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BACK TO THE DRAWING BOARD: RE-EXAMINING ACCEPTED PREMISES OF REGIONAL CIRCUIT STRUCTURE

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I. INTRODUCTION

Regional boundaries have defined the lower federal courts since their inception. But the federal courts have changed markedly in the intervening years in terms of the jurisdiction, staffing, and role of each tier within the federal judicial system. Today, the courts of appeals are almost always the end of the line for litigants.¹ The only path to review by the Supreme Court is discretionary, and the Court takes only a minute fraction of the cases in which certiorari petitions are filed.² The balance of

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1. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 Wis. L. Rev. 11, 24.

2. In 2008, for example, there were 8,966 cases on the Supreme Court's docket. Eighty-seven cases were argued during the 2008 Term; eighty-three were decided by full opinion and another ninety-five were reviewed and decided without oral argument. Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts*, [http://www.uscourts.gov/Statistics/Judicial Business/Judicial Business.aspx?doc=/uscourts/Statistics/](http://www.uscourts.gov/Statistics/Judicial%20Business/Judicial%20Business.aspx?doc=/uscourts/Statistics/)

cases in federal courts today is heavily weighted toward cases involving federal law.³ Cases involving application of state law have steadily declined as a fraction of federal court caseloads.⁴ Accordingly, it would seem that the federal courts should be structured to promote reasonable uniformity of decision on questions of federal law.

Paradoxically, the geographic organization of the federal courts seems to privilege regional over national concerns and may render these courts ill-suited to promote uniform interpretation of federal law. The courts of appeals function as largely independent adjudicatory bodies.⁵ The regional structure of the courts of appeals, together with the “law of the circuit” doctrine, values intra-circuit consistency and tolerates considerable inter-circuit conflict.⁶ The result is a systemic lack of capacity for uniform development of federal law.

The experience of recent decades suggests that political will is lacking to undertake a broad restructuring of the courts of appeals that involves either adding appellate courts or departing altogether from the concept of regional organization.⁷ Congress

Judicial Business/2009/appendices/A01Sep09.pdf (2009) (tbl. A-1); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178–79 (1989) (noting that Supreme Court reviews an “insignificant proportion” of all cases decided by the federal district courts and courts of appeals).

3. In the year ending March 31, 2010, the federal courts of appeals (excepting the Federal Circuit) reviewed 44,255 cases, of which 20,505 were federal-question cases, 13,065 were criminal cases, and 7,626 involved the United States as defendant. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/B07Mar10.pdf> (Mar. 31, 2010) (tbl. B-7).

4. In the year ending March 31, 2010, 2,623 of 44,255 cases (5.9 percent) in the courts of appeals were diversity cases. *Id.* By contrast, in 1950, 563 of 1,822 cases (30.9 percent) in the courts of appeals were diversity cases. Administrative Office of the United States Courts, *Annual Report of the Director for the Fiscal Year Ended June 30, 1950* at 137 (1950). In 1890, when Congress was debating creation of the federal courts of appeals, one Member of Congress noted that “[m]ore than one-half of all the business now on the docket of the Supreme Court and the inferior courts of the United States springs from controversies between citizens of different states.” 21 Cong. Rec. 3405 (1890) (remarks of Rep. Culberson).

5. Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 Loy. L. Rev. 535, 538 (2010); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235, 1268–70 (2004).

6. Dragich, *Uniformity*, *supra* n. 5, at 538.

7. See generally Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report*, <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf> (Dec. 18, 1998) [hereinafter *White Commission Report*]. (The Commission on Structural Alternatives

has acted rarely and cautiously in response to excessive caseloads. Beginning in 1929, when it carved the new Tenth Circuit out of the former Eighth Circuit,⁸ Congress chose intra-circuit reform over system-wide adjustments. Since the split of the Eleventh Circuit from the former Fifth Circuit in 1980⁹ and the creation of the Federal Circuit in 1982,¹⁰ the only structural reform measure enacted was a significant increase in authorized judgeships in 1990.¹¹ Following that expansion of the federal judiciary, circuit judges themselves have debated the merits of any further expansion.¹² Yet calls for reform are persistent, even though continuing to regard the existing regional boundaries as sacrosanct makes meaningful reform that preserves federal appellate justice in its traditional form difficult to imagine.

This article aims to determine which of the accepted structural features of the courts of appeals are essential by demonstrating that the federal courts are designed to assure the supremacy and uniformity of federal law, and that regional organization was intended to foster, not to negate, uniformity. And it identifies and evaluates specific entrenched ideas about circuit structure.

for the Federal Courts of Appeals is also known as the “White Commission,” for its Chair, retired Justice Byron White.)

8. Act of Feb. 28, 1929, ch. 363, § 1, 45 Stat. 1346, 1346–47 (currently codified in 28 U.S.C. § 41 (2011)) (available at <http://uscode.house.gov>). The Eighth Circuit was divided in 1929 and a new Tenth Circuit, consisting of approximately half the states of the former Eighth Circuit, plus New Mexico, was created. A separate circuit was created for the District of Columbia in 1948. Act of June 25, 1948, ch. 646, § 41, 62 Stat. 869, 870 (also currently codified in 28 U.S.C. § 41).

9. Fifth Circuit Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (currently codified in 28 U.S.C. § 41). The Fifth Circuit was split in 1980, with three states plus the District of the Canal Zone remaining in the Fifth Circuit and three others making up the new Eleventh Circuit. *Id.*

10. Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25. The new Court of Appeals for the Federal Circuit was created in 1982 and, unlike the other circuits, was organized by subject matter, drawing cases from all districts. 96 Stat. at 37–38 (now codified in 28 U.S.C. § 41) (establishing the jurisdiction of the Federal Circuit).

11. Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 202–06, 104 Stat. 5089, 5098–104 (Dec. 1, 1990) (titled “An act to provide for the appointment of additional Federal circuit and district judges, and for other purposes”).

12. Compare, for example, Jon O. Newman, *Litigation Reforms and the Dangers of Growth of the Federal Judiciary*, 70 Temp. L. Rev. 1125, 1128–30 (1977) (cautioning against further expansion of the federal judiciary) with Stephen Reinhardt, *Surveys without Solutions: Another Study of the United States Courts of Appeals*, 73 Tex. L. Rev. 1505, 1515 (1995) (calling for significant expansion of the federal judiciary).

Thus, this article considers the Hruska Commission's¹³ articulated (but largely unexplained) criteria,¹⁴ which hold that

- (1) circuits should be composed of at least three states;
- (2) no circuit should be created that would immediately require more than nine judges;
- (3) a circuit should contain states with a diversity of population, legal business, and socioeconomic interests;
- (4) realignment should avoid excessive interference in established circuit alignment; and
- (5) no circuit should contain noncontiguous states.¹⁵

This article also assesses the additional, widely accepted criterion that no state should be split between two or more circuits,¹⁶ and concludes that these criteria have hindered attempts to accommodate the growing appellate caseload by restructuring the courts of appeals in a manner calculated to provide for reasonably uniform interpretation of federal law.¹⁷ It

13. The Commission, chaired by Senator Roman Hruska, produced two reports. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973) [hereinafter *Geographical Boundaries*]; see also Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975) [hereinafter *Structure*].

14. *Geographical Boundaries*, *supra* n. 13, at 231–32 (describing, without citation, “several important criteria”).

15. Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 56 (West Pub. Co. 1994) (referring to “self-imposed criteria” applied by the Commission on Revision of the Federal Court Appellate System in 1973 in connection with its study of the old Fifth Circuit). This article uses the following terms to refer to these five criteria: the “three-state” principle, the “nine-judge” principle, the “diversity of business” principle, the “minimal disruption” principle, and the “contiguity” principle.

16. See *e.g.* Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. Pa. L. Rev. 1188 (1974); but see *Geographical Boundaries*, *supra* n. 13, at 238–40 (concluding that “[d]ividing the judicial districts of California between two circuits raises no insoluble or unmanageable problems”). The present article refers to the principle that no state should be split between circuits as the “whole-state” criterion.

17. Efforts to split the Ninth Circuit in particular have foundered on these notions. See *e.g.* *White Commission Report*, *supra* n. 7, at 29–57. The Commission proposed to divide the Ninth Circuit into administrative divisions, with California split between the divisions, rather than to split the circuit, citing disruption and cost of a circuit split. *Id.* Other proposals regarding the Ninth Circuit have also focused on finding a way to restructure that court within its current geographic boundaries. For various reasons, including the fact that cases from California so significantly dominate the Ninth Circuit's docket, none of the bills introduced in Congress has been enacted. Meanwhile, the Ninth Circuit has implemented extensive “intramural” reforms, see *e.g.* Baker, *supra* n. 15, at 78–83, 106–85 (discussing “administrative innovations” in Ninth Circuit and both adopted and proposed “intramural

includes an argument that these criteria are generally outmoded,¹⁸ tracing their origin to earlier courts bearing little resemblance to the current courts of appeal, and notes that the criteria are also internally inconsistent.¹⁹

But it also acknowledges that some of the entrenched criteria remain meaningful determinants of circuit structure given the contemporary role and function of the federal courts of appeals: The three-state and diversity-of-business principles preserve the generalist tradition of the federal courts and promote uniformity of federal law, at least weakly. They could be strengthened if Congress were to consolidate some circuits. The whole-state criterion does little to promote uniformity in federal law but does protect uniformity of state law. Given the shift from diversity cases to federal question cases, this consideration is of diminishing importance as a determinant of the structure of the federal courts of appeals. The contiguity criterion has lost relevance given changes in the demographics, economies, and other characteristics of individual states. At the same time, the contiguity criterion may be in tension with the diversity-of-business principle.

Inconsistency and obsolescence notwithstanding, the accepted criteria continue to dominate the discussion because structural criteria interact with the decisional structures of the courts of appeals. Decisions are rendered by panels of three judges.²⁰ En banc decisions are rare; many question the effectiveness of this mechanism in maintaining intra-circuit consistency of decision.²¹ Panels are bound to follow prior panel

reforms" across the federal appellate system), which have themselves generated considerable controversy. Other circuits have adopted similar strategies to varying degrees, often at the urging of the Judicial Conference. Baker, *supra* n. 15, at 106-185 (discussing adopted and proposed intramural reforms).

18. The most obvious example is the nine-judge criterion, which has been abandoned as infeasible, even if ideal. See generally *White Commission Report*, *supra* n. 7, at 29-30 (discussing advantages of smaller courts but acknowledging that courts of more than nine members are inevitable); see also Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 *Tex. L. Rev.* 949, 968-73 (1964) (discussing court size); Deborah J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform 2-7* (Yale U. Press 1988) (discussing the "rule of nine" in context of the struggle to divide the Fifth Circuit).

19. See *infra* Parts III(C) and III(D).

20. 28 U.S.C. § 46(b) (available at <http://uscode.house.gov>).

21. See e.g. Dragich, *supra* n. 1, at 33-34, 34 n. 126.

decisions from within the circuit.²² But inter-circuit conflicts develop because the circuits are not bound to follow each other's decisions.²³ The Supreme Court, exercising discretionary review only, resolves relatively few such conflicts.²⁴ Thus, the key decisional structures of the courts of appeals have come to emphasize the "law of the circuit" rather than uniform federal law.²⁵ The law of the circuit doctrine, in turn, cements the minimal-disruption criterion. Because federal law is settled circuit by circuit and inter-circuit conflicts develop, any change in circuit boundaries would be accompanied by a change in the law applicable to some citizens.²⁶ As a result, all realignments of states to circuits since the Evarts Act have taken place within existing circuit boundaries that date to the Civil War era.²⁷

The article continues by inquiring whether meaningful structural reform is possible within the geographic organizing principle and concludes that Congress is unlikely, for good reasons, to abandon this broad principle. It goes on to suggest the types of reform Congress could consider within the regional organizing principle. This Part concludes that reform remains possible only if Congress is willing to reconsider its adherence to some or all of the accepted criteria for circuit structure.

The article ends by concluding that reform proposals invariably run afoul of one or more of the accepted criteria and yet seem likely to achieve relatively little. If Congress undertakes a serious reform effort, it should acknowledge that disruption is inevitable and focus on the important, enduring characteristics of the courts of appeals as small, generalist courts inferior to the Supreme Court. These characteristics are far more central than the specific criteria for drawing circuit boundaries.

