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How Circuits Can Fix Their Splits

Wyatt G. Sassman

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HOW CIRCUITS CAN FIX THEIR SPLITS

WYATT G. SASSMAN*

The desire to avoid conflicts between the regional circuits of the federal courts of appeals, commonly known as “circuit splits,” has had an immense influence on the structure and operation of the federal appellate courts for roughly a century. Over time, the Supreme Court has been assigned responsibility for resolving these conflicts. Yet as overall federal caseloads have increased, this reliance on the Supreme Court has imposed serious and well-recognized burdens on the operation of the federal courts. For decades scholars have debated bold proposals to address these problems, such as creating a new national court dedicated to resolving conflicts or fundamentally restructuring the Supreme Court. This Article offers a straight-forward yet transformational proposal overlooked in these debates: let the courts of appeals resolve their conflicts on their own.

This Article argues that the federal courts of appeals should resolve circuit splits on their own, rather than rely on the Supreme Court, and lays out how they could do so. A judge-made doctrine known as the “law of the circuit” prohibits a later panel of a court of appeals from revisiting an earlier panel’s decision, even when the earlier decision has resulted in a conflict with another circuit. Because practically all work in the courts of appeals is done by three-judge panels, the law of the circuit doctrine has the effect of locking conflicts in place—the first circuit to address an issue cannot confront the reasons that motivated a latter circuit to come to a different conclusion. Instead, every circuit gets one chance to weigh in and, as a practical matter, no circuit can ever resolve the conflict.

I therefore propose relaxing the law of the circuit doctrine when a circuit’s prior decision has resulted in a conflict with another circuit. This proposal is narrowly tailored, identifying tools already in use in some courts of appeals

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that would allow them to relax the doctrine and revisit a prior decision, but only where that prior decision has subsequently resulted in a conflict with another circuit. This creates the opportunity to address the conflict without Supreme Court intervention while maintaining the existing doctrine's benefits in the vast majority of the court of appeals' cases. Yet the proposal is also transformational, fundamentally changing the relationship between the federal appellate courts by empowering the courts of appeals to engage in dialogue with each other and reducing reliance on the Supreme Court. This Article therefore offers a realistic proposal for achieving important structural and institutional improvements in the federal courts at a lower cost and with less disruption than existing proposals.

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I. INTRODUCTION

Conflicts in the interpretation of federal law between two regional circuits of the federal courts of appeals—commonly known as “circuit splits”—have vexed the federal courts for well over a hundred years. The desire to avoid these conflicts and maintain uniformity in federal law is so strong that it has changed the very structure of our federal courts, earned the attention of congressional committees, and occupied countless hours of study.¹ For decades we have relied on the Supreme Court to resolve conflicts among the courts of appeals. Yet over time, the caseloads of the lower federal courts have ballooned while the Supreme Court’s docket has shrunk such that most now doubt the Supreme Court’s capacity to meaningfully maintain uniformity in the lower courts by resolving conflicts.² This problem has generated proposals of remarkable scope, such as creating a new national court dedicated to resolving conflicts or fundamentally changing how the Supreme Court works.³ This Article offers a proposal that this literature has overlooked: let the circuits fix their own splits.

Consider, for example, that a different Voting Rights Act applies in Georgia than in Tennessee because of a conflict between the Sixth Circuit and Eleventh Circuit. In 2000, the Sixth Circuit decided that there is no private right of action to enforce a section of the Act that says states cannot prohibit a person from voting because the person omitted information on their voter registration form that was not material to their eligibility to vote.⁴ The appeal was brought *pro se* by a Tennessee resident who felt that he should not have to provide his Social Security number in order to register to vote.⁵ The Sixth Circuit rejected his

1. Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395, 396 (2000) [hereinafter Baker, *Generation Spent*].

2. *See infra* Part II.

3. *See, e.g.*, William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 475 (1973).

4. *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (discussing claims under 42 U.S.C. § 1971(a)(2)(B)). Section 1971(a)(2)(B) was recodified as 52 U.S.C. § 10101(a)(2)(B).

5. *McKay*, 226 F.3d. at 754.

claims, relying on a district court case to conclude that the Tennessean had no right to enforce that provision of the Act—only the federal government could.⁶

Three years later, the Eleventh Circuit faced the exact same question and split with the Sixth Circuit.⁷ A Georgia family felt that they should not have to provide their Social Security numbers in order to register to vote.⁸ The district court threw out their case, relying on the Sixth Circuit's decision.⁹ The Georgians, represented by the American Civil Liberties Union, appealed and won.¹⁰ The Eleventh Circuit reasoned that there was an implied, private right of action to enforce the provision of the Act.¹¹ In its opinion, the Eleventh Circuit sharply criticized the Sixth Circuit's opinion on the issue.¹² According to the Eleventh Circuit panel, the Sixth Circuit had misapplied a district court case, missed controlling Supreme Court precedents, ignored relevant legislative history and historical context, and departed from the plain language of the Act.¹³ So now, people in Georgia, Alabama, and Florida can enforce that provision of the Voting Rights Act. People in Michigan, Ohio, Kentucky, and Tennessee cannot.

Conflicts like this are commonplace—even familiar. Lawyers and legal publications have long tracked conflicts.¹⁴ A law review is dedicated to collecting them.¹⁵ Conflicts are the perennial subject for law student notes.¹⁶

6. *Id.* at 756 (citing *Willing v. Lake Orion Cmty. Sch. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996)).

7. *Schwier v. Cox*, 340 F.3d 1284, 1294–97 (11th Cir. 2003).

8. *Id.* at 1286–87.

9. *Id.* at 1294 (“The district court found that Congress intended § 1971(c) to foreclose the possibility of a private right of action under § 1983. The district court relied on the Sixth Circuit’s holding in *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), that § 1971 is only enforceable by the Attorney General.”).

10. *Id.* at 1285, 1297.

11. *Id.* at 1296–97.

12. *Id.* at 1294–97.

13. *Id.*

14. For example, U.S. Law Week has long published a well-known collection called Circuit Splits Roundup, which used to be associated with prominent Supreme Court practitioner Thomas Goldstein. See, e.g., Baker, *Generation Spent*, *supra* note 1 at 406 n.56 (2000) (“Thomas Goldstein counts fifteen to twenty, on average, each month in ‘Circuit Split Roundup,’ published in U.S. Law Week.”).

15. See Circuit Review Staff, *Current Circuit Splits*, 14 SETON HALL CIR. REV. 279 (2018).

16. See, e.g., Andrew Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. LEGAL EDUC. 259, 271 (2012) (“a circuit split seems like the *beau ideal* of a student note topic.”); see also *Types of Notes*, NYU L.,

Conflicts persist for years, accumulating opinions on either side of an issue until the Supreme Court grants certiorari to resolve it.¹⁷ That's the standard practice.

But the open secret is that the Supreme Court cannot possibly resolve all of the conflicts generated by the courts of appeals. While there is vigorous and important debate over the frequency and effects of conflicts, avoiding such conflicts in federal law has long served as the lodestar of the federal appellate courts' structure and operation.¹⁸ Concerns for uniformity helped justify the Supreme Court's transition to a court of limited and discretionary review, and federal appellate judges openly identify concerns about conflicts—either creating one or avoiding one—as an important element of their decisionmaking.¹⁹ As others have recognized, this focus on achieving uniformity in federal law despite a growing number of judges, cases, and conflicts has saddled the federal courts with serious structural problems.²⁰ Many have proposed solutions to this problem over several decades now, focusing primarily on reforming the Supreme Court's certiorari process to increase its capacity to decide more cases.²¹ Nothing has yet taken hold.

Missing from this debate is that panels of the courts of appeals could resolve conflicts on their own—without Supreme Court intervention or a costly en banc

<https://www.law.nyu.edu/students/studentwriting/typesofnotes> [<https://perma.cc/R6QR-6UPT>] (“a Note might address conflict between Circuit Courts of Appeals (a ‘circuit split’)”).

17. See *infra* Section III.C discussing percolation.

18. Regarding the influence of uniformity on the structure of the federal courts, see *infra* Part III.A. For an example of debates over the scope and effect of circuit splits, see, e.g., Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1584–1606 (2008) (“[T]he effects of nonuniformity do not seem all that troubling.”); Arthur D. Hellman, *Light on A Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247, 300 (“[T]he problem of unresolved conflicts exists only if you look for it—and look for it in a certain way.”); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 795–97 (1995) (confirming that “the Supreme Court denies review in a substantial number of cases that present unresolved intercircuit conflicts” but concluding that “findings on persistence and tolerability” of conflicts “point strongly to the conclusion that unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system.”).

For better or worse—generally for worse—the goal of achieving uniformity has influenced the courts without a full understanding of the impact of conflicts themselves. See, e.g., Frost, *supra* at 1579 (“Uniformity has for so long simply been assumed to be a worthy goal that its supposed benefits have not been discussed in much detail or analyzed with any rigor.”).

19. See *infra* Section II.A describing transition to court of limited review. See also Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 175 (2002) (describing the role of conflicts in appellate decisionmaking).

20. See *infra* Section II.B.

21. See *infra* Section II.B.

rehearing. Consider our Voting Rights Act example, where the Sixth Circuit decided one way in 2000 and the Eleventh Circuit decided the same issue the opposite way in 2003.²² In 2016, a voting rights non-profit brought the issue back to the Sixth Circuit, requesting that the court resolve the conflict with the Eleventh Circuit.²³ The Sixth Circuit noted the Eleventh Circuit's contrary decision, but refused to engage with the reasoning of either the Eleventh Circuit's decision or its own prior decision.²⁴ Rather, the Sixth Circuit said that it was strictly bound to follow its prior decision unless and until the Supreme Court, or the entire Sixth Circuit sitting en banc, reverses it.²⁵ The conflict persists to this day.²⁶

Why? What prohibited the Sixth Circuit from revisiting its criticized decision? The answer is the “law of the circuit” doctrine, a judge-made doctrine adopted by every court of appeals between the 1950s and 1970s.²⁷ Traditionally understood as a tool to help manage increasing caseloads, the law of the circuit doctrine plays an underappreciated role in the development and persistence of conflicts in the federal courts.²⁸ The heart of the doctrine is a strict rule that prohibits panels of a federal court of appeals from revisiting prior panel decisions unless there is an intervening change in higher authority, generally meaning a change in the law from the Supreme Court or the court of appeals sitting en banc.²⁹ By contrast, on-point decisions from other circuits are not binding authority.³⁰ As a result, the first panel in each circuit to address an issue decides that issue for all future panels in that circuit—but only that circuit.³¹

22. Compare *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), with *Schwier v. Cox*, 340 F.3d 1284, 1294–97 (11th Cir. 2003). For a discussion of the circuit split see *supra* pp. 1403–04.

23. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 629–30 (6th Cir. 2016) (rehearing en banc denied October 6, 2017).

24. *Id.* at 630.

25. *Id.* (quoting *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014)).

26. As seen above, the Sixth Circuit denied a request to hear the case en banc on October 6, 2016, and the Supreme Court denied certiorari on June 19, 2017. See 137 S. Ct. 2265 (2017) (denying certiorari).

27. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–96 (2012).

28. *Id.* at 796.

29. *Id.* at 797–98; Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1018 (2003).

30. Mead, *supra* note 27, at 790.

31. *Id.* at 796–97.

The first panel's decision becomes the law of the circuit.³² Few scholars have discussed the doctrine at all, and no one has yet connected it to the long-standing and ongoing debates about the negative effects of relying on the Supreme Court to address conflicts.³³

The purpose of this Article is to connect the law of the circuit doctrine with these debates, proposing that the courts of appeals relax the doctrine when a prior panel decision has resulted in a conflict with another court of appeals. This would give the latter panel an opportunity—but not necessarily the obligation—to settle a conflict without costly intervention by the Supreme Court or the entire court of appeals sitting en banc. This proposal would help mitigate the structural problems created by relying solely on the Supreme Court to resolve conflicts, and likely help resolve more conflicts. Moreover, this proposal could be implemented through methods currently used in a few of the courts of appeals, achieving these benefits with substantially less cost and disruption to the federal courts than other proposals.³⁴

This Article and my proposal nevertheless have important limits. I do not engage debates regarding the value of pursuing uniformity in federal law.³⁵ As others have done, I accept for our purposes here that the federal courts remain committed to pursuing uniformity in federal law, despite its virtues or vices.³⁶ And I consider the law of the circuit doctrine primarily as a tool of judicial administration, as it has been articulated by most courts and scholars.³⁷ While the law of the circuit doctrine can implicate broader issues of stare decisis and due process, I set aside those issues for a different time.³⁸ This Article seeks to advance a workable proposal to improve the function of the federal courts within the existing framework and assumptions of the system.

32. *Id.* at 797.

33. See *infra* Part II for a full discussion of the law of the circuit doctrine, its origins, and its operation.

34. See *infra* Part IV for a full discussion of this proposal.

35. See generally, e.g., Frost, *supra* note 18 (questioning the value of uniformity in federal law).

36. See Wasby, *supra* note 19 at 122 (“I do not take issue here with the assumption, implicit in most discussion of intercircuit conflicts, that all intercircuit conflicts should be eliminated or at least kept to a bare minimum. For present purposes, I take that debatable assumption as a given, because it is an important part of the background against which judges deal with the issue, and because most of their discussion seems to be based on its implicit acceptance.”).

37. See *infra* Part III discussing the purposes of the law of the circuit doctrine.

38. See, e.g., Barrett, *supra* note 29, at 1060–61; Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 B.Y.U. L. REV. 597, 598–99; Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 581–83 (2017).

With this in mind, the Article offers two contributions. The first is a contextualized discussion of the law of the circuit doctrine, its origins, and its purposes. While scholars have written about the doctrine, few have interrogated its origins, and those that have offer only limited accounts about the doctrine's purposes.³⁹ The first two parts of my article offer a more complete history and assessment of the doctrine's purposes than what is currently available in the literature. The second contribution is my proposal. The law of the circuit doctrine is an underlying element of the longstanding debates regarding conflicts and federal courts reform. Bringing the doctrine to the forefront offers a new approach to these problems.

The Article offers these contributions in three parts. Part II contextualizes the law of the circuit doctrine within the history of the federal courts of appeals, the Supreme Court's "shrinking docket," and institutional reforms to the appellate courts such as the rise of "unpublished" opinions. Part II also lays out the doctrine as it exists today. Part III then asks why we have the doctrine, engaging in a critical assessment of the doctrine's purposes and highlighting the role of the doctrine in maintaining the Supreme Court's primary responsibility for resolving conflicts. Part IV then lays out my proposal and its benefits.

39. Compare, e.g., Mead, *supra* note 27, at 796 ("Although it is not precisely clear what sparked the change, [the doctrine] can probably be attributed to the confluence of two phenomena: an increase in the number of cases and judges, and the birth of limited publication practices."), with Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 565 (2010) ("The result in *Textile Mills*" where the Supreme Court endorsed en banc decisionmaking, "led to the development of the law of the circuit doctrine.").

Most scholars don't attempt an explanation. See, e.g., Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 718–19 (2009) [hereinafter Sloan, *Stealth Procedures*] (noting simply that every court follows the rule); Barrett, *supra* note 29, at 1017–18 (same); Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 755–56 (1993) (same).

And courts haven't explained themselves either. See Kannan, *supra*, at 756 ("The decisions applying the interpanel rule have not clearly articulated their legal bases."); see also, e.g., Hart v. Massanari, 266 F.3d 1155, 1173 (9th Cir. 2001) (statement of the Court without further explanation) ("The various rules pertaining to the development and application of binding authority do not reflect the developments of the English common law [but] rather [reflect] the organization and structure of the federal courts and certain policy judgments about the effective administration of justice.") (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("stare decisis is a 'principle of policy,' and 'not an inexorable command'")).

II. THE ORIGINS OF THE LAW OF THE CIRCUIT DOCTRINE

To understand the doctrine and its origins, it's important to understand the intermediate federal courts, their changing role in the federal judiciary over time and, in particular, changes in their relationship with the Supreme Court. This Part provides that necessary background and context. Section A surveys the history of the federal courts of appeals and introduces how the recurring effects of rising federal caseloads laid the groundwork for pervasive conflicts among their decisions. Section B then describes the Supreme Court's shrinking docket, which placed greater decisionmaking responsibility on the federal courts of appeals and eroded confidence in the Supreme Court's ability to maintain uniformity in federal law. Section C then discusses the court of appeals' reactions to this combination of increasing caseloads and increasing responsibility; specifically, the innovation of the law of the circuit doctrine and non-precedential, unpublished decisions. This context sets up a critical discussion of the doctrine's purposes in Part III.

A. *A Brief History of the Federal Courts of Appeals*

1. The Judiciary Act of 1789 and Riding Circuit

The First Congress set up the basic structure of the federal courts: a Supreme Court with six Justices, three regional circuit courts, and thirteen district courts each with a district judge.⁴⁰ Initially, there were no circuit judges.⁴¹ Rather, each circuit court was staffed by a local district judge and two Supreme Court Justices.⁴² These circuit courts had both trial and appellate functions, holding, for example, concurrent jurisdiction with the district courts over certain criminal and civil matters and appellate jurisdiction over matters such as civil and maritime cases above a certain amount in controversy.⁴³ In addition to its original and exclusive jurisdiction, the Supreme Court initially had appellate jurisdiction over cases from the federal courts and over cases from the state courts that “defeated” claims to federal rights.⁴⁴ The Supreme Court's

40. Judiciary Act of 1789, ch. 20, §§ 1–4, 1 Stat. 73; see also David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714–15 (2007) [hereinafter Stras, *Ride Circuit*].

