdiction Stripping*]; *see*

court *created by Congress*, by definition, is an inferior court.”<sup>232</sup> This is of course true in the critical sense that Congress could also abolish such a court, while the existence of the Supreme Court is mandated by the Constitution. It may be that a court’s origin—in the Constitution or otherwise—is the only relevant indicator of superiority or inferiority. If so, Congress could not possibly violate Article III’s inferiority provision by creating a new lower federal court,<sup>233</sup> even one that shared all other attributes of the Supreme Court,<sup>234</sup> because that court would always be subject to elimination by Congress. That notion, however, appears to eviscerate the supremacy of the Supreme Court by replicating its functions elsewhere.

The Constitution itself does not indicate what makes a court either supreme or inferior and does not define either term.<sup>235</sup> The proper understanding of these terms is a matter of debate.<sup>236</sup> The relationship among the Supreme Court and other federal courts is important, however, in assessing their roles. As Justice Scalia noted, “Article III creates[] not a batch of unconnected courts, but a judicial *department* composed of ‘inferior Courts’ and ‘one supreme Court.’”<sup>237</sup> Professor Harrison argues that “lower courts are inferior in that they may be subjected to the Supreme

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*also Article I Tribunals, supra* note 20, at 650 (stating that “the Constitution does not permit Congress to place . . . inferior federal courts beyond the supervision and control of the Supreme Court—their judicial superior”); *id.* at 672.

232. CHEMERINSKY, *supra* note 5, at 223 (emphasis added). Similarly, Professor Amar identifies four characteristics that define the “supremacy” of the Supreme Court: it is the only court created by the Constitution itself, the only court whose jurisdiction derives from the Constitution itself, the only court with a core of irreducible jurisdiction, and the only court from which no appeal could lie. *Neo-Federalist View, supra* note 1, at 221 n.60.

233. This statement refers to Art. III courts only. Consideration of the creation and structure of Art. I courts is beyond the scope of this Article.

234. Jurisdiction assigned by Art. III to the Supreme Court exclusively has been much reduced in practice. District courts now share what Art. III denominates as “exclusive” original Supreme Court jurisdiction. See FALLON ET AL., *supra* note 69, at 271 (noting that 28 U.S.C. § 1251(b) now makes almost all of the Supreme Court’s original jurisdiction concurrent with the jurisdiction of the lower federal courts and state courts, and that the Supreme Court approved this arrangement in *Ames v. Kansas*, 111 U.S. 449 (1884)).

235. See, e.g., Gressman, *supra* note 1, at 960 (noting that “[n]o authoritative judicial delineation of [the] ‘one supreme Court’ language has ever been attempted”); see also THE FEDERALIST No. 82 (Alexander Hamilton) (“The only outlines described for [the subordinate federal courts] are that they shall be ‘inferior to the Supreme Court’ and that they shall not exceed the specified limits of the federal judiciary.”).

236. See, e.g., *Inferior Courts, supra* note 17, at 828-32 (discussing various approaches); Barrett, *supra* note 24, at 326 (discussing various approaches); see also 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, 983 (noting that the “term ‘inferior’ . . . turns out to be somewhat more ambiguous than first appears”).

237. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

Court's appellate jurisdiction," while the "Supreme Court is supreme in that it must be the court of last resort."<sup>238</sup>

The Constitution "provides little structural differentiation among the various federal courts,"<sup>239</sup> even going so far as to provide identical appointment processes and protections to all Article III federal judges regardless of court served.<sup>240</sup> Moreover, although finality of decision is often thought to equate with superiority, such an explanation is insufficient. Inferiority in the federal court system has not always correlated with availability of review by the Supreme Court.<sup>241</sup> Today, decisions of the courts of appeals are almost invariably the end of the line even though discretionary Supreme Court review is theoretically available.

The Supreme Court is universally recognized as the most important court in the United States.<sup>242</sup> On the other hand, while the courts of appeals today function as independent regional adjudicatory bodies with explicit responsibility for developing federal law, they remain structurally inferior in the sense that Congress created them and they are subject to review by the Supreme Court. The question is which characteristics are essential to differentiate the structurally inferior (but often final) courts of appeals from the "one supreme Court."

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238. Harrison, *supra* note 57, at 515.

239. *Inferior Courts*, *supra* note 17, at 845.

240. *Id.* at 845-46; *see also* Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 650 (1991) [hereinafter *Parity*] (noting that all Article III judges are created equal).

241. Congress has in the past provided that no appeal would lie from the lower federal courts in particular cases. Many decisions of the original circuit courts were final and unreviewable, for example. RITZ, *supra* note 88, at 66 (noting that circuit court decisions were appealable only if jurisdictional limit of \$2000 were met); Engdahl, *supra* note 53, at 493 (describing final judgments of inferior federal courts). As noted above, however, such decisions were rendered with the participation of at least one Supreme Court justice. SURRENCY, *supra* note 150, at 22. Whether Congress could create lower courts from which no appeal would lie in any case—that is, whether Congress could create lower courts entirely free of any Supreme Court supervision—is a matter of debate. *See generally* FALLON ET AL., *supra* note 69, at 337-42 (describing various views of congressional power over Supreme Court's appellate jurisdiction). Likewise, judgments of the 1891 Act's new courts of appeals were final in many cases despite the fact that the participation of a Supreme Court justice was no longer required. SURRENCY, *supra* note 150, at 91.

242. *See, e.g.*, Bhagwat, *supra* note 236, at 983 (asserting that "at the time the Constitution was written, with respect to courts . . . the terms 'inferior' and 'supreme' appear to have been understood as referring to importance, and scope of jurisdiction, rather than . . . to hierarchical relationship"). There are many explanations. For an explanation of four characteristics defining the "supremacy" of the Supreme Court, *see Neo-Federalist View*, *supra* note 1, at 221, n.60.

### A. WHAT MAKES THE SUPREME COURT “SUPREME”?<sup>243</sup>

This section identifies characteristics of the United States Supreme Court that establish its “supremacy” in the federal judicial system, on the theory that some or all of these characteristics would be inappropriate for inferior federal courts. These characteristics include the Supreme Court’s structural singularity and unitariness, its discretion over its docket,<sup>244</sup> and its power to review state court decisions.<sup>245</sup>

#### 1. SINGULARITY

Professor Pfander describes the Supreme Court as the “constitutionally mandated leader of a hierarchical judicial department.”<sup>246</sup> This characterization most clearly reflects the fact that the Constitution permits *only one* supreme court. Congress cannot create another, and even a proposal to create an adjunct to the Supreme Court to assist with screening of certiorari petitions failed on the ground that it lodged an important part of the Court’s functions in another, quasi-supreme court.<sup>247</sup>

Debates in connection with the Evarts Act reveal Congress’s concern to protect the singularity of the Supreme Court.<sup>248</sup> A substitute bill to the Evarts Act, proposed by a minority on the Senate Judiciary Committee, would have resolved the Supreme Court’s backlog by allowing that court to

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243. This Article uses the terms “supreme” and “supremacy” to refer to the attributes of the highest court in a judicial system, regardless of the name of the court and at the risk of confusion with the supremacy of federal law over state law. This usage, though confusing, is preferable here because the term “superior” as applied to courts is itself confusing. Many courts named “superior” courts are not, in fact, the “supreme” courts in their hierarchy and may have few, if any, appellate responsibilities—e.g., New York state courts. The historian Wilfred Ritz suggests that all courts in the founding era, including “superior” courts, were trial courts, though “superior” courts often had limited powers of review over “inferior” courts. RITZ, *supra* note 88, at 35-36. Thus, to refer to the United States Supreme Court as a “superior” court would be misleading at best.