22. Dragich, *Uniformity*, *supra* n. 5, at 538

23. *Id.* at 538–39.

24. *Cf. supra* n. 2.

25. See Dragich, *Uniformity*, *supra* n. 5, at 538; Student Author, *Securing Uniformity in National Law: A Proposal for in the Courts of Appeals*, 87 *Yale L.J.* 1219, 1224–25 (1978) (describing the law-of-the-circuit rule as the "concomitant" of division of the courts of appeals into geographic circuits).

26. See e.g. *Geographical Boundaries*, *supra* n. 13, at 228 (noting that "whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them").

27. *Cf. id.* (stating that current boundaries date to nineteenth century with exception of creation of Tenth Circuit in 1929).

In the end, the most significant obstacles to meaningful reform are the highly political nature of the task; Congress's preference for piecemeal reforms; and the Constitution's inferiority mandate.

II. THE NEED FOR FEDERAL COURTS

Article III establishes a "supreme Court" and allows for "such inferior Courts as Congress may from time to time ordain and establish." The scope of Congress's powers to create (or not) lower federal courts, and its power to strip the federal courts of jurisdiction authorized by Article III, are matters of considerable and enduring controversy.²⁸ In large part, this controversy hinges on one's view of the need for federal courts, and hence of the proper roles of such courts. Another important variable is one's view of the ability of state courts to fill any void left by failure to create federal courts or to vest them fully with the jurisdiction Article III authorizes.²⁹ This article recounts only so much of this controversy as is necessary to establish a point of departure for considering the structure of the courts of appeals.

Two roles are commonly ascribed to the federal courts.³⁰ The simpler of the two is that federal courts are needed to serve as neutral arbiters in cases involving states as parties³¹ or cases involving parties from different states.³² The state courts were

28. See generally Erwin Chemerinsky, *Federal Jurisdiction* (5th ed., Aspen Publishers, Inc. 2007).

29. See Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 278–83 (6th ed., Foundation Press 2009) (discussing the "parity debate").

30. See generally *id.* at 7–8 (discussing need for and roles of lower federal courts); Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 2–3 (7th ed. West 2011) (same); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 7–9 (Macmillan 1928) (describing need for federal courts to provide uniformity in certain types of cases, and to lessen friction among states).

31. See Wright & Kane, *supra* n. 30, at 3 (noting early experience with disputes between states).

32. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1460 (2008) (discussing early cases and continuing re-examination of diversity jurisdiction). Diversity of citizenship jurisdiction was (and remains) controversial. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1829–30 (2008).

considered by some to be incapable of deciding such cases in an unbiased manner, or in a manner that litigants would necessarily accept as impartial.³³ But here, the federal courts are merely alternative tribunals to which litigants may resort.³⁴ Federal diversity jurisdiction is not exclusive, it is limited by the amount in controversy and other requirements, and it is declining as a percentage of federal court caseload.

The other major role for federal courts is to ensure the supremacy of federal law. The theory of “dual sovereignty,”³⁵ which holds that the federal and state governments are sovereign within their independent spheres, suggests that the courts of each government must be empowered to serve as ultimate arbiters of that government’s law.³⁶ The only departure comes from the Supremacy Clause, which establishes that federal law trumps state law in case of a conflict.³⁷ Supremacy demands authoritative and uniform interpretation and application of federal law.³⁸ If this were not the case, state courts could indeed hear all cases in the first instance, subject only to discretionary review by the United States Supreme Court. While Article III gives Congress discretion not to create lower federal courts, there are reasons to think that some lower federal courts may be required. In some areas, federal jurisdiction is exclusive.³⁹ The

33. Burbank, *supra* n. 32, at 1461–62; Fallon et al., *supra* n. 29, at 7–8 (recounting Madison’s fears of bias in state courts).

34. See e.g. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996) (pointing out that “[f]ederal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights”). In cases of litigation between two states, of course, the Supreme Court is the only available arbiter. 28 U.S.C. § 1251(a) (providing for Supreme Court’s “original and exclusive jurisdiction of all controversies between two or more states”) (available at <http://uscode.house.gov>).

35. See e.g. *Gregory v. Ashcroft*, 501 U.S. 452, 457–60 (1991).

36. *In re Tarble*, 80 U.S. 397, 406–07 (1871) (noting that “[n]either government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other,” save for “the supremacy of the authority of the United States when any conflict arises between the two governments,” for “[t]he Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land”).

37. U.S. Const. art. VI, cl.2. The impact of the eleventh amendment on the ability of federal courts to enforce federal law requirements against the states is beyond the scope of this article.

38. See Dragich, *Uniformity*, *supra* n. 5, at 541–43 (discussing authorities).

39. See e.g. 28 U.S.C. § 1333 (admiralty); 28 U.S.C. § 1334 (bankruptcy); 28 U.S.C. § 1338(a) (patent and copyright).

power of state courts vis-à-vis federal officers is limited in certain ways.⁴⁰ The Constitutional requirement of a Supreme Court to superintend the exercise of the whole “judicial power” of the United States seems to many scholars to imply the existence of some lower federal courts.⁴¹ The equal protection clauses in the fifth and fourteenth Amendments, which must be read as modifying Congressional power over the federal courts, require uniform protection of federal law to persons across the country. The argument is that federal courts are either required, or at least better situated, to fulfill the supremacy mandate.

State court judges, of course, are bound by the Supremacy Clause to apply federal law regardless of contrary provisions in state law,⁴² but evidently are not always trusted to do so.⁴³ The relative incapacity of state judges is explained variously as deriving from their vulnerability to majoritarian political pressures;⁴⁴ their lesser qualifications, pay, and prestige;⁴⁵ their greater parochialism;⁴⁶ and so forth. Participants in the long-running “parity” debate contest all of these ideas.⁴⁷ But the fact is that Congress immediately created lower federal courts, and it is now unimaginable that we could do without them.

40. “A civil action or criminal prosecution commenced in a State court against” a federal officer or agency may be removed to federal court. 28 U.S.C. § 1442. States lack power to enjoin federal officers. *E.g. Keely v. Sanders*, 99 U.S. 441, 443 (1878) (pointing out that “no State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes”). State courts may not issue writs of habeas corpus for the release of federal detainees. *Tarble*, 80 U.S. at 410–11 (discussing relationship between state and federal courts and pointing out that “the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States”).

41. See *e.g.* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433 (2000).

42. U.S. Const. art. VI, cl. 2; see also James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw. U. L. Rev.* 191, 212 (2007) (discussing constitutionally required “inferiority” of state courts).

43. See generally Fallon, et al., *supra* n. 29, at 278–83 (discussing “‘parity’ debate”).

44. *Id.* at 279–80.

45. *Id.* at 279.

46. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *U.C.L.A. L. Rev.* 233, 283 (1988).

47. For an extended defense of state court judges, arguing in particular that they display little hostility to federal claims, see Michael E. Solimine & James L. Walker, *Respecting State Courts: The Inevitability of Judicial Federalism* 34–42 (Praeger 1999).

The necessity of federal courts does not tell us anything about their ideal design, but form should follow function. Professor Rosenberg suggested that any plan to reform the federal courts should be “parsimon[ious] in creating new judgeships” and should “avoid multiplicity of appeals,” “jurisdictional disputes,” and “[s]pecialization of [a]ppellate [j]udges.”⁴⁸ Indeed, the federal courts have been characterized by a small corps of judges, limited opportunities for appeal, and general (if limited) jurisdiction. Beyond these considerations, the courts of appeals were created to ease the burden on the Supreme Court, provide a realistic opportunity for appeal, and provide for appeal to a multi-member court rather than to a single judge.⁴⁹

This article focuses on the supremacy-maintaining function of the federal courts. All the characteristics just mentioned can be linked with the need for authoritative, uniform interpretation of federal law. Familiar arguments link fewer judges with more highly qualified judges and higher-quality decisions. The higher prestige associated with an elite position (not to mention the tenure and salary protections of Article III) is thought to attract the finest judges.⁵⁰ Collegiality, often thought to be a prerequisite for high-quality appellate decisionmaking, is enhanced when the corps of judges is small enough that judges know one another well.⁵¹ The involvement of both the Senate and the President in the selection of federal judges should ensure that these judges have a national rather than parochial focus. It is also accepted that greater consistency of decision is possible among a smaller cadre of judges.⁵² Limiting avenues for appeal also minimizes a multiplicity of conflicting decisions. The

48. Maurice Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 Cornell L. Rev. 576, 587–88 (1973).

49. See 21 Cong. Rec. 10226 (1890) (remarks of Sen. Dolph) (noting that under then-existing system courts were under-staffed: in many cases there was no appeal allowed, leaving “the decision of a single judge [as] final,” and Supreme Court’s docket was out of control); *id.* at 3404 (1890) (remarks of Rep. Culberson) (describing “judicial despotism” and “kingly power” of district and circuit judges).

50. See Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 *Judicature* 187 (1993) (discussing prestige, quality, and visibility of federal judges).

51. See Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 Ohio St. L.J. 399, 401 (1989).

52. Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70, 71–72 (July 1993).

provision of generalist rather than specialist jurisdiction is thought to reduce parochialism, partiality, and the risk of capture by interested parties.⁵³ Thus, the concentration of the federal appellate judicial power in a limited number of small, generalist courts should tend to promote the supremacy function of the federal courts.

None of these arguments hinges on regional organization, but Congress chose a regional organizing principle in 1789 and has stuck with it. One key feature of Congress's first articulation of the federal court system was that trials and appeals be heard in various parts of the country.⁵⁴ The legislative history of the Judiciary Act reveals significant concern for the convenience of litigants.⁵⁵ Another key feature was the relatively flat design of the system, with Supreme Court justices playing an active role in both trials and appeals. To do so while accommodating the convenience of litigants, Supreme Court justices were required to "ride circuit."⁵⁶ Under conditions then prevailing, travel even to a limited number of districts was difficult for judges;⁵⁷ without regional division, constituting the circuit courts would have been virtually impossible.⁵⁸ Moreover, these realities required the establishment of relatively small circuits.⁵⁹

53. Cf. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 118 (1982) (White, J., Burger, C.J., and Powell, J., dissenting) (discussing generalist versus specialized tribunals).

54. See e.g. James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev. 1515, 1550–51 (2001); Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 469–76 (1989) (discussing geographic concerns of the Framers).

55. Pfander, *supra* n. 54, at 1550; Amar, *supra* n. 54, at 472.

56. Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 Duke L.J. 249, 295 (2010) (discussing the "circuit-riding system" as the "glue that was to . . . bind[] these far-flung outposts of federal justice into a system").

57. Erwin C. Surrency, *History of the Federal Courts* 35 (2d ed., Oxford U. Press 2002) (noting that the pre-1891 organization of states into circuits "was for the sole purpose of assigning the justices to a given geographic region of the country for the purpose of holding the circuit courts").

58. See Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 Buff. L. Rev. 301, 306 (1987) (describing cost savings to both government and litigants, as well as convenience to litigants).

59. Supreme Court justices complained frequently about the burdens of riding circuit, especially in the huge southern circuit. See Surrency, *supra* n. 57, at 43–45 (describing

Regional organization ensured that litigation in federal court would be reasonably convenient for litigants and would afford them the protections of local juries. At the same time, regional organization helped establish the presence and power of the new federal government across the nation. As Part III argues, regional organization of the federal courts also promoted uniformity of federal law and counteracted presumed local bias, while attending to local concerns and facilitating application of state law in appropriate cases. Regional organization was not, however, necessary in and of itself.

III. FEDERAL-STATE RELATIONS AND REGIONAL ORGANIZATION

The early states “had very different economic and social systems,”⁶⁰ and most people at the time “identified themselves foremost as citizens of their States, and secondarily as Americans.”⁶¹ Congress consequently took care to alleviate fears that the nascent federal government would overtake established state government institutions—including the state courts—and ignore local customs and values.⁶² As a result, the federal and state courts have always overlapped in both geography and jurisdiction, and the courts of each system have always been expected to apply the law of the other in appropriate cases. Modern consensus holds that the complex structure of the federal judiciary reflects compromises necessary to secure the supremacy of federal law while respecting the rights of the states to control matters within their constitutional competence.⁶³

circuit duty and noting that most of the justices rode on average 2,000 miles per year, while Justice McKinley (of Alabama) rode 10,000 miles).

