

UNCOMPELLING UNIFORMITY

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Abstract

When the potential for a circuit split arises, courts face competing values in determining the best course of action. A circuit may strive to balance consistency, predictability, uniformity, and correctness, among other values. But balancing uniformity and correctness is beyond the circuit's remit; to engage in it frustrates the constitutional structure and congressional design of the federal judiciary. In other words, it is an illegitimate form of adjudication. Contemplating uniformity between circuits throws courts into the world of policymaking, a domain rightly reserved for the political branches.

By prioritizing uniformity, courts not only overstep their bounds but also introduce additional challenges. Such a focus stifles dialogue between circuits, exacerbates the counter-majoritarian problem, and obstructs judicial decisionmaking. The rationale is based on a fallacious way of reasoning and distorts judicial decisionmaking.

Courts should refrain from letting uniformity drive their decisions, leaving the responsibility of achieving national uniformity to the Supreme Court and Congress. This method of adjudication ensures that the courts stay within their constitutionally confined role, and leaves policymaking to the political branches.

Understanding this dynamic can help distill what a coherent and valid theory of adjudication could look like. A theory of adjudication must be constrained by and further constitutional values. As shown here, a valid theory of adjudication cannot and must not include circuit uniformity.

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INTRODUCTION

The Supreme Court has recently made clear: “In the business of statutory interpretation, if it is not the best, it is not permissible.”¹ Yet, when a circuit court is confronted with a statutory question of first impression, not all courts search for the best interpretation. Instead, circuit courts choose between three modes of decision: (1) ignore other circuits’ decisions; (2) look to other circuits’ decisions as persuasive authority; or (3) turn their sister circuits into quasi-binding authority by putting a burden of persuasion on the circuit-split advocate’s side.²

The fundamental choice between these three options relates back to the over-arching theme of the federal judiciary: Supremacy.³ But federal law can only be supreme if we know what federal law is. Indeed, some argue that “a necessary corollary of supremacy is uniformity in the interpretation and application of federal law throughout the United States.”⁴ Because circuit courts are not required to follow each other, there is the chance that the interpretation of federal law fails to be nationally uniform.⁵ The decision of a circuit court to either agree with a sister circuit or trek out on its own can involve questions of legal methodology and policy.⁶

So, then, what should circuit courts do?

1. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

2. Alternatively, a court can place an irrebuttable presumption of validity. For both legal and practical reasons, this stronger uniformity presumption does not seem to exist in practice, but there is no reason that the logic of the uniformity presumption cannot encompass it.

3. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution”); see also Merritt E. McAlister, *White-Collar Courts*, 76 VAND. L. REV. 1155, 1202 (2023) (describing the argument for jurisdictional contraction of federal courts as one based on an elitist view of trivial cases being “unworthy of federal courts” but “fine for the state courts”).

4. Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 536 (2010).

5. *Id.* at 539; see Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1406 (2020) (detailing the origins of the law of the circuit doctrine, a doctrine which binds future circuit panels to the decisions of the first panel of that circuit to decide an issue).

6. See Michael Abramowicz, *En Banc Revisited*, 100 COLUMB. L. REV. 1600, 1604–05 (2000). But see Daniel A. Farber, *Do Theories of Statutory Interpretation Matter—A Case Study*, 94 NW. U. L. REV. 1409, 1411 (2000) (finding “a resounding absence of evidence that [Judge Richard Posner and Judge Frank Easterbrook’s] sharp theoretical difference has any substantial effects on their judicial votes”); cf. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 144 (1999) (stating that “[c]onstitutional theory has at best limited applicability to constitutional law”).

One route was seen in *United States v. Thomas*,⁷ where the Tenth Circuit answered a question of statutory interpretation.⁸ The court started the interpretive analysis as most courts do today: it began with the plain text and interpreted it per its “ordinary, everyday meaning.”⁹ The court resolved the interpretive question using that plain meaning.¹⁰

But the court did not stop there. It used uniformity to bolster its argument. The court explicated a reluctance to create circuit splits.¹¹ It explained that courts “should not create a circuit split merely because [a court] think[s] the contrary arguments are marginally better.”¹² In other words, circuit splits should be avoided unless “compelling” or “sound” reasons justify creating one.¹³ This description of a court’s decisionmaking mandates a presumption that cannot be rebutted by even a preponderance of the evidence against it. Even inconsistency with the text of a statute may not be strong enough.¹⁴ Bluntly, even if precedent, ordinary meaning, and structural values are on one side of the equation, the other side must win if a court can find another circuit decision with a sufficiently persuasive argument. With this view, independent judgment is not the lodestar of the circuit courts, guiding the judiciary toward the correct result; instead, uniformity is king.¹⁵

The Ninth Circuit in *Sachs v. Republic of Austria*¹⁶ took the same approach. The en banc court relied on a uniformity

7. 939 F.3d 1121 (10th Cir. 2019).

8. *See generally id.* (“We perform [the task of determining the intent of the Sentencing Commission in the Sentencing Guidelines] by applying traditional techniques of statutory construction.”).

9. *Id.* at 1123.

10. *Id.* at 1127–28.

11. *Id.* at 1130–31.

12. *Id.* at 1130.

13. *Id.* Some circuits substitute the *compelling* or *sound reason* language for “strong reason.” *United States v. Alexander*, 287 F.3d 811, 820 (9th Cir. 2002) (“Absent a strong reason to do so, we will not create a direct conflict with other circuits.”).

14. *United States v. Games-Perez*, 695 F.3d 1104, 1123 n.7 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) (“[W]hile the concurrence quotes cases from other circuits counseling against creating a circuit split ‘absent a strong reason to do so,’ inconsistency with an unambiguous statutory direction from Congress surely qualifies as just such a ‘strong reason.’” (internal citation omitted)).

15. *Cf. United States v. Scott*, 14 F.4th 190, 203 (2021) (Phipps, J., dissenting) (“[By basing the decision] solely on the uniformity of cases in five other circuits . . . the [majority] diminishes this Circuit’s independent obligation to say what the law is[.]” (footnote omitted)).

16. 737 F.3d 584 (9th Cir. 2013), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015).

presumption to buttress its statutory argument.¹⁷ The majority opinion even chastised the dissenting opinions for not reckoning with the existence of contrary sister circuit authority and for not recognizing that the dissents would have created a circuit split.¹⁸ Relying on its statutory analysis and supported by two sister circuit panel decisions, the majority felt satisfied that it had gotten the law correct.¹⁹ Yet just two years later, the Supreme Court unanimously reversed.²⁰

Although the uniformity presumption was only propping up a resolved interpretation exercise, the rhetoric of uniformity influenced a theory of adjudication which allowed policy to act as a shield for a plausibly incorrect reading of the statute. The court in *Sachs* possibly felt confident resting on its laurels because the uniformity principle blocked out alternative readings.

That is not to say, however, that a court cannot consider the persuasive weight of a decision that it believes is correct. This happens frequently and is a legitimate form of judicial decisionmaking.²¹ What should not be condoned is giving that nonbinding opinion quasi-binding stature or using the value of uniformity to buttress a decision. The distinction here may seem like a trivial accent on judicial decisionmaking, but federal courts implementing uniformity values leads to an aggregation of power in the judiciary that both constitutional structure and congressional design prohibit courts from exercising. That is, it allows courts to exercise a theory of adjudication incompatible with its role in our government.

Contrast the *Thomas* and *Sachs* cases with *Padilla-Ramirez v. Bible*.²² In *Padilla-Ramirez*, the Ninth Circuit created a circuit split instead of following a contrary circuit court opinion.²³ The court held that even though immigration is a

17. *See id.* at 593 (“[W]e see no compelling reason to create a circuit split with our sister circuits.”).

18. *Id.* at 592 n.5.

19. *See id.* at 596–97.

20. *OBB Personenverkehr AG*, 577 U.S. at 38, *rev’g* *Sachs v. Republic of Austria*, 737 F.3d 584 (9th Cir. 2013). For a similar story, *compare* *Cochran v. SEC*, 20 F.4th 194, 237 (5th Cir. 2021) (en banc) (Costa, J., dissenting), *with* *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 905–06 (2023) (unanimous).

21. *See* *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 672 F. Supp. 3d 220, 243 (N.D. Tex. 2023), *aff’d in part, rev’d in part* *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 107 F.4th 415 (5th Cir. 2024) (considering the Sixth Circuit’s “persuasive opinion”).

22. 882 F.3d 826 (9th Cir. 2017).

23. *See id.* at 836.

special context where a “comprehensive federal scheme [may] require[] a nationally unified administration program,” a proper reading of the legislation pointed to a clear result.²⁴ Thus, the court chose to give effect to Congress’s purpose rather than disregard Congress’s judgment and rely on uniformity.²⁵ It understood its role is to interpret statutes correctly to the best of its ability and that the Supreme Court’s role is to “harmonize the resulting split of authority.”²⁶ Despite uniformity being arguably more important in the immigration context than in other areas of federal law,²⁷ the court chose to stick with its analysis over defaulting to another circuit’s prior decision that went against the panel’s judgment.

Empowering the uniformity presumption ensures that a federal statute’s best or correct interpretation will sometimes be ignored or missed.²⁸ Because the presumption potentially weighs consistency and uniformity over close calls, the presumption can lead to interpretations that do not “represent the best and fairest reading” of a statute.²⁹ “[T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong.”³⁰ Yet, that is exactly what courts pursuing the uniform course do. The courts’ valuation of uniformity cuts against Congress’s and the founding

24. *Id.*

25. *See id.*

26. *Id.* at 837. Additionally, Congress could harmonize the split by clearly adopting one result over the other via statutory amendment. *Cf.* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1639 (2008) (stating that Congress is better than courts both in “making the policy choices at the heart of many disputes over the meaning of federal law” and in “determining when uniformity is truly important”).

27. *See* *Matter of M-H-*, 26 I. & N. Dec. 46, 49 (B.I.A. 2012); *Carez-Guiterrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). Uniformity in the immigration context may even be constitutionally required. *See id.*

28. *See* *Pub. Health Tr. of Dade Cnty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 n.4 (11th Cir. 1993) (noting that the Eleventh Circuit will often follow other circuits even if there is doubt about the correctness of those circuits’ decisions); *Mendieta v. Gonzalez*, No. 07-21891-CV, 2007 WL 9710890, at *3 n.3 (S.D. Fla. 2007) (noting the same). In fact, the “other circuit” decision that the Eleventh Circuit relied on in *Pub. Health Tr. of Dade Cnty.* despite doubting its correctness was later recognized as abrogated by subsequent Supreme Court and intracircuit precedent. *See* *US Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010).

29. *Kisor v. Wilkie*, 588 U.S. 558, 592 (2019) (Gorsuch, J., concurring in the judgment).

30. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024).

generation's collective decisions.³¹ Moreover, this presumption creates a “systematic judicial bias in favor of” established results, leaving all the benefits of percolation on the table.³²

The uniformity presumption is not a “product of some congressional mandate [that the courts] are powerless to correct.”³³ Courts can and should end their preference for national uniformity without waiting for Congress to wade further into the discussion.

This rhetoric of uniformity confuses the roles of the federal system³⁴ and the federal courts.³⁵ Additionally, placing uniformity enforcement within the job description of federal courts forces the judiciary to choose between different, competing policy values.³⁶ A focus on uniformity disrupts the

31. See *infra* Part II; cf. *Loper Bright*, 144 S. Ct. at 2267 (“We see no reason to presume that Congress prefers uniformity for uniformity’s sake over the correct interpretation of the laws it enacts.”).

32. *Kisor*, 588 U.S. at 592; see also *United States v. Ramirez*, 52 F.4th 705, 712–13 (7th Cir. 2022) (explaining that the benefits of percolation include the production of new perspectives and refinement of prior viewpoints); *Brown Shoe Co. v. United States*, 370 U.S. 294, 355 (1962) (Clark, J., concurring) (criticizing the Expediting Act, which allows for direct appeal from the district court to the Supreme Court in civil antitrust cases where the United States is the complainant, for depriving the Supreme Court of the “benefit of consideration by a Court of Appeals”).

33. *Kisor*, 588 U.S. at 592.

34. See, e.g., Eric Stein, *Uniformity and Diversity in a Divided Power System: The United States’ Experience*, 61 WASH. L. REV. 1081, 1083 (1986) (“There is . . . uniformity within the system of federal law based on federal statutes . . . and rulings of the federal executive and of federal agencies implementing federal statutes.”); see also *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 775 (7th Cir. 2023) (Easterbrook, J., concurring) (“The Supreme Court or Congress could produce a nationally uniform approach; [circuit courts] cannot.”), *cert. denied*, 144 S. Ct. 683 (2024).

35. See, e.g., *Frost*, *supra* note 26, at 1626 (examining the federal judicial structure and founding era jurisdictional choices and finding that the “federal courts were not viewed as the protectors of uniformity”). This Note confines itself to the rhetoric of uniformity as it relates to the federal judiciary. The concerns, values, and history occupied in the federal context are not all present in the state context. See ROSCOE POUND, *ORGANIZATION OF COURTS* 240 (1940) (describing the unique concerns of state courts).

36. See *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (Murphy, J., concurring in the denial of rehearing en banc) (valuing public perception of the judiciary and uniform application of the laws to justify the circuit court’s refusal to create a circuit split); *J. Supor & Son Trucking & Rigging Co. v. Trucking Emps. of North Jersey Welfare Fund*, 30 F.4th 179, 183 (3d Cir. 2022) (valuing a thirty-year consensus by the circuits to adopt one plausible interpretation of the statute over the plain-meaning of the statute); Thomas M. Reavley & Ryan S. Killian, *Against the Rule of Judges*, 68 BAYLOR L. REV. 661, 663–64, 675 (2016) (valuing

percolation of new answers to difficult and complex legal questions. Defaulting to uniformity may arouse our consensus-building brains,³⁷ but it is not the *sine qua non* of law.³⁸

Ultimately, this uniformity presumption strikes at the heart of a fundamental question about federal courts: What is their role in our democracy?