244. See generally Cordray & Cordray, *supra* note 29, (discussing the Supreme Court’s discretion over its docket).

245. 28 U.S.C. § 1257 (2006); Judiciary Act of 1789, § 25, 1 Stat. 73, 85-86.

246. James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1062 (2001) [hereinafter *Supervisory Powers*]; see also Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 227 (1995).

247. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 590-95 (1972) [hereinafter *Freund Report*] (calling for creation of National Court of Appeals to “screen all petitions for review now filed in the Supreme Court”); see also BAKER, *supra* note 21, at 35 (noting that Freund Committee proposal to create national Court of Appeals “was met with a hailstorm of controversy and criticism”). For an example of this criticism, see Gressman, *supra* note 1, *passim*; Wilkinson, *supra* note 13, at 75.

248. See 21 Cong. Rec. S10224 (Sept. 19, 1890).

sit either in divisions of three or en banc.<sup>249</sup> This proposal was abandoned<sup>250</sup> following a lengthy discussion revealing that Congress thought that to authorize the Supreme Court to sit in panels would amount to dividing the “one” supreme court into multiple “supreme” courts.<sup>251</sup> Opponents of the division proposal also considered the diminution in dignity of the Supreme Court if it were divided.<sup>252</sup> The Evarts Act as ultimately passed changed only the appellate jurisdiction<sup>253</sup> and not the structure of the Supreme Court, instead dividing federal appellate jurisdiction between the Supreme Court and the new circuit courts of appeals according to the nature of the case.<sup>254</sup>

By contrast, the lower federal courts were originally, and remain, intentionally multiple.<sup>255</sup> The Supreme Court is the only federal court whose jurisdiction is unlimited by either geography or subject matter.<sup>256</sup> The multiplicity of the courts of appeals ensures that no lower federal court speaks generally for the whole nation.

## 2. UNITARINESS

The Supreme Court functions as a single unit; the justices “always sit all together.”<sup>257</sup> Unitariness is closely related to singularity. Because the supreme court in a hierarchy speaks with finality, it is usually thought that it must speak as one body.<sup>258</sup> Uniformity demands a structure that eliminates

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249. 21 CONG. REC. S10220 (Sept. 19, 1890) (remarks of Sen. Evarts); 21 CONG. REC. S10224 (Sept. 19, 1890) (remarks of Sen. Vest); 21 CONG. REC. S10303-10311 (Sept. 22, 1890) (general discussion).

250. The minority substitute proposal, offered by Senator Vest, appears at 21 CONG. REC. S10303, 10311 (Sept. 22, 1890). It is not clear whether this proposal ever came up for a vote of the Committee. *See id.* at 10311 (statement of Mr. Harris about which amendment was being voted on). The majority’s substitute for the House bill was passed on September 24, 1890. 21 CONG. REC. S10365 (Sept. 24, 1890).

251. 21 CONG. REC. S10303-08 (Sept. 22, 1890).

252. 21 CONG. REC. S10224 (Sept. 19, 1890).

253. Evarts Act, ch. 517, 26 Stat. 826 (1891).

254. *McLish v. Roff*, 141 U.S. 661, 666 (1891).

255. *Cf. Engdahl, supra* note 53, at 472-76 (discussing Framers’ approaches to a “multiplicity” of inferior courts); *Chemerinsky & Kramer, supra* note 48, at 73 (discussing Congress’ decision to create “a small number of intermediate appellate courts” rather than a single one).

256. *Inferior Courts, supra* note 17, at 830-31.

257. Harrison, *supra* note 57, at 517.

258. Gressman, *supra* note 1, at 964 (arguing that the “‘oneness’ thrust upon the Supreme Court . . . can be respected only by unitary action of the Justices constituting the ‘one’ Court”). The early Supreme Court issued individual opinions seriatim. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Chief Justice Marshall inaugurated the practice of issuing an opinion of the court as a body (along with any concurring or dissenting opinions). *See* Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1181 (2009).

the possibility of conflicting but “final” rulings.<sup>259</sup> Accordingly, the supreme court in a judicial hierarchy is usually a unitary court, meaning that the decisional unit is the full court, not a panel.<sup>260</sup> The highest court is usually larger than the panels of subordinate courts.<sup>261</sup> Larger size is thought to promote careful decision simply by bringing more minds to the task and by incorporating a diversity of views and values.<sup>262</sup> Larger courts are also thought to promote legitimacy by making decisions appear more institutional and less individual or random.<sup>263</sup>

As noted above, Congress rejected proposals to authorize the Supreme Court to sit in panels. Opponents of the minority proposal took the phrase “Supreme Court” to mean one undivided court.<sup>264</sup> These Senators

259. *Inflation, Malfunction*, *supra* note 8, at 642 (“The most stable, certain, and predictable appellate arrangement would be a court composed of permanently assigned judges, all of whom sit on each appeal.”); *see also* Engdahl, *supra* note 53, at 476 (discussing Madisonian Compromise). As Justice Jackson famously noted, the Supreme Court is “not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 433 (1953) (Jackson, J., concurring).

260. *See generally* Gressman, *supra* note 1, at 964.

261. *See* RITZ, *supra* note 88, at 6 (noting that “superior” in 1789 “usually meant only that a reviewing court had more judges sitting on it” than did the inferior courts whose decisions it reviewed).

262. *Id.* at 28; *See also* *Breaking the Banc*, *supra* note 224, at 917-18 (comparing modern appellate courts with Professor Llewellyn’s description of traditional appellate process). The same theory has led the Supreme Court to hold that juries below a certain size are inadequate to secure the right to trial by jury. *See, e.g.,* *Ballew v. Georgia*, 435 U.S. 223 (1978). In *Ballew*, the Court noted that

recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.

*Id.* at 232-33.

263. Hessick & Jordan, *supra* note 64, at 655. *Cf.* Carrington, *supra* note 33, at 561 (discussing panel size).

264. 21 CONG. REC. S10225 (Sept. 19, 1890) (remarks of Mr. Carlisle describing provision allowing Supreme Court to sit in panels of three as “a division of the court in substance and in fact and in law”). Senator Carlisle argued that under the minority proposal:

The Supreme Court itself as one entire body will never have jurisdiction to hear and determine any case unless the three [justices] who sit separately may see proper to give them that opportunity by certifying it to them. In all other cases the three [justices] who constitute a quorum may decide a question, and, although the other six [justices] of the Supreme Court of the United States may be opposed to that decision, they must enter it upon their records as the judgment of the Supreme Court.