60. Robert J. Reinstein, *Foreword: On the Judicial Safeguards of Federalism*, 17 *Temp. Pol. & Civ. Rts. L. Rev.* 343, 351 (2008).

61. *Id.*

62. See generally Wythe Holt & James R. Perry, *Writs and Rights, “clashings and animosities”*: *The First Confrontation Between Federal and State Jurisdictions*, 7 *L. & History Rev.* 89, 95–97 (1989) (discussing opposition to creation of lower federal courts).

63. Cf. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141, 1144–45 (1988) (describing competing understandings of the “Federalist” and “Nationalist” models of judicial federalism). Professor Fallon defines the “Federalist” model as one based on respect for state sovereignty and on deference to state judicial proceedings, while the “Nationalist” model is based on a “preference for federal courts over state courts as guarantors of federal rights.” *Id.* Regarding the use of the terms

Geographic organization of the federal courts was a key feature implementing this compromise in the original design.⁶⁴ Professor Caminker describes the federal judicial structure as requiring “a centralized decisionmaker within a system of decentralized access.”⁶⁵ Locating federal courts around the country provides decentralized access, while jurisdictional arrangements and determination of the governing law establish a central focus for decisionmaking.

Under the 1789 Act, each federal district encompassed a state;⁶⁶ each of the three original circuits comprised two or more districts.⁶⁷ Regional organization both respected and transcended state boundaries. It allowed for consideration of both national and local concerns.

A. Local Interests and National Interests

The original district courts, whose boundaries were coterminous with those of the states, were designed primarily to be responsive to local interests. The inclusion of the local district judge on the circuit court was one way to assure sensitivity to local interests. The requirement that otherwise

“national” and “federal,” see Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie after the Death of Diversity?* 78 Mich. L. Rev. 311, 320 n. 33 (1980).

64. See generally Julius Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 470–73 (Cambridge U. Press 1971) (describing the creation and specific structure of the inferior courts, highlighting in particular their “localization”); Surrency, *supra* n. 57, at 35 (noting that geographical organization was “basic to the functioning of the federal courts [and] clearly envisioned by the authors of the first Judiciary Act”).

65. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* 46 Stan. L. Rev. 817, 866 (1994); see also *id.* at 833–34 (considering whether judicial structure compels lower federal court obedience to Supreme Court precedent).

66. Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789*, at 63–64 (U. Okla. Press 1990). Adherence to state lines was not inevitable; other organizational schemes were considered. *Id.* at 63. The districts of Maine and Kentucky were originally outside any circuit. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74; see also Maeva Marcus & Natalie Wexler, *the Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?* in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, at 22 (Maeva Marcus ed., Oxford U. Press 1992) (discussing drafters’ “deci[sion] to respect preexisting state boundaries” when omitting Maine and Kentucky from the original circuit system).

67. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75. (allocating districts to circuits).

“geographically remote”⁶⁸ Supreme Court justices travel out to the states to hold circuit courts was another.⁶⁹ And to the extent that Supreme Court justices were assigned to circuits encompassing their home states, litigants would be further assured of attention to local concerns.⁷⁰ Several additional features of the federal courts also promoted protection of local interests: the establishment of district courts within state boundaries;⁷¹ the requirement that juries be drawn from within the district;⁷² the staffing of district courts with permanent judges who were required to reside in the district served;⁷³ and the role of the Senate in confirming judges.⁷⁴ Professor Ritz suggests that the novel hierarchical structure of the federal judiciary, in which the Supreme Court’s appellate jurisdiction was limited to review of questions of law, also protected local autonomy by preventing re-litigation of facts to a non-local jury (which might see the matter differently).⁷⁵

The original circuit courts, each comprising two or more districts, exercised a strange combination of trial and appellate jurisdiction. These courts played a hybrid role with respect to

68. Pfander, *supra* n. 54, at 1519; *see also* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 569–71 (discussing decision to provide for circuit-riding by Supreme Court justices).

69. Pfander, *supra* n. 68, at 569–70, 569 n. 50 (discussing convenience); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 Minn. L. Rev. 1710, 1710 (2007) (quoting an 1848 statement of Senator Badger reported in the Congressional Globe implying need for Supreme Court to be familiar with laws and conditions of the states); Joshua Glick, Student Author, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753, 1757–61 (2003) (discussing various advantages of circuit riding); 21 Cong. Rec. 10231 (1890) (remarks of Sen. Morgan) (discussing advantages of having circuit judges “go out and intermingle with the people”).

70. *See* Surrency, *supra* n. 57, at 43–44 (noting that in “the early decades of the Nineteenth Century, justices were assigned to the circuit in which they lived”).

71. Kermit L. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829–1861*, at 3 (U. Neb. Press 1980) (noting that each federal district court “was made responsive to local interests by being established wholly within the boundaries of a particular state”).

72. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88.

73. *Id.* at § 3.

74. Hall, *supra* n. 71, at 4 (noting, in a discussion of the appointment of district judges, that “[b]y requiring the consent of the Senate, the Constitution insured that local interests would have an important role in the selection process”).

75. Ritz, *supra* n. 66, at 11–12. Congress chose not to implement jurisdiction in the Supreme Court to reexamine facts. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84–85. The Seventh Amendment, adopted in 1791, elevates this choice to one of constitutional dimension. *See* U.S. Const. amend. VII.

local interest versus nationalizing function. The role of the regional circuit courts, it has been argued, was to promote the authority and legitimacy of federal court decisions by involving Supreme Court justices at the trial stage.⁷⁶ Supreme Court justices were required to ride circuit not only so that they would appreciate local concerns,⁷⁷ but also to help spread the power and presence of the national government throughout the country.⁷⁸

These factors led naturally to regional organization of the original circuit courts. The requirement that Supreme Court justices participate in holding court across the country called for some sort of geographical division of responsibilities. The desire that federal judges appreciate local concerns and apply local law in many cases suggested the creation of regional circuits comprising contiguous states with common interests or traditions.⁷⁹ Regional differences at the time were considered significant,⁸⁰ giving rise to the notion that rules appropriate in one region might not be suitable in another.⁸¹ Given the irregular publication of legal materials,⁸² as well as the unavailability of comprehensive law libraries, it would have been difficult for federal judges to handle cases from a wide variety of states. Instead, by concentrating their attention on a small number of

76. Holt, *supra* n. 58, at 306–07.

77. See Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 *Geo. Wash. L. Rev.* 1255, 1264–65 (2010) (discussing views of members of the First Congress).

78. Collins, *supra* n. 56, at 293–95.

79. One justification for circuit riding, for example, was that it required the justices to “be brought into contact with the great mass of the community, as they are now by traveling into different sections of the country, and becoming to some extent acquainted with local facts, the character of our people, and the various interests in different parts of the country.” Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 57 (U. Chi. Press 1968) (quoting Senator Charles R. Buckalew).

80. See Reinstein, *supra* n. 60, at 352 (noting that at the time of founding, “people of one region were ignorant and suspicious of the people of the other [region]s”).

81. See Holt, *supra* n. 58, at 321 (quoting Chief Justice Jay’s view that “state jurisprudence ‘was accommodated to local, not general convenience, to partial, not national policy’”). This view is in tension, of course, with the notion that much non-federal law was of a transcendent, “general” character.

82. See Ritz, *supra* n. 66, at 10, 46–52.

nearby states, federal judges could master the law and procedure of those states and apply them with confidence.⁸³

The Judiciary Act's jurisdictional provisions illustrate the compromise between local and national interests. The district courts, for example, were assigned original jurisdiction over admiralty and maritime cases and minor federal crimes. Circuit courts had jurisdiction over most federal criminal cases, and concurrently with the state courts, over diversity cases as well.⁸⁴ This arrangement enhanced the national role in cases of national interest⁸⁵ by "eliminat[ing] most ordinary cases" from federal court dockets.⁸⁶ The presence of both a Supreme Court justice and the local district judge on the circuit courts incorporated a strong national perspective to balance local ties of district judges even at trial.⁸⁷ Cases assigned to the circuit courts would draw upon this dual perspective rather than that of the district judge alone, as in the district courts. At the same time, this jurisdictional allocation preserved an important role for state courts to decide local disputes.

83. Cf. Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 *Yale L.J.* 187, 217 (1957) (noting that "[i]f judicial expertise in the law of the state in which the district court sits is really to be the test, review of its rulings on state law ought to be permitted only when the appellate bench is also made up of judges from the same state jurisdiction"). Professor Ritz disputes altogether the premise that federal judges ought to be expert in the law of particular states: "It would have literally been unthinkable for the members of the First Congress to have directed national courts sitting in diversity cases to apply the law of the states in which they sat." Ritz, *supra* n. 66, at 79. The hypothesis that familiarity with state law promotes better federal court decisionmaking still surfaces from time to time. See e.g. *Mich. v. Long*, 463 U.S. 1032, 1039 (1983) (noting that the "process of examining state law [in the context of determining whether an adequate and independent state ground of decision exists] is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar").

84. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79; see Ritz, *supra* n. 66, at 64-66 (describing division of jurisdiction between district and circuit courts); see also Chemerinsky, *supra* n. 28, at 10-11; Holt & Perry, *supra* n. 62, at 100 (1989) (describing diversity jurisdiction and removal process).

85. See Ritz, *supra* n. 66, at 66 (noting that assignment of admiralty cases to district courts and of diversity cases to circuit courts appears "topsy-turvy"). Ritz reconciles the apparent contradiction with reference to problems of bias, noting that admiralty law was inherently uniform, whereas diversity cases raised the possibility of local bias if heard by the local district judge sitting alone. *Id.*

86. Holt & Perry, *supra* n. 62, at 100.

87. Cf. Ritz, *supra* n. 66, at 66 (describing divergent knowledge bases and viewpoints of Supreme Court justices and district judges); see also Goebel, *supra* n. 64, at 472-73 (similar).

Moreover, Professor Collins argues that the provision of federal equity jurisdiction had a profound unifying tendency. Even if federal judges were mandated to apply state law in diversity cases on the “law side”⁸⁸ of the docket, in equity cases the federal courts “conform[ed] to a national standard . . . regardless of the remedies available in the forum state courts.”⁸⁹ Section 34 “applied only to actions at common law,” not in equity.⁹⁰ Thus, although there was “significant variation of equity practices in the individual states,”⁹¹ “horizontal uniformity-of-equity principles” soon became the “explicit norm in federal equity cases.”⁹² Because states’ equity rules varied considerably, the application of uniform federal equity rules “would result in a different outcome.”⁹³ The Supreme Court “insist[ed] on federal uniform equity principles” both “to ensure litigant equality [of access to the federal courts] and uniform administration of justice throughout the federal judicial system.”⁹⁴

On balance, these features suggest Congress took care to ensure that regional organization did not swamp national interests. Congress did not regard circuit boundaries as sacrosanct but rather was willing from the very beginning to redraw circuit boundaries as needed to accommodate national expansion.⁹⁵ Circuit boundaries shifted even at a time when the federal courts were called upon to decide far more cases by reference to state law, and fewer on the authority of federal law, than they do today. This flexibility indicates that the geographic circuits served federal interests and did not enshrine any particular alignment of states to federal courts.

A place in which tensions between national and local interests came to a head was commercial law.⁹⁶ One historian

88. Collins, *supra* n. 56, at 258.

89. *Id.* at 276.

90. *Id.* at 283.

91. *Id.* at 267.

92. *Id.* at 266.

93. *Id.* at 276–77.

94. *Id.* at 300–01.

95. See Surrency, *supra* n. 57, at 36–42 (discussing numerous reconfigurations); Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* 9–19 (2d ed., Fed. Jud. Ctr. 1994) (same, and including a series of helpful maps).