41. Stras, *Ride Circuit*, *supra* note 40, at 1715.

42. Judiciary Act of 1789 § 4; Stras, *Ride Circuit*, *supra* note 40, at 1715.

43. Stras, *Ride Circuit*, *supra* note 40, at 1714, nn.23–24.

44. See Judiciary Act of 1789 § 22; see also Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 710 (2018).

appellate jurisdiction was mandatory, meaning it had to hear and decide every appeal.⁴⁵

This set up, with Justices serving on both hybrid appellate-and-trial circuit courts and a Supreme Court with mandatory appellate jurisdiction, was the basic structure for federal appeals that Congress tinkered with for the next hundred or so years. One explanation for its persistence was that both Federalists and anti-Federalists felt change in either direction would cost more money.⁴⁶ Appointing more judges would inflate the federal budget at the states' expense—as one commenter noted, the Justices' many roles under the 1789 Act may well be attributed to a “close-fisted Connecticut concern to get value for money.”⁴⁷ Yet scrapping the appellate function of the regional circuit courts would impose substantial costs on litigants who would have to travel to Washington, D.C. to bring an appeal.⁴⁸

This initial scheme required Supreme Court Justices to devote substantial time away from Washington, D.C. attending circuit court, a practice known as “riding” the circuit.⁴⁹ In early America, circuit riding was often a difficult and dangerous endeavor.⁵⁰ The Justices had to travel long distances, generally on horseback or carriage, through poor weather, on poor roads (if there were roads at all), to poor lodging that they had to pay for themselves.⁵¹ For example, Justices assigned to the southern circuit (Georgia and the Carolinas) had to travel over two thousand miles to fulfill their circuit duties, an endeavor that regularly consumed over half of their year.⁵²

Riding circuit did offer important benefits beyond value for money.⁵³ For example, getting the Justices out of Washington exposed the Justices to local customs and communities.⁵⁴ Moreover, having the same Justices sit on both appellate and trial courts throughout the country encouraged uniformity in

45. Epps & Ortman, *supra* note 44, at 710.

46. Stras, *Ride Circuit*, *supra* note 40, at 1715.

47. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 130.

48. Stras, *Ride Circuit*, *supra* note 40, at 1715.

49. *Id.* at 1711 n.7.

50. *Id.* at 1718.

51. *Id.*

52. *Id.*

53. *Id.* at 1716.

54. *Id.*

federal law.⁵⁵ The Justices also served as a kind of roadshow for the new federal government.⁵⁶ As part of the circuit-court duties, the Justices would perform important public functions that gave them an opportunity to extol the values of the new federal government.⁵⁷ Although such opportunities did not always serve the Justices well as national politics changed—the Jeffersonians impeached Justice Samuel Chase in part because of statements he made in grand jury charges while presiding over a circuit court.⁵⁸

Despite these virtues, “[t]o say that most Justices disliked circuit riding would be an understatement.”⁵⁹ The Justices regularly complained to anyone who would listen about their circuit duties.⁶⁰ The prospect of riding circuit made appointment to the Court particularly unattractive to the nation’s top lawyers, who preferred the relative comfort of positions in the private bar or state governments.⁶¹ Some Justices who did accept a seat later resigned because of the scourge that was circuit riding.⁶²

Congress first heeded the Justices’ concerns in 1793, amending federal law to require that only one Justice attend each circuit court.⁶³ Yet even with that reform, the Justices still chafed at the obligation to the point of neglect, and “it became increasingly common for circuit court proceedings to be held by only a single district judge, who often reviewed his own prior rulings in a case.”⁶⁴ Congress acted again in 1801, abolishing circuit riding altogether and creating sixteen new circuit judges.⁶⁵ But the Judiciary Act of 1801—known to history as the Midnight Judges Act—is famous for other reasons: an attempt by a lame-duck Federalist Congress to pack the judiciary with Federalist circuit judges

55. *Id.* at 1717.

56. *Id.* at 1716–17.

57. *Id.*

58. See Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians*, 62 VAND. L. REV. 349, 363 (2009) (“[Chase’s] infamous charge given to a Baltimore Grand Jury in 1803 [was] the act that seems to have put in motion his impeachment proceedings.”).

59. Stras, *Ride Circuit*, *supra* note 40, at 1718.

60. *Id.* at 1719.

61. *Id.* at 1718.

62. *Id.*

63. *Id.* at 1719 (discussing the Judiciary Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333).

64. *Id.* at 1722.

65. *Id.* at 1719–20 (discussing the Judiciary Act of Feb. 13, 1801, ch. 4, 2 Stat. 89).

that resulted in *Marbury v. Madison*.⁶⁶ The Jeffersonians repealed the law a year later, sending the Justices back out on the road.⁶⁷

The deeply partisan experience of the Midnight Judges Act soured many on major judicial reform, contributing to a general reluctance to meaningfully change the federal courts during the lead up to the Civil War.⁶⁸ As the country expanded westward, Congress would mostly maintain the status quo by creating a new circuit and adding a new Justice to oversee it, occasionally adjusting the length of the Supreme Court's terms to help manage its growing docket.⁶⁹ By 1863, the number of circuits had grown from three to ten, and the size of the Supreme Court from six to ten Justices.⁷⁰ Geography exacerbated many of the initial problems of circuit riding, with nineteenth century travel no less burdensome or dangerous.⁷¹ Justice Field, for example, had to travel roughly six weeks to get to the circuit that covered California and Oregon and was nearly assassinated during one trip west.⁷²

In 1869, Congress finally created one circuit judge for each circuit (then nine) and set the Supreme Court at nine Justices.⁷³ The jurisdiction and function of the circuit courts largely remained the same, but now each consisted of a district judge from the circuit, the circuit judge, and a Supreme Court Justice.⁷⁴ The operation of these nineteenth-century circuit courts is quite foreign when compared to our modern scheme. As Second Circuit Judge Raymond Lohier explained,

the equivalent today [would be] Justice Ruth Bader Ginsburg (the Second Circuit's current circuit Justice), Chief District Judge Colleen McMahon, and I convening together to preside over a once-a-year sampling of federal cases in Manhattan, determine questions of both fact and law, and otherwise share

66. 5 U.S. (1 Cranch) 137 (1803); Stras, *Ride Circuit*, *supra* note 40, at 1719–20.

67. Stras, *Ride Circuit*, *supra* note 40, at 1720.

68. *Id.* at 1721–24 (“[T]he Midnight Judges Act was a particularly infamous historical precedent that, in the minds of many legislators, was not to be repeated.”).

69. *Id.* at 1721, 1723.

70. *Id.* at 1720–21.

71. *Id.* at 1721–22.

72. *Id.* at 1721 n.80.

73. Judiciary Act of 1869, ch. 22, §§ 1–2, 4, 16 Stat. 44; Stras, *Ride Circuit*, *supra* note 40, at 1725.

74. Judiciary Act of 1869 § 2; Stras, *Ride Circuit*, *supra* note 40, at 1725.

responsibility for trial and appellate functions.⁷⁵

“Looking back,” Judge Lohier reflected, “the process was essentially preposterous.”⁷⁶

But the reality was that most Justices still neglected their circuit court duties, shirking even the infrequent requirement that they sit with the circuit court to instead focus on the mandatory appellate docket of the Supreme Court.⁷⁷ This structure persisted until the innovation of the federal courts of appeals and eventual shift from hybrid trial-and-appellate intermediate courts to fully appellate intermediate courts with their own staff of judges.⁷⁸ The Justices would have to wait until that innovation—in 1891—to stop riding circuit.⁷⁹

With this context in mind, it’s worth pausing to reflect on the nature and role of precedent during these early years. As others have recognized, there was no settled doctrine of *stare decisis* in the United States for roughly the first hundred years of federal law.⁸⁰ While there was some sense of the importance of adhering to prior decisions, unreliable reporters and other features of early American judicial practice diminished precedent’s role.⁸¹ Moreover, until 1891, a group of between six and ten Supreme Court Justices were involved in nearly all of the appellate decisionmaking across the entire country, either as a member of the Supreme Court or as a member of the regional circuit courts.⁸² Indeed, the unifying effect this small group of decisionmakers had on federal law was seen as an important benefit of the circuit-riding system.⁸³ Although still complicated, precedential doctrines became more relevant as the federal

75. Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 *FORDHAM L. REV.* 945, 946 (2016).

76. *Id.* Others have advocated a return to the circuit riding system. See Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 *MINN. L. REV.* 1386, 1404–05 (2006); Stras, *Ride Circuit*, *supra* note 40, at 1726–51.

77. Stras, *Ride Circuit*, *supra* note 40, at 1723.

78. *Id.* at 1725–26.

79. *Id.*

80. See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 *AM. J. LEGAL HIST.* 28, 33, 35–36 (1959).

81. *Id.* at 33–36.

82. See Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 *N.C. L. REV.* 123, 130–31 (1977) (“Circuit courts in the early days of the Republic were extensions of the Supreme Court since Justices of the Supreme Court sat on the circuit courts.”).

83. Stras, *Ride Circuit*, *supra* note 40, at 1717.

courts expanded and modernized.⁸⁴ The Supreme Court cultivated the now familiar balancing principles of *stare decisis* to exert a slow and purposeful character to changes in American law.⁸⁵ But, as we will see, a completely different and altogether unique practice developed in the courts of appeals.

2. The Caseload Crisis and the Evarts Act

To get to the courts of appeals, we first have to encounter *the* caseload crisis. From roughly between 1875 and 1890, the overall federal caseload increased dramatically.⁸⁶ The rising caseload stemmed from two priorities of the Republican-controlled government after the Civil War.⁸⁷ The first priority was a concern for the civil rights of freed slaves in the South.⁸⁸ Republicans pushed expansions of federal civil rights remedies with a goal of protecting enforcement of federal policies across the reconstructed South.⁸⁹ But Republican interest in civil rights waned in the 1870s and gave way to a second priority, expanding the national economy by empowering large corporations.⁹⁰ The federal judiciary became a major tool in Republican economic policy, owing in large part to the party's control over the Senate and White House over this period of time, which allowed them to appoint judges sympathetic to their economic views.⁹¹

Republican interest in expanding the reach of federal judiciary culminated in the Judiciary Act of 1875, which drew the modern boundaries of federal jurisdiction by creating federal-question jurisdiction and expanding diversity jurisdiction.⁹² This fairly dramatic expansion in federal jurisdiction created the

84. See generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 665–66 (1999) (discussing the historical significance of *stare decisis* and the expansion of exceptions to the rule); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84 (2000) (explaining that the idea of precedent was always present but the binding effect was weak).

85. See, e.g., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096, 2098 (2018) (illustrating the Court's modern and complicated approach to its prior decisions).

86. See Tara Leigh Grove, *The Exceptions Clause As A Structural Safeguard*, 113 COLUM. L. REV. 929, 951–53 (2013) [hereinafter Grove, *Exceptions Clause*].

87. *Id.* at 950 n.89.

88. *Id.*

89. *Id.* at 989.

90. *Id.* at 950 n.89 (“[T]he political support for civil rights enforcement waned in the 1870s, and the Republicans turned instead toward building a strong national economy.”).

91. *Id.* at 950.

92. *Id.* at 951 (citing the Judiciary Act of 1875, ch. 137, §§ 1–2, 18 Stat. 470, 470–71).

first well-known “caseload crisis” in the federal courts and the Supreme Court specifically.⁹³

While Congress was busy expanding the reach of the lower federal courts, there was no meaningful reform to the system of processing appeals.⁹⁴ The 1789 scheme of appellate jurisdiction was still largely in place and the Supreme Court had mandatory jurisdiction over nearly all appeals.⁹⁵ This scheme perceived of the Supreme Court as resolving a narrow range of issues—namely, interstate disputes and state court compliance with the then-limited range of federal laws.⁹⁶ But the jurisdiction of the federal courts had expanded significantly to cover a wider range of issues, including non-federal issues when sitting in diversity jurisdiction.⁹⁷ The Court thus became burdened by mandatory jurisdiction over appeals covering a wide-range of new federal and non-federal issues.⁹⁸ During this time, the Supreme Court was processing somewhere between a quarter and a third of the matters docketed in a term.⁹⁹

The Justices pleaded to Congress for relief, eventually resulting in the Judiciary Act of 1891, also known as the Evarts Act after its sponsor Senator William Evarts.¹⁰⁰ The bargain of the 1891 Act was to maintain mandatory Supreme Court jurisdiction over cases involving questions of federal law, but to give discretionary jurisdiction over other cases, such as diversity suits, patent, admiralty, criminal, and tax cases.¹⁰¹ In the Supreme Court’s place, a new system of intermediate federal appellate courts—the federal circuit courts of appeals—would review these issues.¹⁰² The Evarts Act also created new circuit judge positions and, at long last, abolished mandatory circuit riding.¹⁰³ The circuit courts themselves lingered on separate from the circuit courts of appeals, creating particularly complicated questions of the relationship between the two intermediate courts until the circuit courts’ abolition in 1911.¹⁰⁴ But

93. *Id.* at 951–53.

94. *Id.* at 952–53.

95. *Id.*

96. *Id.* at 948.

97. *Id.* at 951.

98. *Id.* at 952–53.

99. *Id.* at 953.

100. *Id.* at 954, 957–58.

101. *Id.* at 958 n.141.

102. *Id.* at 954, 956–57.

103. Stras, *Ride Circuit*, *supra* note 40, at 1725–26.

104. *See id.* at 1726; Vestal, *supra* note 82, at 136.

eventually the Evarts Act gave the federal court system a familiar “symmetry and logic,” with the courts of appeals serving as the intermediate decisionmakers and the Supreme Court as “the apex” who would “establish the corpus juris of the federal system.”¹⁰⁵

The introduction of this discretionary review is often the focus of the Evart’s Act, and it marked an important shift in the role of the Supreme Court. Rather than processing the majority of appeals, the Evarts Act saw the Supreme Court as taking a supervisory role to “guard against diversity of judgment” in the intermediate appellate courts.¹⁰⁶ The goal was to provide the Court with “flexibility, elasticity, and openness” in its docket such that it could review cases “in the interest of jurisprudence and uniformity of decision.”¹⁰⁷

But another way of viewing the Supreme Court’s new discretionary review scheme is that the Act gave intermediate appellate courts final authority over certain cases. For our purposes, this was the primary innovation of the Evarts Act that marked the beginnings of the modern character of the federal appellate courts. The Supreme Court became a court of limited and discretionary review dedicated to systemic principles like uniformity, while the mine-run of appeals would be processed by independent, regional courts of appeals without further oversight. The minds behind the Evarts Act were aware that the change would create more conflicts and sought to balance that outcome with a structural compromise: the cost of the Supreme Court’s freedom will be a responsibility to supervise the lower courts to maintain uniformity.¹⁰⁸ Over time, increasing caseloads will stress this compromise. The courts of appeals will gain greater independence from each other and the Supreme Court, while the Supreme Court’s capacity (or desire) to maintain uniformity in federal law will fail. The resulting proliferation of conflicts has been a concern for decades.

The Evarts Act was only the beginning, however, of the Supreme Court’s path towards complete control over its docket and full freedom from the work of the lower courts. Importantly, the Act offered two ways to get the Supreme Court to review a case: by writ of certiorari, and by certification from the federal courts of appeals.¹⁰⁹ This second path gave the intermediate appellate courts some control over the Supreme Court’s docket by identifying questions that the

105. See Vestal, *supra* note 82, at 140.

106. See Grove, *Exceptions Clause*, *supra* note 86, at 954 (quoting 21 Cong. Rec. 10,222 (1890) (statement of Sen. William Maxwell Evarts, R-N.Y.)).

107. *Id.* at 954–55 n.123.

108. See Dragich, *supra* note 39, at 561–62.

109. See Grove, *Exceptions Clause*, *supra* note 86, at 958.

Supreme Court would have to address.¹¹⁰ But, as we'll see, the Supreme Court soon consolidated nearly complete control over its docket—leaving the courts of appeals with dramatic and seemingly unexpected independence.

3. The Judges' Bill and the Discretionary Docket

The introduction of intermediate appellate courts and discretionary review by the Supreme Court began a counterintuitive cycle that repeated over the next decades: federal dockets balloon in size, and in response the Supreme Court decides fewer cases, leaving the courts of appeals with greater independence. Granting the Supreme Court some control over its docket in 1891 did not end the Supreme Court's caseload problems, and Congress exacerbated things by continuing to expand the Court's jurisdiction over the twentieth century.¹¹¹ In 1914, Congress expanded certiorari jurisdiction to include all state cases where federal questions were involved, rather than simply cases where federal right had been defeated, as was the case since 1789.¹¹² And later, Congress added bankruptcy cases to the Court's certiorari jurisdiction.¹¹³

The Court's new role as “supervisor[] over” federal law was partly to blame for these expansions of its jurisdiction.¹¹⁴ It made sense to have the Court review all state cases involving federal issues and cases involving the federal bankruptcy powers if the Court was to supervise all federal law.¹¹⁵ But this prompted yet another caseload crisis, which in turn prompted the Judiciary Act of 1925, the so-called Judges' Bill.¹¹⁶

The 1925 Act is most closely associated with Chief Justice Taft, who lobbied “energetically” to shift the Court to an almost-entirely discretionary docket.¹¹⁷ Taft summarized that, since “the business has accumulated so that one court can not take care of all the appellate business, intermediate courts are introduced, and the office of the Supreme Court has ceased to be that of a

110. *Id.* Some have argued to return to certification. See Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1319–26 (2010).

111. See Grove, *Exceptions Clause*, *supra* note 86, at 962.

112. *Id.* at 963; Epps & Ortman, *supra* note 44, at 710.

113. Grove, *Exceptions Clause*, *supra* note 86, at 963.

114. *Id.* at 957, 963.

115. *Id.* at 963.

116. *Id.* at 963, 966–67; Epps & Ortman, *supra* note 44, at 711.