*Id.* Senator Carlisle later described the undivided Supreme Court as “the real Supreme Court of the United States.” *Id.* Senator Dolph remarked:

[T]he jurisdiction, original and appellate, which the Supreme Court exercises, it must exercise as one court. The power of Congress to provide regulations for the exercise of this jurisdiction can not [sic] be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts with power to hear and finally determine causes for the one Supreme Court provided by the Constitution.

questioned whether the decision of a “division” of the Supreme Court would be accepted as “the decision of the court.”<sup>265</sup> Senator Gray raised the possibility that a decision of two justices (sitting on a panel of three whose decision was split two to one) might contravene “the real opinion of seven” other justices.<sup>266</sup> Other features also illustrate the importance of decision by the full Court. The early practice of individual, seriatim opinions of the justices was soon replaced by opinions of the Court.<sup>267</sup> Opinions commanding less than a majority of the Court are viewed as weak precedent.<sup>268</sup> Although each justice is assigned as “Circuit Justice” for one or more federal circuits,<sup>269</sup> applications to individual justices are limited to matters on which “an individual justice has authority to grant the sought relief.”<sup>270</sup>

### 3. CONTROL OVER DOCKET

The ability to control its docket is a key distinguishing feature of the Supreme Court.<sup>271</sup> The Supreme Court has “virtually complete control”<sup>272</sup> over its docket. Since 1988, review is by the discretionary writ of certiorari only.<sup>273</sup> Efforts to assign the case selection power to another body have met with widespread criticism on the ground that the power to select cases for decision is essential to the Court’s unique role.<sup>274</sup> By contrast, the courts of appeals exercise mandatory jurisdiction. This distinction apparently reflects

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21 CONG. REC. S10227 (Sept. 19, 1890).

265. 21 CONG. REC. S10225 (Sept. 19, 1890) (colloquy between Mr. Spooner (against the minority proposal) and Mr. Vest (supporting the minority proposal)).

266. 21 CONG. REC. S10226 (Sept. 19, 1890). Senator Vest later argued that under the minority proposal “the Supreme Court . . . could . . . provide that the decision of every one of these divisions should be submitted to the whole court.” *Id.* This argument seems to fly in the face of the impetus for the Evarts Act: to relieve the crushing caseload of the Supreme Court.

267. *Compare*, Chisholm v. Georgia, 2 U.S. 419 (1793) (seriatim opinions), with Marbury v. Madison, 5 U.S. 137 (1803) (opinion of the Court).

268. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 63-65 (1996) (discussing of plurality opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989)).

269. 28 U.S.C. § 42 (2006).

270. SUP. CT. R. 22.1; *see generally* GRESSMAN ET AL., SUPREME COURT PRACTICE 862-63 (9th ed. 2007).

271. Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 272 (2006).

272. Cordray & Cordray, *supra* note 29, at 389.

273. 28 U.S.C. § 1254 (2006). Section 1254 also allows cases to reach the Supreme Court by certification by a court of appeals of any question of law, an option rarely if ever used. *Id.* Furthermore, 28 U.S.C. § 1253 allows direct appeals to the Supreme Court from orders of a district court of three judges. Congress has abolished nearly all such courts, making this exception insignificant.

274. Wilkinson, *supra* note 13, *passim*. For a recent proposal to reassign case selection to a panel of experienced court of appeals judges, see Carrington & Cramton, *supra* note 19, at 632-34.

the judgment that the courts of appeals will decide routine cases, while the Supreme Court should conserve its resources for “important” cases.<sup>275</sup> Moreover, Congress’s power to affect the jurisdiction of the Supreme Court is limited to providing “exceptions and regulations” to the Court’s appellate jurisdiction.<sup>276</sup>

#### 4. REVIEW OF STATE COURT DECISIONS

The Constitution and federal statutes constituting the federal courts comprehend parallel and overlapping federal and state court systems,<sup>277</sup> but the interactions between the two systems are limited. The Supreme Court, alone among the federal courts, has jurisdiction to review state court decisions.<sup>278</sup> This feature implements the supremacy of federal law but at the same time minimizes the interference of federal courts in matters within the jurisdiction of state courts. In *The Federalist* No. 82, Alexander Hamilton “perceive[d] . . . no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals . . . .”<sup>279</sup> Hamilton concluded that this matter is “left to the discretion of the legislature.”<sup>280</sup> Although Hamilton “imagine[d] many advantages”<sup>281</sup> to allowing appeal from state courts to the subordinate federal courts, Congress has chosen to grant jurisdiction over state court decisions only to the Supreme Court.<sup>282</sup> This choice appears to reflect that one aspect of the Supreme Court’s supremacy is its unique power to superintend the decisions of the state courts on federal questions.<sup>283</sup>

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275. See Shapiro, *supra* note 271, at 278-79.

276. See *Jurisdiction Stripping*, *supra* note 231, at 1436 (“[T]he constitutional requirement of a supreme-inferior relationship between the Supreme Court and inferior federal courts may impose an important textual and structural limitation on what might otherwise appear to be the broad power of Congress to fashion exceptions to the Court’s appellate jurisdiction.”). As noted above, the debate about the proper interpretation of the Exceptions and Regulations Clause is outside the scope of this Article.

277. See generally LaCroix, *supra* note 141, at 363-74 (discussing concurrent jurisdiction between federal and state courts under Judiciary Act of 1789).

278. RITZ, *supra* note 88, at 36. Habeas corpus review by lower federal courts of state court criminal convictions and sentences is the lone exception. See 28 U.S.C. § 2241 (2006).

279. THE FEDERALIST NO. 82 (Alexander Hamilton).

280. *Id.*

281. *Id.* (suggesting that such advantages would include the reduction in motives to multiply the federal courts and in the appellate jurisdiction of the Supreme Court; the corresponding ability to leave more federal matters to decision by state courts in the first instance; and the availability of a federal appeal closer to home).

282. 28 U.S.C. § 1257 (2006); The Judiciary Act of 1789, § 25, 1 Stat. 73, 85-87.

283. See Hart, *supra* note 78, at 502-03. Even then, the Supreme Court’s appellate jurisdiction was carefully drawn to limit [the Court] to the consideration of federal questions. [Congress] expressly denied [Supreme Court] jurisdiction to reverse state court decisions on any ground save that which ‘immediately respects’ a claim of federal right. . . . [and] gave the Court no authority to review decisions of state courts in cases of diverse citizenship.

In sum, the Supreme Court is supreme because it derives its existence from the Constitution and because Congress's power to affect its jurisdiction is limited. This supremacy is manifested in features including the Court's singularity, unitariness, and discretion over its docket, as well as in the Court's unique relationship with the state court systems.