96. Collins, *supra* n. 56, at 330; see also Frankfurter & Landis, *supra* n. 30, at 8–9.

writes:

As the national economy evolved, the federal system—the division of authority between local, state, and national governments—increased the cost of economic development. Several factors fostered uncertainty in the federal system. First, there was little or no uniformity in the local law of the states governing rights and obligations arising out of private transactions. This lack of uniformity was pronounced enough that many times the local law included different rules on similar or even identical issues. . . . Furthermore, interstate rivalry and local distrust of outsiders generated state laws and regulations that frankly discriminated against out-of-state business. Until the early twentieth century, this uncertainty in many of the “rules of the game” governing interstate enterprise no doubt constituted something of a barrier to economic development, a barrier that would have been higher except for the federal courts.⁹⁷

The national interest in facilitating interstate commerce was one factor in the allocation of federal court jurisdiction, as discussed in the next section.

B. Federal Jurisdiction and State Jurisdiction

Article III authorizes broad jurisdiction in the federal courts, but only a small portion of it may be exercised as an original matter by the Supreme Court. Article III leaves to Congress to decide how to structure the lower federal courts.⁹⁸ The jurisdictional provisions of Article III, however, establish important parameters of lower federal court design by providing a greater federal role in some types of cases than in others.⁹⁹

As is well known, Article III declares that the “judicial power shall extend” to enumerated cases. These cases fall into

97. Tony Allan Freyer, *Forums of Order: The Federal Courts and Business in American History* xvii (JAI Press, Inc., 1979) (footnotes omitted).

98. See *Stuart v. Laird*, 5 U.S. 299, 309 (1803) (noting that “Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another”).

99. Cf. *Kan. v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (discussing the idea that the Constitution’s allocations of jurisdiction—and specifically of the Court’s power to review state court decisions—are closely connected to the objective of “ensur[ing] the integrity and uniformity of federal law”).

two categories.¹⁰⁰ In the first category, Article III extends federal judicial power to “all Cases” arising under the Constitution, laws, and treaties of the United States; affecting ambassadors or other public ministers and consuls; or involving admiralty or maritime jurisdiction.¹⁰¹ This category is based on the nature or subject matter of the case and, by extension, its relevance to national interests.¹⁰² Justice Story explained that “all the cases enumerated in [this] class [are of ‘vital importance’] to the national sovereignty.”¹⁰³ These cases “enter into the national policy [and] affect the national rights.”¹⁰⁴ Accordingly, federal jurisdiction “should be commensurate with the mischiefs intended to be remedied, and . . . should extend to all cases whatsoever.”¹⁰⁵ The statutory grant of exclusive federal jurisdiction in some cases within this jurisdictional category

100. See Fallon, *supra* n. 29, at 14–18. Recent scholarship explores the distinctions and relationships between the two categories or “tiers” of federal jurisdiction. See e.g. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 209–10 (1985).

101. Article III makes federal jurisdiction exclusive in cases of admiralty and maritime jurisdiction and in cases affecting ambassadors and consuls. U.S. Const. art. III, § 2, cl. 2 (extending the federal judicial power to “all” such cases). Congress may provide for either exclusive or concurrent jurisdiction over cases arising under the constitution, federal laws, and treaties. *Id.* (extending the federal judicial power to such “controversies”).

102. Cf. John P. Frank, *Historical Bases of the Federal Judicial System*, 13 L. & Contemp. Probs. 3, 12–14 (1948) (discussing need to provide federal jurisdiction sufficient to secure effective national government and provide for the conduct of international relations).

103. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 334 (1816).

104. *Id.* at 335.

105. *Id.* Given Justice Story’s view of the importance of cases in this category to the new federal union, it is somewhat surprising that Congress did not provide for general federal question jurisdiction until much later. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 501 (1954) (referring to Judiciary Act of 1789, in which, “[f]ar from giving the lower federal courts a broad common law jurisdiction, Congress withheld from them any general jurisdiction whatever even in cases arising under the Federal Constitution, statutes or treaties”). But at the time of the creation of the lower federal courts in 1789, there was little federal law to serve as the basis for general federal “arising under” jurisdiction even if Congress had provided for it. Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. Va. L. Rev. 611, 615 (2007) (pointing out that “[i]n the beginning, there was the law that the states used,” and “[t]hat was all there could have been”). Instead, Congress sometimes provided for federal question jurisdiction under specific federal statutes. Westen & Lehman, *supra* n. 63, at 367, n. 166 (noting that “[a]lthough Congress did not vest the federal courts with general federal question jurisdiction until 1875, it did include within the Judiciary Act of 1789 jurisdiction over certain specialized federal questions” (emphasis in original)).

marks them as clearly “federal” for purposes of federal-state choice of law.¹⁰⁶ Moreover, federal courts continue, after *Erie*, to create and apply federal common law in admiralty and maritime cases, and in other cases of “dominant federal interest,”¹⁰⁷ regardless of the lack of any constitutional or statutory directive that they do so.¹⁰⁸

The second jurisdictional category comprises “controversies to which the United States [is] a party,” as well as “controversies” between states, and those

between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or its citizens thereof, and foreign states, citizens, or subjects.¹⁰⁹

Cases in this jurisdictional category, which is based on the identity of the parties, do not require exclusive federal jurisdiction and may be left to the state courts. Chief Justice Marshall observed that the Constitution, by providing for federal diversity jurisdiction,

either entertains apprehensions [that the state courts will not administer justice impartially to parties of every description] or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.¹¹⁰

106. Cf. Donald L. Doernberg, *Juridical Chameleons in the “New Erie” Canal*, 1990 Utah L. Rev. 759, 778–81 (1990) (discussing various reasons why federal courts apply federal rather than state law). Even when (as in the usual case) the grant of federal jurisdiction is not exclusive, the Supreme Court has interpreted particular federal statutes (such as the Labor Management Relations Act and the Sherman Act) “as a command to create federal common law.” *Id.* at 779.

107. See Doernberg, *supra* n. 105, at 644–59 (recasting Supreme Court’s substance/procedure dichotomy in *Erie* line of cases as terms relating to presence or absence of a dominant federal interest).

108. Doernberg, *supra* n. 106, at 778.

109. *Martin*, 14 U.S. at 327 (quoting constitutional provisions). The Constitution authorizes exclusive original federal jurisdiction in state-party cases. U.S. Const., Art. III, § 2, ¶ 2. The 1789 Act provides for original, but not exclusive, jurisdiction in some such cases. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

110. *Bank of U.S. v. Deveaux*, 9 U.S. 61, 87 (1809), *overruled in part on other grounds*, *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844).

Article III “enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals,” which were more likely to be impartial.¹¹¹ In these cases, the Constitution and Congress provide an alternative tribunal, but not a change in applicable law.¹¹²

In sum, the Constitution allocates federal jurisdiction between two broad categories of cases¹¹³ to meet two important objectives. Cases implicating federal sovereignty and important national interests are allocated to the federal courts, in some instances exclusively and in others concurrently with state court jurisdiction. The objective is to ensure the availability of a federal tribunal to protect federal interests from errors or encroachments by the states.¹¹⁴ The 1789 Act implemented relatively little of this jurisdiction, but this category has steadily expanded.¹¹⁵ Article III also allocates to the federal courts cases

111. *Martin*, 14 U.S. at 347. In providing for diversity jurisdiction, Congress originally limited that jurisdictional grant to “those cases where prejudice was to be feared, in which ‘the suit is between a citizen of the State where the suit is brought, and a citizen of another State.’” Hart, *supra* n. 105, at 501 & 501 n. 31; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79; see *White v. Fenner*, 29 F. Cas. 1015 (C.C.R.I. 1818) (dismissal on ground that neither party was a citizen of forum state). The diversity of citizenship grant was expanded in 1875. See Tony Allan Freyer, *Harmony & Dissonance: The Swift and Erie Cases in American Federalism* 55 (N.Y.U. Press 1981) (discussing “the general expansion of federal judicial authority” during the Civil War and Reconstruction); compare Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (providing that circuit courts have original jurisdiction, concurrent with state courts, of suits “in which there shall be a controversy between citizens of different States” without regard to whether the suit is filed in a district of the state where plaintiff resides) with Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (providing that circuit courts have original jurisdiction, concurrent with state courts, of suits “between a citizen of the State where the suit is brought, and a citizen of another State”).

112. *Gasperini*, 518 U.S. at 426.

113. See Amar, *supra* n. 100, at 205, 208–09 (building upon theories of Justice Story regarding two “tiers” of jurisdiction).

114. See e.g. Chemerinsky, *supra* n. 28, at 272 (noting widespread acceptance of the idea that “a federal forum should exist for federal law matters and that Supreme Court review of state court decisions is insufficient to adequately ensure such a forum”).

115. Federal question jurisdiction originally was provided for only within specific statutes. See David E. Engdahl, *Federal Question Jurisdiction under the 1789 Judiciary Act*, 14 Okla. City U. L. Rev. 521, 522 (1989) (arguing more broadly that “all cases which then could have been contemplated as within these ‘federal question’ terms were provided for” in the 1789 Act); see also *id.* at 533–34 (summarizing history of various additions to federal question jurisdiction). For example, the existence of federal question jurisdiction in *Osborn v. Bank of the U.S.*, 22 U.S. 738, 817 (1824), “depend[ed] entirely on the language of the act,” meaning the act chartering the bank. General federal question jurisdiction was

in which a party might face bias in the state courts. The 1789 Act implemented much of this jurisdiction, concurrently with state court jurisdiction.¹¹⁶ The objective in these cases was to provide an impartial tribunal for adjudication of the controversy, to provide the appearance of justice throughout the nation, and to prevent the outbreak of serious conflict among the states. This category has slowly contracted.¹¹⁷

Regardless of whether a litigant sought to pursue a federal question or feared state court bias in a diversity case, regional organization of the lower federal courts provided ready access to a federal court possessed of jurisdiction to hear the claim.¹¹⁸ On balance, however, the jurisdiction implemented by Congress in 1789 seems heavily weighted to the identity-of-party category, including diversity of citizenship cases. The balance today is

enacted in 1875. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470. Federal question jurisdiction formerly was conditioned on an amount on controversy; this requirement was eliminated in 1980. Federal Question Jurisdictional Amendments of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369-70 (1980) (codified as amended at 28 U.S.C. § 1331). A number of federal statutes provide for jurisdiction exclusively in the federal courts. *See e.g.* Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383, 386-87 (1991). Such statutes negate the usual presumption that federal jurisdiction, even in federal question cases, is concurrent with that of the state courts. *See e.g.* Chemerinsky, *supra* n. 28, at 268-69.

116. In providing for diversity of citizenship jurisdiction Congress originally limited that jurisdictional grant to “those cases where prejudice was to be feared, in which ‘the suit is between a citizen of the State where the suit is brought, and a citizen of another State.’” Hart, *supra* n. 105, at 501 n. 31; *see* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. This provision was amended in 1875. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (providing that circuit courts have original jurisdiction, concurrent with state courts, of suits “in which there shall be a controversy between citizens of different States”).

117. *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo. Wash. L. Rev. 353, 365-66 (2010).

118. Professor Pfander suggests that

Article III sought to guarantee access to a first instance federal tribunal for certain claims that the Framers were unwilling to leave to state courts. In describing the [Original Jurisdiction] Clause as authorizing original jurisdiction only as to the specified claims, however, the Federalists sought to assure the nation that Congress would not be able to expand the original docket of the geographically remote Supreme Court.

Pfander, *supra* n. 54, at 1519 (footnote omitted) (considering power of Congress to expand original jurisdiction of Supreme Court). By contrast, a proposal (rejected by the Framers) that the Constitution vest in the Supreme Court original jurisdiction over cases in which the United States was a party would have “threatened individuals around the country with government enforcement of the[ir] manifold obligations [to the federal government] before a distant tribunal and jury.” *Id.* at 1556.

quite different.¹¹⁹ While diversity jurisdiction has been broadened beyond cases in which plaintiff files in the courts of her home state,¹²⁰ the amount in controversy requirement has steadily risen.¹²¹ Diversity cases have fallen dramatically as a percentage of federal court caseload.¹²² Diversity jurisdiction is widely believed today to be the least important component of federal jurisdiction, and calls for its complete elimination are common.¹²³ By contrast, federal question jurisdiction has expanded in various ways. The amount in controversy requirement was eliminated in 1980.¹²⁴ An increasing number of federal statutes provide for jurisdiction exclusively in the federal courts.¹²⁵ Federal question cases now make up the major portion of the federal courts' caseload.¹²⁶

C. State Law, General Law, and Federal Law

As noted above, the federal courts' docket in the early days included mainly "private disputes between citizens of different

119. See e.g. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1687 (1992) (discussing reduced need for diversity jurisdiction).