117. Epps & Ortman, *supra* note 44, at 711–12; see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1660–98 (2000) (discussing Taft's role in pursuing the discretionary docket).

tribunal to afford everybody a review of his case.”¹¹⁸ Rather, the Court’s “real work” was now to decide “important” and “significant” cases “for the purpose of expounding and stabilizing principles of law” that would “make the law clearer” to the public and litigants.¹¹⁹ Although there is a slight shift in rhetoric from uniformity to overall importance, there is a fairly clear line from the Evarts Act to the Judges’ Bill connecting systemic values such as stability and uniformity in federal law with the Court’s transition to a kind of judicial policymaker with control over its own agenda.¹²⁰

Yet the cycle continued: federal litigation grew at a dramatic rate through the latter half of the twentieth century and again outpaced the Court’s ability to manage its docket.¹²¹ The Court responded by retreating further still, generally deciding fewer cases (although there were some important fluctuations during the Warren and Burger courts).¹²² In 1988, Congress eliminated the Court’s mandatory appellate jurisdiction in all but a few circumstances.¹²³ The Court had achieved effectively complete control over what it would decide.¹²⁴

The relatively consistent rhetoric along the Supreme Court’s path to a discretionary docket masks the lack of guidance to the courts of appeals about their role in this new scheme. The creation in 1891 of intermediate appellate courts also created an intermediate body of decisional law without any real

118. Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 48 (2009) [hereinafter Grove, *Vertical Maximalism*].

119. *Id.* at 48–50 (first quoting William Howard Taft, Address to the New York County Bar Association 6–7 (Feb. 18, 1922), *microformed on* William H. Taft Papers, Reel 590 (Library of Congress); then quoting H.R. REP. NO. 68–1075, at 2 (1925); and then quoting *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. On the Judiciary*, 67th Cong. 2 (1922)).

120. For modern treatment of the Supreme Court’s various roles, see, for example, Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 237–44 (2016) (discussing the implications of different views of the Supreme Court’s role on its docket management). Notably, the Supreme Court adopted Rule 35(5) in 1925 that expressly noted intercircuit conflicts as one of the reasons for granting certiorari. See SUP. CT. R. 35(5)(b), 266 U.S. 681 (1925) (repealed 1939). However, the rule also emphasized the discretionary nature of the Court’s review. *Id.*

121. Grove, *Vertical Maximalism*, *supra* note 118, at 51–52.

122. See *infra* note 128 and accompanying text.

123. Judiciary Act of 1988, Pub. L. No. 100–352, 102 Stat. 662 (codified as amended at 28 U.S.C. §§ 1257–58 (1988)).

124. See Grove, *Vertical Maximalism*, *supra* note 118, at 51 (“In 1988, Congress responded by largely eliminating the Court’s remaining mandatory appellate jurisdiction so that the Court could hear virtually every appeal by way of discretionary certiorari review.”).

thought to its internal management or structure.¹²⁵ While Congress intervened in limited ways to increase the capacity of the courts of appeals—for example, Congress would increase the number of judges and staff in the circuits, create the Tenth Circuit in 1929, and split the Fifth Circuit in two in 1981—little was done to address this growing body of decisional law or the growing distance between the Supreme Court and the federal courts of appeals.¹²⁶ Combining the anachronistic geography of the circuit courts with more appellate decisionmakers and decreased supervision from the Supreme Court started the federal judiciary down a path towards producing less uniformity in federal law, not more.¹²⁷ These circumstances have created the conditions for pervasive conflicts among the lower circuits that, as far as we can tell, has quickly outpaced the Supreme Court’s ability (or desire) to resolve them.

B. *The Supreme Court’s Shrinking Docket*

The Supreme Court’s shrinking docket is well-known phenomenon among scholars and observers of the federal courts.¹²⁸ The basic “paradox” is that the Supreme Court has decided fewer cases while overall federal caseloads have increased.¹²⁹ For example, the Supreme Court has generally issued fewer opinions over the twentieth century, from between 150 to 200 written opinions

125. See Dragich, *supra* note 39, at 582 n.321.

126. See *id.* (discussing the creation of new circuits); *infra* Section II.C (discussing increase in judges and staff).

127. See Thomas E. Baker & Douglas D. McFarland, Commentary, *The Need for A New National Court*, 100 HARV. L. REV. 1400, 1407 (1987) (“The concept of the ‘law of the circuit,’ sometimes called the rule of interpanel accord, obliges a panel of circuit judges to treat as binding precedent earlier decisions of that same court of appeals, absent intervening en banc or Supreme Court action. Decisions of other courts of appeals, however, are deemed merely persuasive. This practice weakens the theory of one national law.”).

128. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 739 (2001) (“[P]resent[ing] a comprehensive assessment of the causes of this recent decline in the Supreme Court’s plenary docket”); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 404 [hereinafter Hellman, *Shrunk Docket*]; Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1508 (2008) [hereinafter Lazarus, *Advocacy Matters*] (“Others have written about the possible causes of the shrinking docket, which reportedly even mystifies the Justices themselves.”); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006) [hereinafter Starr, *The Ghost*] (“While no single answer explains the Rehnquist Court’s docket-shrinking behavior, the continual (and consistent) reduction of its caseload has been well documented.”).

129. See Lazarus, *Advocacy Matters*, *supra* note 128, at 1507–08 (identifying the shrinking docket as a “paradox”).

in the 1930s to around 70 written opinions a term in 2016, with a bit of variability until a fairly steady decline since the 1980s.¹³⁰ It is this modern (1980–90s) decline that most are referencing when they talk about the Court’s “shrinking docket.”¹³¹ By contrast, there has been a nearly twenty-fold increase in cases terminated by federal courts of appeals during this period—from less than 3,000 cases in 1932 to over 55,000 cases in 2016.¹³² Perhaps more tellingly, the Supreme Court reviews shockingly few of the *merits* decisions of the federal courts of appeals—between 70 and 80 of the 40,000 decisions issued “on the merits” by the courts of appeals a year.¹³³ Based on these numbers, a panel of a federal appellate court that decided a case on the merits in 2016 risked about a .002% chance that the Supreme Court would review its work.

The Supreme Court has maintained a focus on resolving conflicts even as its docket shrinks, which has resulted in important structural problems that exacerbate the distance between the Supreme Court and courts of appeals.¹³⁴

130. For the Supreme Court data, I used the Federal Judicial Center’s numbers on cases disposed “[b]y written opinions” from 1932 to 1969 and cases “[d]isposed by full opinion” from 1970 to 2016. *Caseloads: Supreme Court of the United States, Method of Disposition, 1932–1969*, FED. JUD. CTR. [hereinafter *Caseloads: 1932–1969*], <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-method-disposition-1932-1969> [https://perma.cc/4VAH-7SRX?type=image]; *Caseloads: Supreme Court of the United States, Method of Disposition, 1970–2016*, FED. JUD. CTR. [hereinafter *Caseloads: 1970–2016*], <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-method-disposition-1970-2016> [https://perma.cc/QSB6-36PC?type=image]. I’m assuming that these numbers are roughly analogous. Notably, both sets of numbers exclude per curiam opinions, even those issued after argument. *Caseloads: 1932–1969, supra*; *Caseloads: 1970–2016, supra*.

131. See, e.g., Hellman, *Shrunken Docket, supra* note 128 (comparing Supreme Court docket composition from the 1980s and 1990s); Starr, *The Ghost, supra* note 128, at 1368 (focusing on the Rehnquist Court).

132. For the Court of Appeals data, I also used the Federal Judicial Center’s numbers on cases terminated in the courts of appeals between 1932 and 2016. *Caseloads: U.S. Courts of Appeals, 1892–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/caseloads-us-courts-appeals-1892-2017> [https://perma.cc/GR6N-XMK6?type=image].

133. See *FAQ – General Information*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/ERT5-7MKW] (noting that the Supreme Court grants certiorari in about 1% of the roughly 8000 petitions for certiorari); U.S. COURTS, TABLE B-12. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2016.pdf [https://perma.cc/LZ9T-3J3J] (noting the merits decisions of the courts of appeals in 2016).

134. See Hellman, *Shrunken Docket, supra* note 128, at 415–16 (“[C]ases presenting inter-circuit conflicts did decline in number between the 1980s and the 1990s[. . .] but the diminution in conflict grants

For example, the Court seemingly fills a majority of its small docket—about 70%—with cases involving purported conflicts.¹³⁵ And it’s well known among practitioners that the presence of a circuit split on an issue is the most consistent indicator of whether the Supreme Court will grant certiorari in a case.¹³⁶ Separate from the impact of conflicts themselves,¹³⁷ the Court’s focus on conflicts has created structural problems between the Supreme Court and courts of appeals, such as what Daniel Epps and William Ortman have called “informational” and “accountability” gaps.¹³⁸ The vast majority of appellate decisions will not result in a split, such that it is all but guaranteed that the Supreme Court will not review appellate decisions in cases that are typical or quotidian.¹³⁹ Moreover, there are important issues where splits just do not develop as frequently or at all, such as where law or circumstance send a particular type of case to one circuit court (like patent cases in the Federal Circuit) or a small number of circuits (like Indian law cases in the Eighth, Ninth, and Tenth circuits).¹⁴⁰ Likewise, splits may not develop on important issues where lower courts agree on a legal standard but need guidance in how to *apply*

is modest compared with the shrinkage in cases that did not involve intercircuit conflicts . . . [and] the number of conflict [cases involving statutory interpretation] actually increased[.]”).

135. See Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 274 (2013) (“As many as 70% of the cases before the Court where certiorari has been granted present clear conflicts between either the federal courts of appeals or state courts of last resort.”); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981 (2007) (“Evaluating petitions for certiorari, lower court opinions, and the Court’s opinion to determine whether a case involved a lower court conflict, the study determined that nearly 70% of the cases reviewed by the Court involved a split among the lower courts.”) (book review).

That said, conflicts are notoriously difficult to track, partly because there are incentives for lawyers and judges to hide, grandstand, or otherwise manipulate the extent of a conflict for purposes of influencing the Court’s review. See Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L. 361, 361–62 (2014) (discussing why it is “difficult” to determine which of the Supreme Court’s cases involve splits “and how the difficulties mar the resulting measurements” of the Supreme Court’s relationship with intercircuit conflicts); see also *id.* at 375 (“One could read the certiorari petitions, of course, but taking them at face value would likely lead to overinclusion, given that petitioners have a powerful incentive to claim a conflict whenever possible.”).

136. See, e.g., STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT, & DAN HIMMELFARB, *SUPREME COURT PRACTICE* §§ 4.3, 4.4 (10th ed. 2013).

137. See, e.g., Frost, *supra* note 18, at 1582–84.

138. Epps & Ortman, *supra* note 44, at 717–23.

139. *Id.* at 721–22.

140. *Id.* at 728–29; see also Matthew L.M. Fletcher, *Factbound and Splitless, The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 956 (2009).

that standard, or where the consensus of appellate courts simply get the law wrong.¹⁴¹ The Court's focus on conflicts therefore deprives the Court of a full picture of the types of cases and issues facing the lower courts, including what issues are important to resolve—the “informational” gap.¹⁴² And the courts of appeals judges *know* the vast majority of their decisions will not be reviewed by the Supreme Court, especially if they write an opinion that appears routine—the “accountability” gap.¹⁴³

The Court's focus on splits also opens its docket to more direct manipulation. The Supreme Court's decisions have immense influence over the nation as a whole, and the Court's reliance on splits gives lawyers and Court-watchers a clear, reliable signal to tap the Court's power. By creating or tracking splits, a small group of Supreme Court practitioners and the interests they represent have “captured” the Supreme Court's docket.¹⁴⁴ These lawyers represent the vast majority of clients before the Court, sometimes arguing several cases before the Court in a single term.¹⁴⁵ This capture yields a substantial influence over the Court's decisions: studies show that you are not only more likely to have the Court grant review in your case if one of these repeat players represents you, you are more likely to win your case too.¹⁴⁶ The Court's continued focus on resolving splits is the key to this influence.

Concerns with how the Supreme Court selects cases and the impact that process has on the courts of appeals have prompted calls for reform over several decades, many of which were focused on the specific problem of pervasive conflicts.¹⁴⁷ For example, a study group of the Federal Judicial Center

141. Epps & Ortman, *supra* note 44, at 729.

142. *Id.* at 720.

143. *Id.* at 721–23.

144. Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 89 (2009) [hereinafter Lazarus, *Docket Capture*], <https://www.yalelawjournal.org/forum/docket-capture-at-the-high-court> [<https://perma.cc/4JG8-S3ZY>] (discussing “the very real possibility that the Court's plenary docket is increasingly captured by an elite group of expert Supreme Court advocates, dominated by those in the private bar.”).

145. *Id.* at 90; Lazarus, *Advocacy Matters*, *supra* note 128, at 1520.

146. See Lazarus, *Advocacy Matters*, *supra* note 128, at 1521–62 (2008) (discussing repeat advocates' success at the certiorari and merits stage); see also Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. 429, 459 (2016) (“The most experienced attorneys and firms predominately write briefs that are more successful (based on the overlap measure) than those from other attorneys. Their briefs are also generally of a higher than average writing quality for briefs submitted to the Supreme Court.”).

147. See generally Baker, *Generation Spent*, *supra* note 1 (discussing the history of reforms).

appointed by Chief Justice Burger was tasked with studying the Supreme Court's caseload and methods for resolving it.¹⁴⁸ In 1972, the group “called for nothing less than a widescale revamping of the federal judiciary system[.]” including creating a new National Court of Appeals dedicated to resolving conflicts in the Supreme Court's place.¹⁴⁹ The proposal for a national court to address conflicts was subsequently endorsed by a congressional commission¹⁵⁰ and the Federal Judicial Center's Advisory Council on Appellate Justice in 1975,¹⁵¹ revived by Chief Justice Burger in the early 1980s,¹⁵² but then went nowhere.¹⁵³ The string of proposals rejected in the Judicial Conference's 1995 Long Range Plan for the Federal Courts—including, for example, “proposals to consolidate the present circuits into a few ‘jumbo’ circuits” or create “a new tier of federal courts”¹⁵⁴—is illustrative of the surprising breadth and tenor of debates over reforming the relationship between the Supreme Court and courts of appeals during this time.

There has been a notable increase in proposals to reform the Supreme Court's docket in the last decade or so, often with a focus on conflicts.¹⁵⁵ For example, Epps and Ortman recently argued that the Supreme Court should

148. Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 *FORDHAM LAW REV.* 863, 863 (1973).

149. *Id.* at 863–64.

150. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 *F.R.D.* 195, 208–09 (1975) [hereinafter Hruska Commission Report] (“The Commission recommends the creation of a new national court of appeals, designed to[, among other things,] resolv[e] conflicts between circuits after they have developed, and . . . , by anticipating and avoiding possible future conflicts, eliminate years of repetitive litigation and uncertainty as to the state of the federal law.”).

151. See Baker, *Generation Spent*, *supra* note 1, at 402 (“After a four-year study, the Advisory Council, comprised of judges, lawyers, and law professors, developed guidelines for restructuring the federal appellate system much in line with the recommendations from the Hruska Commission.”).

152. See Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 *GA. L. REV.* 913, 930 (1994) [hereinafter Baker, *Alternative Futures*] (noting that the Chief Justice revived the proposal in 1983 and that “Justices White, Rehnquist, Powell, and O’Connor supported the Chief Justice’s idea”). *But see* Brennan, Jr., *supra* note 3, at 475 (arguing against the proposition of a National Court of Appeals).

153. Baker, *Generation Spent*, *supra* note 1, at 402; see also Chief Judge Edward R. Becker, *Contemplating the Future of the Federal Courts of Appeals*, 34 *U.C. DAVIS L. REV.* 343, 346 (2000) (“As we have seen, the suggestions for a National Court of Appeals have disappeared; they are not even on the radar screen anymore in view of the sharply decreasing docket of the Supreme Court.”).

154. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 46 (1995).

155. See Epps & Ortman, *supra* note 44, at 729 (“[P]roposals have proliferated in recent years”).

select its cases by lottery to help mitigate the negative effects of its focus on conflicts.¹⁵⁶ Other proposals have included reforming certiorari around administrative law principles;¹⁵⁷ remaking the Supreme Court along the lines of the courts of appeals so that it can decide more cases and conflicts;¹⁵⁸ adding more judges,¹⁵⁹ adding more staff,¹⁶⁰ or limiting the role of law clerks in the certiorari process;¹⁶¹ reviving courts of appeals' ability to certify cases;¹⁶² and just flat forcing the Supreme Court to take more cases.¹⁶³

Most of these proposals focus on reforming the certiorari process, and within this context, debate which reform will cause the least disruption to the work and structure of the federal courts.¹⁶⁴ In doing so, most proposals have overlooked opportunities to reform how the courts of appeals generate and perpetuate conflicts.¹⁶⁵ To consider those opportunities, we need to understand how the circuit courts' decisionmaking practices have changed in the face of increasing caseloads and the Supreme Court's shrinking docket. As the next

156. *Id.* at 732–34.

157. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 21–25 (2011).

158. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1449–50 (2009).

159. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 632 (2009).

160. Lazarus, *Docket Capture*, *supra* note 144, at 97.

161. Starr, *The Ghost*, *supra* note 128, at 1376–77.

162. See Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1289 (2010); Tyler, *supra* note 110, at 1319–26.

163. Starr, *The Ghost*, *supra* note 128, at 1366.

164. See, e.g., Epps & Ortman, *supra* note 44, at 731 n.171 (“George and Guthrie’s innovative proposal would achieve some of the same benefits as our proposal, but—given its total redesign of the Supreme Court—at a substantially higher cost. Our proposal would be far easier to implement.”).

165. The primary exception is proposals to make the first decision in any circuit the law of all circuits, which I discuss in Section III.B.2. See 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, 635 (2003) (arguing in favor of “intercircuit stare decisis”); Dragich, *supra* note 39, at 587 (same). Todd Thompson also proposed reforming the courts of appeals rather than the Supreme Court to deal with caseload problems, but unlike proposals of a strict rule of intercircuit stare decisis, Thompson proposed structural changes to the courts of appeals, such as dividing the courts into subject-matter divisions and proposing an alternative national court that would “act like an en banc panel for the entire circuit court system.” Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 492–503 (1984). Like structural reforms to the Supreme Court, structural reforms to the courts of appeals also risk high implementation costs.

section explains, the courts of appeals developed their own tools to cope with the twin pressures of increasing caseloads and increasing independence, including the law of the circuit doctrine to help manage each circuit's growth and independence. But in a world where the Supreme Court cannot meaningfully reconcile conflicts across these independent circuits, the law of the circuit doctrine now exacerbates the negative effects of the Court's focus on uniformity.