### B. WHAT MAKES THE COURTS OF APPEALS "INFERIOR"?

The courts of appeals presently share none of these characteristics of the Supreme Court. They are multiple rather than singular, decide most cases in panels rather than as unitary courts, exercise mandatory rather than discretionary jurisdiction, and have no role in reviewing state court decisions for error. Whether the courts of appeals were intended as unitary courts at the time of the Evarts Act is unknown. But their development<sup>284</sup>—later ratified by Congress<sup>285</sup>—has been as non-unitary courts usually divided into panels for adjudication. The courts of appeals have found it difficult to function in unitary fashion, via the en banc process, even within a circuit.<sup>286</sup> Instead, the rule of interpanel accord allows the decision of a panel to bind the whole court.

The jurisdiction, structure, and functions of the lower federal courts further mark them as inferior tribunals. The lower federal courts derive their jurisdiction (not to mention their very existence) entirely from statute; Congress can modify, reduce, or eliminate their jurisdiction at will.<sup>287</sup> Inferior courts commonly possess a limited range of jurisdiction, measured by either geography<sup>288</sup> or subject matter.<sup>289</sup> Hamilton in Federalist No. 81 stressed that the "evident design" of the provision allowing Congress to establish "'tribunals inferior to the Supreme Court' . . . is to enable the institution of local courts, subordinate to the Supreme, either in states or larger districts."<sup>290</sup> Throughout our history, "Congress has never created an

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Hart, *supra* note 78, at 502-03.

284. See *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326 (1941).

285. 28 U.S.C. § 46 (enacted 1948).

286. En banc hearings are rare. Solimine, *supra* note 221, at 325. In the largest circuits, "mini-en banc" hearings are permitted by Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978); see also BAKER, *supra* note 21 at 78-79. The Ninth Circuit has used this procedure for years. *Id.* at 79-81.

287. See, e.g., *Neo-Federalist View*, *supra* note 1, at 221; *Supervisory Powers*, *supra* note 246, at 1589 (noting that Chief Justice Marshall's reading of Article III in *Marbury v. Madison* "established the [Supreme] Court's authority as deriving directly from the Constitution and denied Congress a role in reallocating [its] original and appellate jurisdiction").

288. See Engdahl, *supra* note 53, at 473 (stating that "connotation plainly carried by the adjective 'supreme' . . . at the time was nationwide (or statewide) geographic competence").

289. Engdahl states that Blackstone used the term "inferior," among other reasons, to refer to courts of "local, limited" cognizance. *Id.* at 467.

290. THE FEDERALIST NO. 81, n.2 (Alexander Hamilton).

intermediate appellate court that simultaneously enjoyed both national and plenary subject matter jurisdiction.”<sup>291</sup> The courts of appeals today remain inferior in the sense of their limited geographic scope or, in the case of the Federal Circuit, limited subject matter jurisdiction.

In terms of structure, a court is inferior because it is subordinate to some other court in a judicial hierarchy, meaning that the inferior court is bound to follow precedent of the higher court and that the inferior court’s decisions are subject to review by the higher court.<sup>292</sup> The Supreme Court’s “traditional powers of superintendence provide one important measure of [the] supreme-inferior relationship” between the Court and the lower federal courts.<sup>293</sup> The Supreme Court, for example, has insisted that the “lower courts must apply and follow an extant, on-point precedent of the Court no matter how outdated that precedent, and no matter how much later decisions may have undermined the reasoning of that precedent.”<sup>294</sup> The Supreme Court alone has “the prerogative of overruling its own decisions.”<sup>295</sup> Court of appeals judges recognize this responsibility as a consequence of the inferiority of the courts of appeals to the Supreme Court, but paradoxically find the duty to follow Supreme Court precedents the “most important because ‘[o]n almost all cases the courts of appeals have the last word.’”<sup>296</sup>

As for function, one appellate court is inferior to another appellate court if the inferior court’s appellate function is limited to error correction rather than lawmaking.<sup>297</sup> Despite the finality of many circuit court

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291. *Inferior Courts*, *supra* note 17, at 831.

292. *Inferior Courts*, *supra* note 17, at 818-20, 823-25; *see also Supervisory Powers*, *supra* note 246, at 1532-35 (connecting the “supremacy” of a court with its supervisory authority over other courts); *Article I Tribunals*, *supra* note 20, at 721 (discussing availability of direct appellate review as a means of preserving inferiority, in the context of review of decisions of Article I tribunals by Article III courts).

293. *Jurisdiction Stripping*, *supra* note 231, at 1436.

294. Bhagwat, *supra* note 236, at 967, 970.

295. *Id.*

296. Goldman, *supra* note 210, at 477.

297. *See, e.g.*, Bhagwat, *supra* note 236, at 994 (noting that the modern Supreme Court does not decide cases but rather makes abstract rules); *id.* at 996 (noting that it is “essentially impossible for the [Supreme] Court to engage in meaningful ‘error correction’” and thus casting doubt on current validity of the notion that the Court’s “supremacy” flows from its function “as a court of ultimate appeal” in the federal judicial hierarchy); Shapiro, *supra* note 271, at 278-79 (contrasting lower court functions of error correction with Supreme Court’s preference to “cast itself not as a source of justice for individual litigants . . . but rather as providing the structure and guidance necessary for the lower courts to correct or avoid errors”). *See also Precedent and Prediction*, *supra* note 21, at 80 (noting that inferior federal courts “know that the real reach of their law-declaration power is highly circumscribed . . . by the prospect of Supreme Court review;” this “perception” holds even given the Supreme Court’s “limited docket”).

decisions and the parity of all federal judges, the Supreme Court clearly was in charge of the federal courts' lawmaking function under the 1789 Act.<sup>298</sup> The Evarts Act, however, arranged the federal courts into "three tiers that define the [current] pattern of appellate review: [d]istrict courts exercise original jurisdiction; courts of appeals engage in initial appellate review granted . . . as a matter of right; and the Supreme Court engages in final but discretionary appellate review."<sup>299</sup> In this structure, the courts of appeals are subordinate to the Supreme Court because they are generally subject to the Court's revisory jurisdiction.<sup>300</sup> But subordinate posture does not necessarily equate with the actual availability of review.

The courts of appeals today retain most indicia of inferior courts. But the distinction has blurred. The courts of appeals are now unquestionably the primary lawmaking courts in the federal system.<sup>301</sup> They are bound to follow decisions of the Supreme Court but to decide cases independently when there is no such precedent. Gradual developments including the ability of the courts of appeals to sit en banc,<sup>302</sup> their perceived "responsibility" to develop the law of the circuit,<sup>303</sup> and the practical unreviewability of their decisions,<sup>304</sup> all weaken the apparent inferiority of these courts. Yet the inferiority of the courts of appeals as they operate today has not been seriously questioned. One simple explanation is that the courts of appeal are still clearly "lesser in rank or importance" than the Supreme Court.<sup>305</sup> Recent proposals to reform the courts of appeals, however, have been viewed as threatening the preservation of the Supreme Court as superior and the intermediate courts as inferior courts.<sup>306</sup>

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298. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 86-87. Congress originally provided for the involvement of two Supreme Court justices on every appeal heard in the circuit courts, and the circuit courts lacked a separate, permanent existence and judges of their own. These arrangements led one scholar to liken the original circuit courts to "panels of the Supreme Court, both in form and function." *Inferior Courts*, *supra* note 17, at 836.