When the potential for a circuit split arises, competing values abound on what the best course of action is.

- Should a judge solely focus on uniformity?
- Should the judge instead vote based on her interpretive methodology?
- Would it be better for the judge to side against uniformity to allow experimentation on a novel question of statutory law?
- What about predictability?

These normative policy considerations collapse into the essential question of whether uniformity should be a factor when deciding a legal issue. It should not. A method of adjudication can only be valid if it takes into account just

predictability and consistency with other circuits over searching for the correct result); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 363 (5th Cir. 2009) (en banc) (noting that the most important values for the law are predictability and consistency and applying those values in a context that disregards the plain words of the statute being interpreted); *Games-Perez*, 695 F.3d at 1123 (Gorsuch, J., dissenting in the denial of rehearing en banc) (valuing trying to get it right over uniformity and consistency).

37. See Hannes Rusch, *The Evolutionary Interplay of Intergroup Conflict and Altruism in Humans: A Review of Parochial Altruism Theory and Prospects for its Extension*, 281 PROC. ROYAL SOC'Y BIOLOGICAL SCI. Nov. 7, 2014, at 6, <https://royalsocietypublishing.org/doi/epdf/10.1098/rspb.2014.1539> [<https://perma.cc/7TFC-4RU2>]; cf. Clark et al., *Tribalism is Human Nature*, 28 CURRENT DIRECTIONS PSYCH. SCI. 587, 590 (2019) ("Humans are tribal creatures. They were not 'designed' to reason dispassionately about the world; rather, they were 'designed' to reason in ways that promote the interests of their coalition[.]").

38. Cf. Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 391 (1997) ("Consensus is . . . not a definition of legal validity."); *Wages & White Lion Invs., L.L.C. v. FDA*, 90 F.4th 357, 386 (5th Cir. 2024) (en banc) ("[L]aw is not a nose-counting exercise.").

judicial values.³⁹ Uniformity is not a judicial value, so considerations of it or policy values emanating therefrom should be absent from the mind of the judicial decisionmaker.

Additionally, the uniformity presumption entangles federal courts further into the countermajoritarian difficulty. When using a uniformity rationale, the court asserts authority derived from the wisdom of the popular understanding of jurists while standing athwart to manifestations of the popular will by legislatures. If uniformity is used as a judicial policy to strike down or narrow legislation, then the court aggrandizes itself with the power to declare national laws rather than leaving that position to Congress. Furthermore, the use of uniformity in the exercise of judicial power signals to the public that “case law [is] fueled by power rather than reason.”⁴⁰

This Note primarily discusses the role of circuit courts engaging in questions of law regarding statutes, not constitutional law. There may be other values and concerns present in cases of constitutional interpretation and construction that are not relevant in the statutory context.⁴¹

Part I discusses the structure of our government. The role of the Legislature is contrasted with that of the Judiciary to illustrate why uniformity is not a responsibility delegated to inferior courts. Part II explores the history of uniformity in the federal judiciary. Part III considers the majoritarian difficulty that results when courts take up uniformity as a judicial value. Part IV canvasses the negative impact that uniformity has on the federal judiciary. Lastly, Part V begins to establish what a proper theory of adjudication should prescribe.

39. Discerning what all of the legitimate judicial values that can aid, guide, or instruct adjudication is outside this Note’s purview. This Note’s domain is much simpler. First, the Note shows that uniformity is not an apt criterion or model for courts to use in deciding a case. Second, the Note sets the groundwork for a theory of adjudication that I will explore in future writings. *See infra* Part V.

40. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1726 (2013) (footnote omitted). This language originates from Justice Thurgood Marshall’s dissent in *Payne v. Tennessee*, 501 U.S. 808 (1991), and emanates from his concern about personnel, not a focus on the law itself, being the catalyst for results. Justice Marshall’s concern is like the concern present in the uniformity context—results being rendered by mere happenstance of the particular personnel who exist on a circuit or who get selected for a particular panel. Strict adherence to the uniformity presumption leads to results that follow, not from the law, but from the specific personnel of the first panel to hear a question of first impression.

41. For instance, Congress can easily legislate to correct statutory decisions as compared to the rectifying method it must use in constitutional cases for harder-to-pass constitutional amendments.

I. CONGRESS AND THE JUDICIARY: UNIFORMITY ROLES

Congress is *primus inter pares*—first among equals—relative to the other branches of the United States government. With that great position comes great responsibility.⁴² This Part explores why Congress, and not federal courts, should determine when uniformity is essential. It is Congress’s job and prerogative to ascertain and decide when the benefits of uniformity outweigh the benefits of possible disuniformity. That responsibility and power derives from the constitutional plan.

A. *The Congressional Engine*

In a heterogeneous society, groups must “jostle, cajole, and horse-trade” for their desired outcomes.⁴³ These policy decisions reflect fundamental values that the representatives and their constituents deposited to Congress.⁴⁴ Due to these competing policies and their resulting unclear drafting,⁴⁵ interpreting congressional output can be complicated and can lead to tough decisions in determining the best and correct reading of a statute.⁴⁶

Moreover, unlike in Britain, where there was a “constitutional struggle . . . over how to wrest policymaking from the monarch and deposit it in a representative assembly,” the question here was not “*whether* a legislature should make policy” but was “*which* legislature.”⁴⁷ The United States determined that Congress should be entrusted with legislative

42. See generally SPIDER-MAN (Columbia Pictures 2002) (and see specifically Uncle Ben).

43. EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 202 (2011).

44. See *id.* at 204.

45. See Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1139 (2009) (“Like Madison, modern textualists and public choice theorists realize the difficulty of ascribing theoretical coherence to multimember assemblies, where the necessity of bargaining and compromise, as well as the constraints of the legislative process, often define the outcome.”); see also Tal Fortgang, *Textualism Is About Compromise*, THE DISPATCH (June 10, 2024), <https://thedispatch.com/article/textualism-is-about-compromise/> [<https://perma.cc/G4JS-Z29C>] (“At its core, textualism is about compromise. . . . It comprehends majorities arrive at an approved text only after an untold amount of horse-trading, coalition-building, and red-penning.”).

46. See Transcript of Oral Argument at 15–16, *Pulsifer v. United States*, 601 U.S. 124 (2024) (No. 22-340), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-340_ca7d.pdf [<https://perma.cc/EUM8-M3Z9>].

47. Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 HARV. J.L. & PUB. POL’Y 573, 580 (2017).

power because it is a “representative assembly.”⁴⁸ The Framers understood that popular representation and policymaking go together.⁴⁹

This popular representation results in the ability for the legislature to be held accountable for its actions. That is, through elections, “the link between the people and their rulers” is “preserve[d].”⁵⁰ Since there is the capacity of Congress to be held accountable, Congress “can claim to represent the people’s interest and claim the authority to act on their behalf.”⁵¹ After all, Congress is the only aspect of the national government that is directly connected and tied to the people.⁵² These features, among others,⁵³ support Congress’s role as the “driving force” of government.⁵⁴ Thus, it has a responsibility to be the “repository of national powers . . . and the channel of popular energy.”⁵⁵

Pointing out the institutional role of Congress is not controversial. Presumably, most people would prefer if the national legislature legislated. Instead, our legislature has blinked at circuit splits ranging from insignificant to controversial. It is focused on fundraising and sensation.⁵⁶ This may result from institutional design, campaign expenditure laws, or any other list of variables and factors. Either way, the result is a Congress that is not engaged in legislating.

This abdication has left a gap in our governance—a gap that the courts (and an ever-expanding executive branch) have

48. *Id.* at 575.

49. *Id.*; see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 209–19 (1996) (discussing the Framers’ focus on “maintaining a close bond between legislators and constituents”).

50. Whittington, *supra* note 47, at 580.

51. *Id.* at 582.

52. THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 19 (2006).

53. Whittington, *supra* note 47, at 574–75 (detailing other features).

54. *Id.* at 574; see also MANN & ORNSTEIN, *supra* note 52, at 21 (“The prominence of Congress in the Convention deliberations, constitutional text, and state ratifying debates speaks powerfully to the framers’ belief that the legislature would be the keystone of the American republic, deriving its legitimacy from the people but also able to act responsibly in their long-term interest.”).

55. Whittington, *supra* note 47, at 574. As this Note explains, Congress has used these powers to structure federal courts in a particular way, deciding when uniformity is an important value for the inferior federal courts to apply. See *infra* Part II.

56. See Stacey Selleck, *Congress Spends More Time Dialing for Dollars Than on Legislative Work*, US TERM LIMITS (Apr. 26, 2016), <https://www.termlimits.com/congress-fundraising-priority/> [<https://perma.cc/8893-T5ZB>].

attempted to fill.⁵⁷ For the executive, these gap-filling exercises primarily occur via declaration of power under broad delegations. The constitutionality of such delegations are irrelevant for the purposes of this Note; the delegations do occur and they do enable the executive to make policy under, at least the guise of, congressional authority. With the judiciary, the transfer of power is more pernicious due to its lack of direct connection to any electorate. The courts' statutory and constitutional decisions matter more because they are likely the last word on issues for which Congress is unable to muster bipartisan action.

At bottom, it is Congress's job to create a *national* law, a law that applies uniformly throughout the country. Congress has the obligation to write clear, consistent statutes. If circuit courts interpret a statute differently, then it is a sign that Congress may need to clarify its intent. Neither Congress nor the Constitution has delegated this task to the federal judiciary.

B. *The Role of the Inferior Courts*

The inferior courts' role in the federal system is circumscribed. It is physically so because each court only resolves cases that are (1) filed and (2) not settled, and because of the category of cases that can end up in federal court—those that fall under the court's diversity, federal question, and supplemental jurisdiction heads. But the point here is broader. The constraint on judicial interpretive methodology⁵⁸ (and output⁵⁹) also leads to the inferior courts' circumscribed role.

Because it is “reasonable to assume that Congress intends to leave policymaking to political actors,” it is the role of the court to apply its own legal judgment to questions of law.⁶⁰ In fact, the Constitution was framed to “ensure that federal judges

57. Douglas R. Williams, *Congressional Abdication, Legal Theory, and Deliberative Democracy*, 19 ST. LOUIS UNIV. PUB. L. REV. 75, 75 (2000); cf. David French, *The Worst Candidate for Civil Liberties Just Entered the Race*, THE DISPATCH: FRENCH PRESS (Nov. 26, 2019) <https://thedispatch.com/newsletter/Frenchpress/the-worst-candidate-for-civil-liberties/> [<https://perma.cc/G248-B7BZ>] (noting the Supreme Court's ability to “restor[e] the constitutional order”).

58. See, e.g., Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807, 829 (2023); Lawrence B. Solum, *Pragmatics and Textualism* 59–60 (July 1, 2024) (unpublished manuscript) (on file with author) (discussing the statutory constraint principle embodied within plain meaning textualism).

59. See, e.g., Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 364 (2013).

60. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 n.4, 2266 (2024).

could exercise judgment free from the influence of the political branches.”⁶¹ It is the court’s job to answer questions of law clearly, without “an eye to policy preferences.”⁶² In the context of statutory interpretation, federal courts (should) use their legal judgment to answer what the law *is*.⁶³

Although this Note is interpretive-theory-agnostic, there are a few non-negotiable guiderails that ensure only (arguably) legitimate values are used by courts. This Note touches on one foundational barrier: policymaking. Any legitimate methodology must not be based on pure policy judgments.⁶⁴ Or, at the very least, policy considerations incongruent with congressional judgment. Incorporating that type of policy into statutory interpretation is an act of judicial aggrandizement and leads to congressional diminution; it takes power from Congress and gives it to the judiciary.

This is not to say, however, that policy considerations are irrelevant to statutory interpretation. Courts have routinely used policy considerations when interpreting text, and that, by itself, is not illegitimate.⁶⁵ But, that use of policy is different from policymaking. When policy considerations are used to search for a statute’s meaning, they are used only to the extent that they help resolve ambiguity and discerning Congress’s intent.⁶⁶ Conversely, the imposition of the uniformity policy by federal courts is not a tool of discovering or implementing congressional meaning. Instead, the implementation of a uniformity presumption, absent congressional instruction, is pure policymaking. And that policy is to be made by Congress—not by courts.

C. Congress’s Domain: Uniformity as Policy

Congress knows how to fix issues arising from a lack of uniformity in federal law. Historically, Congress has shown itself capable of resolving circuit splits by passing new

61. *Id.* at 2268.

62. *Id.* (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896)).

63. Various theories of interpretation attempt to strive for this goal. This Note does not seek to answer which theory is correct; it simply posits that no matter which theory is implemented to decide a case, using uniformity as a value is contrary to the constitutional and congressional plan.

64. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2162 (2016).

65. See William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 543 (2017).

66. See *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013).

legislation that fixes divergent interpretations of federal law.⁶⁷ If the legislature wishes to cut off diverging interpretations of statutes, it can do so by amending the law and adding more precise language. Congress is “capable of resolving judicial disagreements over the meaning of federal law” and is better suited than a court, and is solely empowered by the Constitution, to balance the competing policy implications of differing interpretations.⁶⁸ Because Congress holds representative authority, Congress can democratically engage in these policy decisions.

Congress has also shown itself to be aware of when uniformity is important within a single circuit. For instance, despite Congress’s numerous proposals to divide the Ninth Circuit into different divisions (in response to debate about the circuit’s jurisprudence and decisionmaking),⁶⁹ it never implemented the plan because of concerns that the reorganization would disrupt the uniform interpretation and application of federal law within the circuit.⁷⁰ Congress, empowered by the Constitution, considered the benefits of uniformity and the impact of the current law on the constituents and citizens in the Ninth Circuit and made a policy determination. This weighing is an exercise that Congress can engage in due to its constitutional position. When courts get in the way and implement their own policy decisions, they frustrate Congress’s design and lawmaking ability under the Inferior Tribunal Clause. A court must follow the decision Congress has made on the issue of uniformity.

67. Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 66–67 (2001); cf. *Braxton v. United States*, 500 U.S. 344, 347–48 (1991) (“Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment . . .”).

68. Frost, *supra* note 26, at 1609; see, e.g., H.R. Rep. No. 115-25, at 29–30 (2017) (engaging in policy balancing when deciding that uniformity is important in the class certification process because of how dispositive that process normally is).

69. See generally Federal Ninth Circuit Reorganization Act of 1999, S. 253, 106th Cong. (1999) (proposing reorganizing the Ninth Circuit into three different divisions).

70. See, e.g., *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S. 253 Before the Subcomm. on Admin. Oversight & the Cts. of the S. Comm. on the Judiciary*, 106th Cong. 37, 54, 153–54 (1999) (expressing concern about the erosion of intracircuit uniformity over time and stating that the proposed design would undermine uniformity). These concerns resemble the rationale for the law of the circuit doctrine.

II. THE CONSTITUTIONAL PLAN AND CONGRESSIONAL ACTION: HISTORICAL CONTEXT OF UNIFORMITY IN THE FEDERAL JUDICIARY

Article III of the United States Constitution does not say much.⁷¹ Beyond providing for terms of good behavior and prohibiting salary diminishment, the text plainly and simply vests the “judicial power” in a Supreme Court and in the inferior courts that Congress creates.⁷² Despite the lack of textual hooks, scholars and jurists have claimed that uniformity is a constitutionally mandated goal for the judiciary as a whole.⁷³ Not so.

There is no historical evidence that the Constitution was designed with circuit-court-created uniformity of federal law in mind. The very existence of the Madisonian Compromise suggests that the “Framers did not intend for the judiciary to take a lead role in harmonizing divergent interpretations of federal law.”⁷⁴ The Madisonian Compromise allowed Congress to (or not to) provide for federal courts and define or limit their jurisdiction.⁷⁵ This control is

at odds with the view that the federal courts were intended to promote uniformity in the interpretation of federal law. . . . If [inferior federal courts] are prevented from issuing decisions on certain federal questions, then those subject areas will be left to the more numerous state courts, leading to greater disarray.⁷⁶

When these inferior federal courts were created, the foremost concern appeared to be “national and international peace and harmony.”⁷⁷ Additionally, the ability to carve out appellate jurisdiction over federal question cases provides evidence that the founding fathers were not concerned with courts standardizing federal law.⁷⁸ Similarly, the Framers expected that courts would confront cases using their own legal

71. McAlister, *supra* note 3, at 1164.

72. *See* U.S. CONST. art. III, § 1.

73. Frost, *supra* note 26, at 1614. This is so despite the explicit references to uniformity in other sections of the Constitution. *See, e.g.*, U.S. CONST. art. I, § 8, cls. 1 & 4.

74. Frost, *supra* note 26, at 1620–21.

75. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449–50 (1850).

76. Frost, *supra* note 26, at 1621–22 (footnote omitted).

77. *Id.* at 1623.

78. *Id.* at 1624–25.

judgment, uninfluenced by either of the “political branches.”⁷⁹ This extended to internal influence within the branch (excepting vertical *stare decisis* commands). Thus, at best, the Constitution is uniformity-neutral—there is no basis for inferior federal courts to proclaim a significant judicial interest in standardizing federal law.⁸⁰

Furthermore, the structure of federal courts is inconsistent with the uniformity presumption. Congress has structured multiple geographically situated intermediate appellate courts without firm horizontal *stare decisis*. The decision to have numerous courts at the same level leads to various voices, with equal footing, answering the same questions. Speaking with a single voice would have mandated an alleged federal interest in uniformity.⁸¹ If there were a uniformity policy to be applied by circuit courts, Congress would have structured a system cohesive to such a policy. But, that is not the choice that the founding Congress, nor subsequent Congresses, made. Instead, the Constitution initially made and Congress has continuously subscribed to the policy determination that judicial independence is to be valued over uniformity. Subsequent Congresses implemented that determination via a regional structure that valued representation and locality over national uniformity.

A. *The Original Structure of the Federal Court System*

The historical development of federal courts is not a story of uniformity. The Judiciary Act of 1789⁸² created a system of lower federal courts that were inferior to the Supreme Court.⁸³ Still, the Act “deprived the lower federal courts and the Supreme Court of jurisdiction over many of the subject matters that Article III would have permitted them to hear.”⁸⁴ Where

79. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266, 2268 (2024).

80. Frost, *supra* note 26, at 1619.

81. See Transcript of Oral Argument at 63, *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, 601 U.S. 65 (2024) (No. 22-500), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-500_1o23.pdf [https://perma.cc/K2EF-U28H] (Justice Ketanji Brown Jackson: “[I]f we have a single federal spokesperson regarding what is accepted, you’re more likely to advance the interests of uniformity and predictability”); cf. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14 (reasoning that the president’s ability to speak with one voice is characteristic of unity).

82. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

83. See *id.*

84. Frost, *supra* note 26, at 1616.

the Act did not grant original jurisdiction to the inferior federal courts, matters were left to the state courts to decide.⁸⁵

The Judiciary Act did not give the Supreme Court jurisdiction over all state court cases applying federal law. In fact, federal courts were not granted original jurisdiction over cases arising under federal law until 1875.⁸⁶ When the First Judiciary Act was enacted, the Supreme Court could only hear cases where state courts refused to recognize a federal right or privilege.⁸⁷ The Supreme Court was to serve as a check on a state court's potential hostility to federal law,⁸⁸ not as a buffer on a state court's reception of federal law. In other words, the Supreme Court was empowered to police the floor, but not lower the ceiling, of federal rights throughout the United States. This lack of involvement of federal courts in pro-right decisions lasted for 125 years.⁸⁹ That unbroken 125-year period showed that Congress, starting from the founding, "was focused more on cases in which the court was needed to vindicate federal rights" than on cases where "uniformity of federal law across the states" was of interest.⁹⁰

Where the Act did provide jurisdiction to the inferior federal courts, the Supreme Court could not always act as an appellate tribunal. For instance, the Supreme Court could not hear cases reviewed by the circuit courts via writ of error.⁹¹ The Supreme Court could hear cases reviewed on appeal by the circuit courts only if the amount in controversy was over \$2,000.⁹²

Given the lack of *carte blanche* federal question jurisdiction at both the original and appellate level, the takeaway from the pre-Civil War evidence is clear: uniform interpretation of

85. *Id.*; see also Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 104 (2003) (noting that state judges retained authority for adjudicating cases that arose under federal law and that state courts were the primary institution responsible for adjudicating "federal question cases throughout history").

86. See Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

87. Judiciary Act of 1789 § 25.

88. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 907 (1984).

89. Steve Vladeck, *The Supreme Court and State Courts*, ONE FIRST (Mar. 25, 2024), <https://stevevladeck.substack.com/p/73-the-supreme-court-and-state-courts> [<https://perma.cc/BM4J-NN3U>].

90. *Id.*

91. Frost, *supra* note 26, at 1617.

92. *Id.*

federal law was not the goal.⁹³ The Act did not “ensure that [federal question] cases were handled by a federal court system . . . equipped to issue consistent decisions about the meaning of federal law,” nor could the first Congress have “seen harmonizing varied interpretations of federal law as the federal judiciary’s primary, or even secondary, role in the national government.”⁹⁴

B. *Post–Civil War Structure*

Like the lack of founding evidence that uniformity is the goal of the federal judiciary, the congressional debate over the Evarts Act also refutes that uniformity is a federal judiciary value.

The Evarts Acts created what we now regard to be our modern intermediate federal appellate courts.⁹⁵ The Act created “nine standalone circuit courts, staffed by standalone circuit judges.”⁹⁶ The courts were disbursed geographically.⁹⁷

The framers of the Act were aware that a two-stop system may lead to “diversities . . . in decisions.”⁹⁸ The supporters of the Act knew that the “geographical distribution” of the courts resulted in the uniformity of federal law being “endangered.”⁹⁹ To guard against this “diversity of judgment” that could arise from creating separately staffed and regionally dispersed circuits, the Act allowed for two avenues of Supreme Court review: certification by the circuit courts and discretionary final review by the Supreme Court.¹⁰⁰ Despite the ability to do so,

93. *Id.* at 1618–19 (“If uniform interpretation of federal law was a goal, the first Congress would have given the Supreme Court jurisdiction over . . . many . . . lower federal and state court decisions discussing federal law . . . [and] granted the lower federal courts either concurrent or exclusive federal question jurisdiction[.]”).

94. *Id.*

95. See STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 49–50 (2023) (detailing the effect of the Evarts Act).

96. *Id.* at 48.

97. See Evarts Act, ch. 517, §§ 2–3, 26 Stat. 826, 826–27 (1891).

98. 21 CONG. REC. 10221 (Sept. 19, 1890).

99. *Id.*

100. Dragich, *supra* note 4, at 562; see also Sassman, *supra* note 5, at 1416 (“The Supreme Court became . . . dedicated to systemic principles like uniformity, while . . . mine-run . . . appeals would be processed by independent, regional courts of appeals without further oversight.”). Additionally, appeals on various public questions could be brought straight from the district court to the Supreme Court. See Evarts Act § 5. Although this direct appeal accounted for only big, public questions of law, such as constitutional interpretation and adjudication of a statute’s validity, it did not permit

Congress did not include a provision in the Evarts Act making one circuit's authority binding on every other circuit.¹⁰¹ Instead of mandating uniformity at the circuit-court level, Congress left the Supreme Court with the “flexibility, elasticity, and openness” needed to supervise the circuit courts.¹⁰² Congress was “aware that the change would create more conflicts,” and it balanced that concern by giving the Supreme Court “a responsibility to supervise the lower courts.”¹⁰³

The Act also provided the Supreme Court with increased control over its docket.¹⁰⁴ Ostensibly, the new discretionary review mechanism allowed the Supreme Court to focus on uniformity concerns, while the new intermediate appellate courts would focus on mundane appeals.¹⁰⁵ However, due to the Supreme Court's newfound ability to manage its docket, conflicts between the circuit courts proliferated and lasted.¹⁰⁶ What had been born out of a concern for increased national uniformity of federal law had created a firestorm of regional circuit conflicts.

Given the reverse effect the Act had on circuit conflicts, the open acknowledgment that such reverse effect was likely, and the historical case backlog that motivated the passage of the Act,¹⁰⁷ using the Evarts Act as evidence that uniformity is at the forefront of judicial policy falls short.¹⁰⁸ The best the Evarts

the direct appeal of the construction of a federal statute. *See id.* Thus, circuit splits would regularly occur in statutory interpretation cases (the thrust of cases where the uniformity rationale is used). *Cf.* Sassman, *supra* note 5, at 1416 (noting that Congress knew that the Evarts Act would create more conflicts). Concededly, there may be an argument that uniformity creeps in as a value in the category of cases that directly went to the Supreme Court under the Evarts Act; however, Congress removed the direct appeal provisions in the Act and kept the structure of the intermediate federal courts.

101. Dragich, *supra* note 4, at 586.

102. 21 CONG. REC. 10222 (Sept. 19, 1890).

103. Sassman, *supra* note 5.

104. *See* Evarts Act § 6.

105. Sassman, *supra* note 5, at 1415–16.

106. *Id.*

107. VLADECK, *supra* note 95.

108. In a similar vein, the structure of the court system is better evidence of the inspiration, purpose, and goal of the Evarts Act than any contemporary legislative statement on its objective. *See* Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 376 (noting the concern that when using legislative history one can usually find what one is looking for). Looking at the structure resulting from the Act and the Act's immediate aftermath, one may conclude that the “drafters of the Evarts Act implicitly recognized important truths that in a country as complex as the United States, the adjudicatory system is

Act does is provide support for the commonsense proposition that the Supreme Court, not the regional circuit courts, should resolve issues that arise from disuniformity. The Supreme Court was provided the flexibility to supervise the circuit courts and ensure uniformity through discretionary review. The circuit courts, however, were left uninterrupted in the pursuit of deciding cases based on the “general and central propositions of [their own individual] jurisprudence.”¹⁰⁹

A survey of the constitutional text, the Judiciary Act of 1789, and the Evarts Act show that neither the founding generation nor the framers of our modern federal court system were concerned with the intermediate federal courts as a vehicle for uniformity. Instead, the evidence tells a tale of judicial independence and supremacy.¹¹⁰

C. Congressional Action

It is Congress’s decision to determine when uniformity of federal law is necessary.¹¹¹ Congress has decided where the benefits of uniformity outweigh the benefits of disuniformity. This decision is evident in the purpose and structure of two particular parts of the federal court system—the United States Court of Appeals for the Federal Circuit and issues designated for exclusive jurisdiction within one specific court—and in the administrative application of federal laws. Analyzing these three areas provides clear evidence of uniformity, where the federal courts’ structure does not. Additionally, these examples show (1) where uniformity has been introduced into the system and (2) that Congress can introduce such policy and knows how to do so.¹¹²

stronger when courts . . . question one another, modify each other’s outcomes, and resolve similar issues differently.” Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 S.M.U. L. REV. 505, 523 (2013) (emphasis added).

109. 21 CONG. REC. 10221 (Sept. 19, 1890).

110. See Frost, *supra* note 26, at 1572 (“[Both the lack of federal question jurisdiction until 1875 and the refusal to provide the Supreme Court power to review all state court decisions addressing federal questions until 1914] indicate that the standardization of federal law was low on a list of original federal courts values, falling well below the need to supply neutral tribunals for interstate and international disputes and to ensure the supremacy of federal law.”).

111. Just as they did when passing the Evarts Act itself. See Evarts Act, ch. 517, § 5, 26 Stat. 826, 827–28 (1891).

112. This institutional knowledge is further evidence that Congress has not introduced uniformity where it cannot be found.