C. *Precedent and Publication in the Courts of Appeals*

While the overall structure of the federal courts did not change, increasing caseloads nevertheless caused several important institutional changes in the courts of appeals over the middle of the twentieth century. The courts received (many) more judges—from 19 judges in 1892, to 75 judges in 1950, to 179 judges in 1990.¹⁶⁶ These judges sat on an increasing variety of three-judge panels, issuing more decisions.¹⁶⁷ It became normal for the panel of judges deciding a case to not know the views of the other judges on the court regarding the issues they were deciding.¹⁶⁸ The courts also received more staff, and judges began to rely on staff attorneys and law clerks to perform in-chambers functions historically seen as aspects of the judicial function, such as screening unmeritorious appeals, closely reading the record and precedents, and drafting opinions.¹⁶⁹ Less time, more hands, and more cases led to both real and perceived decreases in the quality of appellate decisionmaking.¹⁷⁰ The job lost features of an orderly, collegial, and careful deliberative process that was a

166. COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 13, tbl.2-2 (1998) [hereinafter White Commission Report].

167. *Id.* at 13–14.

168. See Hruska Commission Report, *supra* note 150, at 266 (“Even under more favorable conditions many circuits no longer undertake to have each active judge review decisions before they are handed down, and in larger circuits there is already evidence that all of the judges may no longer be able to remain current with the law of the circuit as it develops.”).

169. See White Commission Report, *supra* note 166, at 21–23 (discussing the “genuinely new” practice “[s]tarting in the early 1970s” of hiring “central staff attorneys to,” among other things, “perform a screening function,” “review the briefs and records,” and “in some courts . . . recommend dispositions and draft proposed opinions.”).

170. See, e.g., *id.* at 24 (“[T]he process . . . raises apprehensions as to the degree of attention . . . appeals actually receive from judges themselves”).

hallmark of the courts' initial years.¹⁷¹ In its place was a rushed, isolating, and seemingly endless press of appeals.¹⁷²

The Supreme Court's increasing distance from the courts of appeals and general lack of guidance from Congress provide important context to these changes in the character of the courts of appeals. The courts of appeals were developing into an independent institution largely on their own, making it up as they went. Many issues were on the table, without clear answers: how would the geographic circuits interact with each other? How would the increasingly large number of judges within a circuit interact with each other? How would the courts of appeals understand their relationship to the increasingly distant Supreme Court? The courts confronted these issues mostly over the latter part of the twentieth century.¹⁷³ One innovation of this period was the development of the law of the circuit doctrine. The primary purpose of this section is to describe the law of the circuit doctrine as it developed and as it exists today. Another innovation of this period was the adoption of policies to not publish certain decisions, or what I'll call "nonpublication" policies. A secondary purpose of this section is to briefly distinguish the law of the circuit doctrine from nonpublication policies. Though sometimes conflated, the two are distinct, and distinguishing them offers greater clarity regarding the purposes of the law of the circuit doctrine and its role in perpetuating conflicts among the circuits. This clarity sets up our critical discussion of the doctrine's purposes in Part III.

1. The Law of the Circuit

The law of the circuit doctrine is, at its heart, a "strict," "binding," and "rigid" rule that a panel of a federal court of appeals may not revisit the decision of a prior panel on the same court.¹⁷⁴ Rather, a panel may only revisit a prior

171. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168 (1978) (quoting Remarks by Chief Judge Collins J. Seitz, Third Circuit Judicial Conference (Sept. 22, 1976)) ("I hope I am not telling secrets when I say that there was an overwhelming feeling that in deciding, as they do now, some 240 cases a year, they [the circuit judges] were perilously close to compromising the integrity of the decision making process.").

172. *Id.* (quoting Remarks by Chief Judge Collins J. Seitz, Third Circuit Judicial Conference (Sept. 22, 1976)) ("[J]udges were concerned whether they had sufficient 'thinking' and research time to feel reasonably satisfied with their votes in all the 240 or more appeals on which they sat.").

173. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *Lacy v. Gardino*, 791 F.2d 980, 985 (1st Cir. 1986).

174. See Barrett, *supra* note 29, at 1017–18, 1018 n.20 (collecting cases from every circuit).

decision when there has been an intervening change in higher authority, like an en banc or Supreme Court decision or a change in statutory or constitutional law.¹⁷⁵ The rule itself is sometimes referred to as the “prior panel rule” or rule of “interpanel accord.”¹⁷⁶ The phrases “circuit precedent” and “law of the circuit” are often used to describe both the rule and the body of case law within a specific circuit (both panel decisions and en banc decisions) that enjoys the benefit of the rule.¹⁷⁷

Every circuit adopted this rule in case-law, and many reiterate it in local rules or court policies.¹⁷⁸ Nevertheless, there can be considerable variation in how the modern rule is applied.¹⁷⁹ For example, what counts as a “change” in higher authority can vary from circuit to circuit. Some circuits will revisit a case because the reasoning of a new Supreme Court case undermines the reasoning of a prior decision.¹⁸⁰ Other circuits refuse to do just that.¹⁸¹ At least one circuit recognizes “rare circumstances” where “non-controlling but persuasive case law”—including decisions from other circuits—can justify

175. See *id.* at 1018 n.20 (collecting cases from every circuit).

176. See, e.g., *United States v. Dunn*, 728 F.3d 1151, 1156 (9th Cir. 2013) (“Rather, under the rule of interpanel accord, we must follow *Colson* unless there is intervening Supreme Court authority or en banc authority to the contrary.”); *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004) (“Under the prior panel rule, we are bound by the holdings of earlier panels unless and until they are clearly overruled en banc or by the Supreme Court.”); see also, e.g., *Dragich*, *supra* note 39, at 538 (“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.”).

177. See, e.g., *United States v. Orona*, 923 F.3d 1197, 1203 (9th Cir. 2019) (noting the obligation “to ‘apply our prior circuit precedent without running afoul of the intervening authority.’”); *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010) (“The ‘law of the circuit’ rule” states that “newly constituted panels in a multi-panel circuit court are bound by prior panel decisions that are closely on point.”); see also, e.g., *Hruska Commission Report*, *supra* note 150, at 205 (discussing “stability and harmony in the law of the circuit”).

178. *Barrett*, *supra* note 29, at 1017–18 (noting “the rule . . . that one panel cannot overrule another” is “followed in every circuit”); *Mead*, *supra* note 27, at 794–95 (“With the arguable exception of the Seventh Circuit, each circuit court has adopted some version of ‘law of the circuit.’”).

179. See *Mead*, *supra* note 27, at 795 (discussing the doctrine’s “considerable complexity”).

180. See, e.g., *United States v. Holloway*, 630 F.3d 252, 258 (1st Cir. 2011) (“A Supreme Court opinion need not be directly on point to undermine one of our opinions.”).

181. See, e.g., *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 331 (5th Cir. 2013) (“[A] panel of this court can only overrule a prior panel decision if such overruling is unequivocally directed by controlling Supreme Court precedent.”).

departing from a prior decision.¹⁸² Others refuse to do just that.¹⁸³ And some circuits have made it easier to reconsider prior decisions by, for example, changing their en banc rules to allow hearings with less than the full membership of the court.¹⁸⁴ Or by allowing panels to overrule prior decisions so long as the panel's new decision is first circulated to all members of the court for approval—sometimes called “mini-en banc” procedures.¹⁸⁵ Other circuits haven't made such changes.¹⁸⁶ The bottom line is that the doctrine is strict enough to generally prohibit circuits from reconsidering prior decisions in light of a relevant change in circumstances, but multifaceted enough that the same change can yield different outcomes in different circuits.¹⁸⁷

This strict, rule-based approach to prior decisions is a departure from a flexible approach to prior decisions that predominated in the circuit courts and courts of appeals through most of their history.¹⁸⁸ For example, the early intermediate courts seemed to treat both relevant prior decisions and decisions from other circuits similarly, viewing them as not binding but worthy of careful consideration.¹⁸⁹ The strict, rule-based approach to prior decisions currently

182. *United States v. Rodriguez*, 311 F.3d 435, 438–39 (1st Cir. 2002) (quoting *United States v. Chhien*, 266 F.3d 1, 11 (1st Cir. 2001)).

183. *United States v. Vega-Castillo*, 540 F.3d 1235, 1236–37 n.3 (11th Cir. 2008) (“It is important to note that the First Circuit employs a different prior precedent rule.”).

184. 9TH CIR. R. 35–3 (providing for a “Limited En Banc Court” with the Chief Judge and 10 randomly-drawn active judges).

185. *See, e.g.*, 7TH CIR. R. 40(e); *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981) (“The foregoing part of the division’s decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit.”); *see also* *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 n.9 (2d Cir. 2009) (referring to the practice of circulating an opinion overruling a prior panel decision to all active members of the court prior to filing a “mini-en banc” process).

186. *See* Sloan, *Stealth Procedures*, *supra* note 39, at 726 (noting that “The U.S. Courts of Appeals for the Third, Ninth, Eleventh, and Federal Circuits do not authorize or use” informal en banc procedures).

187. *Compare, e.g.*, *United States v. Rodriguez*, 527 F.3d 221, 225 (1st Cir. 2008) (overruling a prior panel decision because the Supreme Court’s opinion in *Kimbrough v. United States*, 552 U.S. 85 (2007), undermined its reasoning), *with* *United States v. Reyes-Hernandez*, 624 F.3d 405, 418–19 (7th Cir. 2010) (overruling prior panel decision in light of *Kimbrough*, 552 U.S. 85, using 7TH CIR. R. 40(e)), *and* *Vega-Castillo*, 540 F.3d at 1236–37 n.3 (refusing to overrule prior decision in light of *Kimbrough*, 552 U.S. 85, and distinguished the First Circuit’s approach).

188. *See* Mead, *supra* note 27, at 795, 795 n.58 (noting that “[h]istorically, some deference was extended, but panels could reject precedent if it was erroneous in the later panel’s eyes” and collecting cases as early as 1919).

189. Vestal, *supra* note 82, at 130–31.

applied in the courts of appeals is “decidedly modern.”¹⁹⁰ The strict approach seems to have “surfaced” in the late 1950s,¹⁹¹ “change[d]” the circuits’ approach to prior decisions through the 1960s,¹⁹² and “solidified” across the circuits in the 1970s.¹⁹³

Most courts adopting the strict rule generally did not explain why they were making this change.¹⁹⁴ Those that did stressed the need to maintain uniformity and stability in the circuit’s decisions.¹⁹⁵ This is consistent with contemporary sources, which described the rule as a “tradition” or practice the courts themselves developed, rather than, for example, an obligation dictated by statute or Supreme Court precedent.¹⁹⁶ To this day, the rule-like approach to the courts of appeals’ prior decisions is distinguishable from balancing principles of *stare decisis* applied by the Supreme Court to its own decisions.¹⁹⁷

190. Barrett, *supra* note 29, at 1065–66; *see also* Mead, *supra* note 27, at 795 (“The adoption of a law-of-the-circuit rule is a ‘relatively modern judicial phenomenon.’”).

191. Barrett, *supra* note 29, at 1065–66.

192. Mead, *supra* note 27, at 796; *see also, e.g.*, Chappell & Co. v. Frankel, 367 F.2d 197, 201 (2d Cir. 1966) (noting that the flexible “rule of our circuit has commanded no following in other federal courts of appeals and has been much criticized by the commentators.”).

193. Mead, *supra* note 27, at 796.

194. *See, e.g.*, Mallory v. United States, 259 F.2d 801, 802 (D.C. Cir. 1958) (“It is an informal but generally accepted rule of this court that a recent opinion of a division may not be overruled by another panel of judges, but only by the full bench.”); *Am.-Foreign S.S. Corp. v. United States*, 265 F.2d 136, 142 (2d Cir. 1958) (“However, we will not overrule these recent decisions of other panels of the court.”), *vacated on other grounds*, 363 U.S. 685 (1960); *see also* Barrett, *supra* note 29, at 1066 n.214 (collecting some early cases).

195. *See, e.g.*, Lacy v. Gardino, 791 F.2d 980, 985 (1st Cir. 1986) (“Uniformity of decisions within a multi-panel circuit can only be achieved by strict adherence to prior circuit precedent, with the error-correcting function reserved to the court sitting en banc.”); *see also* Of Course, Inc. v. Comm’r, 499 F.2d 754, 760 (4th Cir. 1974) (Boreman, J., concurring in part and dissenting in part) (“This Circuit has deemed it unseemly, presumptuous and an unacceptable practice for one panel to assume to overrule a decision of another panel of this court; the decision of a panel becomes the law of the Circuit until it is overruled by the court sitting in banc.”).

196. *See, e.g.*, Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867 (3d Cir. 1984) (“It is the tradition of this court that reported panel opinions are binding on subsequent panels.”) (quoting the Internal Operating Procedures of the Court of Appeals for the Third Circuit, Chapter 8.C.).

197. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (discussing *stare decisis*); *see also* Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1465 (2010) (“Because there was no individual or group of individuals who would purport to independently speak for ‘the court,’ it should not be surprising that the rules of precedent developed in a manner that treated prior panel decisions as binding on subsequent panels to a degree that was even stronger—that is, more binding—than that followed by the Supreme Court or individual district court judges.”).

In contrast to the strict prior panel rule, the circuits' have maintained a flexible approach to the decisions of other circuits. Before the appointment of circuit judges in 1869, the circuit courts were, in many ways, "extensions of the Supreme Court," and opinions from that time show that the Justices sitting in circuit courts gave opinions of other Justices respectful consideration but "not conclusive" weight until they all sat together on an issue.¹⁹⁸ With the advent of circuit judges, these judges struggled with whether to follow relevant opinions from other jurisdictions on similar issues, sometimes deferring and sometimes not, but generally avoiding a strict rule.¹⁹⁹ One circuit judge's opinion from 1891, for example, rejected a party's argument that "when one circuit court of the United States decides a point, all the others should conform their views to this decision, until the matter is settled by the rulings of the supreme court," reasoning that "[i]n the Bible there is the command: 'Thou shalt not follow a multitude to do evil.'"²⁰⁰

The issue of whether or not to follow the decisions of other circuits enjoys one of the rare instances of Supreme Court guidance in this area. In *Mast, Foos & Company v. Stover Manufacturing Company*, the petitioner argued that the Seventh Circuit had erred in deciding not to follow the decision of the Eighth Circuit on an issue of patent enforcement.²⁰¹ In a short opinion issued in 1900, the Supreme Court disagreed and affirmed the Seventh Circuit's decision to split from the Eighth Circuit.²⁰² "Comity," the Court reasoned, "is not a rule of law, but one of practice, convenience, and expediency."²⁰³ 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."²⁰⁴ Deference comes into play only where "there may be a doubt as to the soundness of [the judge's] views" such that "a uniformity of ruling to avoid confusion" would be preferable "until a higher court has settled the law."²⁰⁵ The Court made clear that "no one" should

198. Vestal, *supra* note 82, at 130–31.

199. *Id.*; *see also id.* at 136–37 (identifying a minority of circuit courts that, after the advent of the court of appeals, deferred to prior decisions from other circuit courts for purposes of "comity, avoidance of confusion, time constraints of the courts, and a belief that if the circuit court were not to be followed, the circuit court of appeals should make that decision.").

200. *Id.* at 135 (quoting *N. Pac. R.R. Co. v. Sanders*, 47 F. 604 (C.C.D. Mont. 1891)). As noted, some still propose this solution today. *See* Thompson, *supra* note 165, at 494.

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

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 488–89.

“abdicate his individual judgment” in a case based on a decision from a “coordinate tribunal.”²⁰⁶ It is a mistake to overread *Mast, Foos & Company* as mandating circuit independence, as some suggest.²⁰⁷ But the decision, often paired with congressional maintenance of the regional circuits over time, can reasonably be read as support for a longstanding practice of treating decisions from other circuits as persuasive and not binding authority.²⁰⁸

In a sense then, there are two sides of the law of the circuit as a legal concept. One is the strict rule to follow prior panel decisions, while the other is the flexible approach to the decisions of other circuits: strict adherence, combined with balkanization. One is not necessary for the other, and while our primary interest is the prior panel rule and conflicts, the circuits’ decisional independence is both relevant and important. As others have recognized, the combination of these two aspects lays the groundwork for pervasive conflicts.²⁰⁹ Freeing each circuit to consider an issue according to the facts and context of each case—to “decide them right,” as the Supreme Court encouraged²¹⁰—predictably results in disagreements among the circuits.²¹¹ But it is the other side, the strict prior panel rule, that gives conflicts their rigid and yet unstable character.²¹² Rather than enabling a dialogue between the disagreeing circuits, the strict rule effectively locks each side of the disagreement into place. In this way, conflicts are persistent and rigid; accumulating cases—maybe even settling on a best practice—but unable to

206. *Id.* at 489.

207. Compare Dragich, *supra* note 39, at 584 (stating that *Mast, Foos & Co.*, 177 U.S. 485, adopted a “rule of comity”), with *Mast, Foos & Co.*, 177 U.S. at 488 (“Comity is not a rule”).

208. See, e.g., Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1094–95 (2017) (“Congress was aware that dividing the courts of appeals into regional circuits would create disuniformity, and thus a lack of intercircuit stare decisis was foreseeable, perhaps even inevitable, from the structure of the regional circuits. This policy choice was explicitly recognized in *Mast, Foos & Co. v. Stover Manufacturing Co.* . . . [H]owever, Congress created and maintained a system without intercircuit stare decisis . . .”).

209. Baker & McFarland, *supra* note 127, at 1407 (“The concept of the ‘law of the circuit,’ sometimes called the rule of interpanel accord, obliges a panel of circuit judges to treat as binding precedent earlier decisions of that same court of appeals, absent intervening en banc or Supreme Court action. Decisions of other courts of appeals, however, are deemed merely persuasive. This practice weakens the theory of one national law.”).