299. *Inferior Courts*, *supra* note 17, at 823-24.

300. *Id.* at 824; *see also Precedent and Prediction*, *supra* note 21, at 80 (noting that "all inferior court judges . . . know that the real reach of their law-declaration power is highly circumscribed over the long run by the prospect of Supreme Court review").

301. *Cf. Precedent and Prediction*, *supra* note 21, at 80 ("[I]nferior court judges exercise a great deal of power with respect to both case disposition and law declaration, with district courts controlling much of the former and intermediate appellate courts much of the latter.").

302. When sitting en banc, the courts of appeals would function as "unitary" courts. This happens very rarely. Stein, *supra* note 15, at 831.

303. *Cf. United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689-90 (1990).

304. *See, e.g., Bhagwat*, *supra* note 236, at 984 ("As a practical matter, lower federal courts are not, and have never been, under the close supervision of the Supreme Court in carrying out their day-to-day duties and functions.").

305. *Inferior Courts*, *supra* note 17, at 828-29.

306. For example, the proposed National Court of Appeals was shot down as creating a second "supreme court." *See Inflation, Malfunction*, *supra* note 8, at 627; Gressman, *supra* note 1,

## VI. RESOLVING THE TENSION BETWEEN INFERIORITY AND UNIFORMITY

Congress's focus in 1891—protecting the Supreme Court—caused it to distinguish the new courts of appeals from the Supreme Court by denying them most indicia of “supremacy.” One aspect of the Supreme Court's supremacy is its role as the final, lawmaking court in our system. It is clear that the courts of appeals today have absorbed much of the lawmaking role, although they are still subject, in theory, to Supreme Court supervision. Within the scope of its limited geographic jurisdiction, each regional court of appeals develops a body of law rarely reviewed by the Supreme Court. Thus, uniformity and inferiority are in tension.

There was no tension between uniformity and inferiority under the 1789 Act. The structure of the federal court system, along with the jurisdiction and functions of the various courts, all combined to establish the supremacy of the Supreme Court and the inferiority of the lower federal courts. The inclusion of Supreme Court justices on all circuit court decisions served to carry the nationwide focus of the Supreme Court out to the lower federal courts.<sup>307</sup> There is some evidence that the lower federal courts in earlier times felt an obligation to treat the decisions of coordinate courts as controlling precedent.<sup>308</sup>

The potential for tension between uniformity and inferiority began to appear at the time of Evarts Act, but that Act included mechanisms to preserve uniformity among the new intermediate appellate courts.<sup>309</sup> The Acts of 1925 and 1988, however, eliminated much Supreme Court control by reducing and later eliminating mandatory review.<sup>310</sup> These actions lessened the Court's own ability to ensure uniformity and increased the practical power of the multiple, independent regional courts of appeals. As the twentieth century progressed, the increasing appellate caseload combined with the declining Supreme Court docket to intensify these trends.<sup>311</sup>

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*passim*; see also Maurice Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 580 (1973).

307. See FRANKFURTER & LANDIS, *supra* note 79, at 19-20; *Enemies*, *supra* note 66, at 307-08; see also STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 57 (1968) (noting that the “assumption that it was desirable for members of the Supreme Court to deal with people and law on the local level” persisted “well into the late nineteenth century” and accounted for hostility to authorization of separate circuit judges and probably to the establishment of intermediate courts as well).

308. Harrison, *supra* note 57, at 516 (citing *Shreve v. Cheesman*, 69 F. 785 (8th Cir. 1895)).

309. See *supra* text accompanying notes 178-183.

310. CHEMERINSKY, *supra* note 5, at 22-23.

311. Dragich, *supra* note 21, at 21-24.

The Evarts Act did not directly address the role the new courts would play in the development of federal law. At the time of their creation, the courts of appeals were clearly designed as error-correction courts; the whole point of the Evarts Act was to restore the Supreme Court's ability to enunciate and develop federal law.<sup>312</sup> Much of that lawmaking function has unquestionably shifted to the courts of appeals. But the Supreme Court's decision that these courts are bound to each other by comity only, together with the Court's subsequent pronouncement that the courts of appeals are responsible for developing the law within their own boundaries, allows the courts of appeals to function as independent adjudicatory bodies making law on a regional basis. It could be argued that even this much (essentially final) lawmaking by the courts of appeals offends the inferiority criterion, but more likely these courts' limited geographical reach blunts that argument.

At the same time, the limited geographical reach of the courts of appeals creates a systemic incapacity for uniform development of federal law. In 1891, that deficiency manifested itself in intolerable delays in Supreme Court decision-making. Today, given the disparity between the output of the courts of appeals and the Supreme Court's docket, the result is instead the practical unavailability of a single voice to settle federal law for the nation.

History suggests that proposals to restructure the federal court system must preserve (and not replicate elsewhere) the Court's singular status, its unitary decisional process, and the Court's discretion over its own docket.<sup>313</sup> The question is what, if anything, could now be done to resolve the tension between the need for uniformity in federal law and the need to maintain the inferiority of the courts of appeals. The current possibility of divergent rulings among the courts of appeals arises from the confluence of the courts' geographic organization and their decisional structures. Professors Carrington and Cramton state that "[n]either Congress nor the Court gave much consideration to the secondary implications of the 'law of

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312. *See supra* text accompanying notes 169-170.

313. Senator Evarts' original proposal to authorize the Supreme Court to increase its capacity by sitting in panels was defeated on the ground that it destroyed the singularity and unitariness of the Court. More recently, the Freund Committee's proposal to create a National Court of Appeals would have created a fourth tier court between the Supreme Court and the courts of appeals to screen certiorari petitions so the Court itself could decide more cases on the merits. This proposal ran afoul of inferiority requirements because it was seen as usurping an important aspect of Supreme Court's role and function. The discretion to decide which cases merited the Court's attention was identified at that time—if not before—as an essential feature of the Supreme Court's "supremacy." One of the most important things the Supreme Court does is decide what to decide. *See* Gressman, *supra* note 1, at 952 n.2 (quoting address by Justice Goldberg in reaction to the Freund Report).

the circuit' or to its likely effectiveness in a circuit of many judges."<sup>314</sup> Addressing the problem of intercircuit conflicts could take the form of changing either geographic organization or decisional structures. This Part considers first, whether Congress could modify the geographic structure of the courts of appeals and second, whether either Congress or the Supreme Court could replace the doctrine of intercircuit comity with a rule of intercircuit stare decisis.