120. Compare the original text of Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (providing federal diversity jurisdiction "where . . . the suit is between a citizen of the State where the suit is brought") (emphasis added) with the language of the present diversity jurisdiction statute, 28 U.S.C. § 1332 (providing jurisdiction "where the matter . . . is between citizens of different States") (emphasis added).

121. See Fallon et al., *supra* n. 29, at 1355–56 (recounting history of amendments to statute providing for diversity jurisdiction).

122. See *supra* n. 4.

123. See e.g. Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W.Va. L. Rev. 171, 183–84 (1995) (referring to a then-current plan that "urg[ed] Congress to turn over to the state courts much of the diversity docket (about 50,000 cases or about a quarter of the current federal civil docket)"); *id.* at 184 n. 39 (collecting authorities). But trial lawyers argue for its preservation. See e.g. Tammy A. Sarver, *Resolution of Bias: Tort Diversity Cases in the U.S. Courts of Appeals*, 28 Just. Sys. J. 183, 184 (2007).

124. Federal Question Jurisdictional Amendments of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369–70 (codified as amended at 28 U.S.C. § 1331).

125. See Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations from the History of the Federal Courts*, 46 N.Y. L. Sch. L. Rev. 7, 12 (2002–03).

126. The trend is not absolute, however. The Class Action Fairness Act of 2005, for example, expands federal jurisdiction over state-law cases involving multiple parties and multiple claims. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 4 (now codified in various sections of Title 28).

states or foreign nations.”¹²⁷ “[D]iversity jurisdiction exists precisely so that federal courts might decide cases differently from state courts, e.g., without ‘bias.’”¹²⁸ One question is whether the federal courts were thought to be fairer only “because [their] personnel are supposedly . . . more free from local prejudice,” or also because they are “to apply a substantive law that is itself less locally biased.”¹²⁹ Most discussions of the issue have focused on the former rationale, relating to state court personnel.¹³⁰ One account, however, suggests that even after the Civil War,

leading corporate businesses engaged in interstate enterprise encountered [not only] hostile local judges and juries distrustful of the power of business, [but also] state laws aimed at controlling or preventing activities of such businesses.¹³¹

In response, “federal judges . . . used their [diversity] jurisdiction . . . to establish a uniform corporate jurisprudence administered in federal court.”¹³² Despite criticism, this state of affairs prevailed until the 1930s.¹³³

The Rules of Decision Act (RDA), which directs federal courts to apply “the laws of the several states” as the rules of decision “in cases where they apply,” was enacted as section 34 of the Judiciary Act of 1789.¹³⁴ The conventional wisdom is that section 34 forces a choice between federal law and state law,¹³⁵

127. Freyer, *supra* n. 97, at xix; *see also* Kurland, *supra* n. 83, at 196 (quoting *Lumberman’s Mutual Cas. Ins. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring: “[t]he stuff of diversity jurisdiction is state litigation”).

128. Craig Green, *Repressing Erie’s Myth*, 96 Cal. L. Rev. 595, 610 (2008).

129. Ritz, *supra* n. 66, at 8; *cf.* Collins, *supra* n. 56, at 253–54 (discussing early federal courts’ application of “nonstate, judge-made principles” in federal equity cases not only to promote uniformity but also “precisely because of the failure of the forum state’s laws to provide adequate relief”).

130. *See e.g.* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1120–28 (1977) (discussing various advantages attributed to having federal constitutional claims heard by federal judges).

131. Freyer, *supra* n. 97, at xix.

132. *Id.*

133. *Id.*

134. Judiciary Act of 1789, 1 Stat. 73, § 34; *see also* Collins, *supra* n. 56, at 262 (aptly describing this mandate as “oblique”).

135. *See* Westen & Lehman, *supra* n. 63, at 314; Doernberg, *supra* n. 105, at 612–13, 665–66 (describing and refuting conventional view, and suggesting an interest-balancing alternative).

but some scholars argue otherwise.¹³⁶ This provision may have been “intended to remove the objection of those who had opposed” the creation of lower federal courts on the ground that these courts would have “the right of . . . determining the rules by which their judgment shall be regulated.”¹³⁷ Under this view of the RDA, “state law would continue to govern unless federal law displaced it.”¹³⁸ Alternatively, the RDA may have been intended simply to “provide for the application of American law rather than English law,”¹³⁹ or for the application of “general” law common to all the states rather than the law of a particular state,¹⁴⁰ except in cases involving purely local issues.¹⁴¹

In 1789, the primary role of state courts was the “exposition” of the common law; this function “lay at the heart of the role of the judiciary.”¹⁴² At the time the Constitution was ratified, “the law that the states used [including perceived natural law]. . . was all there could have been” for the federal courts to apply.¹⁴³ Accordingly, “a good starting point for the study of the federal common law might be the premise that in delegating to the federal courts a judicial power, the Constitution

136. See e.g. Ritz, *supra* n. 66, at 9–10 (arguing that in enacting section 34 Congress “could not have had the intent attributed to it by *Erie*”); see generally Collins, *supra* n. 56.

137. Kurland, *supra* n. 83, at 202 (quoting Charles Warren).

138. Doernberg, *supra* n. 105, at 618 (describing this view as resulting from the “uneasy settlement that the Framers reached” between state and federal power); see also *id.* at 645 (stating that “one should begin analyzing any [federal-state] choice-of-law problem by presuming that state law applies”).

139. Ritz, *supra* n. 66, at 76.

140. *Id.* at 140–41 (contrasting the phrases “several states” and “respective states”); see also Collins, *supra* n. 56, at 263–64 (citing William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1527–28 (1984)). The application of “general” law, rather than the law of a particular state, would have had a “centralizing” influence. Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & Socy. Rev. 57, 102 (1975).

141. Freyer, *supra* n. 111, at 14 (distinguishing general “laws” from local “customs”).

142. Doernberg, *supra* n. 106, at 801 (quoting Student Author, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1516 (1969)); see also Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 376 (2006) (describing differences between Founding-era and modern federal courts’ perceptions of “the judicial role in common law cases”); see generally *id.* at 376–79.

143. Doernberg, *supra* n. 105, at 615, 645 n. 190. In the absence of federal legislation or a body of federal decisional law, the early federal courts had recourse to only two sources of law according to Justice Iredell: “the particular laws of the State . . . [o]r [p]rinciples of law common to all the States.” *Chisholm v. Ga.*, 2 U.S. 419, 434 (1793).

delegated the same type of power that state courts possess[ed].”¹⁴⁴ Federal law was then an entirely undeveloped “new category of law”,¹⁴⁵ “state law governed nearly all areas of society.”¹⁴⁶ But “[a]s federal law developed, some of it displaced state law.”¹⁴⁷ Thus, the question of choice of law in the federal courts was an important one.

By the antebellum era, there were “three types of law: state law, federal law, and natural law, often referred to as ‘general’ law.”¹⁴⁸ Judges and lawyers of this era probably failed to discern a “sharp distinction between federal and state law.”¹⁴⁹ At the time, the distinction between “general” and “local” law would have been more salient.¹⁵⁰ “General” law included commercial law, which was founded on “universal principles” accepted throughout the “commercial world.”¹⁵¹ “Local” law, by contrast, involved matters such as title to land.¹⁵²

Under the jurisprudential theory of the time, in which judges merely “discovered” the (independently existing) law,¹⁵³ “general” law principles, upon which all states’ decisional law rested, “were not considered state law within the meaning of the RDA” unless and until “declared” by state statute.¹⁵⁴ Thus, it may be that section 34’s reference to “the laws of the several states” does not “assume[] the existence either of discrete bodies of definitely ascertainable state law, or of some discrete body of national law as contrasted to state law.”¹⁵⁵ The determination as to which cases call for the application of state law is also a

144. Doernberg, *supra* n. 106, at 801 (quoting *The Federal Common Law*, *supra* n. 142, at 1516).

145. Doernberg, *supra* n. 105, at 614.

146. *Id.* at 615.

147. *Id.* at 645.

148. *Id.* at 617; *see also* Collins, *supra* n. 56, at 263–64.

149. *Cf.* Ritz, *supra* n. 66, at 24 (noting that “we moderns” assume the existence of such a distinction).

150. Freyer, *supra* n. 111, at 35–38.

151. *Id.*

152. *Id.* at 29–34.

153. Doernberg, *supra* n. 105, at 617 (citing Blackstone); Doernberg, *supra* n. 106, at 801–02 (quoting *The Federal Common Law*, *supra* n. 142).

154. Doernberg, *supra* n. 105, at 623.

155. Ritz, *supra* n. 66, at 78.

matter of debate,¹⁵⁶ but may hinge on the particular grant of jurisdiction that allows the case to be heard in federal court.¹⁵⁷ The cases where state law was to “apply” are likely to be those “controversies” that reached federal court because of the character of the parties, not the nature of the case.¹⁵⁸

The Supreme Court’s *Swift* decision in 1842¹⁵⁹ interpreted the Rules of Decision Act to require federal courts to apply state statutes but not state decisional law. *Swift*, in other words, approved federal court development of a “general common law” where there was a need for national uniformity.¹⁶⁰ According to Professor Hart,

the conception of questions of general commercial law as depending essentially upon the discerning ascertainment and wise application of principles common to the English-speaking world, rather than upon any “law” peculiar to a

156. See e.g. Ritz, *supra* n. 66, at 146 (stating that Section 34 “provides no clue as to which are the cases where [state laws] are to be applied”); Doernberg, *supra* n. 105, at 618 (noting that “[i]t is difficult to know what to make of the last clause [of section 34]”).

157. See Westen & Lehman, *supra* n. 63, at 311–16 (describing debate about whether *Erie* doctrine applies to diversity cases only or also to federal-question cases); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U. L. Rev. 427, 441–42 (1959) (explaining why “a federal court may appropriately ‘make’ law under one head of jurisdiction and not under another”); see also Ritz, *supra* n. 66, at 8–10 (discussing various possible interpretations of Section 34); but see *id.* at 75 (noting that in Ritz’s view, authors of Section 34 saw the problem “as being applicable to the whole of the federal jurisdiction, not separable depending upon the subject involved”).

158. See Doernberg, *supra* n. 105, at 618 (pointing out that “federal courts have assumed that Congress intended [the RDA] as a direction to federal courts to apply a particular body of law in diversity cases”); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 930 (2004) (suggesting that RDA may carry a different meaning “when federal courts act within the scope of an existing federal enactment” than when they act in diversity cases). The *Erie* opinion itself suggests that the RDA may be “merely declarative of the rule which would exist in [its] absence.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938) (quoting *Mason v. U.S.*, 260 U.S. 545 (1923)). In *Guaranty Trust*, the Court suggested that the RDA “was deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts.” *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 103–04 (1945); but see Kurland, *supra* n. 83, at 203–04 (discussing constitutional basis of *Erie* and casting doubt on theory that *Erie* is merely declarative of existing rule).

159. *Swift v. Tyson*, 41 U.S. 1, 18–19 (1842), *overruled*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

160. Cf. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 387–88 (1964) (discussing alternate ways in which the *Erie* Court might have disposed of—or allowed the death of—*Swift*).

particular jurisdiction, was “congenial to the jurisprudential climate of the time.”¹⁶¹

In theory, all judges (state or federal) would “find” the same law.¹⁶² Hart noted, however, that even in 1842 it “should have been apparent that the wisest of judges would differ upon such questions.”¹⁶³ The multiplicity of decisionmakers in fact led to inconsistency of results.¹⁶⁴ Because general federal common law decisions were not binding on state courts,¹⁶⁵ *Swift* led to divergent rulings not only between states but also in “federal courts and state courts ‘a block away’ from each other.”¹⁶⁶ *Swift* thus failed to produce the desired “nationally uniform common law.”¹⁶⁷ Dissatisfaction resulted with the

161. Hart, *supra* n. 105, at 505 (quoting *Guaranty Trust*). Common law was still thought to be found (pre-existing), not made. *Id.*; see also Kenneth C. Cole, *Erie v. Tompkins and the Relationship Between Federal and State Courts*, 36 Am. Pol. Sci. Rev. 885, 889, 893 (1942). “General common law” applied by federal courts was not “federal common law” but rather a transcendent law found and elaborated by federal judges in the same manner as by state judges. Any competent judge, using accepted methods of analysis, would presumably arrive at about the same result. *Cf.* Hart, *supra* n. 105, at 505; see also Kurland, *supra* n. 83, at 190–91.