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

211. Berger, *supra* note 208, at 1094.

212. See Dragich, *supra* note 39, at 566 (“The so-called rule of interpanel accord 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.”).

fully resolve the conflict without costly and unlikely intervention by the Supreme Court or en banc court. Yet this rigidity does not mean that conflicts are also stable. Rather, regional variations in the law of the circuit doctrine itself mean that the same change in the law can cause different changes in different circuits, sometimes inadvertently. The result is a rigid yet unstable scheme that, among other problems, hinders the courts of appeals from adopting a uniform approach to an issue through dialogue and collective experience.

2. Unpublished Opinions

Another innovation of this period was the practice of issuing nonprecedential or unpublished opinions. The history, merits, and use of nonprecedential or unpublished opinions in the courts of appeals is extensively covered elsewhere.²¹³ My goal here is to distinguish the adoption of nonpublication policies, and vigorous debate about unpublished opinions, from the development of the law of the circuit doctrine. This is a necessary aside because the development of the law of the circuit doctrine is sometimes credited to the adoption of nonpublication policies.²¹⁴ The practice of distinguishing between precedential and nonprecedential decisions wouldn't be meaningful, the thinking goes, unless the precedential decisions bound future panels.²¹⁵ But this thinking is likely a mistake for two reasons.

First, nonpublication policies were adopted after the development of the law of the circuit doctrine in at least some circuits.²¹⁶ General concerns with the "avalanche of decisional law" published by the federal courts have existed for the entire twentieth century, but there was no unified attempt to limit

213. See generally, e.g., Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002) (giving context to Rule 32.1); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001) (discussing history and merits of nonpublication policies); Reynolds & Richman, *supra* note 171, at 1168 (an earlier example); Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005) (discussing the adoption of Federal Rule of Appellate Procedure 32.1).

214. See Mead, *supra* note 27, at 796 ("Although it is not precisely clear what sparked the change, it can probably be attributed to the confluence of two phenomena: an increase in the number of cases and judges, and the birth of limited publication practices.").

215. *Id.* ("the ability of a panel to explicitly endorse an opinion as 'published' enhanced the decision's status: not only in symbolic effect, but by limiting the number of precedents entitled to heightened deference and by signaling that the precedent is the product of some heightened attention by the deciding judges.").

216. *Id.* at 798–99; Katsh & Chachkes, *supra* note 213, at 291–92.

publication of federal appellate decisions until the 1970s.²¹⁷ In 1964, the Judicial Conference recommended that the courts of appeals only publish decisions of “general precedential value,” to assuage the “increasing practical difficulty and economic cost of establishing and maintaining private and public law library facilities.”²¹⁸ Recognizing a “widespread consensus that too many opinions are being printed or published or otherwise disseminated” in 1971, the Federal Judicial Center requested in 1972 that each circuit develop a policy for issuing unpublished decisions and, importantly, prohibiting citation to those opinions.²¹⁹ By 1974, every circuit had adopted rules authorizing unpublished decisions and prohibiting citation of those decisions—although the rules varied considerably.²²⁰ While it’s hard to draw clear conclusions, the law of the circuit doctrine seems to have developed before then in at least some circuits—around the 1950s and 1960s—and was “solidif[ying]” in the circuits by the time nonpublication policies were solicited by the Federal Judicial Center.²²¹

Second, this thinking conflates a court’s ability to designate some decisions as nonprecedential with a separate issue about how the court will treat its precedential decisions. The law of the circuit doctrine mandates how a court will treat its full-blown precedent—with strict adherence as opposed to a flexible approach. Nonpublication policies allow courts to designate some opinions as something less than full-blown precedent. One is not required for the other. For example, a court of appeals that has a flexible approach to its full-blown precedent could still have a policy of designating some of its decisions as nonprecedential in order to spend less time and judicial effort on those decisions. And the opposite could be true: a court of appeals that views all of its decisions as having *some* precedential value could still have a rule that prohibits later panels from revisiting a category of precedential decisions—that appears to be the case in the D.C. Circuit.²²² The law of the circuit doctrine and

217. Reynolds & Richman, *supra* note 171, at 1169–70; *see also* David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 84 (2009) (“the first rumblings about limiting citation began in the Third and Fifth Circuits in the 1940s.”).

218. Cleveland, *supra* note 217, at 84–85.

219. Reynolds & Richman, *supra* note 171, at 1169–70.

220. Katsh & Chachkes, *supra* note 213, at 292.

221. *See* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 580 (1969) (noting that the law of the circuit as having “emerged”); Mead, *supra* note 27, at 796.

222. *Compare* D.C. CIR. R. 32.1(b)(1)(B) (“All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January

nonpublication policies deal with similar but independent issues, and one is not a necessary result of the other.

Confusion between the two is likely a result of the debate over citation to unpublished decisions in the 2000s, which raised larger issues about precedent in the courts of appeals.²²³ Again, this debate is covered extensively elsewhere.²²⁴ Two limited takeaways should suffice for our purposes here. The first is that the debate over unpublished opinions occurred in the shadow of the law of the circuit doctrine, not the other way around. For example, the Ninth Circuit's opinion in *Hart v. Massanari* featured prominently in this debate and argued that nonpublication policies were necessary *because of* the strictures of the law of the circuit doctrine.²²⁵ This further emphasizes that the law of the circuit doctrine was never in doubt during the debate over unpublished opinions, and suggests that, if anything, the law of the circuit doctrine has had an influence on the maintenance of nonpublication policies rather than the opposite.

The second takeaway is that the debate over unpublished decisions largely exhausted observers on the more difficult questions about nonprecedential opinions that could genuinely implicate the law of the circuit doctrine. One primary account of the debate over unpublished opinions suggests that judges resisted citation to unpublished decisions so vigorously because they feared the change would raise deeper concerns about the practice of issuing nonprecedential opinions.²²⁶ “[J]udges view unpublished opinions with discomfort or even embarrassment.”²²⁷ Prohibiting citation to these decisions

1, 2002, may be cited as precedent.”), with *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (noting that “One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court.”). See also D.C. CIR. R. 36(e)(2) (“a panel’s decision to issue an unpublished disposition means that *the panel* sees no precedential value in that disposition.”) (emphasis added).

223. Barnett, *supra* note 213, at 21; Katsh & Chachkes, *supra* note 213, at 289; Schiltz, *supra* note 213, at 1458.

224. See generally, e.g., Barnett, *supra* note 213; Schiltz, *supra* note 213.

225. *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001) (“Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings.”); see also Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 625 (2009) (“Other judges confirm that the use of unpublished opinions enables them to devote less time to those latter opinions and to hastily resolve certain cases, and they acknowledge that unpublished opinions do not receive the same scrutiny as published opinions.”).

226. Schiltz, *supra* note 213, at 1489.

227. *Id.*

would ensure that they do not come back to “haunt” the judges.²²⁸ Removing that barrier may, judges feared, bring a reckoning with the practice of issuing nonprecedential decisions themselves.²²⁹ But no such reckoning has happened—both the law of the circuit doctrine and nonpublication practices operate largely as they had before the debate.

Others have drawn connections between nonpublication practices and the law of the circuit, but nothing causal. For example, Amy Sloan has suggested that the dominance of unpublished decisionmaking in the courts of appeals has “eroded” the law of the circuit doctrine “beyond recognition.”²³⁰ But, by the same token, the dominance of unpublished decisionmaking has amplified the lock-in effect of published decisions. All circuits will publish, as a matter of practice, decisions that create, implicate, or resolve conflicts.²³¹ Counterintuitively then, judges avoid unpublished decisions in conflict cases, where issues are in the greatest flux, in favor of a more rigid tool to solidify them.

To sum, growing federal caseloads resulted in a structural compromise embodied by the courts of appeals: create independent intermediate courts to decide most appeals, while freeing the Supreme Court to focus its efforts on maintaining uniformity and stability in federal law. Over time, the effects of still-growing federal caseloads have again and again disrupted this balance, resulting in the courts of appeals’ greater independence over the development of federal law while undermining the Supreme Court’s capacity to maintain uniformity. The Supreme Court’s continued focus on resolving conflicts in this context negatively influences the operation and effectiveness of the federal courts and has long prompted calls for reform. Most prior proposals have

228. Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 570 (2005) (“No-citation rules guarantee that the hastily reviewed language of summary opinions will not come back to haunt judges in future cases.”); Schiltz, *supra* note 213, at 1490 (“Seventh Circuit judges refer to the citation of their own official actions [unpublished opinions] as ‘throwing’ those actions ‘back in their faces.’”) (original alteration omitted).

229. Schiltz, *supra* note 213, at 1483 (“Many judges likely pushed strongly against Rule 32.1 for the same reason: They, too, expect—or at least fear—that Rule 32.1 will be the first step down a slippery slope that will lead to judges being required to issue published precedential opinions in all cases.”).

230. Sloan, *Stealth Procedures*, *supra* note 39, at 752.

231. See DONNA STIENSTRA, FED. JUDICIAL CTR., UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 37 (1985), <https://www.fjc.gov/sites/default/files/2012/Unpblshd.pdf> [<https://perma.cc/F4NT-8BF5>] (noting that “all” circuits “publish a decision that resolves or creates conflict in the law”).

focused on reforming the Supreme Court rather than looking for opportunities for reform in the practices of the courts of appeals. While the Supreme Court was shrinking its docket, the courts of appeals were also developing ad hoc tools to help them manage their increasing decisional independence, such as the law of the circuit doctrine. This doctrine plays an underappreciated role in generating and perpetuating conflicts, making it a potential candidate for reform to help address the negative influences conflicts have on the federal courts. The next Part will therefore critically assess the purposes of the law of the circuit doctrine to contextualize possible reforms.

III. THE PURPOSES OF THE LAW OF THE CIRCUIT DOCTRINE

As others have recognized, the law of the circuit doctrine's purpose is "not precisely clear."²³² The early cases stating the rule do not explain where the rule comes from or why courts adopted it.²³³ Some courts describe the rule as a "tradition" without noting when or why it began.²³⁴ Most scholars who have written about the doctrine have not questioned its origins or interrogated its purposes.²³⁵ Among those that have, most note that the doctrine arose as a response to growing federal caseloads.²³⁶ Within that broad category, scholars and judges have offered competing narratives and a variety of institutional values that the law of the circuit doctrine advances.²³⁷

This Part collects these explanations into three categories and critically assesses them. The first category considers explanations that the law of the circuit doctrine is necessary for uniformity, in particular uniformity within a

232. Mead, *supra* note 27, at 796.

233. *See id.*; *see also* Kannan, *supra* note 39 at 756 ("The decisions applying the interpanel rule have not clearly articulated their legal bases.").

234. *See, e.g.*, Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867 (3d Cir. 1984) ("It is the tradition of this court that reported panel opinions are binding on subsequent panels.") (quoting the Internal Operating Procedures of the Court of Appeals for the Third Circuit, Chapter 8.C.).

235. *See* Dragich, *supra* note 39, at 540.

236. *See* Mead, *supra* note 27, at 796 ("[the doctrine] can probably be attributed to the confluence of two phenomena: an increase in the number of cases and judges, and the birth of limited publication practices."); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 127 (2006) (suggesting that the doctrine "is largely a product of the past thirty years' mounting caseloads.").

237. *Compare, e.g.*, Baker, *Alternative Futures*, *supra* note 152, at 959 (suggesting that the law of the circuit developed because en banc hearings were too costly), *with* Carrington, *supra* note 221, at 580–81 ("The 'law of the circuit' has emerged as a response to the Supreme Court's incapacity to resolve intracircuit conflicts," and suggesting that en banc proceedings are "now usually employed" when the law of the circuit fails).

circuit's decisions, to support stability in the law and fairness to litigants. The second category considers arguments that the doctrine helps make judicial decisionmaking more efficient. The third category considers the doctrine's role in generating and perpetuating conflicts, and its role enabling the Supreme Court's "percolation" approach to certiorari.

This Part serves two purposes. First, it fills a gap in scholarship by collecting the various rationales given for the law of the circuit doctrine in one place. As far as I am aware, this is the first comprehensive and critical analysis of the doctrine's purposes. Second, this analysis contributes an important framework for my proposal in Part IV. Thus far, we've discussed the structural costs imposed by pervasive conflicts and the Supreme Court's focus on conflicts, as well as the law of the circuit's role in perpetuating those problems. Awareness of the doctrine's institutional purposes helps tailor potential reforms.

A. Uniformity

The most common justification for the law of the circuit doctrine is that the rule is necessary to maintain uniformity of decisions *within* a circuit—so-called intracircuit uniformity.²³⁸ This concern is generally tied to an increasing number of appellate judges in light of increasing caseloads.²³⁹ More judges on the same court deciding more cases means more disagreements, the thinking goes, so a rule is needed to keep things uniform.²⁴⁰ Defenders argue that strictly

238. See, e.g., *Lacy v. Gardino*, 791 F.2d 980, 985 (1st Cir. 1986) ("Uniformity of decisions within a multi-panel circuit can only be achieved by strict adherence to prior circuit precedent, with the error-correcting function reserved to the court sitting en banc."); Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 452 (2019) ("The prior-panel rule exists in large part to avoid intra-circuit conflict so that district judges in the circuit will know the 'law of the circuit,' thereby easing their decisionmaking process."); Dragich, *supra* note 39, at 568 ("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.'").

239. Dragich, *supra* note 39, at 568; Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 254 (1994) ("Large courts of appeal present too great an opportunity for producing law of the panel rather than law of the circuit.").

240. Becker, *supra* note 153, at 344 (the law of the circuit "is a qualitative matter, founded upon the notion that only when the judges are able to master circuit law can they sufficiently and with necessary celerity engage each other substantively. When the circuit gets too large, quality suffers."); Mead, *supra* note 27, at 796 ("Moreover, the increase in the number of judges tended to make the courts less cohesive, and increased the likelihood of strong disagreements between panels.").

mandating uniformity within a circuits' decisions encourages stability, predictability, and fairness to litigants.²⁴¹

The main problem facing these justifications is why *intracircuit* uniformity (consistency within a circuit) should outweigh *intercircuit* uniformity (consistency between circuits). As has been noted, "intracircuit uniformity comes at the expense of intercircuit conflicts."²⁴² And given the mobility and breadth of modern life, there's good reason to think that conflicts between circuits could undermine the benefits achieved by avoiding conflicts within a circuit.²⁴³ Many peoples' lives and endeavors are not constrained within a single geographic circuit, so conflicts among circuits likely undermine the stability or fairness sought by maintaining uniformity within a circuit.²⁴⁴

Likewise, uniformity within a circuit doesn't necessarily make the law more clear because the Supreme Court could always change the law of any circuit—and it could do so inadvertently, such as when the Court's decision undermines the reasoning of a decision in a circuit that considers such undermining a sufficient "change in the law" to revisit their precedent.²⁴⁵ This is particularly important when the law of the circuit locks-in a conflict, since the conflict destabilizes both circuits' precedent by increasing the (albeit low) likelihood of Supreme Court intervention.²⁴⁶

241. See, e.g., *Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth.*, 945 F.2d 10, 12 (1st Cir. 1991), *rev'd on other grounds*, 506 U.S. 139 (1993) ("The orderly development of the law, the need for stability, the value of results being predictable over time, and the importance of evenhanded justice all counsel continued fidelity to this principle."); see also Gerald Bard Tjoflat, *The Federal Judiciary: A Scarce Resource*, 27 CONN. L. REV. 871, 873 (1995) ("The clarity and stability of the rule of law in a circuit depends on the number of judges pronouncing the rule.").

242. Dragich, *supra* note 39, at 568.

243. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 855–56 (1994) ("only the truly sedentary can expect to avoid potential application of the law of other circuits"); Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 885 (1993) ("It would be difficult to argue that contemporary society is less mobile than the relatively stationary society of the nineteenth or mid-twentieth centuries. Perhaps the law of the circuit was acceptable when society was immobile, and people and businesses rarely ventured outside their home circuit.").

244. See Caminker, *supra* note 243, at 855–56; Tiberi, *supra* note 243, at 885.

245. See *United States v. Rodriguez*, 527 F.3d 221, 226–29 (1st Cir. 2008) (discussing circuits' response to *Kimbrough v. United States*, 552 U.S. 85 (2007)); see also Caminker, *supra* note 243, at 866 ("[A]gainst a backdrop of intercircuit divergence, only one of the uniformity values—predictability—clearly supports a rigid 'law of the circuit,' and then only in certain contexts.").

246. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 256 (1st ed. 1985) (noting that "whenever there is a conflict between two circuits, the law of both circuits is unstable because the Supreme Court is likely sooner or later to intervene.").

Moreover, valuing intracircuit over intercircuit uniformity encourages forum shopping and increased litigation.²⁴⁷ Parties with interests in various circuits may relitigate an issue in other circuits, further undermining stability.²⁴⁸ To the extent we value uniformity somewhere, intercircuit uniformity may well be a better steward of stability and fairness than intracircuit uniformity given the current context and realities of the federal courts.²⁴⁹

But even assuming that uniformity of decision within a circuit is valuable, it's not clear that the law of the circuit doctrine is particularly effective at achieving that goal. The en banc rehearing process is expressly designed to resolve conflicts within a court of appeals' decisions.²⁵⁰ And as en banc review has become so "unwieldy" that it "is now seldom used," the strict law of the circuit doctrine has, as best we can tell, not proved effective at avoiding intracircuit conflicts in its place.²⁵¹ Inconsistency within a circuit's decisions has generally been seen as a widespread problem since the 1990s, well after the law of the circuit doctrine took hold—although, as with intercircuit conflicts, there is debate about the actual scope and effect of intracircuit conflicts.²⁵² At

247. Rebecca Hanner White, *Time for A New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 679 (1991) ("Adherence to the law of the circuit, moreover, promotes forum shopping."); cf. Frost, *supra* note 18, at 1602 ("As long as both parties have the latitude to argue for their favored forum, however, there is nothing wrong with each attempting to have the case heard where they prefer—whether because it is more convenient, the jury or judges seem more sympathetic, or the law in that circuit is more favorable.").