### A. MODIFYING REGIONAL STRUCTURE

Numerous proposals have called for the creation of a tribunal with nationwide scope for the purpose of averting or reconciling conflicting decisions of the courts of appeals.<sup>315</sup> No such proposal has been seriously considered by Congress, though Congress clearly has the power to adjust the structure of the lower federal courts.<sup>316</sup> The Supreme Court has interpreted Congress's power to create the lower federal courts as a broad power to control their structure and jurisdiction.<sup>317</sup> There was no challenge to Congress's power to split the Fifth Circuit or create the Federal Circuit, and arguments against division of the Ninth Circuit are not based on lack of Congressional power to accomplish it.<sup>318</sup> Rather, Congress shows little appetite for the task.<sup>319</sup>

In the unlikely event that Congress were to consider creating a nationwide court of appeals, that court surely would not function in unitary fashion. Even if that mode of decision is not an essential marker of the Supreme Court's supremacy, the perceived difficulties of the current en

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314. Carrington & Cramton, *supra* note 19, at 621.

315. See generally BAKER, *supra* note 21, at 242-61 (discussing numerous proposals).

316. Congress's power under Art. III, § 1 of the Constitution to create the lower federal courts has been interpreted broadly to include many "lesser" powers such as the power to control the jurisdiction of those courts once created. See Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 744-56 (2001).

317. See *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992). Only once, in *Boumediene v. Bush*, 553 U.S. 723 (2008), did the Court squarely reject Congress's attempt to strip the federal courts of jurisdiction in a particular substantive area. See FALLON ET AL., *supra* note 69, at 278.

318. See generally Harrison, *supra* note 57, at 504-05 (arguing that Congress can legislate rules of precedent for the federal courts); Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1516 (noting that "certainly Congress may move some attributes of judicial power . . . from one federal court to another"). Professor Engdahl states the proposition even more forcefully: Congress "may refashion [the federal judiciary] however political wisdom directs, without doing violence to the Constitution." Engdahl, *supra* note 53, at 504. The merits of the larger debate about Congress' powers over the federal courts are outside the scope of this Article.

319. See *Inflation, Malfunction*, *supra* note 8, at 637-41 (discussing impediments to Congressional action to reform the federal courts); Pushaw, *supra* note 316, at 848-49 (discussing Congress's disinclination to pass legislation regarding federal court procedures).

banc procedure in large regional circuits suggest that it would be impossible for a nationwide court of appeals to function as a unitary court. Unless the intermediate federal courts were restructured to function as a unitary court, they could not achieve uniformity on their own. Supreme Court review would still be required.

Congress could consider more limited structural reforms. The present circuit boundaries are “old and irrational,”<sup>320</sup> and Congress could adjust them. But Congress seems disinclined to do so. In any case, the trend of recent decades has been to split rather than combine circuits.<sup>321</sup> Additional circuits would exacerbate, not reduce, potential conflicts. The difficulties of finding a way to split the Ninth Circuit may have brought an end to that approach.<sup>322</sup>

The merits of larger versus smaller circuits have been debated elsewhere.<sup>323</sup> Disagreement persists both on and off the Ninth Circuit about efficacy of that large court and the caseload management strategies it has adopted. If the Ninth Circuit “experiment” demonstrates that large courts employing rigorous screening mechanisms, mini en banc panels, and other techniques are capable of maintaining uniform law within the circuit, then the consolidation of some of the smaller circuits might make sense. With fewer circuits, the incidence of intercircuit conflicts should fall somewhat. Even this modest change would entail some disruption, however. Without a rule of intercircuit stare decisis to go along with it, this change would do relatively little to avert conflicting decisions on federal law.<sup>324</sup>

Congress’s minimalist approach to federal court reform over the past few decades suggests that it may have implicitly adopted many of Professor Rosenberg’s prescriptions for appellate reform: any plan should be “parsimon[ious] in creating new judgeships” and should avoid multiplicity of appeals, jurisdictional disputes, and specialization of appellate judges.<sup>325</sup>

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320. Carrington, *supra* note 33, at 586.

321. The Tenth Circuit was created in 1929 by splitting the former Eighth Circuit into two circuits. Act of Feb. 28, 1929, 45 Stat. 1346. The Eleventh Circuit was split off from the old Fifth Circuit in 1980. Act of Oct. 14, 1980, 94 Stat. 1994. The only significant departure from the pattern of splitting circuits geographically was the creation in 1982 of the Federal Circuit, which is organized by subject matter jurisdiction rather than by geography. Act of Apr. 2, 1982, 96 Stat. 25.

322. Frank Tamulonis III, *Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?*, 112 PENN ST. L. REV. 859, 859-69 (describing various proposals regarding Ninth Circuit).

323. *See, e.g.*, Dragich, *supra* note 21, at 60 and sources cited therein.

324. *Cf. Inflation, Malfunction*, *supra* note 8, at 637 (noting that modest reforms of the 1970s did “not ameliorate[] . . . the problems of lack of uniformity in federal law”).

325. Rosenberg, *supra* note 306, at 587-88 (1973).

Maintaining the geographic organization of the courts of appeals accomplishes many of these objectives. Regional organization imposes a practical, if not an absolute, cap on the number of judges assigned to any one circuit.<sup>326</sup> Adhering to the current structure also continues the tradition of one appeal as of right without affording the possibility of additional avenues of review (as adding a fourth tier would do) and maintains the courts of appeals (with the exception of the Federal Circuit) as generalist courts. The current structure also avoids jurisdictional disputes among the courts of appeals because it is generally obvious to which regional circuit a particular decision may be appealed.<sup>327</sup>

For all these reasons, structural reform is unlikely either to occur or to succeed in promoting uniform interpretation of federal law. Accordingly, the next section considers the adoption of a rule of intercircuit stare decisis.

## B. ADOPTING A RULE OF INTERCIRCUIT STARE DECISIS

### 1. THE COURT

To the extent that the lack of uniform nationwide interpretation of federal law is problematic, one solution might be to abandon the comity rule and the concomitant law of the circuit doctrine. Neither Congress nor the Supreme Court has addressed the question of nationwide decision-making by the courts of appeals. It would appear that either body could do so.<sup>328</sup>

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326. Even after the nine-judge maximum for courts of appeals had faded into history, *see The Overloaded Fifth Circuit*, *supra* note 56, at 969, the Eleventh Circuit has decided that it cannot function properly with its full complement of authorized judgeships. This Circuit therefore has never requested additional judgeships beyond the twelve authorized when the Eleventh Circuit was created in 1980. *See U.S. Courts of Appeals Authorized Judgeships*, United States Courts, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/doc/s/authAppealsJudgeships.pdf>. In that time every other geographic circuit has had at least one additional judgeship authorized. *Id.* The Ninth Circuit's cadre of authorized judgeships, though by far the largest of any circuit, still falls far short of the number that would be authorized under a strict ratio of filings to judges. The Judicial Conference recently recommended the authorization of an additional four permanent judges and one temporary judge for the Ninth Circuit. *See id.*

327. Review of administrative agency action is complicated, and depends on the terms of the particular statute authorizing the agency. Generally, "Congress confers review jurisdiction on all circuit courts or all district courts" (depending on which courts have power of review over the particular agency). RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 1698 (4th ed. 2002). Venue provisions address which circuit or district court should review the action; "in many situations, a single petitioner can choose among several reviewing courts." *Id.* This "creates an opportunity for forum shopping," *id.*, and may lead to the phenomenon known as "intercircuit nonacquiescence." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679, 687 (1989).