162. *Cf.* Green *supra* n. 128, at 604–06 (describing *Swift*-era legal notions, including the proposition that many common-law judges simply “discovered” “primordial ideals” embodied in the common law, and noting that “federal courts crafted common law in diversity cases using the same techniques as state courts”).

163. Hart, *supra* n. 105, at 505; see also *id.* at 506 (noting that the resulting inconsistent rulings amounted to an “offense to the most basic concepts of justice according to law”).

164. *Id.*

165. Cole, *supra* note 161, at 886 (noting that the availability of federal diversity jurisdiction added to, rather than reduced, the area of disagreement). Professor Doernberg explains:

Here the difference between the natural-law and the legal-positivist approaches becomes critical. . . . The [federal courts knew] . . . three sources of law . . . until *Erie*. First, there was federal law, which stemmed from the Constitution, from federal statutes and from judicial decisions of questions of law that fell within one of the Constitution’s grants of federal power. Second, there was state (or, as Justice Brandeis referred to it, “local”) law. Under *Swift*, that included state constitutions, state statutes, and state decisional law that related to local matters. General rules of contract law applicable in the states were not considered state law within the meaning of RDA unless declared by state statute; they were general common law not associated with any sovereign. That body of “general commercial law” was common (so to speak) to the states and the federal government. Neither could authoritatively expound it to the other. That is why the state courts were able to “persist” in their own opinions of general law without running afoul of the Supremacy Clause.

Doernberg, *supra* n. 105, at 623–24.

166. Green, *supra* n. 128, at 606.

167. *Id.* at 601.

“spurious uniformity”¹⁶⁸ of *Swift*, leading to the overruling of that decision in 1938.¹⁶⁹

D. Creation of the Courts of Appeals in 1891

The courts of appeals were established at a time when the balance between federal law and state law and the caseload mix between diversity and federal question cases were about to begin a marked shift toward their modern form.¹⁷⁰ Both the country and the federal courts had changed markedly between 1789 and 1891. Interstate commerce had grown along with the expansion of the nation, causing business interests to press for the uniform commercial law that had not developed under *Swift*.¹⁷¹ Federal court caseloads in 1891 still consisted predominantly of diversity cases, despite the passage of the post-Civil War constitutional amendments and an increasing number of federal statutes¹⁷² and the authorization of general federal question jurisdiction.¹⁷³

Against this background, the Evarts Act of 1891 created new courts of appeals using the circuit boundaries that had been in place since 1866.¹⁷⁴ Congress’s refusal to alter circuit boundaries as the country grew created vast circuits in the West, each including states with widely varying history, law, practice,

168. *Cf. Friendly*, *supra* n. 160, at 384.

169. *Erie*, 304 U.S. 64.

170. See generally Fallon, *supra* n. 63, at 1144–45 (noting that a “vast reordering” of federal-state relations was “inaugurated by the Civil War and Reconstruction”).

171. Freyer, *supra* n. 97, at 99–114 (describing post-bellum demographic, commercial, and legal developments and the resulting need for more uniform and more certain law across the country); Friendly, *supra* n. 160, at 405–06 (discussing *Swift*’s failure to achieve uniformity).

172. See Fallon, *supra* n. 63, at 1145 (describing “vast reordering of federal relations” following the Civil War and Reconstruction); *id.* at 1159 (stating that state sovereignty “must be viewed as vastly diminished, if not eviscerated, by the Reconstruction amendments”).

173. Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331).

174. See Surrency, *supra* n. 57, at 87 (noting that 1891 Act made “no adjustments . . . in the organization of the circuits”); Wheeler & Harrison, *supra* n. 95, at 19 (map showing 1866 circuit boundaries); 21 Cong. Rec. 3399 (1890) (including remarks of Rep. Breckinridge noting that “these nine separate courts will be located in what are now the nine circuits of the United States” and indicating Rep. Rogers’s agreement with that statement).

and current interests. This adherence to antiquated boundaries was due in large part to partisan wrangling.¹⁷⁵ The existing regional boundaries, established for convenience and formerly redrawn as needed, now took on an important significance in defining the new courts.¹⁷⁶ But the only relevant political systems in the United States are federal and state; regions have never had independent political significance. Professor Carrington forcefully states:

The structure of the courts of appeals was not intended to allow regional adaptation of federal law. On the contrary, the legislative history of the Evarts Act indicates that these courts were intended to harmonize and unify the national law, not to fragment it. Further, circuit regionalism violates the premise of the commerce clause and other provisions . . . of the Constitution that national uniformity is desired on many subjects of federal legislation. It would be a most peculiar scheme of government whose judiciary made decisions in the regional interest without the support or restraint of any politically responsible executive or legislative officials. The needs of regionalism are adequately protected by a healthy respect for federal-state relations and, in exceptional circumstances, by federal legislation which explicitly incorporates state law.¹⁷⁷

Developments following the Evarts Act tended to reflect the rising national interest. The “rise of legal positivism” in place of the natural law theory “rema[d]e the American view of law as a whole and of the law of federal-state relations in

175. See Frankfurter & Landis, *supra* n. 30, at 77–102 (recounting history of reform efforts from 1875 to 1891).

176. Dragich, *Uniformity*, *supra* n. 5, at 560, 562–68 (discussing evolution of federal courts of appeals); see also 21 Cong. Rec. 3399 (1890) (remarks of Rep. Breckinridge noting that the version of the bill then under consideration “create[s] nine separate courts”).

177. Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 602–03 (1969). This kind of battle played out in the long struggle about how to divide the old Fifth Circuit. During the 1950s and 1960s, federal law (requiring desegregation) was at odds with state policy in the South (favoring segregation). Federal judges differed in their deference to state policy. Southern Senators tried to divide the Fifth Circuit in such as way as to minimize the influence of so-called “activist” federal judges by isolating them in a two-state circuit and assigning the remaining four states to a more conservative circuit. See generally Barrow & Walker, *supra* n. 18.

particular.”¹⁷⁸ Given the marked changes in the caseload, jurisdiction, and role of the intermediate federal courts since their creation, this article argues that the primary contemporary role of the federal courts of appeals is application and development of federal law, which ought to be reasonably consistent across the nation.¹⁷⁹

IV. RE-EXAMINING ACCEPTED CRITERIA FOR REGIONAL STRUCTURE

According to the Report of the Federal Courts Study Committee, “five fundamental characteristics” of the federal courts of appeals have persisted since their “creation in 1891.”¹⁸⁰ This account holds that the courts of appeals comprise the only intermediate tier of courts in the federal system,¹⁸¹ provide litigants an appeal as of right,¹⁸² assign cases for decision by three-judge panels,¹⁸³ are organized geographically,¹⁸⁴ and are divided into circuits roughly approximating the number of Supreme Court justices.¹⁸⁵ Together, these characteristics describe both the decisional and geographic structures of the modern courts of appeals. Other characteristics of the federal

178. Doernberg, *supra* n. 105, at 617 (noting that legal positivism and natural law “could not co-exist”).

179. Many others have made this argument, though it is by no means universally accepted. See e.g. Dragich, *Uniformity*, *supra* n. 5, at 540–44 (summarizing uniformity arguments and citing sources).

180. Federal Courts Study Committee, Judicial Conference of the United States, *Report of the Federal Courts Study Committee* 113 (1990).

181. *Id.*

182. *Id.*

183. *Id.* It is not quite accurate to say that the assignment of cases to three-judge “panels” dates back to 1891. The 1891 Act defines the new courts as “consist[ing] of three judges, of whom two shall constitute a quorum.” Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826. The Act also provides that Justices of the Supreme Court, circuit judges, and district judges “shall be competent to sit as judges of the circuit court of appeals within their respective circuits.” *Id.* at § 3, 26 Stat. 827. Section 3 also refers to the “full court” (apparently meaning three judges), but does not speak of panels. *Id.* The Supreme Court in 1940 authorized the system of sitting in panels; Congress ratified this decision in 1948. Dragich, *supra* n. 5, at 565, nn. 204–06.

184. *Report of the Federal Courts Study Committee*, *supra* n. 180, at 113.

185. *Id.* Note that 28 U.S.C. § 42 mandates “allotment” of Supreme Court justices among the circuits. For current assignments, see *Allotment Order*, www.supremecourt.gov/orders/courtorders/ALLOTMENTORDER9-28-10.pdf (Sept. 28, 2010).

courts have changed over the years,¹⁸⁶ including the rising caseloads of the courts of appeals and the processes and procedures they employ to deal with expanded caseloads.¹⁸⁷ The function of these courts has also evolved from error correction alone to include significant law-making.¹⁸⁸

Taking a regional organizing principle and the decisional structures of the courts of appeals as a given, the question remains how well the specific criteria for circuit structure implement the essential design. The answer would seem to be not very well, in that “[t]he present circuit boundaries are old and irrational.”¹⁸⁹ The practice of decision by panels rather than en banc, combined with application of the rule of stare decisis among panels within a circuit but not among circuits, gives rise to inter-circuit conflicts in federal law. The specific regional structure of the courts of appeals seems ripe for reconsideration in light of current realities. This Part examines each of the accepted criteria for circuit structure, discussing both their origins and their contemporary relevance.

A. Realignment Should Avoid Excessive Interference in Established Circuit Alignment

According to the Commission on Structural Alternatives for the Federal Courts of Appeals, the circuit boundaries drawn by an 1866 statute “are largely still in existence,” because “[s]ince 1866, Congress has accommodated new states by adding them to existing circuits.”¹⁹⁰ Recent modifications in circuit structure have adhered strictly to the minimal-disruption

186. Cf. Collins, *supra* n. 56, at 255 (noting that “radical transformations . . . have occurred in our understanding of the judicial power as set forth in Article III”).

187. *Report of the Federal Courts Study Committee*, *supra* n. 180, at 114 (discussing increases in caseloads, judges, law clerks and other staff, as well as reductions in oral argument and increase in summary dispositions and settlement programs).

188. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757, 766–68 (1995) (citing sources).

189. Carrington, *supra* n. 177, at 586.

190. *White Commission Report*, *supra* n. 7, at 9.

criterion.¹⁹¹ For example, the division of the old Fifth Circuit into the new Fifth and Eleventh Circuits was accomplished within existing circuit boundaries, despite the fact that broader realignments were at least briefly considered.¹⁹² The same was true decades earlier when the current Tenth Circuit was split off from the former Eighth Circuit.¹⁹³ Almost all recent proposals to divide the Ninth Circuit, even proposals to divide the current circuit into three new circuits, take the outer boundaries of the existing circuit as a given.¹⁹⁴

Recent history sharply diverges in this respect from the early history of the lower federal courts. In less than eighty years, “Congress realigned the circuits thirteen times,”¹⁹⁵ freely grouping states into new combinations as necessary or desirable. For example, Delaware was at times part of a circuit also containing the states of New Jersey and Pennsylvania, while at other times was paired only with Maryland. Virginia was paired at times with North Carolina alone, and at other times with Maryland, West Virginia, North Carolina, and South Carolina. South Carolina was originally paired with Georgia; these two states later came to be in separate circuits.

When the intermediate appellate courts were created in 1891, the existing circuit boundaries remained despite the fact that the function of the intermediate courts—and countless other

191. The Hruska Commission denominated this the “principle of marginal interference.” *Geographical Boundaries*, *supra* n. 13, at 232.