248. See, e.g., White, *supra* note 247, at 641 (discussing agency relitigation and nonacquiescence with circuit law).

249. See Caminker, *supra* note 243, at 855 (noting that "a rigid rule of intracircuit precedent . . . appreciably undermines the values of efficient public law administration, equal treatment, and respect for judicial authority; intracircuit uniformity can do little to compensate. Rather, the only uniformity value the rule of intracircuit precedent promotes is some predictability within a circuit's territorial boundaries."); Dragich, *supra* note 39, at 587–88 (advocating for intercircuit stare decisis).

250. See FED. R. APP. P. 35(a)(1).

251. See Caminker, *supra* note 243, at 855 n.161 ("Indeed, a rule of intracircuit precedent does not necessarily produce a uniform law within a circuit."); Dragich, *supra* note 39, at 566–67 (noting that en banc procedures are "now seldom used" and other "existing mechanisms to unify law within a circuit are also of questionable efficacy.").

252. Compare, e.g., 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 Hellman, *Jumboism*] ("The court of appeals has embarked on an ambitious program to maintain consistency in its decisions, but among lawyers and district judges, the perception is widespread that inconsistency remains a major problem."), with *id.* at 600 ("Occasional inconsistencies in panel decisions may be a

the very least, conflicts within a circuit's precedent arise with enough regularity that many circuits have developed yet another rule to navigate the problem: the earlier panel decision controls.²⁵³

Some circuits have also made other changes to their rules or procedures after the rise of the law of the circuit doctrine that may be better suited to avoiding intracircuit conflicts. For example, several circuits have amended their rules to make en banc review easier, either through rehearings with less than the full court or by allowing panels to overrule prior decisions after circulating the new decision to the full court.²⁵⁴ Although limited, a study by Arthur Hellman suggested that the Ninth Circuit had effectively avoided serious intracircuit conflicts at least in part because of internal procedures that better informed panel judges of prior decisions on issues and allowed for input from other judges on the circuit before issuing the panel decision.²⁵⁵ At bottom, there is not much support that the rule requiring strict adherence to prior decisions—separate from en banc review or other procedures for input from other judges on the circuit—meaningfully helps maintain uniformity within a circuit's decisions.

Some also argue that the law of the circuit doctrine is a necessary result of en banc procedures, which, in turn, are necessary for maintaining uniformity in the circuit's decisions.²⁵⁶ More strident versions of this argument suggest that

small price to pay when judged against" structural changes to the federal judiciary, such as creating a national court of appeals). *See also, e.g.*, Becker, *supra* note 153, at 344–45 (“[A]lthough I understand that Professor Hellman’s study reflects that there is consistency and coherence in Ninth Circuit jurisprudence, I must tell you that the private reports I get from judges who are on or have sat with the Ninth Circuit are quite different.”).

253. *See, e.g.*, Morrison v. Amway Corp., 323 F.3d 920, 929 (11th Cir. 2003) (“[W]hen circuit authority is in conflict, a panel should look to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel.”); *see also* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 20 (2009) (collecting cases) (“In most federal courts of appeal, resolution of an intra-circuit split is straightforward: the earliest decision controls”).

254. *See* Mead, *supra* note 27, at 797.

255. Hellman, *Jumboism*, *supra* note 252, at 547–48 (discussing procedures), 600 (noting that judges “spend a substantial amount of time reviewing opinions and exchanging memoranda in order to iron out apparent inconsistencies without calling an en banc hearing.”).

256. *See, e.g.*, Pamela Ann Rymer, *The “Limited” En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 319–20 (2006) (“Of course, three-judge panels regularly speak for the court as whole, and their decisions settle most of the law of the circuit. But decisions by three-judge panels are generally accepted and regarded as authoritative because the full court is there as a backstop.”).

the law of the circuit doctrine can be derived from legislation.²⁵⁷ These arguments mostly stem from an ambiguity in the 1911 Judiciary Act, which stated—as the Evarts Act had—that a “court of appeals . . . shall consist of three judges.”²⁵⁸ But then authorized four judges in some circuits.²⁵⁹ The courts of appeals simply began sitting in panels of three circuit judges, mirroring practice in the courts since the Evarts Act, and Congress kept adding circuit judges over time.²⁶⁰ In 1940, the Third and Ninth Circuits split over whether a court of appeals was statutorily authorized to decide a case en banc given that the 1911 Act said that the courts “shall consist” of three judges.²⁶¹ The Supreme Court granted certiorari, and in a case known as *Textile Mills*, endorsed en banc procedures.²⁶² Some have pointed to this endorsement in *Textile Mills* as the basis of the law of the circuit doctrine.²⁶³

These arguments over-read *Textile Mills*. The Court’s primary findings were that neither the text nor legislative history of the 1911 Act prohibited the courts of appeals from sitting en banc.²⁶⁴ Although the Court found the

257. See *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (“the law-of-the-circuit doctrine is derived from legislation and from the structure of the federal courts of appeals.”) (citing 28 U.S.C. § 46(c)). But see Amy E. Sloan, *If You Can’t Beat ‘Em, Join ‘Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 936 (2008) [hereinafter Sloan, *Pragmatic Approach*] (“Although statutes and procedural rules directed toward the en banc procedure recognize the law of the circuit rule, no statute or rule establishes the law of the circuit rule or mandates its application.”); Thompson, *supra* note 165, at 500 n.191 (“The source of the prevailing rule in the courts of appeals is not clear, but it is not from an act of Congress.”).

258. Judiciary Act of 1911, ch. 231, § 117, 36 Stat. 1131.

259. *Id.* § 118.

260. See White Commission Report, *supra* note 166, at 62 (“Three-judge panels in federal appellate courts are a legacy of the three-judge appellate courts created by the 1891 Evarts Act.”); *id.* at 13 (“As they grew, the courts began to sit in more than one panel of three, convening occasionally en banc, a practice approved by the Supreme Court and then codified in the 1940s.”).

261. Compare *Comm’r v. Textile Mills Sec. Corp.*, 117 F.2d 62, 70–71 (3d Cir. 1940), with *Lang’s Estate v. Comm’r*, 97 F.2d 867, 869–70 (9th Cir. 1938).

262. *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 334–35 (1941).

263. See, e.g., *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (citing *Textile Mills*, 314 U.S. 326); Dragich, *supra* note 39, at 565–66 (“The result in *Textile Mills* led to the development of the law of the circuit doctrine. Although the *Textile Mills* opinion does not say so, the import of that decision is to allow the court of appeals in each circuit to control the development of the law of that circuit.”). Cf. Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686 (1984) (“Congress may never have intended that the concept of law of the circuit develop, but something of the sort was inevitable because the Evarts Act directed each court of appeals to interpret federal law independently.”).

264. *Textile Mills*, 314 U.S. at 334–35.

interpretive problem “beset with difficult[y],” it concluded that the ambiguity was probably inadvertent and so en banc decisionmaking should be allowed because the practice “makes for more effective judicial administration.”²⁶⁵ “Conflicts within a circuit will be avoided” and finality promoted, the Court reasoned, by enabling the full court to weigh in on an issue—a valuable consideration “in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.”²⁶⁶ Seven years later, Congress codified that the courts of appeals can make decisions in panels or en banc.²⁶⁷

At best, *Textile Mills* endorses the en banc court’s role in maintaining intracircuit uniformity; the decision makes no endorsement or connection to strict adherence to prior panel decisions.²⁶⁸ And there is nothing about the practice of sitting as a whole court, or the principle that intracircuit conflicts should be avoided, that necessarily mandates strict adherence to prior panel decisions. Panels could, for example, maintain a flexible approach to its prior panel decisions while treating en banc decisions as strictly binding, higher authority. Such a tiered approach would be more consistent with readings of *Textile Mills* that say the en banc court holds ultimate authority over the circuit’s precedent than the current doctrine that gives both panel decisions and en banc decisions equal weight.

Moreover, the courts of appeals themselves maintained competing visions of how to treat their prior decisions after the codification of en banc procedures in the 1940s, as the law of the circuit doctrine “solidified.”²⁶⁹ While the

265. *Id.* at 333–35.

266. *Id.* at 335.

267. Act of June 25, 1948, ch. 646, § 46, 62 Stat. 869, 871–72 (codified as amended at 28 U.S.C. § 46(b)–(c) (2006)); *see also* United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689–90, (1960) (reiterating the values of en banc procedures noted in *Textile Mills* when considering whether retired judges could sit with a court of appeals en banc).

268. *Textile Mills*, 314 U.S. at 333–35.

269. *See* Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) (“The most complex relationship is between a court and its own previous decisions. A court must give considerable weight to those decisions unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling. But it is not absolutely bound by them, and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision.”); N.C. Utils. Comm’n v. FCC, 552 F.2d 1036, 1045 (4th Cir. 1977) (“The mere fact that a prior opinion exists is not sufficient in itself to call the doctrine of stare decisis into play: otherwise one rogue opinion could deprive the law of the accumulated expertise that stare decisis strives to safeguard. If the rule of interpanel accord serves a purpose different from that of stare decisis, its purpose must be to allocate decisionmaking power between coequal panels subject to reversal by the Court of Appeals *en banc*.”).

Supreme Court's endorsement of en banc decisionmaking does suggest that the Court and Congress expected the courts of appeals to be maintaining their own lines of precedent—developing their own “law of the circuit” in the broader sense—there is no indication that either the Court or Congress intended the courts of appeals to adopt a strict rule of adhering to prior decision as part of that process. To attribute the law of the circuit doctrine either to congressional action or the Supreme Court's blessing of en banc decisionmaking in *Textile Mills* seems to be a mistake.

To sum up, the law of the circuit's role in promoting uniformity within a circuit's decisions is a common justification that should be narrowed in a modern context. The doctrine's prioritization of intracircuit over intercircuit uniformity threatens to undermine many of the values associated with intracircuit uniformity. This threat presents itself most clearly in conflict cases, where the doctrine's strict adherence to prior decisions locks-in a conflict that destabilizes both circuits' precedent and encourages further litigation in other circuits. Neither congressional nor Supreme Court action clearly mandates the rule, as some argue,²⁷⁰ and circuits have developed other, more flexible tools—such as relaxed en banc procedures or other internal checks—that, based on limited experience, appear effective at maintaining intracircuit uniformity. By contrast, any uniformity benefits offered by the strict law of the circuit doctrine come with clear costs, some of which could be mitigated by relaxing the rule in conflict cases.

B. Efficiency

Another set of arguments is that the law of the circuit doctrine improves judicial efficiency by reducing the time or effort needed to make decisions.²⁷¹ One initial problem with these justifications is that commenters will sometimes not distinguish between the benefits of the law of the circuit doctrine and nonpublication policies when discussing decisionmaking efficiency.²⁷² This is

270. Mead, *supra* note 27, at 794.

271. See, e.g., White, *supra* note 247, at 682 (arguing that relaxing the law of the circuit doctrine would cause “an increase in judicial workload,” reasoning “[w]hen a panel is not bound by circuit law but is expected to examine an issue for itself, courts will expend additional time and energy” on cases).

272. See, e.g., Oakley, *supra* note 236, at 128 (“Screening systems suppress reevaluation by fast-tracking later like cases [controlled by circuit precedent]—indeed, this is what makes strict rules of the law of the circuit appealing as an efficiency device.”); Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 257 (2003) (“Given the tremendous volume of appeals docketed in the Eleventh Circuit, efficiency

important because the efficiency benefits of nonpublication policies appear to be significant, and as discussed above, the doctrine and nonpublication policies are not necessarily linked to one another.²⁷³ At least one study shows that the adoption of nonpublication policies, along with a reduction in oral arguments, have had the greatest effect on reducing decision times in the courts of appeals.²⁷⁴ And specific aspects of nonpublication policies—namely, the ability to create a second-class of nonprecedential decisions that require less judicial attention—closely match statements from judges about changes that improve decisionmaking efficiency in light of growing caseloads.²⁷⁵ By contrast, the law of the circuit doctrine’s connection to reducing the time and effort on decisions is more subtle, since the doctrine concerns the weight given to precedential decisions—absolute rather than persuasive. Courts could enjoy most, if not all, of the benefits associated with nonpublication policies even if they did not strictly adhere to prior decisions. It is important, therefore, not to attribute the efficiency benefits of nonpublication policies with the law of the circuit doctrine.

That said, there are two efficiency arguments targeted at the unique role of the law of the circuit doctrine. The first argument is that strict rules of precedent makes decisions easier because the judge does not have to reconsider the merits

necessitates that judges devote their time most significantly to writing opinions in those cases that involve issues of first impression and development of the common law of this Circuit, that will create conflict with another circuit, that involve issues of continuing public concern, and that modify or clarify the law of this Circuit.”); see also Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 26 (2000) (cautioning against conflating efficiency justifications with precedential arguments).

273. See *supra* Section II.C.2.

274. Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REFORM 415, 441–42 (1988) (“The most effective procedural changes are those that reduce the burden of writing and publishing opinions.”). To be sure, commenters debate the efficiency of nonpublication policies. See, e.g., Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 125 (1995) (noting that “[t]he critical assumption underlying the efficiency rationale in favor of nonpublication is that judges are able to determine in advance which opinions will be valuable to future litigants,” and questioning judges’ ability to predict well).

275. See *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) (“While federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same end: They select a manageable number of cases in which to publish precedential opinions, and leave the rest to be decided by unpublished dispositions or judgment orders.”).

of the issue—the judge simply relies on the prior case and is done.²⁷⁶ This argument is often made in support of precedent generally, reflecting Justice Cardozo’s proverb that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case.”²⁷⁷ Therefore, the strict rule improves efficiency, one might argue, over a flexible approach.

I am skeptical. When assessing this argument, it’s helpful to distinguish between the perspectives of district courts and the courts of appeals. For the district courts, it’s important to recognize that the law of the circuit doctrine is a rule of *horizontal* precedent—it addresses how future panels of the courts of appeals should treat the decisions of prior panels.²⁷⁸ The district courts’ obligation to follow circuit decisions is a separate rule of *vertical* precedent. Relaxing the law of the circuit doctrine—saying, for example, that future panels in new cases can reconsider prior panel decisions—does not necessarily mean that district courts can question prior panel decisions. Therefore, relaxing the law of the circuit would not necessarily decrease decisionmaking efficiency in the district courts.²⁷⁹ Likewise, the law of the circuit doctrine does not itself guide district courts if there is a conflict within a circuit’s decisions—a separate rule does: the earlier decision controls.²⁸⁰ As with nonpublication policies, you could have the earlier-decision rule without a strict rule binding future panels of the court of appeals to prior panel decisions.²⁸¹ All told, it’s hard to imagine

276. See Douglas & Solimine, *supra* note 238, at 452 (“[I]f the initial appellate panel is faithful to the prior-panel rule, it will necessarily reverse a district judge that rules contrary to prior circuit caselaw. This leads to greater efficiency for both the district court and the initial circuit court panel (not to mention the litigants).”); Caminker, *supra* note 243, at 867 (“One can still justify a blanket duty to obey the ‘law of the circuit’ by extolling other virtues of bright-line rules, such as efficiency (‘freeing’ the district court from having to weigh the relative merits of obedience and autonomy in a given case).”).

277. White, *supra* note 247, at 672 (quoting Cardozo in this context); see also, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987) (“When a precedent has no decisional significance as a precedent, the conscientious decisionmaker must look at each case in its own fullness. But when a rule external to the decisionmaker compels reliance on the decisions of others, it frees the decisionmaker from these responsibilities.”).

278. Mead, *supra* note 27, at 790.

279. *Contra* Caminker, *supra* note 243, at 867 (justifying the law of the circuit because it “‘free[s]’ the district court from having to weigh the relative merits of obedience and autonomy in a given case”).

280. See *Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003).

281. For example, the Eighth Circuit applies the strict law of the circuit doctrine, but not a rule that the earlier panel decision controls in an intracircuit conflict. See *Williams v. Nat’l Football*

how the strict law of the circuit doctrine improves the district court's efficiency in finding and applying the controlling precedent.

This first argument makes more sense from the perspective of the courts of appeals, though likely quite a bit more narrow than advocates suggest. Advocates argue that the strict law of the circuit doctrine makes it easier for a later panel to come to a decision, which in turn expedites affirmance or reversal.²⁸² But this argument depends on how much decisionmaking effort is saved after finding the relevant decisions and determining whether they are on-point enough to be considered precedent. These two initial tasks are time consuming and often the primary difficulty associated with applying precedent.²⁸³ The law of the circuit doctrine may save marginal time and effort once the decisionmaker has found and analyzed the precedent, but no one seems to have pursued this argument at that depth.

The second efficiency argument casts the law of the circuit doctrine as a guard against time and resource intensive en banc proceedings.²⁸⁴ The argument is that the law of the circuit doctrine reduces the overall workload of the court by minimizing intracircuit conflicts and therefore minimizing the need for time consuming en banc decisionmaking.²⁸⁵ Although framed as an efficiency argument, it relies on the assumption that the law of the circuit actually achieves intracircuit uniformity, which, as we've discussed, is debatable.²⁸⁶

At bottom, arguments that the law of the circuit promotes efficiency are limited. It is important to distinguish the doctrine's efficiency benefits from other related but independent policies, such as the recognized efficiency

League, 598 F.3d 932, 934 (8th Cir. 2009) (Colloton, J., dissenting) ("This circuit has a peculiar approach to conflicting prior panel opinions. The prior panel rule emphatically holds that one panel of this Court is not at liberty to disregard a precedent handed down by another panel, but if a second panel violates this rule and deviates from circuit precedent, then subsequent panels are free to follow suit, and to disregard the original circuit precedent in favor of the second decision.") (internal quotations and citations omitted).

282. See Douglas & Solimine, *supra* note 238 at 452 (arguing that greater clarity "leads to greater efficiency for both the district court and the initial circuit court panel (not to mention the litigants)").

283. See, e.g., Schauer, *supra* note 277, at 591–95 (discussing difficulties regarding the application of precedent).

284. See Baker, *Alternative Futures*, *supra* note 152, at 959 ("The en banc court evolved as a mechanism to preserve [consistency and control]. However, en banc rehearings result in considerable expense and delay, for litigants and courts alike. Consequently, there developed a concept of the law of the circuit or the law of interpanel accord.").