328. *Cf. Jordan*, *supra* note 206, at 595 (arguing that either legislative or judicial action would be "viable" to implement a policy of automatic substitution when one judge of a three-judge panel

The Supreme Court, having adopted in *Mast, Foos & Co.* the rule of comity among circuits, could reverse that decision and require that each circuit follow the decision of the first court of appeals to rule on a particular issue, subject to the usual parameters of the rule of stare decisis. Professor Harrison notes that “[t]he norms of precedent as the federal courts know them consist mainly of unwritten principles that are characterized as binding law but that reflect substantial judicial input, custom and practice.”<sup>329</sup> These norms, he notes, “are the hallmarks of general [i.e., judge-made] law.”<sup>330</sup> Many rules of precedent “cannot plausibly be attributed to the Constitution,”<sup>331</sup> and even those pertaining to the courts of appeals are not entirely based on statutes constituting those courts.<sup>332</sup> Thus Harrison likely would argue that the Supreme Court has power to create a rule of intercircuit stare decisis.<sup>333</sup> Moreover, Professors Carrington and Cramton note that with the deference of Congress, the “federal judiciary as a whole [has become] . . . substantially autonomous and self-governing with respect to internal structures and procedures.”<sup>334</sup>

Professor Robert Pushaw, on the other hand, would likely argue that rules relating to precedent fall outside the category he refers to as “pure judicial power,” with respect to which the federal courts have inherent power to make rules.<sup>335</sup> Rather, such rules would be merely “beneficial” to the federal courts in implementing Article III.<sup>336</sup> As such, enactment of rules relating to precedent would belong to Congress.<sup>337</sup> Pushaw acknowledges, however, that “federal judges have repeatedly cited ‘inherent powers’ . . . to rationalize a wide range of actions that are not essential to . . . the proper exercise of judicial authority” and that the Supreme Court, reviewing such actions, has defined inherent powers broadly.<sup>338</sup>

The early twentieth century Supreme Court apparently assumed it had some such power when it adopted the rule of intercircuit comity in *Mast, Foos & Co. v. Stover Mfg., Co.*<sup>339</sup> If the Court had power to adopt the

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becomes unavailable).

329. Harrison, *supra* note 57, at 529.

330. *Id.* Professor Harrison’s argument is that Congress may adopt any norm of stare decisis that a court reasonably could recognize. *See id.* at 504.

331. *Id.* at 531.

332. *Id.*

333. *Id.* (accepting without question that courts adopt norms of stare decisis based on considerations of accuracy, economy, stability, and predictability in the law).

334. Carrington & Crampton, *supra* note 19, at 618.

335. Pushaw, *supra* note 316, at 844.

336. *Id.* at 848.

337. *Id.*

338. *Id.* at 738.

339. *Mast, Foos & Co. v. Stover Mfg., Co.*, 177 U.S. 485, 489 (1900).

comity rule, it would also be within its power to overrule *Mast, Foos & Co.* and adopt instead a rule of intercircuit stare decisis. This is so even if a rule of intercircuit stare decisis goes beyond the sort of inherent power necessary to the adjudication of a particular case. Such a rule could be grounded instead on the Supreme Court's supervisory power over the federal judicial department.<sup>340</sup> On the other hand, if the Court lacked power to adopt the comity rule in *Mast, Foos & Co.*, this lack of power itself would justify overruling that decision.<sup>341</sup>

Though the Court does not lightly overrule its prior decisions, doing so would be justified in this case. First, the notion of "comity" seems misplaced in this context. Comity is usually thought of as a reciprocal arrangement between co-equal sovereigns.<sup>342</sup> The Supreme Court's opinion in *Mast, Foos & Co.* implicitly recognizes as much when it draws a sharp line between the horizontal relationship among circuits and the hierarchical relationship of the courts of appeals to the Supreme Court.<sup>343</sup> Regions of the United States are not, and never have been, sovereign or independent in any sense. The courts of appeals are part of a larger structure of sovereignty shared by the federal and state governments. To the extent that *Mast, Foos & Co.* suggests a role within our federal structure for comity among regional lawmaking bodies, it is either mistaken or misunderstood.

Second, and perhaps more importantly, even if a rule of comity made sense when *Mast, Foos & Co.* was decided, it does not fit current circumstances. In 1900, the Supreme Court described its own "duty" as "to review the judgments of all inferior courts, and in case of conflict to decide between them."<sup>344</sup> The Supreme Court then had considerable mandatory appellate jurisdiction; as noted above, that jurisdiction has vanished.<sup>345</sup> Intercircuit comity, though conceptually problematic, had little practical significance. Although the existence of an intercircuit conflict remains one of the factors favoring the grant of certiorari under Supreme Court Rule 10, no one today believes the Court is able or willing to resolve all conflicts. Thus, the foundation on which *Mast, Foos & Co.* rested no longer supports that decision.

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340. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995); see also *Supervisory Powers*, *supra* note 246, at 1062.

341. Compare this situation with the overruling of *Swift v. Tyson* in *Erie*. In *Erie*, the Court decided that the choice of law rule it had adopted for diversity cases in *Swift* exceeded the Court's powers under the Constitution and contravened the Rules of Decision Act. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. 1 (1842).

342. See, e.g., *CHEMERINSKY*, *supra* note 5, at 39-40.

343. *Mast, Foos & Co. v. Stover Mfg., Co.*, 177 U.S. 485, 488 (1900).

344. *Id.*

345. *CHEMERINSKY*, *supra* note 5, at 22-23.

Finally, if the objection to a rule of intercircuit stare decisis is that such a rule would allow the courts of appeals to usurp the Supreme Court's role as lawmaker, the language of *Mast, Foos & Co.* blunts this criticism. The statement in *Mast, Foos & Co.* that the "primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right"<sup>346</sup> must be understood in the context of the Evarts Act's appellate provisions. In certain cases, including some arising under federal statutes, decisions of the circuit courts of appeals were final. Thus, decisions of these courts in some cases were constrained neither by the possibility of subsequent Supreme Court review nor by the prior decisions of other circuits. That seems at least as great a departure from the usual understanding of the inferiority of the courts of appeals as would a rule of intercircuit stare decisis. The only question is whether expanding the geographic reach of court of appeals decisions is a step too far for the Court to contemplate.