192. Consideration was given, for example, to moving Arkansas from the Eighth Circuit to join the portion of the restructured Fifth Circuit containing Texas. *See e.g. id.* at 232–34. Professors Barrow and Walker provide a detailed account of political and strategic considerations leading to the split of the former Fifth Circuit. Barrow & Walker, *supra* n. 18, at 62–218.

193. New Mexico was added to the new Tenth Circuit at this time. Theodore J. Fetter, *History of the United States Court of Appeals for the Eighth Circuit* 43–45 (Judicial Conference of the United States, Bicentennial Committee 1977) (describing various plans for splitting the Eighth Circuit that were discussed at the time).

194. *See e.g.* Ninth Circuit Judgeship and Reorganization Act of 2004, S. 2278, 108th Cong. § 3 (proposing the division of states and territories in the existing Ninth Circuit into three new circuits: one composed of California, Guam, Hawaii, and the Northern Marianas Islands; one composed of Arizona, Nevada, Idaho, and Montana; and one composed of Alaska, Oregon, and Washington). A few proposals suggested moving Arizona from the Ninth Circuit to the Tenth Circuit. *See e.g. White Commission Report*, *supra* n. 7, at 55–56.

195. *White Commission Report*, *supra* n. 7, at 8.

aspects of life in the United States—had changed completely.¹⁹⁶ After 1891, “circuit boundaries no longer allocated Supreme Court justices’ trial court duties; rather circuit boundaries defined the territorial reach of appellate court jurisdiction.”¹⁹⁷ The overlay of existing boundaries onto a fundamentally new structure for the lower federal courts suggests that the boundaries were retained for convenience or political expediency and were not themselves a deliberate part of the design of the new courts of appeals. Changes in the boundaries were anticipated.¹⁹⁸

Moreover, at the time the new appellate courts were created, Congressional intent to authorize those courts to develop a new “law of the circuit” was unarticulated, to say the least.¹⁹⁹ In fact, these courts were created in response to a “near-breakdown of the [federal] judicial system,”²⁰⁰ traceable to a “vast expansion of judicial business” under the Reconstruction Amendments, post-Civil War statutes, and the authorization in 1875 of “general federal question jurisdiction.”²⁰¹ The federal trial courts had become “the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.”²⁰² The overwhelming expansion of federal judicial business fueled a crisis of appellate judicial

196. See Frankfurter & Landis, *supra* n. 30, at 56–64; see also Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 Miss. C. L. Rev. 349, 374 (1994) (pointing out that “the present arrangement of circuits (apart from the Tenth, Eleventh, and D.C. Circuits) derives from legislation enacted in 1866”).

197. *White Commission Report*, *supra* n. 7, at 11.

198. See 21 Cong. Rec. 10230 (1890) (remarks of Sen. Morgan, observing that “[w]e shall find it necessary to readjust these circuits very soon. . . because the population over [the Pacific Slope] is so large and they are scattered over such a vast area that it seems to me impossible that either the present or the proposed arrangement for circuit judges can be sufficient for the administration of justice in that region of [the] country”); see also *id.* at 10228 (remarks of Sen. Dolph, arguing that “California, Oregon and Washington should not be in one circuit, with all their vast coast line and with the great amount of admiralty business there is in courts of those districts”).

199. One criticism of the bill was that it would negate the “preservation of a homogeneous jurisprudence” by creating separate courts, each rendering final and conclusive decisions. 21 Cong. Rec. 3407 (1890) (remarks of Rep. Breckinridge); see also *id.* at 10222 (remarks of Sen. Evarts, answering a similar objection by noting that there would be “uniformity of decision”).

200. *White Commission Report*, *supra* n. 7, at 10.

201. *Id.*

202. *Id.* (quoting Frankfurter & Landis).

administration, which the new courts of appeals were intended to address. The precipitating event was the Supreme Court's inability to manage its docket. Thus, the focus was on increasing federal appellate capacity nationwide, not by region.

When federal judges applied mainly state law to decide mostly local controversies, and when federal law was made and supervised effectively by the Supreme Court alone, circuit boundaries could change as necessary without disrupting existing law.²⁰³ Responsibility for the development of law, whether state or federal, rested with courts other than the courts of appeals. Circuit boundaries did not carry adjudicative significance.

The development of the law of the circuit doctrine has changed the picture by creating precedent binding within a particular circuit but not beyond it. Now, when federal courts decide mostly federal controversies, and when the courts of appeals serve as important lawmaking bodies in the federal court system, changes in circuit boundaries would disrupt established federal law. At least where there are unresolved inter-circuit conflicts, the interpretation of federal law could change for people living in states that were shifted from one circuit to another. Probably for this reason, Congress has preferred simply to split existing circuits into smaller units. The newest circuits started from an established base of precedent created by the former circuit.²⁰⁴ Thus, changes in the law occurred incrementally and only within the context of a specific dispute considered by the new court.

As long as the law of the circuit doctrine remains in place and the Supreme Court is unable to resolve all inter-circuit conflicts, the minimal-disruption criterion is likely to stymie reorganization of the courts of appeals. Subdivision of existing circuits is no longer a fruitful strategy. The creation of more, smaller circuits itself would lead to greater fragmentation of federal law by increasing the potential for inter-circuit

203. Federal judges might have experienced a learning curve when assigned new states, however. *Cf.* 21 Cong. Rec. 10230 (1890) (remarks of Sen. Morgan noting difficulty of dealing with diverse laws of the several states).

204. *See e.g. Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting case law of former Fifth Circuit as governing body of precedent for new court); *South Corp. v. U.S.*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc) (similar reference to holdings of Federal Circuit's predecessor courts).

conflicts.²⁰⁵ Moreover, subdivision within its existing boundaries is wholly inadequate to resolve the problems of the Ninth Circuit given the imbalance California cases create within the circuit's caseload.²⁰⁶ Congress should either discard the minimal-disruption criterion (accepting some disruption as inevitable in any kind of restructuring) or legislate a departure from the law of the circuit doctrine. Under either course, Congress should then find it easier to reconsider the remaining criteria for circuit structure.

B. Circuits Should Be Composed of at Least Three States

The Commission on Revision of the Federal Court Appellate System in 1973 stated that "where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created."²⁰⁷ According to the Commission,

[a] one-state circuit would lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states. The Commission believes that such diversity is a highly desirable, and perhaps essential, condition in the constitution of the federal courts of appeals. Moreover, only two senators, both from a single state, would be consulted in the appointment process; a single senator of long tenure might be in a position to mold the court for an entire generation.²⁰⁸

The early history of the lower federal courts provides little support for the three-state criterion. The Judiciary Act of 1789 arranged the thirteen federal district courts into three circuits, known as the eastern, middle, and southern circuits. The eastern circuit comprised four states and the middle circuit comprised five states, but the southern circuit included only two states.²⁰⁹ Several of the early modifications to circuit structure created

205. Carrington, *supra* n. 177, at 586; *see also* Wright, *supra* n. 18, at 973.

206. *Cf.* Carrington, *supra* n. 177, at 587 (discussing difficulty of splitting Second Circuit owing to dominance in its caseload of cases from New York).

207. *Geographical Boundaries*, *supra* n. 13, at 231-32.

208. *Id.* at 237.

209. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74. The districts of Maine and Kentucky were omitted from the Circuit structure. *Id.*

other circuits including only two states,²¹⁰ and Congress in 1855 created the California Circuit consisting of that state alone.²¹¹ This history indicates that neither the three-state criterion nor the narrower rule against a single-state circuit was an essential, inviolable aspect of the early design of the intermediate federal courts.

It is true, however, that two-state circuits (and, by implication, single-state circuits) are “unprecedented in the history of the courts of appeals”²¹² as opposed to the earlier circuit courts. And there are cogent arguments against the creation of one- or two-state circuits.²¹³ Professor Wright argued that it is “difficult to overstate the importance” of the federal courts of appeals as “broad regional courts,”²¹⁴ explicitly linking the need for nationally uniform law with the regional character of the circuits. The federal courts of appeals, he asserted, are “best able” to serve the “national interest” by applying a “national system of law” when they are “composed of judges who have practiced in different states, who have a wide variety of experience, [and] who are free from the prejudices and provincialisms which color the thinking of lawyers in any one state.”²¹⁵ One- or two-state circuits would draw on a narrower range of experience and political interests, exaggerate the influence of a few Senators in the appointment process, and create a danger that federal judges would come to view their responsibilities as essentially local.²¹⁶

210. See Judiciary Act of 1801, ch. 4, § 6, 2 Stat. 89, 90 (Fourth Circuit includes only Virginia and Maryland); Judiciary Act of 1802, ch. 31, § 4 2 Stat. 156, 157 (Third, Fourth, Fifth, and Sixth Circuits consist of only two states each); Judiciary Act of 1837, ch. 34, § 1, 5 Stat. 176, 176 (Third, Fourth, Fifth, and Sixth Circuits consist of only two states each). The 1862 Act created two circuits of only two states each. Kutler, *supra* n. 79, at 17 (table showing states in each circuit as of 1860 and 1862).

211. See Judiciary Act of 1855, ch. 142, § 1, 10 Stat. 631, 631. California appears not to have been accounted for in the 1862 Act, but is included in the 1866 Act as part of the Ninth Circuit, along with Oregon and Nevada. See Kutler, *supra* n. 79, at 18 n. 22 (pointing out that “[i]n 1855 Congress provided a separate circuit for California, with a separate circuit judge”), 61 (table showing states in each circuit as of 1860, 1862, and 1866).

212. Barrow & Walker, *supra* n. 18, at 66.

213. See e.g. Carrington, *supra* n. 177, at 586–87.

214. Wright, *supra* n. 18, at 974.

215. *Id.*

216. Carrington, *supra* n. 177, at 586–87.

In this vein, Professor Wright compared the “eminent[t]” New York Court of Appeals with the even “stronger” Second Circuit.²¹⁷ Wright noted that “[m]ost of the cases in the Second Circuit [come from] New York, but for many years a third of its judges have come from Connecticut and Vermont.”²¹⁸ Second Circuit judges from New York were, he noted, “better judges for having to test their thinking” against judges from the other two states.²¹⁹ Wright argued further that a proposed new Eleventh Circuit consisting of only Texas and Louisiana “would be seriously handicapped” by including only states having “unique [] system[s] of jurisprudence” and lacking “the leavening influence of judges raised in the common law tradition.”²²⁰

The three-state criterion essentially sets a threshold below which circuit size is considered inadequate to effectuate federal interests. Justifications for the three-state criterion reflect the importance of uniformity of federal law and ensure that federal interests are not swamped by state interests. But setting the threshold as low as three states actually works against these justifications. Few combinations of three states (especially if the states must also be contiguous) are adequate to create a strong regional—let alone national—focus for the court. This is especially so where one of the three states dwarfs the other two in size, population, and volume of litigation, as New York does, for example, in the Second Circuit. Rather than using the three-state criterion to insulate the smallest existing circuits from restructuring, Congress would do better to determine whether, on balance, it prefers fewer larger circuits than exist in the present arrangement (providing for an even stronger focus on federal interests).²²¹

C. No Circuit Should Contain Non-Contiguous States

The organization of the lower federal courts into circuits has generally, but not invariably, followed the contiguity

217. Wright, *supra* n. 18, at 975.

218. *Id.*

219. *Id.* at 976.

220. *Id.*

221. This assertion assumes that Congress finds the Ninth Circuit’s case-management procedures adequate to ensure proper functioning of a large circuit.

principle. It appears that in 1855, the two states of Alabama and Louisiana made up the Fifth Circuit, while the intervening state of Mississippi, along with part of Arkansas, made up the Ninth Circuit.²²² The current assignment of Puerto Rico to the First Circuit and the Virgin Islands to the Third Circuit, rather than assignment of both territories to the geographically more proximate Eleventh Circuit, would appear to violate the contiguity criterion, but perhaps territorial status somehow obviates the need for contiguity in circuit structure.²²³ In any event, all circuit boundaries place contiguous states into separate circuits.

The contiguity principle likely had its origins primarily in convenience for circuit-riding justices, as well as for lawyers and litigants. This reason is no longer salient. Even if regional circuits are still desirable, or if appeals should be heard around the country and not only in the nation's capital, these goals can be achieved within a court structure that is not based on perfect contiguity.