1. The Federal Circuit

Congress knows how to ensure uniformity for a particular area of law. Compare the structure of the twelve circuit courts with regionally defined boundaries with the subject-matter-defined Federal Circuit. Congress had uniformity in mind when creating the Federal Circuit.¹¹³ The same cannot be said for the regional courts.

In the lead-up to the creation of the Federal Circuit, the Supreme Court, instead of primarily focusing on resolving intercircuit disagreements on issues of patent law doctrine, concentrated on answering whether particular inventions were patentable.¹¹⁴ This one-track focus resulted in “disorder in patent law[,]” leading inventors to opt for trade secret protection over patent protection and thereby “depriving the public of the benefits of the full disclosure required by patent law.”¹¹⁵ In response, Congress established the Federal Circuit due to the “special need for nationwide uniformity.”¹¹⁶

Congress’s purpose for centralizing patent cases was to “reduce the widespread lack of uniformity and [the resulting] uncertainty of legal doctrine.”¹¹⁷ Congress understood that a specialized, centralized court was the best way to achieve uniformity in patent law.¹¹⁸ Congress, in balancing uniformity and percolation, weighed the need for a more stable and predictable doctrine.¹¹⁹ It was aware of the potential negatives of a centralized, uniform structure but decided that those

113. See Jason Rantanen & Lee Petherbridge, *Disuniformity*, 66 FLA. L. REV. 2007, 2040 (2014).

114. Lynda J. Oswald, *Improving Federal Circuit Doctrine Through Increased Cross-Pollination*, 54 AM. BUS. L.J. 247, 265 (2017).

115. *Id.* at 265–66.

116. S. REP. NO. 97-275, at 2 (1981); see also Oswald, *supra* note 114, at 266.

117. Holmes Group, *The Federal Circuit, and the State of Patent Appeals: Hearing Before the Subcomm. on Cts., The Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 9 (2005) (statement of Edward R. Reines, Esq., Weil, Gotshal, & Manges LLP) [hereinafter Holmes Group, *The Federal Circuit, and the State of Patent Appeal*].

118. *Id.*

119. Oswald, *supra* note 114, at 266–67; see also Holmes Group, *The Federal Circuit, and the State of Patent Appeals*, *supra* note 117, at 89 (statement of Rep. Howard L. Berman) (noting that “stability, uniformity, and dependability in the patent system” was needed for an innovative market).

negatives were outweighed by the impact standardizing the area of law would have.¹²⁰

But Congress did not make that choice for the regional federal circuits. Perhaps Congress was aware of the great benefits of “cross-pollination” in developing legal rules and interpretations of statutes.¹²¹ Or perhaps not. Congressional awareness is immaterial; the policy choice between uniformity and disuniformity is for Congress to make in the first instance—not the courts.

At bottom, Congress knows how to create a structure designed for uniformity and does so when it finds that uniformity is important and that the need for it outweighs other important values or principles. In the intermediate circuit context, Congress has chosen a structure that speaks to uniformity’s lack of importance in particular genres of federal law.

2. Exclusive Jurisdiction

Another way that Congress shows uniformity’s importance is by passing legislation that creates exclusive jurisdiction in a particular court. For instance, numerous statutes grant the D.C. Circuit exclusive jurisdiction over specific areas of administrative law.¹²² Some of these exclusive jurisdiction grants may be influenced by a congressional belief that for particular areas of law “it is more efficient to have a single court provide guidance about administrative proceedings.”¹²³ This may be because “federal agen[cies] regulat[e] on a national scale, [so, agencies] need tailor action to only one body of

120. See Holmes Group, *The Federal Circuit, and the State of Patent Appeals*, *supra* note 117, at 90 (“Vesting exclusive jurisdiction over all patent law issues in a single appellate court may impose uniformity before better interpretations of the law can be developed and may result in inadequate consideration of competing interests. By limiting legal interpretation to a single Court of Appeals, the relevant policy decisions (and alternatives) also are deprived of the chance for empirical validation before a unitary interpretation is imposed.”).

121. Oswald, *supra* note 114, at 257.

122. See, e.g., 8 U.S.C. § 1189(c)(1) (granting exclusive jurisdiction to the D.C. Circuit to resolve petitions for revocations of designations of foreign terrorist organizations).

123. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131, 145 (2013); see also Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1095 (2017) (discussing reasons for why exclusive jurisdiction exists for some areas of law at the D.C. Circuit).

precedent, rather than to a patchwork of potentially conflicting cases in multiple circuits.”¹²⁴

At bottom, most grants of exclusive jurisdiction are to “achieve greater uniformity of construction and more effective and expert application of that law.”¹²⁵ For those specific areas where the D.C. Circuit has exclusive jurisdiction, Congress has decided that “nationwide uniformity outweighs the benefits of percolation and intercircuit dialogue.”¹²⁶ For example, Congress has decided that review of some decisions by the Environmental Protection Agency (EPA) should be heard in the D.C. Circuit when truly national, otherwise they should be heard in the local regional circuit court.¹²⁷ However, other decisions by the EPA are vested in the D.C. Circuit regardless of whether they are truly national.¹²⁸ That is, Congress determined when decisions needed an uniform outcome and when they did not.

Consequently, where Congress has not vested exclusive jurisdiction over particular areas of law in a specific court, it follows the system designed to create intercircuit dialogue through regional decisionmaking. Disuniformity is not an “unintended byproduct of a geographically dispersed, decentralized judicial structure.”¹²⁹ It is and was a legislative choice.¹³⁰

124. Fraser et al., *supra* note 123.

125. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996).

126. Berger, *supra* note 123, at 1096.

127. See 42 U.S.C. § 7607(b)(1).

128. See 42 U.S.C. § 6976(a)(1).

129. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT’S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 48 (1986); see also Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1107 (2018) (“[C]onflicting rulings are the cost we pay for allowing lower courts to reach divergent conclusions about the meaning of federal law—a cost that many think is worthwhile”); cf. *id.* (explaining that, in the context of nationwide injunctions, conflicting injunctions “are a natural byproduct of a judicial system that permits courts with overlapping jurisdiction to reach different results”).

130. See Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government’s Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 943, 969 (2012) (“[T]he freedom for the lower courts to disagree was not a legislative accident.”); *id.* at 971 (“[L]egislative design [of the inferior courts] ratifies the value of developing the law through debate in the lower courts.”); cf. Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686 (1984) (stating that regional independence was an “inevitable” result of the Evarts Act). The choice is a clear policy decision. Berger, *supra* note 123 (“[The regional structure of the circuit courts that] has prevailed for over a century is a testament to

3. Administrative Adjudication

Various administrative agencies oversee the uniform administration and application of the federal laws they are tasked with enforcing. For instance, the Board of Immigration Appeals (BIA) has nationwide jurisdiction over certain immigration court decisions.¹³¹ Similarly, the Federal Trade Commission (FTC) Commissioners can review an administrative law judge's recommendation, and their decision is final.¹³² These structures allow these administrative agencies to more faithfully apply federal laws uniformly¹³³—it is easier to apply laws uniformly when a single institution interprets and enforces them. The ability of these agencies to both interpret and apply the law creates conditions that allow uniform application to thrive.

True, Congress can leave open the door for direct appeal to the federal judiciary. In both the immigration and FTC contexts, Congress allows final decisions (by the BIA and FTC Commissioners, respectively) to be appealed directly to the courts of appeals.¹³⁴ Then, the resulting circuit court opinions displace the administratively created uniform body of applicable law.¹³⁵ This was not an issue pre-*Loper Bright* because these divergent interpretations were routinely unified at the administrative agencies, with the agencies usually citing *Brand X*.¹³⁶

Loper Bright provides a strong foundation for understanding those conflicting uniformity structures that combine singular agency application with segmented federal court interpretation. First, federal courts police, but do not intrude upon, congressional delegations of policymaking authority.¹³⁷ Second, ambiguity is not an implicit delegation of policymaking authority, so ambiguity should be resolved by courts exercising

the policy choice that percolation and intercircuit dialogue are more valuable—in the short term—than efficiency, immediate uniformity, and complete relief.” (footnote omitted)).

131. See 8 C.F.R. § 1003.1 (2023).

132. See 16 C.F.R. § 3.54 (2023).

133. “Uniformly” does not mean “consistently.” When a political flip happens in the interpretation or application of a federal law by an administrative agency, the law is no longer consistent, but it remains uniform. See, e.g., *Nat'l Cable & Telecomms., Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

134. See 8 U.S.C. § 1252; 15 U.S.C. § 45(c).

135. See *Matter of Augustin Ortega-Lopez*, 27 I. & N. Dec. 382, 396 (B.I.A. 2018).

136. See *id.* at 387. Similarly, in the federal judiciary context, the Supreme Court (and Congress) oversees the unification of divergent interpretations of federal law.

137. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

their legal judgment.¹³⁸ Where Congress is concerned with a uniform application of federal law, it may delegate substantive policymaking authority to the agencies. But when it does not so delegate, federal courts will not infer that delegation. Instead, courts will infer that Congress chose the traditional method of resolving ambiguity: a federal court imposing “*its own*” best reading of the statute.¹³⁹ This best reading is determined by the conventional interpretive method, including tools that arise from constitutional concerns (e.g., constitutional avoidance).

So, Congress, in establishing administrative agencies tasked with both the enforcement of federal law and its application to facts, created a structure that was prone to uniformity. Either expressly or implicitly, the structure and authority of these agencies allowed for uniformity to creep into the decisionmaking process. The same cannot be said for the federal judiciary writ large. Where Congress has allowed federal courts to step into the administrative-law picture, it has done so on the traditional terms of legal judgment.¹⁴⁰

III. THE MAJORITARIAN RATIONALE

The uniformity rationale boils down to a particular circuit court getting to a particular decision in a particular case first; thereafter, every court must follow that first court’s lead. The argument that the courts must stick together as a collective unit fails when juxtaposed against a court’s constitutional role: safeguarding individual liberty against popular majoritarian (or collective) tyranny.

A. *Majoritarian Difficulties and Federal Courts*

Courts, as a countermajoritarian institution, limit what can be done by the popular majority.¹⁴¹ Uniformity and majoritarianism are not necessarily interchangeable.¹⁴² But, in the legislative and judicial context, majoritarianism results in uniformity. In the legislature, the majority passes a law that applies uniformly throughout the country. So too in the

138. *Id.* at 2266.

139. *Id.* (emphasis added).

140. *See, e.g.*, 5 U.S.C. § 706; *Loper Bright Enters.*, 144 S. Ct. at 2281–82 (Gorsuch, J., concurring).

141. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

142. *Compare Uniform*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[I]dentical or consistent.”), *with Majority*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[M]ore than half of some defined or assumed set.”).

judiciary the decisions of a particular circuit court (or panel) need not be uniform to apply uniformly throughout that court's geographic reach. Further, only a majority of judges in a regional circuit court need to buy into the uniformity principle for that principle to apply.¹⁴³ In other words, to apply the uniformity rationale, a circuit court need not uniformly agree.

Courts empowering themselves with majoritarian rhetoric while engaged in anti-majoritarian action is a wound worsened by the fact that the judicial branch was not designed to be governed based on majoritarian values. While a specific panel or circuit court sitting en banc may reach a result through a majority decisional rule, the intermediate federal level, as a constitutional and statutory unit, cannot achieve such a nationwide result through such means. The reason is simple: Each circuit's law is its own.¹⁴⁴ The compartmentalization of the federal judiciary is a feature, not a bug—in fact, it is the design itself. This design can help resolve issues that emanate from the counter-majoritarian difficulty.

When implemented by courts, uniformity's twin values of consistency and national application are proclaimed to outcompete other values (such as correctness). Yet, courts use the uniformity presumption to narrow (or misinterpret, or strike down) majoritarian legislation, which otherwise would provide consistency, predictability, and uniform national application. Courts engaging in the rhetoric of majoritarian values on one hand while limiting (or striking down) democratically enacted laws on the other illustrate the illegitimizing effect of the uniformity presumption.

1. The Self-Imposed Majoritarian Difficulty

It may be true that judicial review of legislation helps protect minority rights from political pressure.¹⁴⁵ But, the existence of judicial review does not *ipso facto* make for a more legitimate government.¹⁴⁶ Instead, that legitimacy springs from how courts behave.¹⁴⁷ Analyzing the impact the courts have on our

143. And only a majority of Justices on the Supreme Court need to agree to bind their decision on the United States as a whole.

144. See Marcus, *supra* note 130, at 686–87.

145. Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1042 (2010).

146. See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 398 (2011) (“Nothing guarantees in advance that judicial review either will or will not make a majoritarian community more legitimate and democratic.”).

147. See *id.*

system of government requires careful observation of the institution, which includes judicial rhetoric and usage of “democratic” values.¹⁴⁸ Thus, careful observers of the judiciary should look at how legitimate governmental values are repurposed by courts.

There are roughly two mainstream positions one can take on democracy as it relates to judicial review. The first finds no solace in judicial review of popular legislation because it equates democracy with “the right of majorities to rule.”¹⁴⁹ Opponents of judicial review argue that it is democratically illegitimate.¹⁵⁰ Advocates of this position presume that such popular legislation reflects the will of the prevailing popular majorities and that striking down such legislation “thwarts the will of . . . the actual people of the here and now” and “exercises control, not in behalf of the prevailing majority, but against it.”¹⁵¹

The second stance focuses on political equality, where “majority rule . . . play[s an] important role,” but understands that a democracy can only be legitimate if it protects minority rights and promotes fair deliberation.¹⁵² This second theory is more comfortable with judicial review because such review may contribute to a democracy’s ability to foster that protection and deliberation.¹⁵³

Courts sometimes defend exercises of judicial power as springing from their obligation to ensure uniformity in federal law—uniformity that usually springs from popular legislation. In those cases, courts deny that they are using their own power through rhetoric that downplays their role. Namely, by deciding a case by applying another court’s decision, hiding their own power by invoking the name of a different court.