## 2. CONGRESS

Alternatively, Congress could legislate a departure from the law of the circuit doctrine by mandating intercircuit application of the rule of stare decisis.<sup>347</sup> Congress could also provide exceptions, specify procedures for raising serious objections to precedent established in another circuit, and so on. Professor Harrison's extended consideration of "the power of Congress over the rules of precedent" grounds such a power in Congress's power under the Necessary and Proper Clause to carry the judicial power of the United States into effect.<sup>348</sup> To the extent that stare decisis generally is justified as improving the performance of the judicial function, it fits well within the Necessary and Proper Clause, which grants Congress "precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively."<sup>349</sup> Nor, according to Harrison, would such an exercise of Congressional power violate the separation of powers doctrine by usurping the judicial role to decide the weight to be accorded to an earlier decision.<sup>350</sup> "To adopt a rule about whether and how much to follow earlier cases," he says, "is not to decide on particular outcomes."<sup>351</sup> Only when Congress enacts legislation "to influence results and not for systemic reasons" is its assertion of power over the federal courts

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346. *Mast, Foos & Co. v. Stover Mfg., Co.*, 177 U.S. 485, 488 (1900).

347. Congress has power to do so under Article III in conjunction with the Necessary and Proper Clause. Harrison, *supra* note 57, at 504, 538-39.

348. *Id.* at 532-39.

349. *Id.* at 532.

350. *Id.* at 539-40.

351. *Id.*, at 540.

“problematic.”<sup>352</sup>

Congress’s power to legislate under the Full Faith and Credit Clause may provide another ground of power to create a rule of intercourt stare decisis.<sup>353</sup> Although the Clause in terms refers only to the obligation of “each *State*” to give effect “to the public Acts, Records, and judicial Proceedings of every other *State*,”<sup>354</sup> Congress took a broader approach in enacting 28 U.S.C. § 1738.<sup>355</sup> Section 1738 requires, as Article IV itself does not, that *federal* courts must give full faith and credit to the decisions of state courts. Arguably, Congress could rely on this Clause for authority to require one federal court of appeals to give precedential effect to the decisions of another. Congress’s enactment of a broader rule of preclusion than the Constitution requires suggests that Congress has power to specify the preclusive effect of prior decisions in the federal courts. The Supreme Court has many times enforced § 1738’s requirement that federal courts give full faith and credit to the decisions of state courts.<sup>356</sup>

### 3. INTERCOURT STARE DECISIS AND INFERIORITY

If either the Court or Congress were to adopt a rule of intercourt stare decisis, the first decision rendered by a circuit would be precedentially binding on the other circuits.<sup>357</sup> This solution would cause federal appellate courts to interpret and apply nationally uniform federal law, not to create regional versions of federal law. Absent any other provision by Congress, all such rulings would be appealable by writ of certiorari to the Supreme Court for final resolution.

Many objections to the proposal for a rule of intercourt stare decisis

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352. Harrison, *supra* note 57, at 541.

353. That Clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the *Congress may by general Laws prescribe the Manner* in which such Acts, Records and Proceedings shall be proved, *and the Effect* thereof.” U.S. CONST. art. IV. § 1 (emphases added).

354. U.S. CONST. art. IV. § 1 (emphasis added).

355. That statute provides: “The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit *in every court within the United States* and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C. § 1738 (2006) (emphasis added). The Supreme Court has noted that “[t]he Act extended the rule of the Constitution to all courts, Federal as well as State.” *Davis v. Davis*, 305 U.S. 32, 40 (1938) (citing *Mills v. Duryee*, 7 Cranch 481, 485 (1813)); *see also* *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518 (1986).

356. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90 (1980).

357. Algero, *supra* note 11, at 633, 637. This obligation would be subject to the usual caveat in the Full Faith and Credit context that the first court properly asserted jurisdiction over the proceeding. *See* James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 364 (2008).

exist and have been explored elsewhere.<sup>358</sup> For purposes of this Article, the most important objection is that a panel of three judges, drawn from a small number of states in a single part of the country, would have vastly increased power to set the course of federal law for the nation.<sup>359</sup> Professor Algero has suggested conditions under which such a rule might operate to ameliorate these concerns.<sup>360</sup> Two important features of her plan are that it would apply only to decisions interpreting federal statutes and rules, and a variety of options would exist for the eventual overruling of a court of appeals decision having nationwide precedential effect.<sup>361</sup> In addition, Congress could provide broader representation on court of appeals panels in several ways: by creating fewer, larger circuits; by providing for the regular assignment of judges across circuits; or by providing for larger decisional units, such as panels of five judges rather than three. Congress could also require decision (or at least rehearing upon motion) en banc in cases of first impression among the circuits.<sup>362</sup>

The question raised by this Article is whether the adoption of a rule of intercircuit stare decisis would run afoul of the inferiority criterion. The current combination of the regional independence and practical finality of court of appeals decisions may come close to the line demarking inferior from supreme courts. Limited geographic reach may be an important marker of the inferiority of the courts of appeals. But the costs of inferiority are high. Perhaps greater uniformity can be purchased only at the price of concessions to inferiority.

A rule of intercircuit stare decisis, however desirable it might be on grounds of uniform interpretation of federal law, would allow the courts of appeals to function as lawmaking courts whose rulings are both practically unreviewable and of nationwide effect. But the true markers of inferiority would remain: the courts of appeals are created and controlled by Congress, and their decisions remain subject to review by the Supreme Court. A rule of intercircuit stare decisis interferes with neither. Moreover, a carefully structured rule of intercircuit stare decisis can preserve sufficient differentiation of the courts of appeals from the Supreme Court.

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358. For example, the first-presented case might have had unusual facts or might have been poorly argued, or the first panel may have been unrepresentative of the court as a whole. Another argument is that percolation is desirable as a means of broadening consideration before the obligation of stare decisis attaches.

359. See, e.g., Algero, *supra* note 11, at 637 (acknowledging this criticism); Harrison, *supra* note 57, at 535 (acknowledging this criticism).

360. Algero, *supra* note 11, at 635 (discussing proposed legislative solution).

361. *Id.*

362. The dearth of en banc hearings now and the provision allowing for “mini en banc” panels in the largest circuits would seem to make this course unpalatable.

## VII. CONCLUSION

Providing a mechanism for uniform application of federal law is, and always has been, a paramount concern of Congress, prompting it to create lower federal courts and to vest them with increasing jurisdiction over the decades. The regional organization of the courts of appeals, originally adopted as a step to increasing the capacity for uniform application of federal law, now threatens that same objective. Potential solutions to that problem exist, but many seem to implicate another important concern: that the courts of appeals remain “inferior” to the Supreme Court.

The question of the proper balance between uniformity and inferiority seems most appropriately answered by Congress. Congress would do little to facilitate greater uniformity merely by modifying the geographic structure of the courts of appeals. A more productive and potentially less disruptive option would be for Congress to legislate a rule of intercircuit stare decisis.

Alternatively, the Supreme Court could accomplish the same result by overturning its *Mast, Foos & Co.* decision. Given Congress’s disinclination to legislate with respect to the courts of appeals,<sup>363</sup> the latter may be a more promising short-term strategy (although the Supreme Court has given no indication of any dissatisfaction with its comity rule). But Congressional action would have the advantage of spelling out in advance the details for operation of a rule of intercircuit stare decisis.

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363. Harrison suggests in passing that it is unlikely Congress would legislate regarding precedential effect of courts of appeals decisions. Harrison, *supra* note 57, at 538.