285. *Id.*

286. See *supra* Section III.A.

benefits of nonpublication policies or the clarity of a rule that the earlier decision controls when a district court faces an intracircuit conflict. On its own, arguments that the law of the circuit doctrine makes appellate decisionmaking easier seem to narrow to the decisionmaking effort saved *after* the judge has identified relevant cases and determined whether they are sufficiently on-point to be considered precedent. These steps make up a large part of the effort associated with precedent-based reasoning and would occur regardless of whether the circuit followed a strict or flexible approach to its prior decisions. The efficiency benefits of the doctrine alone may therefore be limited. Relaxing the doctrine in conflict cases likewise might not impose a substantial burden on the courts both because of the limited number of conflict cases in the overall cases and because of the doctrine's limited role in overall decisionmaking efficiency.

C. Percolation

The law of the circuit doctrine's role in supporting the Supreme Court's percolation approach to certiorari is an underappreciated feature of the doctrine. Less common than efficiency and uniformity rationales, the law of the circuit doctrine's role in generating and maintaining conflicts is sometimes raised dismissively or alongside criticism of the Supreme Court's practice of denying certiorari in conflict cases to let an issue "percolate."²⁸⁷ However, the law of the circuit doctrine's structural history and current context suggest that the doctrine's role in generating conflicts should be given more credit as a value.²⁸⁸

The idea behind percolation is that the federal courts benefit from allowing competing decisions to accumulate on an issue before the Supreme Court

287. See Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 690 (noting that the law of the circuit doctrine provides "a pseudo-justification for deferring decisions on difficult issues while conflicting opinions accumulate in the courts of appeals.").

288. See Dragich, *supra* note 39, at 567 ("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."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 698–99 (1984) ("In contrast, we believe that the federal judicial system—consisting, as it does, of several courts of appeals unbound by each other's decisions—reveals in its very structure that a degree of conflict is desirable."); White, *supra* note 247, at 672 ("The advantages of percolation and of providing the Supreme Court with different approaches to important issues are seen as outweighing an unavoidable loss of uniformity.").

finally grants certiorari and resolves it.²⁸⁹ Advocates argue that percolation improves the Court's ultimate decision by allowing it to review multiple perspectives.²⁹⁰ They also argue that percolation improves decisionmaking in the courts of appeals by allowing courts to consider the views of other circuits.²⁹¹ And they argue that percolation forces the lower appellate courts to take their job more seriously, since their decisions may remain law for longer than necessary and their views may be seriously considered by the Supreme Court.²⁹² Finally, advocates argue that percolation helps conserve the Court's administrative and political capital by justifying its decision to wait to review certain issues.²⁹³ Percolation may also serve federalism values.²⁹⁴

Though still debated,²⁹⁵ percolation is generally accepted by the federal appellate courts. Supreme Court Justices will expressly cite the value of letting an issue percolate before taking up issues.²⁹⁶ And courts of appeals have endorsed percolation as an overall benefit of the multi-circuit system.²⁹⁷

Percolation is a modern phenomenon. There are references to the basic principles of percolation extending as far back as shortly after the Civil War,

289. See Dragich, *supra* note 39, at 554–56 (discussing percolation); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 484–89 (2012) (same); Estreicher & Sexton, *supra* note 288, at 699 (same).

290. See, e.g., Gewirtzman, *supra* note 289, at 482–83.

291. *Id.* at 486.

292. *Id.* at 484.

293. *Id.*

294. See *Johnson v. Texas*, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting) (“our practice of letting issues ‘percolate’ in the 50 States [is] in the interests of federalism”).

295. Gewirtzman, *supra* note 289, at 484, 489 (noting advocates and critics of percolation in the judiciary).

296. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (“These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.”); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

297. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001) (“The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do. This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of ‘percolation’ within the lower courts.”).

well before the creation of the courts of appeals.²⁹⁸ But the concept seems to have gained prominence much later in the twentieth century. Some argue that there was clear shift in 1950 from Supreme Court's practice from granting certiorari in conflict cases "as of course" to denying certiorari in conflict cases.²⁹⁹ By the 1980s, percolation was popular enough that it began showing up explicitly in Supreme Court opinions.³⁰⁰

The law of the circuit doctrine plays an important role in enabling and supporting percolation. Notably, percolation matches more closely with both sides of the doctrine—*independent circuits*, but strict adherence within a circuit—than the more common *uniformity* or *efficiency* rationales. On one hand, each circuit's independence allows them to come to differing and competing conclusions.³⁰¹ On the other, the lock-in effect of strict adherence to prior decisions prioritizes the Supreme Court's role in resolving the conflicts. By contrast, these features undermine intercircuit uniformity and make overall resolution of issues of national concern less efficient.³⁰²

This connection between the law of the circuit doctrine and percolation also fits the structural history and context of the doctrine. As discussed, the doctrine generally took hold as the Supreme Court transitioned to a discretionary caseload focused on maintaining uniformity and the courts of appeals gained greater independence over an increasingly large caseload.³⁰³ While I have not found any express connections between the two during this time, the law of the circuit doctrine's effect of prioritizing the Supreme Court's role as final arbiter of conflicts among the circuits, even as the courts of appeals remain the final word in most cases, reflects this structural shift. No circuit's decision is prioritized over the other, rather they each remain bound only to the views of

298. See Vestal, *supra* note 82, at 134 (noting "the desirability of diversity so that a reviewing court would be able to consider all possibilities" as a reason given shortly after the Civil War for why circuit courts should not defer to other circuit court decisions on an issue).

299. See Tiberi, *supra* note 243, at 884 (discussing Robert L. Stern, *Denial of Certiorari Despite A Conflict*, 66 HARV. L. REV. 465 (1953)). But see Edward T. Roehner & Sheila M. Roehner, *Certiorari-What is a Conflict Between Circuits?*, 20 U. CHI. L. REV. 656, 657 (1953) (disputing Stern's claim that the Court's denials that term actually involved conflicts).

300. See *Smith v. Murray*, 477 U.S. 527, 537 (1986) ("As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal.").

301. See, e.g., Estreicher & Sexton, *supra* note 288, at 698–99.

302. See, e.g., Dragich, *supra* note 39, at 568 ("intracircuit uniformity comes at the expense of intercircuit conflicts.").

303. See *supra* Part II.

the Supreme Court. And no circuit can resolve a disagreement among them; they can only offer their thoughts and wait for the Supreme Court. In this way, the doctrine reinforces the Supreme Court's role as conflict-resolver, which was an express justification for the Court's shift to a discretionary docket.

However, the law of the circuit doctrine only allows percolation up to a point. While percolation theory is largely focused on the Supreme Court, defenders of the approach also argue that it improves decisionmaking by allowing the circuits to converse and engage with each other.³⁰⁴ But the lock-in effect of the doctrine works against these values by limiting each circuit's engagement after that first decision, cutting short continuing discussion and debate among the circuits. This lock-in effect also imposes structural costs we've noted.³⁰⁵ By supporting the Supreme Court's primary yet inadequate role in resolving conflicts, the doctrine works to perpetuate conflicts and impose other costs associated with skewing the Supreme Court's work towards conflicts. Some of the most vocal criticisms of percolation as an approach to certiorari stem from these same concerns.³⁰⁶

To sum, the law of the circuit doctrine's role in enabling the Supreme Court's percolation approach to certiorari is likely undervalued. The doctrine's contribution to percolation reflects a stronger fit between the doctrine's history and operation than the uniformity or efficiency arguments more common in the literature. But the doctrine's role in percolation also highlights the doctrine's vulnerability to the modern reality of conflicts. The rule's effect of closing off debate in the courts of appeals in favor of prioritizing the Supreme Court's role in resolving conflicts both undermines a goal of percolation—developing the law through dialogue—and gives rise to one of the prime criticisms of percolation—that the percolation simply perpetuates conflicts and their costs. The doctrine's role in percolation is therefore underappreciated both as a value and as an opportunity for reform. Relaxing the doctrine in conflict cases could both better serve percolation's goals—and arguably the doctrine's goals—in two ways: first by better enabling development of the law through dialogue, and second by mitigating some of the impacts identified by percolation's critics.

304. See Gewirtzman, *supra* note 289, at 487.

305. See *supra* Section II.B.

306. See Gewirtzman, *supra* note 289, at 489–92 (noting critiques “arguing that percolation perpetuates ‘uncertainty and repetitive litigation’ by creating a lack of uniformity in federal law and thus undermining the legitimacy of the federal courts and potentially the Constitution itself.”) (quoting Frost, *supra* note 18, at 1582).

IV. HOW CIRCUITS CAN FIX THEIR SPLITS

This Part offers my proposal for relaxing the law of the circuit doctrine in conflict cases. Section A explains the proposal and offers ways to adopt the proposal. Section B lays out the proposal's benefits, including structural benefits by reducing reliance on the Supreme Court to resolve conflicts and institutional benefits such as increased transparency and dialogue in appellate decisionmaking at a lower cost than other proposals seeking similar goals. Section C confronts the proposal's potential tradeoffs—increased flexibility in exchange for less stability. Section C therefore discusses two representative counterarguments stemming from potential instability created by the proposal: that the proposal will generally result in too much volatility in federal law, and that the proposal threatens specific doctrinal areas where stability is especially important, such as the need for clearly-established constitutional law. I argue that, on balance, the benefits of the proposal outweigh these risks.

A. Relaxing the Law of the Circuit Doctrine in Conflict Cases

My proposal is that the courts of appeals should relax the law of the circuit doctrine when a prior panel opinion has subsequently resulted in a conflict with another circuit. Courts should relax the doctrine to allow the latter panel to revisit the prior decision and address the grounds for the conflict with another circuit.

The proposal is narrow in three important ways. First, I'm only advocating that the courts of appeals relax the doctrine in conflict cases; the existing strict rule could still apply in the vast majority of cases. Second, I am not advocating that the latter panel *must* resolve a conflict; it could resolve the conflict, clarify that there is no conflict, or even maintain the conflict despite the competing arguments. Any of these outcomes offer benefits over the status quo, as I argue below. Third, the proposal does not change the hierarchical relationship between panels, the en banc court, or the Supreme Court. A panel decision revisiting a prior decision because of a conflict could, for example, still be reheard en banc or heard by the Supreme Court. The same accountability structures could apply; panels simply gain a tool to help address conflicts and, arguably, these accountability structures will be improved by reducing reliance on the Supreme Court to resolve conflicts.

Let's return to the conflict introduced earlier involving the Sixth and Eleventh Circuits to illustrate the proposal.³⁰⁷ In that example, the Sixth Circuit

307. See *supra* pp. 1403–04.

issued a decision in 2000 *pro se* case that there is no implied right of action to enforce a provision of the Voting Rights Act.³⁰⁸ In 2003, the Eleventh Circuit subsequently split with the Sixth Circuit on this issue, arguing, among other things, that the Sixth Circuit had outright missed controlling precedents.³⁰⁹ In 2016, a voting rights non-profit asked the Sixth Circuit to reconsider its prior decision in light of the Eleventh Circuit's contrary decision.³¹⁰

This is where my proposal would kick in. Rather than being bound to the prior panel decision, as the Sixth Circuit held, the Sixth Circuit could revisit the issue. The Sixth Circuit could then consider the Eleventh Circuit's reasons, including the precedents that the Eleventh Circuit found controlling. The Sixth Circuit then has several options. It could change position, align with the Eleventh Circuit, and resolve the conflict. Or it could reject the Eleventh Circuit's reasons and maintain the conflict. Or it could explain, for whatever reason, that there is actually no conflict and that its prior decision remains controlling. At best, the conflict is eliminated. At worst, substantial uncertainty regarding the Sixth Circuit's view is eliminated—the Sixth Circuit has confronted the precedents and reasons that persuaded the Eleventh Circuit, clarifying its dated position on the issue. Even if the Sixth Circuit maintains the conflict, it has nevertheless contributed to further development of the issue by better articulating its position.³¹¹

308. McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000).

309. Schwier v. Cox, 340 F.3d 1284, 1294 (11th Cir. 2003).

310. Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 630 (6th Cir. 2016).

311. In both editions of his book THE FEDERAL COURTS, Judge Posner expressed support for this proposal:

[T]he proposition that a court of appeals should give somewhat less weight to the decisions other circuits than to its own decisions, in order to generate the competitive process that is a worthwhile feature of the circuit system, does not have any merit if there already is a conflict between circuits. Suppose that in case 1 the Third Circuit holds *X*; in case 2 the Fourth Circuit holds not *X*; and case 3 now comes to the Third Circuit, and raises the same issue again. I do not think the Third Circuit should take the position that *stare decisis* requires it to adhere to *X* notwithstanding the intervening decision of the Fourth Circuit, or even to presume the correctness of *X*. On what basis could the Third Circuit think its earlier decision more authoritative than the Fourth Circuit's contrary decision? It ought to reexamine its previous decision conscientiously and without preconceptions. This practice would not add too much uncertainty to the law of the circuit, since, whenever there is a conflict between two circuits, the law of both circuits is unstable because the Supreme Court is likely sooner or later to intervene.

This example helps clarify that the primary goal of the proposal is to change how the federal courts as a whole handle conflicts, not necessarily to eliminate conflicts. As we've discussed, the current interaction between the law of the circuit and the Supreme Court's approach to certiorari results serious structural costs on the federal courts. While other proposals have suggested reforming the Supreme Court's certiorari practice to address these problems, this proposal approaches the same goal—reducing reliance on the Supreme Court to resolve conflicts—from a different direction by reforming how the courts of appeals generate and perpetuate conflicts. As I'll explain below, the proposal has a co-benefit of increasing overall capacity to resolve conflicts, and in particular the kind of low-stakes conflicts implicating a couple or few circuits that many commentators believe are not worth the effort of Supreme Court or en banc review.³¹² But the proposal does not, and is not intended to, guarantee an overall reduction in conflicts. The goal is to adjust the roles of the federal courts regarding conflicts and thereby relieve bottlenecks that impose structural costs on the entire federal judiciary.

Courts could relax the law of the circuit doctrine in conflict cases relatively easily by modifying their local rules. One option is for courts modify the law of the circuit doctrine itself and create an exception to the rule for conflict cases. Courts could accomplish this either by modifying their rules to create an entirely new exception to the doctrine for conflict cases, or make use of the existing doctrinal exception by defining a “change in the law” sufficient to enable a panel to revisit a prior decision to include a conflict with another circuit. A uniform federal rule is likely not necessary—even incremental adoption of the proposal across some of the circuits would offer benefits over the status quo.

Another option would be to adopt an informal, mini-en banc procedure for revisiting panel decisions in conflict cases.³¹³ Under this approach, the current

POSNER, *supra* note 246, at 256; *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGES AND REFORM* 381 (2d ed. 1996) (nearly identical discussion).

In his characteristic way, Posner does not elaborate on this idea further. Nor has anyone else—as far as I can tell, only one law review article has noted Posner's input on this point, and does not discuss it at any length. White, *supra* note 247, at 673 n.216 (“Judge Posner, however, has suggested relaxing the law of the circuit when a subsequent circuit rejects the prior circuit's point of view,” adding without explanation that “Judge Posner is correct”).

312. *See infra* Section IV.B.1.b.

313. *Cf.* Baker, *Alternative Futures*, *supra* note 152, at 959 n.121 (“The Federal Courts Study Committee exhorted courts of appeals to resist creating intercircuit conflicts and suggested that a draft opinion that would create a conflict should first be circulated to the full court.”).

panel would be able to circulate the opinion revisiting the prior decision in a conflict case to the rest of the court for approval. Assuming that such informal procedures are valid exercises of the en banc power, this option would not require modification of either the law of the circuit doctrine or the court's rule: the en banc court would be revisiting the prior decision as allowed under the current doctrine, only the panel is doing most of the work. A court could even adopt this option *only* for conflict cases. Informal en banc procedures are controversial, and a court could limit potential negative effects of the practice by limiting its use to revisiting panel decisions that resulted in a conflict.³¹⁴

Both of these options could also be achieved by changing the circuit's case law. The law of the circuit doctrine is itself a creature of case law, which creates an odd problem of circularity: because the doctrine makes prior cases strictly binding, it would be impossible for a later panel to change the doctrine.³¹⁵ Changing the doctrine by modifying the circuit's case law may therefore require an en banc proceeding, which seems both appropriate and worth the additional cost given the lasting benefits the change could have for future panels' work. Some circuits have "adopted" informal mini-en banc procedures by simply using it in a panel decision and then citing back to that opinion as authority for the practice.³¹⁶ So too could a court adopt this practice for conflict cases.

B. Benefits

Relaxing the law of the circuit doctrine in conflict cases would offer many benefits at lower cost than other proposals. This section discusses these benefits in two categories: benefits to overall structure of the federal courts, and benefits to the specific institution of the courts of appeals. I then discuss the proposal's low cost and ease of implementation, which I see as its distinguishing feature. While many proposals have targeted the structural and institutional benefits discussed below, relaxing the law of the circuit using tools already available to the courts of appeals offers a way of pursuing those benefits with substantially less disruption to the courts or other tradeoffs.

314. See, e.g., Sloan, *Stealth Procedures*, *supra* note 39, at 768 ("These are all good points, but on balance, the better course of action is for the courts to resist using informal en banc review to overrule cases unless those cases have been directly invalidated by intervening superior authority.").

315. Mead, *supra* note 27, at 800 n.95 ("There is a circular nature to law of the circuit in those circuits which rely only on prior panel case law to establish it. A case says that later panels are bound by earlier panels, but later panels are bound by that assertion only if they accept the premise that they are bound by that case.").

316. See, e.g., *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

1. Structural Benefits

Relaxing the law of the circuit to allow circuits to address conflicts offers two structural benefits that have long been pursued by advocates of reform in the federal courts: reduced reliance on the Supreme Court to resolve conflicts, and increased capacity to resolve conflicts.

a. Less Reliance on the Supreme Court

As discussed, sole reliance on the Supreme Court to resolve conflicts has imposed serious costs on the federal judiciary, including opening the Supreme Court's docket to capture and creating informational and accountability gaps between the Supreme Court and courts of appeals.³¹⁷ These costs are associated with the Supreme Court's role as conflict-resolver, and many proposals have focused on changing the Supreme Court itself to either accommodate that role,³¹⁸ or to eliminate the Court's role in reducing conflicts altogether.³¹⁹ This proposal comes at the same goals indirectly, by enabling the courts of appeals to take on some responsibility, perhaps even primary responsibility, for resolving conflicts. The Supreme Court could still exercise some role in resolving persistent conflicts among the courts of appeals, but conflicts generally could take on lesser importance in the Court's overall docket.