Ostensibly, this may satisfy (as much as possible) both main camps of judicial review. As to the first, courts get out of the way and allow Congress to legislate (at least for non-constitutional cases)¹⁵⁴ if Congress disagrees with the courts’ initial resolution, contending with only one interpretation

148. See Macedo, *supra* note 145, at 1039.

149. *Id.* at 1030.

150. Lucky B. Trembly, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT’L J. CONST. L. 617, 620 (2005), <https://academic.oup.com/icon/article/3/4/617/792021> [<https://perma.cc/H6XQ-J5UR>].

151. BICKEL, *supra* note 141, at 16–17.

152. *Id.*

153. See *id.*

154. *But see* Gun-Free School Zones Amendments Act of 1995 (amending a gun law held unconstitutional by *United States v. Lopez*).

instead of thirteen. That is, the uniformity rationale allows courts to be minimally intrusive. They only interpret the legislation once. As to the second stance on judicial review, courts still play a role policing the scope and power of Congress, ensuring minority rights are protected. (Albeit, maybe only once).

However, this uniformity obligation does not appear anywhere in law.¹⁵⁵ So when engaged in this uniformity charade, the judiciary assumes the role of chief uniformity enforcer, aggrandizing itself with more power than the countermajoritarian difficulty already contemplates.

Judicial self-aggrandizement is not new.¹⁵⁶ In *Clarifying Judicial Aggrandizement*, the authors synthesize their individual work on judicial self-aggrandizement, setting out an explanation of the phenomenon.¹⁵⁷ They describe two common forms of self-aggrandizement.¹⁵⁸ The first is the creation of vague standards that permit courts to acutely examine action by the other two branches.¹⁵⁹ The second is the use of (often demeaning) rhetoric to describe political institutions outside the judiciary.¹⁶⁰ These tools have allowed courts to stretch their judicial power, expanding their “governance” power.¹⁶¹

The self-aggrandizement that occurs in the uniformity context is more perverse than the aggrandizement discussed above.¹⁶² Courts engaging in the uniformity rationale usually downplay their own powers and act deferential to Congress.¹⁶³ And courts sell the uniformity presumption as a way for them to stay out of policymaking.¹⁶⁴ Despite what courts say (or even believe), they engage in three species of policymaking when applying the uniformity rationale: (1) deciding what role the courts should have in relation to each other; (2) deciding what

155. *See supra* Part II.

156. Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PENN. L. REV. ONLINE 24, 40 (2023).

157. *See generally id.*

158. *See id.* at 39.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *See, e.g.*, United States v. Games-Perez, 695 F.3d 1104, 1115–16 (10th Cir. 2012).

164. *See, e.g.*, United States v. Thomas, 939 F.3d 1121, 1131 (10th Cir. 2019).

values federal courts should prefer over others;¹⁶⁵ and (3) locking in the meaning that federal courts will provide to a statute (and thus how it is nationally understood, transplanting national legislation from Congress to the Judiciary). Proclaiming that uniformity is a constraint on policymaking does not make it true. With this version of self-aggrandizement, courts present themselves as simply following a federal interest in having a uniform federal law, and they downplay their role in resolving contested issues.

“Majority for me but not for thee” is not a compelling motto. Yet, that is exactly what uniformity-enforcing courts believe. When a court champions the principles behind uniformity on one hand, while ignoring the same values furthered by a popular majority on the other, a court values its own power while denigrating the other branches and the people those branches represent. At bottom, the use of uniformity by federal courts aggrandizes the judicial branch at the expense of the people.¹⁶⁶ The judiciary steals national policymaking authority from the executive and legislative branches, disregarding the structure contemplated by both the Constitution and Congress.¹⁶⁷ Ignoring the debates over what a legitimate form of judicial review should look like, the judiciary implements a regime that places it beyond Congress’s remit—it gets to determine what values to care about and how to further them.

2. Combatting that Majoritarian Narrative

There are two more items to recognize when discussing courts’ self-imposed majoritarian difficulty beyond just halting the rhetoric.

First, the uniformity value can lead to a lock-in effect where one wrong decision by a single panel leads to a single wrong answer by multiple circuits.¹⁶⁸ As such, creating a circuit split can itself be in service to the countermajoritarian nature of the courts (limiting the reach and approach of a particular judicial majority), while advocating for the uniformity approach does the opposite (empowering rogue interpretations and majorities). In taking the uniformity approach, courts consume

165. See, e.g., *supra* note 36 (collecting cases); see also *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012) (finding it “inadvisable” to maintain a circuit split on a particular issue).

166. See Sumrall & Baumann, *supra* note 156, at 28.

167. See *supra* Part II.

168. Cf. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 933–34 (mem.) (Kavanaugh, J., concurring in the grant of stay) (discussing vertical lock-in effects).

congressional policymaking power in a way that is inconsistent with Congress's will.¹⁶⁹ If the uniformity approach is not taken, the judiciary does not fill in a singular (potentially wrong) interpretation of a congressional statute but restrains itself from engaging in an en-masse implementation of error.

Second, a way to combat the inherent unease with a countermajoritarian institution in a democracy is to direct that institution to act suspiciously toward its power.¹⁷⁰ This includes questioning the rhetoric a court uses. By deciding to act on their own legal judgment, the courts remind us that they are not the Nation's problem-solvers but are part of a department of the United States designed to answer the questions in front of them to the best of its ability. By defaulting to a uniformity rationale, the judiciary invokes an undeniably national policy power. Rejecting that rationale, and acting directly against it when required, is necessary to preserve the judiciary's legitimacy and minimize its role in the day's policy issues.

B. *Majoritarian Proposals for a Countermajoritarian Institution*

Courts are not alone in trying to impose or implant majoritarian values on the judiciary. Scholars have suggested various decisional and structural changes to better coordinate courts with popular (or majoritarian) outcomes. But, these proposals attempt to graft historically non-judicial decisionmaking mechanisms onto the federal judiciary. Proposals to change the decisionmaking structure because of the lack of majoritarian-supported decisions or deference to the majoritarian branches are inapposite here. That is, court outcomes cannot be made legitimate or more just merely because of the mechanism they are made through. Instead, to

169. *Cf., e.g.,* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6; United States v. Santos, 553 U.S. 507 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2, 123 Stat. 1617, 1617; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101, 123 Stat. 1776, 1783–84 (2009). *See generally* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014).

170. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring in the judgment) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”).

become so, decisions must be grounded on a valid and legitimizing theory of adjudication.

For instance, Professor Michael Abramowicz has recommended pooling judges from every circuit whenever one circuit sits en banc.¹⁷¹ “[A] group of appellate judges from outside the [circuit at issue] would consider petitions for an en banc rehearing of decisions by panels within the circuit.”¹⁷² After picking which cases to decide en banc, the randomly selected judges would meet and decide the cases, which would become binding for the circuit from which the cases originated.¹⁷³ Professor Abramowicz believes this would yield more majoritarian decisions because the “visiting en banc panels” would be more representative of the entire judicial branch.¹⁷⁴ Accordingly, the proposal goes, this version of en banc review would deviate from the branch’s median viewpoint less often.¹⁷⁵ The proposal also discusses other benefits that such a process would accrue.¹⁷⁶ This proposal creates a nationally majoritarian structure out of a regional institution, even if it also creates similar benefits to naturally occurring intercircuit dialogue. Because the intermediate courts are not simply popular majoritarian actors, we should not care about the median viewpoint of the judicial branch. Judges, unlike legislators, are not selected for their viewpoint as such; they are not chosen to represent constituents or to reflect a majority preference. Although their decisions could be definitionally majoritarian (because most sitting judges may tend to agree with a particular result and the results become binding law), they are not meant to represent a national majority faction.

Professor Abramowicz’s focus on majority for the sake of majority confuses the roles of the legislature and the judiciary. The United States was founded on a belief in popular

171. See Abramowicz, *supra* note 6, at 1602.

172. *Id.*

173. *Id.*

174. *Id.* at 1603.

175. See *id.* at 1620.

176. See, e.g., *id.* at 1619. One of the proposed benefits is outside review, which may make it more likely to “catch mistakes” or “reconsider . . . incompletely reasoned” decisions. *Id.* But, there is already a process for that: nonartificial intercircuit dialogue. One of the main reasons for why uniformity, beyond being wrong as a structural judicial value, is bad policy is because the existence of uniformity pressure stymies dialogue. Getting dialogue through the backdoor via roving en banc panels is unnecessary and contrary to the foundation of the judiciary.

sovereignty funneled through representative democracy.¹⁷⁷ The propagators of theories that would push the courts in a more popular majoritarian direction do not mistake the constitutionally assigned role of courts; instead, their concern is based on their claim that courts have become political institutions.¹⁷⁸ The obvious move would be to treat the courts like the political bodies they allegedly are. What follows is usually a proposal that implements majoritarian-focused or collectivist-oriented rules to combat the courts' new role as a super-legislature.¹⁷⁹ These proposals are merely a Band-Aid. To restore legitimacy and decrease the power of the judiciary, scholars and jurists should debate on the ground of adjudication, not arbitrary changes to decisionmaking structure.

In the vein of adjudicatory rules, Professor Jed Shugerman proposes a supermajority rule for decisions at the Supreme Court. This proposed rule functions much like a senatorial filibuster, grounded in debate-oriented and consensus-building goals.¹⁸⁰ Professor Shugerman views the excessive use of judicial review as an issue of insufficient deference to Congress—deference that is warranted to a coequal branch

177. See THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JESSE H. COOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 4–5 (1980).

178. See, e.g., Abramowicz, *supra* note 6, at 1604–05 & nn.20–21.

179. See, e.g., *id.* at 1602 (proposing majoritarian en banc rules); Jed Handelsman Shugerman, *A Six-Three Rule: Reviewing Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893–94 (2003) (proposing a supermajority rule, similar in function to the filibuster, to strike down federal statutes to produce greater consensus and dialogue between members of the Court); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1771 (2021) (favoring reform that shifts power to whoever wins elections); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181, 193 (2019) (proposing a panel lottery where the Supreme Court panel for a case is randomly selected from the judges on the circuit courts and also proposing partisan-affiliated Justices); David Orentlicher, *Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously*, 54 CONN. L. REV. 303, 307, 344 (2022) (arguing for a unanimity rule at the Supreme Court and stating that the same rationale applies to other courts of appeal, such as federal circuit courts); cf. James R. Rogers & Joseph Daniel Ura, *A Majoritarian Basis for Judicial Counter-majoritarianism*, 32 J. THEORETICAL POL. 435, 450 (2020) (“[T]he majority (sometimes) supports judicial independence to preserve the institution . . . in order to ensure that its interests are protected. . . . [D]emands for judicial independence and legislative court curbing [are adjusted] over time in response to changes in the (expected) behavior of courts and legislatures.”).

180. See Shugerman, *supra* note 179, at 894.

representative of popular will.¹⁸¹ To protect against the misuse of judicial review, Professor Shugerman suggests a supermajority voting requirement to strike down a federal law in order to mandate that deference.¹⁸² This proposal is also supported as a mechanism that will allow for greater ability to debate and produce consensus, “two touchstones of legitimacy [that] create the basis for deliberative democracy.”¹⁸³ Professor Shugerman discusses the advantages of such a system of deliberation and consensus by relying on deliberative democracy theorists and scholars.¹⁸⁴ Professor Shugerman states that because the Supreme Court is one of the last traces of republican self-government, the Court has the responsibility “to represent the community and to create a common narrative through dialogue.”¹⁸⁵ That common narrative, Professor Shugerman hopes, would result in consensus.¹⁸⁶

Concededly, the Supreme Court should be focused at some level on creating uniformity in federal law,¹⁸⁷ and Professor Shugerman’s proposal is flatly directed only at the Supreme Court.¹⁸⁸ Additionally, Professor Shugerman’s main concern appears to be the Supreme Court striking down federal laws on constitutional grounds; and, those grounds are unalterable by a future Congress absent constitutional amendment. But I still take issue with Professor Shugerman’s framework, which merits discussion because it relates to how the federal judiciary as a whole is viewed.

While generating deference to the political branches and slowing down the judiciary branch’s seemingly never-ending intervention into American governance is an apt and commendable goal, creating the types of decisionmaking rules proposed by Professors Abramowicz and Shugerman is error. The best way to restore legitimacy and incorporate better decisionmaking methods is through articulating and applying

181. *Id.* at 894–95.

182. *Id.* at 895.

183. *Id.* at 937.

184. *See id.* at 937–41 (relying on Thomas McCarthy, Jurgen Habermas, John Rawls, Bruce Ackerman, and Frank Michelman).

185. *Id.* at 940.

186. *See id.* at 941.

187. *See supra* Section II.B. *But see* *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (mem.) (Sotomayor, J., respecting the denial of certiorari) (stating that it is the Sentencing Commission’s responsibility to address circuit splits “to ensure fair and uniform application of the Guidelines”).

188. *See* Shugerman, *supra* note 179, at 894.

valid theories of adjudication.¹⁸⁹ Basing reforms on an understanding of the federal judiciary as the last trace of “republican self-government” is not appropriate or warranted.

Professor Shugerman recognizes that Congress is designed to create a national consensus, not courts.¹⁹⁰ It is the legislature’s job to form a narrative and find consensus to pass laws of national application. Legislatures are legitimate because they are ultimately based on popular sovereignty.¹⁹¹ It is lawmaking, not law declaring, that becomes legitimate when it rests on dialogic self-government.¹⁹² Shaping courts to look more like a legislature through reforms such as voting (supermajority) or constituency requirements (national en banc pools) only confuses the role of judges even more. While deference to the politically accountable branches has a strong argument as a prong of a theory of adjudication, aiming for that objective by distorting the role of federal courts fails in the long run.

At bottom, a restructuring of the physical decisionmaking method is inapposite. In other words, one should not attempt to address the judiciary issues through readjusting what the federal judiciary is or ought to be. That is not the goal of reform, but revolution. While there is merit in trying to turn down the heat on the Supreme Court’s recent stream of major decisions,¹⁹³ reforms focused on a court’s structure or decisionmaking process have negative secondary effects outside

189. See *infra* Part V. Through theories of adjudication, not congressionally imposed rules of decision, can the court be seen as a constrained government actor. Otherwise, you lock in the perception of the Supreme Court as an illegitimate actor that needs to be stopped. (Whether or not that latter part is true is irrelevant to the best way to assuage those concerns.)

This does not mean, however, that Congress cannot help guide (and perhaps compel) particular theories of adjudication. See *infra* note 279. Proposals such as Shugerman’s are different, however, because they run up against the very nature of the federal courts.

190. See Shugerman, *supra* note 179, at 946 (“Congress is better [than courts] at pursuing and reflecting a national consensus.”). Compare *supra* Section I.A., with *supra* Section I.B.

191. See *id.* at 903; see also *supra* Section I.A.

192. See Shugerman, *supra* note 179, at 940.

193. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *Trump v. United States*, 144 S. Ct. 2312 (2024); *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022); *United States v. Rahimi*, 144 S. Ct. 1889 (2024); *Fischer v. United States*, 144 S. Ct. 2176 (2024).

of the primary constraining effect they aim for. Courts are not designed to act or function as a legislature,¹⁹⁴ so majoritarian plans and designs run counter to their place in our constitutional structure. Courts are not vested with the power to further what the popular sovereignty wills.¹⁹⁵ Scholars such as Professors Abramowicz and Shugerman, while rightly concerned about popular representation and the impact of courts on the federal government's ability to govern, attempt to reshape the judiciary based on values absent from the judiciary rightly understood. The court is not designed to respond to the whims of a current majority faction,¹⁹⁶ and its decisionmaking

194. Trying to alleviate concerns with a court's alleged role as a policymaker seems inapposite with proposals designed to turn a court further into a pseudo-legislature. Majoritarian-based ideals of popular sovereignty should not be used to fix this proposed dilemma. Those proposals would not change but would ossify the court's role. By adding mechanisms that make courts more responsive to majoritarianism or make courts base restraints on learned experience of best legislative practice, courts will be stripped of their constitutionally designed role. Condemning courts to serve as pseudo-legislatures removes a vital check in our government. See Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 159 (2022) (concluding that recent Court-packing reforms would effectively reduce the number of independent branches from three to two). This Note suggests that the first step to rectify the judiciary's legitimacy issue is to cut out any rhetoric and adjudicatory methodology that mistakes the courts' purpose. Cf. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 227 (2020) (stating that Justices issuing signed opinions, rather than unsigned per curiams, lead to incentives that distort the Court's role in our constitutional democracy).

195. See BICKEL, *supra* note 141, at 16–17. Courts strike or narrow laws passed by representative institutions based on constraints originating from prior instances of popular sovereignty (i.e., the Constitution or the text of a statute). But, in striking down one popular law in the name of another popular authority, popular sovereignty is not necessarily furthered or constrained. Instead, the courts are following a hierarchy of authority. See Edward Dumbauld, *Judicial Review and Popular Sovereignty*, 99 U. PA. L. REV. 197, 205 (1950). So, a court in deciding between two sources of popular sovereignty chooses which one is law. In doing so, the court does technically further popular sovereignty by enforcing the Constitution. But, that furtherance is only at the expense of a weaker source of popular sovereignty. Cf. Jorge Farinacci-Fernos, *Constitutional Courts as Majoritarian Instruments*, 14 VIENNA J. INT'L CONST. L. 379, 384 (2021) (“[C]onstitution-making can be seen as a higher form of democratic lawmaking.”). Thus, furthering popular sovereignty is not an end in and of itself, but a means to protect individual liberties and safeguard the constitutional structure (again, at the expense of another species of popular sovereignty). The utility of the judicial power lays not in furthering popular sovereignty, but maintaining and coordinating the results of it. That includes interpreting statutes passed by Congress, which ostensibly have popular support.

196. Cf. Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 772–73 (2010) (comparing elected and appointed judges and concluding that appointed judges can protect constitutional values, debate constitutional meaning, and be less responsive to the citizenry than elected state court judges).

should not be influenced by majoritarian values unmoored from legitimate adjudicatory theories. The judiciary is disfigured if it concerns itself with values purposely absent from the federal courts (such as uniformity and consensus), even if hidden in important values such as popular sovereignty, democratic self-government, and deliberative democracy.¹⁹⁷

Circuit court-enforced uniformity, like outside proposals for more majoritarian-protective processes in the federal courts, is based on a faulty foundation. Uniformity and majoritarianism are absent from the policies that Congress and the Constitution chose for intermediate federal courts.¹⁹⁸ Circuit courts, by their very structure, are designed to generate dialogue across the United States.¹⁹⁹ Trying to embrace federal courts in a bear hug of majoritarian virtue strikes at the very heart of the federal judiciary.

Rectifying perceived issues generated by a lack of uniformity by courts within the federal system or, similarly, a lack of consensus-building dialogue or failed deference at a particular court, by changing their decisionmaking structure is the wrong response. The justification underlying the uniformity rationale and the proposals to generate more judicial consensus come from the same premise: consensus-inducing structures create a more deferential and legally legitimate institution.²⁰⁰ But, transfiguring the judicial process into a quasi-legislative process would only lock in courts and ensure they are viewed as flippant policymakers and legislators.²⁰¹ Selecting the legislature as the social institution to dictate the

197. See, e.g., Orentlicher, *supra* note 179, at 344 (arguing that the unanimity requirement for courts of appeal would “provide a fairer process for litigants, promote a more deliberative and sounder decision-making process, and greatly reduce the political maneuvering that has made for a drawn-out and highly partisan judicial selection process”).

198. See *supra* Part II.

199. See *supra* Part II.

200. Cf. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 40 (1994) (stating that a lack of uniform interpretation of federal law “subverts the courts’ efforts to be seen as oracles of exogenous, objective, and determinant legal principles”). This is not to say that the desired result of Professor Shugerman’s supermajority voting requirement is uniformity. The result is increased deliberation. But, the hope is general agreement; when multiple entities are in general agreement on an outcome, one calls that agreement uniform.

201. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 813 (1998) (“When we wish to encourage behavior that has certain characteristics or that is likely to generate particular results, . . . we can select among various social institutions to bring about the preferred conduct.”).

decisionmaking process for courts will bring along the characteristics of that decisionmaking routine.²⁰² This would remove a vitally important third branch from our constitutional system.²⁰³ This is not to say that the hopeful reformers are not looking to solve a real problem—the judicial branch has a legitimacy crisis.²⁰⁴ But the solution is not to lock in that perception and structure.

When courts parrot uniformity of federal law as a general policy goal of the federal judiciary, they feed into the countermajoritarian difficulties and superlegislature rhetoric. Federal courts disregard the underlying policy decisions that resulted in the congressionally-designed structure. The job of federal courts has never included maintaining a uniform national law or deciding cases through consensus- or deference-inducing mechanisms.

IV. UNIFORMITY'S ADDITIONAL TROUBLES

As explained above, uniformity has historically been, at most, a low priority for the federal judiciary.²⁰⁵ Competing values such as judicial independence and supremacy vastly outweigh the utility of uniformity.

The uniformity presumption travels with numerous ailments. Most important, the hypothetical uniform court is stuck with the first answer even if the arguments on the other

202. *See id.*

203. *See* Siegel, *supra* note 194.

204. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019); Zack Beauchamp, *What Happens When the Public Loses Faith in the Supreme Court?*, VOX (June 26, 2022, 11:01 AM), <https://www.vox.com/23055620/supreme-court-legitimacy-crisis-abortion-roe> [<https://perma.cc/7BSS-YGYW>]; Stephen I. Vladeck, *Why the Fifth Circuit Keeps Making Such Outlandish Decisions*, THE ATLANTIC (Nov. 28, 2023), <https://www.theatlantic.com/politics/archive/2023/11/fifth-circuit-conservative-supreme-court/676116/> [<https://perma.cc/RRJ3-5UEC>]; *see also* Jesse Wegman, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024), <https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html> [<https://perma.cc/CJ8A-ABN5>].

205. The federal judiciary is not the only area where the Framers rejected the idea of uniformity as a leading concern. The idea has been rejected throughout our constitutional order. Martin H. Redish & Victor Hiltner, *Adversary Democratic Due Process*, 75 FLA. L. REV. 483, 546 (2023) (stating that an “adversary democratic spirit” permeates throughout our constitutional democracy because “the Framers chose to promote conflict as the very means to keep conflict in check”).

side are better.²⁰⁶ The court is ordered to disregard a more convincing answer, for, remember, even if the other response is marginally more convincing or marginally closer to the statute or precedent, the uniform court must not diverge from the uniform course. Taking the rhetoric of uniformity to its extreme, the uniform court simply assumes that the first answer is the correct answer.²⁰⁷ This is not the way that the judiciary is supposed to function and shows the invalidity of this theory of adjudication.

The uniformity presumption also forecloses dialogue in the judiciary. Moreover, when the uniformity presumption is missing in high-profile cases, the legitimacy of the court is threatened. This Part discusses these issues.

A. *Barricade on Dialogue*

Uniformity can be a harmful value for the judicial system to focus on. Disagreements can be desirable.²⁰⁸ They can be productive and creative, show gaps in reasoning or logic, reveal legal or factual errors, and move forward results and discussion.²⁰⁹

Starting from a presumption of uniformity neglects the benefits of intercircuit dialogue. Courts benefit from reviewing various attempts to interpret a statute by reviewing the legal reasoning used by a prior court.²¹⁰ This defense of dialogue also sounds in efficacy. A single court or panel may come to a wrong or faulty conclusion of a statute's meaning, but circuit courts collectively addressing the same question may converge to the

206. *Cf. Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (“[T]he indiscreet action of one court might become precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle.”). *Mast, Foos & Co.* is an important post-Evarts Act case that recognized the law of the circuit doctrine. *See id.* at 488–89.

207. *See* Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 455 (1983) (arguing that to increase the uniformity of national law the Supreme Court should provide that “the first panel decision of a court of appeals” should “establish the proposition for all the courts of appeal”).

208. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 58 (1996); *see also* J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 69 (2010) (“Many [circuit splits] contribute fruitfully to the dialogic quality of federal law.”).

209. SUNSTEIN, *supra* note 208.

210. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 685 (1989); Thomas W. Matthew, Note, *Ignoring the Courts: A Contextual Analysis of Administrative Nonacquiescence*, 46 ECOLOGY L.Q. 311, 313 (2019).

right result.²¹¹ Professor Rochelle Dreyfus has called these varying decisions a “species of crowdsourcing” that allows the Supreme Court to access more information on the question at issue.²¹² This information enables the Supreme Court to clarify why it is deviating from particular circuit courts’ resolutions.²¹³ Dialogue between the circuits can thus result in “better informed, more carefully considered jurisprudence.”²¹⁴

Furthermore, disagreement between the circuits allows both the Supreme Court and future circuits to address the issue and learn from the consequences of a prior decision.²¹⁵ Like national injunctions, when courts use the uniformity rationale in resolving a case, the case is resolved, and no other court may weigh in.²¹⁶

Defaulting to a uniformity presumption can even cut off arguments supporting the uniform position. For instance, in *Tufaro v. State of Oklahoma ex rel. Board of Regents of the University of Oklahoma*,²¹⁷ the Tenth Circuit quashed an issue by simply stating that seven other circuit courts had resolved that question the same way.²¹⁸ The court’s only analysis is a single quote out of a federal practice treatise and a string cite of other circuits’ decisions.²¹⁹ The analysis ends with a popular appeal: “The dissent’s position would put this court on an island of a circuit split, a place and position where we decline to take up residence.”²²⁰ There is no interaction with the dissenting judge’s position beyond criticizing him for exercising his own legal judgment. As the dissent points out, “The panel opinion does not cite, nor am I aware of, any opinion of this circuit holding [the majority’s position]. I would avoid creating such an unfortunate precedent.”²²¹ If circuit courts continue answering

211. Dreyfuss, *supra* note 108, at 524–25 & n.182; *see also* Riccio v. Sentry Credit, Inc., 954 F.3d 582, 591–92, 594 (3d Cir. 2020) (overruling circuit precedent after discussing the “growth of judicial doctrine” as exemplified by other, more recent circuit decisions).

212. Dreyfuss, *supra* note 108, at 525.

213. *Id.* at 526 (noting that percolation of an issue through multiple courts aids the Supreme Court in producing its own approach to a question).

214. Matthew, *supra* note 210.

215. *Id.*

216. *See* Frost, *supra* note 129, at 1109.

217. 107 F.4th 1121 (10th Cir. 2024).

218. *Id.* at 1142–43.

219. *See id.*

220. *Id.* at 1143.

221. *Id.* at 1152 (Hartz, J., dissenting in part).

questions in this way, even dialogue concerning why the uniform position is correct will be lost.

This can also go the other way: defaulting to a uniform result can lead to cases accepting that wrong answer, cutting off arguments rejecting that uniform position. For instance, in *Clark v. J.M. Benson Co.*,²²² the Fourth Circuit accepted uncritically the Tenth Circuit's examination of what burden a defendant employer has in proving the applicability of a Fair Labor Standards Act exemption.²²³ So, the Fourth Circuit adopted the Tenth Circuit's standard language for that burden of "clear and affirmative evidence."²²⁴ With no further analysis, the Fourth Circuit has interpreted this phrase to mean "clear and convincing evidence."²²⁵ Yet, the Tenth Circuit has rejected that assertion, clarifying that the Tenth Circuit's "clear and affirmative" language does not mean "clear and convincing."²²⁶ The Tenth Circuit explained that the original "clear and affirmative" language became distorted "over time as it was repeated by different courts" with the original meaning being lost.²²⁷ This misadventure in one circuit applying another circuit's precedent, leading to a garbled interpretation of a statute throughout the Nation is exactly the type of incident that occurs from using the uniformity rationale. The use of this rationale dialogue concerning why the uniform position is incorrect is lost, leading to incorrect interpretations persisting.