While less direct than other proposals, this approach offers a more realistic and incremental approach to addressing these problems. In this way, the proposal is an important contribution linking the reforms in the lower federal courts with persistent debates about reforming the Supreme Court's certiorari docket. Approaching reform indirectly by addressing the source of conflicts that skew the Court's certiorari docket offers a new perspective to these long-standing debates, and as discussed below, a realistic opportunity for reform in a discourse that has been dominated by creative but costly proposals.

b. Increased Capacity to Resolve Conflicts

Relaxing the law of the circuit to allow the courts of appeals to address conflicts increases overall capacity for potentially resolving conflicts. This Article has primarily focused on the negative effects of conflicts on the

317. See *supra* Section II.B.

318. See, e.g., George & Guthrie, *supra* note 158, at 1449–50 (proposing to restructure the Supreme Court to accommodate a large caseloads and, among other things, resolve more conflicts).

319. See, e.g., Comment, *supra* note 148, at 863–64 (discussing the national court of appeals proposal).

Supreme Court's relationship with the courts of appeals, and there is substantial debate about the negative effects of conflicts themselves.³²⁰ Nevertheless, allowing the courts of appeals to resolve conflicts on their own increases the overall number of decisionmakers available to address conflicts—more so than forcing the Supreme Court to decide more conflict cases or than creating a dedicated court or panel of existing Article III judges dedicated to conflicts. This is a potential co-benefit of the proposal alongside the benefits of reducing reliance on the Supreme Court to resolve conflicts. While the Supreme Court could still resolve particularly severe disagreements among the circuits, this proposal would be well suited to resolving lower-stakes disagreements among a few or handful circuits—precisely the kind of conflicts that many critics suggest are not that important and not worth the extraordinary effort the federal appellate structure currently devotes to them.³²¹ In this way, this proposal not only helps increase capacity to resolve conflicts, but increases capacity in the right place to help resolve the right kind of conflicts—those that impose the highest costs for the lowest payoff.

2. Institutional Benefits

In addition to structural benefits offered by reducing overall reliance on the Supreme Court and increasing capacity for potentially resolving conflicts, relaxing the law of the circuit doctrine to address conflicts offers three benefits to the courts of appeals themselves. These benefits can be broadly understood as improving the law-declaration function of the courts of appeals in conflict cases, where this function is particularly important, while maintaining the case-management benefits of the strict law of the circuit doctrine, however limited, in the majority of cases.

a. Better Decisionmaking

Allowing circuits to engage with each other in conflict cases may result in better decisions. It returns to conflict cases an incremental, common-law approach to judicial decisionmaking that underlies the theory of percolation—that repeated engagement with an issue over several sets of facts will yield better results.³²² The federal courts' role in declaring the law is particularly important among panels of the federal courts of appeals, where their decisions

320. See Frost, *supra* note 18, at 1582–84 (laying out arguments in favor of uniformity).

321. See *id.* at 1584–1606 (questioning the arguments in favor of uniformity).

322. Gewirtzman, *supra* note 289, at 482–83.

create binding precedent and are the final word on most issues of federal law.³²³ “Thus, it is exceedingly important,” as Amanda Frost put it, that panels on the federal courts of appeals “get decisions right.”³²⁴ Decisions that have subsequently resulted in a conflict with another circuit present at least a plausible concern that the initial decision is wrong, justifying the need to revisit the initial decision. The result is greater confidence in the court of appeals’ decisionmaking, supporting percolation and the declarative function of the courts of appeals.

This is perhaps my proposal’s primary advantage over a strict rule of intercircuit stare decisis—a competing proposal that the first panel of a court of appeals to address an issue binds all panels of all other circuits.³²⁵ Proposals for intercircuit stare decisis offer some similar benefits—namely, increased uniformity through reduced conflicts—but at the cost of dialogue across the multi-circuit system.³²⁶ Intercircuit stare decisis results in the first panel decision controlling all courts, undercutting percolation and inhibiting the declarative function of the courts. My proposal, by contrast, maintains this value of the multi-circuit system and may therefore result in better decisions while still addressing the negative influence of conflicts.

b. Increased Transparency

Relaxing the law of the circuit doctrine in conflict cases may also result in more candid judicial engagement with prior decisions and decisions from other circuits. One common concern with the existing law of the circuit doctrine is that judges will disingenuously ignore or distinguish prior decisions that, though binding, they disagree with.³²⁷ Likewise, there is some concern that panels will use unpublished decisions to either avoid binding circuit precedent or manipulate conflicts.³²⁸ Or that strict adherence to the law of the circuit may result in circuits setting precedent without full awareness of relevant issues or

323. See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 512 (2009) [hereinafter Frost, *Limits of Advocacy*] (discussing the importance of law-declaration function in the federal courts of appeals).

324. *Id.*

325. See Dragich, *supra* note 39, at 583–84.

326. *Id.* at 583.

327. See, e.g., Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 893–94 (2019) (noting that later “three-judge panels often repudiate principles articulated by earlier panels and confine those principles to the facts that gave rise to them.”).

328. Thanks to Justin Marceau for this comment.

cases, such as the Sixth Circuit's first decision in our Voting Rights Act example.³²⁹

Allowing panels to revisit prior decisions that have resulted in a conflict with another circuit may help mitigate these problems. While this proposal cannot guarantee judicial adherence to precedent in all cases, it may result in more candid engagement with prior decisions in conflict cases by enabling the latter panel to surface and express disagreement. Likewise, panels would have less incentive to submerge disagreements with precedent or other circuits using unpublished decisions if they could openly engage with those decisions with confidence that it could be revisited in light of subsequent disagreements. Finally, the proposal would allow panels to confront information that the prior panel missed, whether inadvertently or not. These benefits, thought limited to a narrow range of cases, may be of most benefit in conflict cases where reasoned engagement with contrary viewpoints is a core aspect of percolation and improving decisions through continued dialogue.

c. Uniformity, Efficiency, and Percolation

Finally, the proposal balances increased attention to conflicts with the law of the circuit doctrine's role in pursuing uniformity, efficiency, and percolation—and in some cases, the proposal improves the doctrine's ability to achieve these values. By limiting this proposal to conflict cases, the strict law of the circuit doctrine would still operate in the vast majority of cases. Although the uniformity and efficiency benefits of the existing doctrine are likely thinner than the literature suggests, this proposal nevertheless maintains those benefits for most cases. Rather, it targets a narrower set of conflicts that most clearly undermine values of uniformity. By giving circuits the tools to address conflicts, the proposal helps better balance the tension in the existing doctrine between intracircuit and intercircuit conflicts. Moreover, allowing circuits to engage with and resolve conflicts is consistent with the theory of percolation, removing an existing barrier in conflict cases to continued dialogue and development of an issue. The proposal therefore maintains the upside, however limited, of the existing doctrine in most cases and helps mitigate some of the doctrine's downside imposed by its role in generating and perpetuating conflicts.

329. See also, generally, Frost, *Limits of Advocacy*, *supra* note 323 (arguing that it is appropriate for courts to raise issues not raised by parties).

3. Lower Cost

The distinguishing feature of this proposal is that it can be implemented at a lower cost than other proposals in three senses.

a. Lower Political Cost

Relaxing the law of the circuit to address conflicts presents a lower political cost than other structural changes. Most attempts to address the structural influences of the Supreme Court's focus on conflicts have proposed changes to the fundamental structure of the federal courts.³³⁰ Ranging from restructuring certiorari to creating an entirely new tier of the federal judiciary, these proposals came with a high political cost that ultimately has never been surmounted.³³¹ Although the federal courts themselves continue changing, major reform to the judicial structure has become more difficult over time. After the introduction of the courts of appeals, the federal courts have settled into a structure so entrenched that even the addition of circuits to accommodate the growing caseloads proved bitterly contentious and, ultimately, ineffective.

Increased partisanship in and around the Supreme Court has made major reform of the Court more popular but also more politically fraught.³³² Structural reforms themselves have taken on a partisan tinge after the appointment of Justice Kavanaugh and the shift of the Court to a solid conservative majority.³³³ Both features, the increasingly settled structure of the federal courts and increasing political baggage associated with structural change, encourage using incremental reforms to address structural problems. This proposal—focused on a targeted doctrinal change in the courts of appeals—avoids some of the political costs associated with prior proposals for structural change while serving some of the same goals.

330. See, e.g., Carrington & Cramton, *supra* note 159, at 632; Comment, *supra* note 148, at 863–64.

331. Carrington & Cramton, *supra* note 159, at 636; Comment, *supra* note 148, at 885.

332. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 150–52 (2019) (discussing the politicization of the Supreme Court and the potential reforms to it).

333. See, e.g., Carl Hulse, *Frustrated Democrats Intensify Demand for Big Institutional Changes*, *N.Y. TIMES* (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/us/politics/democrats-filibuster-court-packing.html> [<https://perma.cc/NB2Q-9ABL>].

b. Lower Institutional Cost

Relaxing the law of the circuit as proposed here presents lower institutional costs than other proposals focused on the courts of appeals. As the debate over citation to unpublished opinions illustrates, even incremental change to certain practices of the appellate courts can be seen as deeply threatening to the position of the courts of appeals in the increasingly lopsided federal judicial system.³³⁴ Other proposals to address conflicts that are focused on the courts of appeals present more serious departures from the courts' settled practices than this proposal. Intercircuit stare decisis, for example, would eliminate the longstanding practice of circuit independence and further entrench a strict approach to prior decisions.³³⁵ By contrast, this proposal is targeted to maintain the existing law of the circuit doctrine for most cases, yet allow a continuing dialogue among circuits in conflict cases consistent with traditional incremental and discursive approaches to judicial decisionmaking.

c. Lower Implementation Cost

Finally, this proposal makes use of existing tools already available among the circuits. Unlike other proposals, this proposal does not require legislative change or Supreme Court intervention. Likewise, it does not require uniform change across the circuits in one fell swoop. Rather, it could be adopted through a change in each circuit's local rules or case law, offering incremental benefits as each circuit adopts the proposal. These features make for lower implementation costs than other proposals directed at similar problems.

C. Counterarguments

The proposal nevertheless comes with potential tradeoffs; allowing greater flexibility in the courts of appeals' decisionmaking can be seen as inviting greater volatility in federal law, and with that volatility, more gamesmanship by judges and lawyers, less certainty for litigants, and greater inefficiency overall. These concerns resonate with the old saw that it is better for the law to be settled than right, which reflects one of the defining tensions in how courts treat their prior decisions. This Section discusses two arguments that are illustrative of concerns that my proposal will result in too much instability. The

334. See Sloan, *Pragmatic Approach*, *supra* note 257, at 951 (arguing that her approach, though "advisable as a matter of policy, permissible under the Rules Enabling Act, and constitutional," is not likely to be adopted because "the vehemence of the views on both sides on citation norms alone" makes "changes to FRAP 32.1 . . . insurmountable.").

335. Dragich, *supra* note 39, at 583–84.

first confronts the broad concern that my proposal will yield a kind of chaotic, constantly changing world ripe for confusion and manipulation. The second argument is a specific application of that general concern, arguing that my proposal undermines specific doctrinal areas where stability is particularly important, such as the need for clearly-established law. I argue that both concerns are exaggerated when compared to the status quo, and that the benefits of my proposal outweigh these concerns.

1. Volatility

One concern with my proposal is that giving courts of appeals the ability to revisit prior decisions in conflict cases will result in a constantly changing law of the circuit, where issues are never fully settled and constantly revisited. Two examples help illustrate this concern.

First, consider a situation where an ideological minority on a circuit uses a conflict as an opportunity to undermine the position of a majority of the judges on the circuit. While plausible, I don't think this gamesmanship is a serious problem with my proposal for several reasons. Implementing the proposal through a procedure that allows for input from other judges on the circuit, such as the informal, mini-en banc procedure, would avoid this problem outright. And even if the proposal was implemented through a different procedure, full rehearing en banc would still be available to police minority views. But even assuming the proposal is implemented in a way to allow this outcome *and* traditional en banc procedures are not available, I still don't think this is a problem with the proposal itself. Rather, it's a problem inherent with using panels to make decisions for the full court. And even if it is a problem with the proposal, relaxing the law of circuit in conflict cases at least narrows this risk to a small minority of cases, maintaining the normal function of the law of the circuit in most cases.

The second illustration concerns *too much* dialogue. Imagine the Sixth Circuit rules on an issue. The Eleventh Circuit then splits with the Sixth Circuit. The Sixth Circuit revisits the issue, but in the meantime the Fourth Circuit splits with the Eleventh Circuit, siding with the Sixth Circuit's initial decision. But now the Sixth Circuit has changed, so a third panel then revisits the second panel's decision, reinstating the Sixth Circuit's initial position. The Eleventh Circuit then revisits its initial decision in light of the split with the Fourth Circuit, and so on. Meanwhile, the Supreme Court wants to grant certiorari, but the circuits positions keep changing. How can the Supreme Court know what the law is? How can lawyers advise their clients?

There are several points in response. First, it's unlikely that federal litigation moves this quickly in all but the most pressing issues, such as the same-sex marriage litigation, or perhaps particularly common issues, such as criminal sentencing issues. A situation like this would be the exception, not the rule. Second, it would still be fairly clear what the controlling law of each circuit is under my proposal even in the midst of such dialogue. Under my proposal, the law of the circuit remains what the latest panel said it is. It would be no more difficult for district courts or lawyers to know what the controlling law is than under the status quo, where potential change is always possible, just limited to a smaller set of actors (a legislature, Supreme Court, or en banc court). My proposal might make such a change more frequent, but no less discernable as a matter of finding what the *controlling* law is. Third, an issue need not be settled in every circuit to be taken up by the Supreme Court and settled nationwide. Many issues are resolved without having every circuit weigh in, and there can be value in the Supreme Court resolving a major issue even while it is still percolating. Plus, hypotheticals like this—where courts are engaged in too much dialogue—would better highlight issues for Supreme Court resolution than the current regime of several circuits each offering a one-time take. Examples of repeated disagreement more clearly signals a need for Supreme Court resolution, and the Supreme Court arguably has a wider diversity of views to consider.

All told, it is likely that my proposal will yield more change generally in the law of the circuit. But it's not clear that such change will result in more gamesmanship, less clear law in each circuit, or undermine Supreme Court review.

2. Clearly-Established Law

Another concern is that, even if increased volatility in general is not that bad, there are specific doctrinal areas where stability is particularly important, such as the need for clearly-established rights in constitutional adjudication. For example, state actors who hurt people are generally protected from civil claims by qualified immunity unless the plaintiff can prove that the state actor violated the person's constitutional or statutory rights under clearly-established law.³³⁶ Often, an on-point panel opinion from the relevant court of appeals is

336. See, e.g., *Tenorio v. Pitzer*, 802 F.3d 1160, 1163 (10th Cir. 2015) (“The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

sufficient to demonstrate that a right is clearly-established.³³⁷ My proposal, one might argue, harms plaintiffs' ability to seek redress of constitutional injuries by undermining the concept that a panel opinion "clearly establishes" a right. Rather, the argument goes, any panel opinion is subject to revision and therefore cannot clearly establish anything.³³⁸

This argument is misplaced and reveals a helpful distinction. As noted above, my proposal does not make it any more difficult to discern what the controlling law of the jurisdiction is. If the District of Colorado must determine whether the Tenth Circuit has recognized a particular right before in a precedential decision, my proposal doesn't make it any more difficult to figure that out. Rather, the argument seems to be motivated by a concern that my proposal will undermine the established-ness of the Tenth Circuit's precedential panel decision. But whether a right is clearly-established is a doctrinal fiction unrelated to how a decision can change and when. That the Tenth Circuit's precedential panel decision can be changed by the Tenth Circuit en banc or the Supreme Court does not, for example, affect a rights established-ness, just as precedential decisions from other circuits do not affect established-ness in the Tenth Circuit. Both the law of the circuit and the concept of clearly-established law are distinct legal fictions designed for different purposes. The two can coexist—the courts of appeals could maintain the existing rule that a precedential panel decision clearly establishes a constitutional right in the circuit, or any other doctrinal feature that requires special attention to stability, even if they adopted my proposal.³³⁹

V. CONCLUSION

Debate over reforms to address the structural influence of conflicts on the federal courts have long focused on the Supreme Court, and long preferred dramatic proposals to fundamentally change the courts and how they work. This debate has largely overlooked targeted, incremental changes in how the courts of appeals generate and perpetuate conflicts as a potential avenue for addressing these same problems. Viewed in context, the courts of appeals

337. *See id.* at 1063–64 (“Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.”) (quoting *Becker v. Bateman*, 709 F.3d 1019, 1023 (10th Cir. 2013)).

338. I want to thank Justin Marceau, Sam Kamin, and Nancy Leong for this point.

339. Notably the concept of clearly-established law has been adjusted to accommodate other reforms in judicial administration. *See* Lauren Staley, *Inadequate and Ineffective? Factual Innocence and the Savings Clause of § 2255*, 81 U. CIN. L. REV. 1149, 1157 (2013).

developed the law of the circuit doctrine in response to their own increasing independence as the Supreme Court transitioned to a court of discretionary review focused on maintaining uniformity. While the doctrine serves several purposes, the doctrine's role in propping up the Supreme Court as the primary court responsible for resolving conflicts closely matches this historical compromise. And as modern realities of federal caseloads have stressed the Court's role in resolving conflicts, the doctrine works to exacerbate the negative effects of conflicts. Reforming the law of the circuit doctrine itself therefore offers a narrowly-tailored and realistic opportunity for change to address these issues, while empowering the courts of appeals to further develop federal law through continued dialogue.