Additionally, the mere existence of a circuit split does not justify overturning precedent on re-examination.²²⁸ The court can assess the persuasiveness of the new perspective and use that new court decision to sharpen and test the arguments used in the original decision.²²⁹ The court should not simply roll over to accommodate the split.

Uniformity is also not an intrinsic good in and of itself. There is no inherent rightness in circuits being uniform. That circuit courts have been uniform in their interpretation of a statute has not stopped the Supreme Court from imposing its own

222. 789 F.2d 282 (4th Cir. 1986).

223. *Id.* at 286.

224. *Id.*

225. *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993).

226. *Lederman v. Frontier Fire Protection, Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012).

227. *Id.*

228. *United States v. Lamon*, 893 F.3d 369, 371 (7th Cir. 2018).

229. See Aaron-Andrew P. Bruhl, *Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 924 (2014) (stating that circuit courts should play their role and reconsider old circuit law that lagged behind novel and emerging decisions).

exposition of that statute.²³⁰ The only weight a deciding court should give to another circuit's interpretation of a statute should be its power to persuade.²³¹ Courts abdicate their duty and neglect their constitutional role when deciding against a better interpretation merely because another circuit has answered the question.

B. *Partisanship and Malleability*

Despite the display of uniformity concerns in the interpretation of federal law, the appearance of uniformity never seems to have the pull it typically has in cases where it would matter most: the politically salient cases that impact nationwide administration of federal programs, agencies, and practices.²³² Sometimes past decisions are discussed and distinguished.²³³ Sometimes adverse statements of law are disregarded altogether as mere dicta.²³⁴ And sometimes those contrary decisions are outright ignored.²³⁵ But usually those decisions are either distinguished in some allegedly meaningful way or found to be wrong.²³⁶ There is no problem with a court, after a thorough discussion of the landscape, finding the decision made by another circuit to be unconvincing or incorrect (or to be correct and persuasive). Indeed, circuit courts *must* engage in that endeavor. The issue arises when courts engage in rigorous analysis with no mention of the uniformity principle

230. See, e.g., *Lexecon Inc. v. Milberg Weiss Bernhard Hynes & Lerach*, 523 U.S. 26, 33, 48 (1998); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 192 (1994) (Stevens, J., dissenting).

231. Cf. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that even though “rulings, interpretations and opinions” of administrative agencies are not controlling, they still possess the “power to persuade”).

232. See, e.g., *Bidi Vapor v. FDA*, 47 F.4th 1191, 1206 (11th Cir. 2022) (acknowledging divergent decisions by other circuits but nevertheless disagreeing with them); *Wages & White Lion Invs., L.L.C. v. FDA*, 90 F.4th 357, 386 (5th Cir. 2023) (en banc) (same).

233. See, e.g., *Bidi Vapor*, 47 F.4th at 1208; *Wullschleger v. Royal Canin U.S.A., Inc.*, 75 F.4th 918, 923–24 (8th Cir. 2023) (explaining that other circuits resolved a similar question on a different ground).

234. See, e.g., *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1215–16 (2023) (disregarding “background assumptions” made in other cases that seemingly answered the question in this case by describing those assumptions as “mere dicta at most”).

235. See, e.g., *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (failing to discuss a contrary Eighth Circuit decision).

236. See, e.g., *Mayes v. Biden*, 67 F.4th 921, 933–34, *vacated as moot* 89 F.4th 1186 (2023) (mem.) (discussing why three Circuits (Fifth, Sixth, and Eleventh) were independently incorrect on a question of law).

in some cases, while affirmatively relying on the principle as additional decisional support in other cases. The flip-flopping power of uniformity strikes at the heart of judicial legitimacy.

The presence or absence of the uniformity rationale makes clear the issues selectively using the rationale has. Only using the virtue when it is in your favor and failing to discuss it when it cuts in the other direction heightens the damage that such a “virtue” does to the judiciary as an institution. As Justice Samuel Alito recently commented at oral argument:

But would you also recognize that there can be circumstances in which there can be a sort of snowball effect in busy courts of appeals, particularly on . . . a certain category of issues so that if a court of appeals decides a question one way . . . the next one just latches onto that, and pretty soon, courts of appeals confronting an issue are very likely to say: . . . I’m not going to create a conflict [with all these other] circuits on this. I’m just going to go along with it.²³⁷

The “certain category of issues” that Justice Alito mentions are surely the ones with limited, if any, partisan engagement. Calling on this alleged canon of judicial institutionalism does damage to the institution. Whether it is a politically salient case or not, the courts are responsible for ensuring that they are getting the law correct.

Sometimes the use of uniformity by a court is not so easily categorized. For example, take the Seventh Circuit case *A.C. ex rel. M.C. v. Metropolitan School District of Martinsville*.²³⁸ Holding that a prior panel decision foreclosed a new answer in a high partisan valence case,²³⁹ the court discusses the existence of a circuit split that had emerged after that prior intracircuit panel decision.²⁴⁰ The court found that the existence of the circuit split negated any potential impact a

237. Transcript of Oral Argument at 34–35, *Royal Canin U.S.A. v. Wullschleger*, No. 26-677 (U.S. Oct. 7, 2024).

238. 75 F.4th 760 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024) (mem.).

239. See Haley Ryan, *Martinsville Appeals Transgender Bathroom Decision, Draws Support From Todd Rokita*, IND. DAILY STUDENT (Aug. 27, 2023, 7:55 PM), <https://www.idsnews.com/article/2023/08/martinsville-transgender-bathroom-todd-rokita-indiana-attorney-general> [<https://perma.cc/VJ5H-8NVW>]; Jarred H. Martin & Pierre Waldemar Brouard, *Bathrooms are Political: How Gender-Inclusive Toilets Can Combat Indignity and Violence*, THE CONVERSATION (Sept. 27, 2023, 8:06 AM), <https://theconversation.com/bathrooms-are-political-how-gender-inclusive-toilets-can-combat-indignity-and-violence-207447> [<https://perma.cc/B7FR-CQTK>].

240. *M.C.*, 75 F.4th at 770–71.

reversal of its prior panel decision would have on intercircuit dialogue.²⁴¹ Whether the previous panel decision was followed or not, a split would remain, and there was no other argument that the circuit could contribute to the conversation.

The decision places a high value on intracircuit stability.²⁴² It explains that overruling prior circuit precedent would occur only when the circuit “is an outlier and [overruling the precedent] can save work for Congress and the Supreme Court by eliminating a conflict” or when the court can “supply a new line of argument that would lead other circuits to change their positions in turn.”²⁴³ The court highlighted the benefits of disuniformity (intracircuit dialogue and percolation) while also equivocating on its role in the debate over uniformity: the court must ensure uniformity except when particular reasons excuse such a duty.

The court rightly diminished its perceived responsibility of ensuring uniformity of federal law while acknowledging the role uniformity may have in a different case. The court also acknowledged the part that disuniformity in the circuit court system can play; it seemingly downplayed the role of circuit courts in creating uniform federal law while preserving uniformity as a potential tool that could be used in a future decision. The Seventh Circuit neither hid behind uniformity as a rationale nor ignored it altogether; instead, the court openly and perversely acknowledged that uniformity plays a role in only a particular set of cases.

M.C. reveals what lurks behind the shadows in uniformity cases: uniformity is used as a link in judicial reasoning only when it is useful to the contemplated result. Uniformity is a virtue when it can be used as one and is a vice, or is outright ignored, when it stands in the way of a particular result. The existence of uniformity rationales in a specific decision, while maybe not doing much logical or intellectual legwork on its own, incidentally destroys any legitimacy or “correctness” that the result may inherently have. The appearance of the uniformity rationale in a particular opinion strips away the power that statutory interpretation and application of precedent have as independent persuaders; uniformity displaces them and jumps

241. *Id.* (“We cannot resolve the conflict . . . on our own. Nor can we supply a new line of argument. . . . As a result, ‘overruling would not be consistent with a proper regard for the stability of our decisions.’” (quoting *Buchmeier v. United States*, 581 F.3d 561, 565 (7th Cir. 2009) (en banc)).

242. *See id.* at 771.

243. *Id.* (internal citation omitted).

in to showcase just how manipulable judicial decisionmaking can be. Uniformity, when used in this way, is an unconstrained, illegitimate mode of decisionmaking.

When a circuit court follows other circuits in cases that do not spark political concerns but abandons uniformity in politically sensitive cases, it exposes uniformity as a mere pretense—a convenient façade of authority. This selective adherence reveals an unconstrained approach to judicial decisionmaking, suggesting that uniformity can be set aside whenever the court chooses. Rather than living in this illegitimizing juxtaposition, courts should forever break free of the uniformity shackles.²⁴⁴ At bottom, the uniformity rationale lacks grounding in any coherent methodology for dispute resolution (or for statutory interpretation), revealing its selective and ultimately unprincipled application. This selectivity lays bare the possibility that hidden values or external principles are driving certain decisions.

Moreover, when dealing with a uniformity presumption, the first question we ask is “uniform to whom?” Whose divergent interpretations do we care about—essentially, who is the *us* and who is the *them*? This elitist (and *superior*) view of the federal, *inferior* courts is disconcerting. It is harder in practice to figure out who is in the in-group than some would suggest. Take for instance *Pacific First Federal Savings Bank v. Commissioner*,²⁴⁵ in which the court was attempting to square tax law uniformity (and its usual concomitant deference to tax courts) with the rejection of a United States Tax Court decision by another circuit.²⁴⁶ Here, the tax law uniformity presumption (that is, a presumption that circuit courts should follow the United States Tax Court due to its expertise and ability to generate uniform national law) gave way to an entirely different uniformity presumption. That different presumption increased the power of generalist courts over that of a specialized court. This example shows how difficult it can be to navigate who is included within the in-group.

C. Discouraging Appeals

The uniformity rationale can also decrease the likelihood of otherwise meritorious appeals, for the simple reason that the

244. Cf. R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN'S L. REV. 1119, 1120 (2019) (advocating that tiers of scrutiny should be replaced because they are “readily manipulable”).

245. 961 F.2d 800 (9th Cir. 1992).

246. *Id.* at 803.

would-be appellant is asking for a circuit split to be created. The possibility of setting precedent within the circuit, rather than just a district court decision, can dissuade lawyers (or revolving litigants) from forcefully advocating for their client's (or their own) position.

Take for instance, the arguments that arose after the University of Virginia's (UVA) Supreme Court Clinic lost at the Supreme Court.²⁴⁷ There, the UVA Clinic petitioned for (and received) review by the Supreme Court to resolve a circuit split.²⁴⁸ The question presented was whether a federal prisoner who did not previously challenge the validity of their conviction on the ground that the statute did not actually criminalize their conduct because circuit precedent foreclosed it may challenge, through a second or successive habeas petition, their conviction after the Supreme Court makes clear in a retroactive decision that their conduct was not unlawful.²⁴⁹ The Supreme Court answered the question in the negative, foreclosing the ability for legally innocent prisoners to obtain habeas relief in these circumstances.²⁵⁰

While the Court's decision was sharply criticized,²⁵¹ critics also bemoaned the Clinic's decision to appeal in the first place and risk (with potentially no chance of success) a result that could erase the pro-prisoner position of the circuits.²⁵²

What, then, will lawyers do if a district court decides a question contrary to other circuits? Will a lawyer, thinking of institutional interests or of clients outside the instant case, decide not to appeal that decision for fear of the uniformity rationale creating negative precedent where that lawyer practices? That answer, given the criticism and outcry about the UVA Clinic, may very well be yes. This perverse result

247. Marcia Coyle, *Should Law School Supreme Court Clinics Take Cases that Could Make 'Bad' Law?*, NAT'L L.J. (May 20, 2022, 4:17 PM), <https://www.law.com/nationallawjournal/2022/05/20/should-law-school-supreme-court-clinics-take-cases-that-could-make-bad-law/> [<https://perma.cc/6UBA-FB5R>].

248. *Id.*

249. See *Petition for a Writ of Certiorari at 1, Jones v. Hendrix*, 599 U.S. 465 (2023) (No. 21-857), 2021 WL 5864561.

250. *Jones*, 599 U.S. at 492–93 (Sotomayor, J., dissenting).

251. See, e.g., Leah Litman (@LeahLitman), X (May 16, 2022, 9:37 AM), <https://twitter.com/LeahLitman/status/1526195087306379265> [<https://perma.cc/H5VW-6NYF>]; Matthew Stiegler (@MatthewStiegler), X (May 16, 2022, 10:38 AM), <https://twitter.com/MatthewStiegler/status/1526210583145635841> [<https://perma.cc/EJ4G-C2J3>].

252. Litman, *supra* note 251; Leah Litman (@LeahLitman), X (May 16, 2022, 9:56 AM), <https://twitter.com/LeahLitman/status/1526199962622648320> [<https://perma.cc/G5H8-B5TE>].

shows the negative impact the uniformity rationale may have on litigants seeking justice. Even if this reasoning stops the appeal of just one case, that is one too many meritorious appeals thrown away based on a court-enforced decisionmaking rationale.

D. Responses to Counterarguments

The thrust of most arguments for intercircuit uniformity seems to follow the arguments for stare decisis and the rule of orderliness.²⁵³ The arguments primarily focus on predictability and legitimacy.²⁵⁴

An argument for the existence of the uniformity presumption is its ability, like vertical stare decisis, to (allegedly) achieve predictability and consistency.²⁵⁵ As the cliché goes, “[I]t is more important that the applicable rule of law be settled than that it be settled right.”²⁵⁶ That argument may have some sway when applied to the Supreme Court because any decision the Court makes is necessarily the “settled applicable law” for the nation.²⁵⁷ Thus, by its very structure, any decision made by the Supreme Court inherently tends toward national uniformity. The same is not true for the circuit courts. The structure of the circuit courts is inconsistent with a tendency toward national uniformity.²⁵⁸

Those who value uniformity for its predictability often posit slippery slopes that a lack of uniformity will lead to an inability for the Nation to function as a multistate union.²⁵⁹ Some argue that a lack of uniformity in intercircuit decisions may lead to multistate actors, such as the government and large corporations, having to learn and follow multiple variations of

253. Compare Henry J. Dickman, Note, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1368–76 (2020) (intracircuit stare decisis), with Dragich, *supra* note 4, at 584 & n.333 (intercircuit stare decisis).

254. See, e.g., Dickman, *supra* note 253, at 1368–69.

255. *Id.*

256. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

257. That is, the Supreme Court’s decision is the law until it is superseded by congressional or constitutional amendments.

258. See *supra* Part II. So whereas the Supreme Court has an institutional interest (and role) in unifying divergent interpretations of federal law, the same cannot be said for the circuit courts, which are designed to percolate, method test, and strive for their best interpretation. Therefore, while the argument for uniformity may have play at the Supreme Court, it falls flat at the circuit level.

259. See *Frost*, *supra* note 26, at 1570.

federal law.²⁶⁰ Additionally, some multistate actors may be unable to predict what the law will be in a particular state at a particular time. Moreover, some practitioners, courts, and scholars have expressed that uniformity should be preferred over accuracy because of the inequity of intercircuit inconsistencies.²⁶¹

That said, “Circuit splits are often more apparent than real.”²⁶² Multistate actors can continue functioning even if circuit splits are not entirely resolved.²⁶³ Most circuit splits are “relatively trivial” and “impose only minimal costs of compliance on multi-state actors.”²⁶⁴ But, even if the differences have total or zero triviality, a court’s foremost criteria should be in getting the law right on its own terms.

Along with the ephemeral nature of federal circuit splits, multistate actors have experience in and a history of complying with and learning about the laws of multiple states. Multistate actors, by definition, know how to function in states with different laws and regulations.²⁶⁵ So, complying with the law in multiple circuits is not too high of a burden. At bottom, in a country that is proudly based on federalism, concerns about multistate actors having to deal with multiple variations of the same law are not persuasive.

In any event, praise of predictability and consistency have merit when discussing the use of en banc procedures at a particular circuit court. It is inconsistent circuit precedent that “drive[s] up costs” and “introduce[s] substantial uncertainty into the trial court’s work, which in turn increases costs yet further.”²⁶⁶ Circuits may be wise to sit en banc to rectify their

260. *Id.* at 1597.

261. *See, e.g.*, Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 634 (1989); Brief for The Missouri Chamber of Commerce et al. as Amici Curiae Supporting Petitioners, *Royal Canin U.S.A., Inc. v. Wullschleger*, 144 S. Ct. 1455 (2024) (No. 23-677), 2024 WL 731179, at *14 (“[B]usinesses operating within and outside of the Eighth Circuit will face different jurisdictional rules in different forums.”).

262. Wilkinson III, *supra* note 208.

263. *Id.*

264. *Id.*; *see also* Frost, *supra* note 26, at 1598 (stating that conflicts that do impact multistate actors are not “necessarily disruptive” because courts “rarely construe the same federal law to make conduct that is compulsory in one jurisdiction illegal in another”; instead most splits are disagreements of degree, “not of kind”).

265. Frost, *supra* note 26, at 1597–98.

266. Matthew H. Solomson, *Take It to the Banc: A General Plea for Increased Consistency and Clarification*, 38 THE NASH & CIBINIC REP. 1, 10 (2024).

own internal decisional asymmetry.²⁶⁷ But, circuits and commentators should not transplant the reasons for sitting en banc to the arguments for nationwide uniformity.

The arguments for predictability and consistency, then, may sound in something else, such as legitimate decisionmaking or judicial legitimacy. If the same cases come out differently, litigants and observers can cast aspersions of judicial twisting of the law.²⁶⁸ Yet paradoxically, as shown above, increased uniformity can highlight when that twisting of law occurs.²⁶⁹

Judicial efficiency is also used as a rationale for the uniformity presumption. In this vein, another circuit's opinion is imbued with a very strong presumption of regularity (or at least reasonableness) and is then applied in this case. At its most extreme, this argument is against resolving closed cases. At its realistic implementation, why second guess and use valuable and scarce judicial resources when three circuits all decided on the same outcome? There are already too few judges for too many cases, so uniformity is a good gestalt for correctness (or a reasonable outcome for a case). Again, that is misstating the role of the inferior federal courts and pushing congressional abdication as a reason for judicial aggrandizement.

Even if these factors did not weigh against uniformity, Congress has spoken. Congress has weighed the burdens that intercircuit inconsistencies bring and decided that they are worth the advantages and benefits of the current system. Through legislation and silence, Congress has balanced the policy values of uniformity, consistency, predictability, innovation, and percolation. Congress has valued percolation and innovation over uniformity in some contexts and vice versa in others. In the judicial context, Congress has unambiguously valued the former.²⁷⁰ If Congress felt that uniformity was "indispensable to the functioning of the federal court system," Congress "surely would have chosen a more effective method to achieve that goal."²⁷¹

267. *See id.* (stating that the Federal Circuit should decide more cases en banc simply to ensure that the governing law is applied correctly to maintain consistent, clear internal precedent).

268. *See Dickman, supra* note 253, at 1369.

269. *See supra* Section IV.B.

270. *See supra* Part II.

271. Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147,

Even if courts view the result of this decision as a burden, they may not adjust the policy valuations made by Congress. That is a species of policymaking consigned to Congress.

V. INSIGHTS INTO A LEGITIMATE THEORY OF ADJUDICATION

This Note identifies a flawed method of judicial decisionmaking, offering a framework to address an often undertheorized area of judicial practice: theories of adjudication. Unlike theories of interpretation, which guide how courts discern a statute's (or a constitution's) meaning, theories of adjudication address the distinct question of how courts should resolve cases.

Consider a circuit court's use of the uniformity rationale. In using it, the court is not trying to faithfully interpret a statutory provision or genuinely ascertaining legislative meaning. Rather, it is viewing the resolution of cases as contingent on particular results: results that aim toward achieving consistency across jurisdictions. Looking at the uniformity rationale in this way shows that it is a tenant of a methodology of adjudication—how to decide contested cases—not focused on interpreting or fixing statutory meaning.²⁷² That is, the rationale's underlying premise fixes on what the goal of dispute resolution by the courts should be.

Yet, as seen in cases like *Thomas* and *Sachs*, courts are also using a theory of adjudication that, at least partially, includes resolving cases on the basis of a statute's meaning.²⁷³ Thus, the courts in those two cases were also employing a theory of interpretation designed to ascertain meaning,²⁷⁴ in service of a theory of adjudication which sought to decide a case partly on the basis of the interpretive theory's outcome. That is, this underlying theory of interpretation, for instance that the

1200 (2006) (“Had the Supreme Court felt that uniformity in forum non conveniens was integral to the smooth functioning of the federal court system, it surely would have chosen a more effective method to achieve that goal.”).

272. See Gary S. Lawson, *Time, Institutions, and Adjudication*, 95 B.U. L. REV. 1793, 1798 (2015).

273. See *supra* notes 7–20 and accompanying text; see also Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2157 (2017) (“[I]t is theoretically possible to have a normative theory of adjudication that says to decide all cases in strict accordance with the meaning of a particular text, as that textual meaning is ascertained through descriptive interpretive theory. It is just that such a theory is entirely impracticable in the real world . . .”).

274. Namely, some variant of textualism.

statutory text should be interpreted based on the plain text of a statute, is also a pillar of the courts' theory of adjudication.²⁷⁵

And therein lies the rub. If a court's theory of adjudication strictly followed statutory meaning, however that is to be understood, no constitutional or structural adjudicatory concerns would likely arise.²⁷⁶ But, courts sometimes turn to uniformity, bolstering their conclusions or adding alternative reasoning. Adjudicating on this basis strays from judicial legitimacy, encroaching on policymaking and invoking nonjudicial values. Too, relying on uniformity to resolve cases is normatively problematic.²⁷⁷ Courts, therefore, should refrain from grounding decisions in uniformity.²⁷⁸

In defining this approach as beyond the limits of valid adjudication, this Note underscores that a sound theory of adjudication must be bound by constitutional, and potentially some legislative,²⁷⁹ constraints—constraints that adjudicating

275. It is also possible to view what the courts are doing in the uniformity rationale context as ascertaining the meaning of a statute through evidence that includes how other circuit courts have interpreted the statute. This method of interpreting statutes may be objectionable on either textualist or structural grounds, but not on adjudication grounds. In my view, it is a better reading of the uniformity cases to say that the court is resolving a dispute via implementing and applying its interpretation of the statute and defending that application by reference to the fact that other circuits have made the same decision. In other words, the instant court should resolve the case on similar grounds in part because of those other courts' decisions. That is a theory of adjudication, i.e. how and when to resolve a dispute. Not a theory of interpretation, i.e. what evidence should be used to ascertain a statute's true meaning.

276. Second order concerns such as whether the theory of adjudication encompasses or is based on an adequate theory of interpretation may arise. But first order concerns, such as the legitimacy of resolving cases on the basis of statutory meaning, would be absent.

277. *See supra* Part IV.

278. Even if uniformity is not playing a decisive role in the court's legal conclusion (which I believe it is in at least some cases), grounding legal decisions in uniformity rhetoric is still problematic. *See supra* Parts III, IV.

279. Congress has some role in influencing methods of adjudication. For instance, in determining sentences, Congress instructs the sentencing judge to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," various needs for the sentence imposed, "the kinds of sentences available," policy statements issued by the Sentencing Commission, "the need to avoid unwarranted sentence disparities," "the need to provide restitution to any victims," and the "kinds of sentences and the sentencing range established" by the Sentencing Guidelines. 18 U.S.C. § 3553(a). This means that the sentencing court "must consult [the Sentencing] Guidelines and take them into account when sentencing." *Booker v. United States*, 543 U.S. 220, 264 (2005). Defining what values judges should apply when determining the appropriate length of a sentence is not

merely a declaration of substantive law, but a decision concerning how courts should go about deciding. After all, the goal of the original sentencing reforms was to “guide the judge in making his decision on the appropriate sentence.” Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 273 (1993) (quoting S. Rep. No. 225, at 51–52 (1984)). While what the “appropriate sentence” is may be a question of ascertainment (and thus somewhat akin to interpretation), the sentencing court is not attempting to discern what Congress truly meant by “appropriate sentence.” Instead the court is attempting to resolve on an individual case basis what the result ought to be. That adjudicatory function is “guided” by Congress.

Of course, Congress mandating factors for a judge to consider in sentencing and setting out a guide for routine case resolution are different. But only in degree. I do not see a constitutionally meaningful difference between Congress dictating how a court should determine the length of a sentence and Congress establishing, by implication or otherwise, the variables inferior courts should take into account when answering when and how they should resolve a case. The process, not the result, is determined by Congress. *Cf.* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 504–05 (2000) (arguing that Congress may “adopt any norm of stare decisis that a court reasonably could recognize”). As long as the court is left to apply the law to facts and the judicial power is left unimpeded, Congress does not overstep its bounds. *See* Bank Markazi v. Peterson, 578 U.S. 212, 225–26 (2016).

This is not to say that Congress can directly determine the result of a case. *See id.* at 225 n.17 (“[R]espondents rightly acknowledged at oral argument that Congress could not enact a statute directing that, in ‘Smith v. Jones,’ ‘Smith wins.’”). Congress could not, for example, set as a primary rule that courts must enter judgment for the federal government in all cases filed against them. Yet they can set decisionmaking criteria, such as standards of proof. *See* 5 U.S.C. § 706(2)(A). *But see* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 219 (2001) (calling into question congressional statutes that regulate standards of proof).

Additionally, Congress’s substantive decisions may also supplement a proper understanding of the duty of those courts. *See supra* Part II. That is, Congress’s determinations can help guide federal courts in identifying how to decide, or resolve, a case. This can help provide external constraints on judicial power based on legitimate democratic policymaking. So too can the Constitution provide a backdrop of valid adjudication. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 317 (2004) (advocating for a “Presumption of Liberty” that “places the burden on Congress to justify the propriety of its actions,” or in other words advocating for an adjudicatory method based in the Constitution); Gary Lawson, *“The Game” (or How I Learned to Stop Worrying and Love the Major Questions Doctrine)*, HARV. J.L. & PUB. POL’Y: PER CURIAM, <https://journals.law.harvard.edu/jlpp/the-game-or-how-i-learned-to-stop-worrying-and-love-the-major-questions-doctrine-gary-lawson/> [<https://perma.cc/9T BK-PLJY>] (framing the major questions doctrine as a decisionmaking tool, not a tool for interpretation).

At the very least, courts, especially inferior courts, should take legislative judgments seriously. *Cf.* Spokeo, Inc. v. Robbins, 578 U.S. 330, 341 (2016) (“In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.”).

cases through the lens of uniformity does not respect.

CONCLUSION

Uniformity is at best irrelevant to circuit court decisionmaking, and its appearance in judicial decisions highlights the harm it does to the judiciary as an institution. This Note argues that the uniformity rationale, when used by circuit courts, is harmful because it highlights the countermajoritarian difficulty and promotes unconstrained decisionmaking. It also prevents dialogue between the circuits, can deter meritorious appeals, and illuminate malleable values in high-stakes cases. The best way to get courts out of this conundrum is to remove uniformity as both a rhetorical device and a way of reasoning.

Until Congress has decided to infuse uniformity into the adjudicatory process, it should not play a role in judicial decisionmaking by circuit courts. Otherwise circuit courts are engaging in an invalid and destructive theory of adjudication.

Even if congressional direction to apply a particular adjudicative methodology are unconstitutional intrusions upon judicial power, courts should still consult democratically-generated values placed on the role of courts. *Cf.* Lawson, *supra* note 273, at 2159 (stating that Justice Scalia took the view that “courts should be pursuing legitimacy rather than interpretative truth”).