The contiguity requirement may also have roots in assumptions about the commonality of legal issues and viewpoints among contiguous states or the greater familiarity of the bench and bar with the law and practice in neighboring states than in distant ones.²²⁴ These assumptions likely made sense as

222. See Wheeler & Harrison, *supra* note 95, at 15 (map showing 1855 boundaries).

223. Cf. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 706–15 (2004) (discussing the local nature and relative impermanence of early territorial courts); see *id.* at 709 (suggesting that the “apparent lack of need for uniformity of decision as between the territories and the states stemmed from the perception that the rights of territorial citizens were defined by reference to a unique set of local laws . . . and did not extend to the federal rights that citizens of the United States could enforce in Article III courts”); but see *id.* at 714–15 (noting that “territorial citizens are no longer seen as lacking federal rights that can be enforced on an equal basis with those of other citizens of the United States” and that even in the territories “some provision for Article III determination” is required today for claims of “federal rights enforceable against the government”).

224. See e.g. Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. Davis L. Rev. 721, 746 (2003) (noting that a “jurist who is stationed in a specific jurisdiction will often have greater familiarity with its substantive laws”); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 57–58 (1994) (suggesting that district or circuit courts “might offer unique contributions when discussing region-sensitive areas of law . . . for which, perhaps, the needs and burdens of federal law would be felt quite differently in varying geographic regions”). One justification for circuit-riding was that it required the justices to “be brought into contact with the great mass of the community, as they are now by traveling

design principles in the early days, when the federal courts were primarily concerned with diversity cases and were required to follow state procedural rules.²²⁵ A contiguity principle makes less sense today, given the dominance of federal question cases in the caseload mix and the promulgation of uniform rules of federal procedure. Today it is as easy to demonstrate the commonality of legal issues and viewpoints among non-contiguous states²²⁶ as it is to demonstrate the diversity of legal issues and viewpoints between contiguous states.²²⁷ Moreover, the contiguity criterion is in tension with the additional criterion, discussed below, that a circuit should contain states with a diversity of population, legal business, and socioeconomic interest. Rather than adhere rigidly to the contiguity criterion, Congress could restructure the courts of appeals into new, loosely regional circuits that would roughly evenly balance workloads while still accommodating convenience of litigants and judges.

*D. A Circuit Should Contain States with a Diversity of
Population and a Diversity of Legal, Business, and
Socioeconomic Interests*

The diversity-of-business principle appears to rest on the same insight that underlies the three-state criterion. The theory, espoused by Professor Wright among others, is that broadly regional courts of appeals are necessary if these courts are to

into different sections of the country, and becoming to some extent acquainted with local facts, the character of our people, and the various interests in different parts of the country.” Kutler, *supra* n. 79, at 57 (quoting Senator Charles R. Buckalew).

225. Cf. Carrington, *supra* n. 177, at 559–60 (suggesting that federal appellate judges regularly have deferred to “judgment of the district judge on a doubtful question of state law” in diversity cases, and implying that district judges know the law of the state in which they sit, while judges of the federal courts of appeals might not). But the need for federal judges to know state law may have been overstated even then, given that federal courts until *Erie* were not bound to apply state law even in diversity cases. Federal courts followed state procedural rules until 1938. See Wright & Kane, *supra* n. 30, at 424–27 (discussing procedural “conformity”).

226. California and New York, for example, though widely separated geographically, may, as the states with the largest and most diverse populations, share a similar political climate or common problems. California and Massachusetts, as the homes of many high-tech companies, may face similar legal issues.

227. Colorado and Utah, for example, although contiguous, have distinct cultures, histories, and political climates, and may face different legal issues.

serve national interests.²²⁸ The Commission on Revision of the Federal Court Appellate System explicitly linked this criterion with the role of the courts of appeals as “national courts.”²²⁹ The theory is that combining states with diverse traditions, and drawing judges from those states to sit together on courts of appeals panels, reduces the danger that the views of any one state will predominate on national issues.

This is so particularly when smaller states within a circuit are “over-represented” in judgeships compared to their share of the caseload of a given circuit as, for example, might be said of Vermont and Connecticut compared with New York in the Second Circuit.²³⁰ Even the smallest states, like Vermont, are represented in court of appeals judgeships, often disproportionately to their populations or volumes of legal business. This fact shapes the federal courts of appeals (like the Senate) as an institution primarily directed toward national interests. The diversity-of-business criterion also attempts to preserve the generalist tradition of the federal courts by ensuring that each circuit hears a rich mix of cases and thus avoids dangers including capture²³¹ and retarded development of the law.²³² All of these arguments can be linked to the desire for a strong focus on and consistent application of federal law.

Yet this criterion appears to conflict with the contiguous-states criterion, at least to the extent that contiguous states are

228. See text accompanying nn. 218–24, *supra*.

229. *Geographical Boundaries*, *supra* n. 13, at 232.

230. See Wright, *supra* n. 18, at 975. In 2007, appeals filed in the Second Circuit were as follows: Connecticut 347; New York 3,316; and Vermont fifty-five. 2007 Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/appendices/B03ASep07.pdf>. (2007) (tbl. B-3A: Sources of Appeals in Civil and Criminal Cases from U.S. District Courts during the 12-Month Period Ending September 30, 2007). Of the thirteen judges in active service on the Second Circuit, three are from Connecticut and one from Vermont. See Federal Judicial Center, *History of the Federal Judiciary, Biographical Directory of Federal Judges*, <http://www.fjc.gov/history/home.nsf/page/judges.html> (click on “select research categories” to search for active Second Circuit judges) (accessed Nov. 30, 2011; copy on file with Journal of Appellate Practice and Process). Thus, while Connecticut and Vermont together account for about eleven percent of the cases, they hold roughly thirty percent of the judgeships on the Circuit.

231. See *Structure*, *supra* n. 13, at 235–36 (dangers of specialized courts).

232. See Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 Nw. L. Rev. 1619, 1622 (2007) (quoting Judge Rader of the Federal Circuit).

thought to share common interests and issues. It is difficult to tell whether the diversity-of-business criterion played any role in the original design of the lower federal courts. The original structure combined New Hampshire, Massachusetts, Connecticut, and New York into the Eastern Circuit; New Jersey, Pennsylvania, Delaware, Maryland, and Virginia into the Middle Circuit; and South Carolina and Georgia into the Southern Circuit. The Middle Circuit, at least, appears to have incorporated considerable diversity of population, legal issues, and economic interests,²³³ but this combination may have resulted more from convenience than design.

Whatever the origins of the diversity-of-business criterion, its role in federal appellate court structure was a subject of considerable importance during the struggle over division of the old Fifth Circuit. Judge John Minor Wisdom was the chief proponent of maintaining the Fifth Circuit (and others) as large courts with a diversity of legal business:

Wisdom, more than any other judge on the court, had a firm philosophical notion of what the courts of appeals should be. He believed that the circuit courts perform a critical role in the political system—a role he called the “federalizing function.” This function included the responsibility for insuring that local legal policies remain consistent with national policy, and for supervising the lower federal courts in such a way that this consistency is achieved. Wisdom strongly advocated that circuits be as large as practically possible so that the courts of appeals reflect diverse interests and values. Splitting the Fifth Circuit, regardless of which geographical configuration was imposed, would

233. For example, New Jersey and Pennsylvania were always free states; Maryland and Delaware were originally slave states that ultimately sided with the Union; and Virginia was a slave state that ultimately sided with the Confederacy. See e.g. WGBH/Annenberg Learner, *A Biography of America, The Coming of the Civil War*, <http://www.learner.org/biographyofamerica/prog10/maps/index.html> (color-coded map titled “Free States and Slave States, before the Civil War”) (accessed Dec. 1, 2011; copy on file with Journal of Appellate Practice and Process). A less obvious example concerns the attitudes of the various states to the role that the common law of England should play in the courts of the new states. See Lawrence M. Friedman, *A History of American Law* 110–15 (2d ed., Simon & Schuster 1985) (discussing choices made by various states, including Virginia, Delaware, and New Jersey, on this question).

create two relatively small circuits that might have a dangerous tendency toward parochialism.²³⁴

Although Judge Wisdom lost the battle to preserve the old Fifth Circuit intact, his views about the importance of diversity of business did prevail in determining where to split the circuit. Early proposals called for the division of the circuit into two new circuits at the Mississippi River, with two states—Texas and Louisiana—in the new western circuit, and four states—Florida, Georgia, Alabama, and Mississippi—in the new eastern circuit.²³⁵ Proponents of this arrangement seemed to rely on a version of the contiguity criterion that stressed the desirable commonality of states within a circuit:

This seems to be a natural territorial division in view of the fact that it [Mississippi] lies east of the Mississippi River. The natural and inherent interests, including transportation facilities and communications, seem to indicate that the State of Mississippi should be in a circuit east of the river.”²³⁶

The eventual compromise that placed Mississippi in the western circuit had the effect, among others, of preventing the creation of an “oil and gas” circuit²³⁷ or a circuit drawing exclusively on the civil law traditions of Texas and Louisiana,²³⁸ and of including a relatively balanced array of judicial attitudes towards civil rights on both new circuits.²³⁹

Contiguity and diversity of business appear to be somewhat inconsistent objectives. It may be that the contiguity criterion mattered more when the federal courts’ caseload was heavily weighted toward diversity cases requiring application of state law. By the same token, the diversity-of-business criterion

234. Barrow & Walker, *supra* n. 18, at 25–26 (internal footnote omitted).

235. *Id.* at 63–65. The Biggs Committee also considered moving Texas into either the Eighth or Tenth Circuit. *Id.* at 64. Several other realignments were considered by the Hruska Commission. *Geographical Boundaries, supra* n. 13, at 232–34.

236. Barrow & Walker, *supra* n. 18, at 64–65 (quoting the Biggs Committee).

237. *Id.* at 192.

238. *Id.* at 164 (describing opposition of Louisiana bench and bar to a two-state circuit); *cf. id.* at 173 (noting suggestions that Texas and Louisiana should form a circuit by themselves “because those two states had such unique law”), 179 (discussing Arkansas’s negative reaction to a proposal to place it in a circuit with Texas and Louisiana, “two states which have a Civil Law background”).

239. *Id.* at 65–74.

arguably matters more today, when the caseload is dominated by federal question cases. Congress could easily fashion manageable circuits incorporating a diversity of legal business even if it departed from the contiguity criterion to some degree.

E. No State Should Be Split Between Two or More Circuits

The organization of the federal courts has always respected state boundaries. Each state originally comprised one federal judicial district.²⁴⁰ Early on, when the caseload of a district required the appointment of an additional judge, generally a new district was created, with a new place of holding court provided, and the new judge was assigned there.²⁴¹ District boundaries within state lines have changed fairly frequently over the years, generally for convenience or in response to increased caseload.²⁴² This pattern of creating new districts by subdividing existing ones continued into fairly recent times, long after district courts became multi-judge courts, with two new districts added in California in 1966.²⁴³ But district boundaries have never crossed state lines.²⁴⁴

The original federal circuits were constituted from the federal districts, not from the states directly,²⁴⁵ but because the districts themselves were coextensive with state lines, no federal

240. Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 73–74. The portion of Massachusetts that later became the state of Maine was made a district separate from that of Massachusetts, and the portion of Virginia that later became the state of Kentucky was made a district separate from Virginia.

241. 21 Cong. Rec. at 3407 (1890) (remarks of Rep. Breckinridge describing expansion of federal district courts).

242. See Lawrence M. Friedman, *Looking Backward: The Central District of California*, 36 Sw. U. L. Rev. 245, 245 (2007) (describing creation of the District Court for the Central District of California).

243. Bradley B. Williams, *When California's Southern District Became Central: A Brief Look at the Historical Context of the Central District in 1966*, 36 Sw. U. L. Rev. 175, 175 (2007).

244. Surrency, *supra* n. 57, at 39 (stating, with reference to the 1837 Act in particular, that “[a]t no time were states that were organized into two or more districts divided between different circuits”). The lone exception is the District of Wyoming, which extends into the portions of Montana and Idaho that lie within Yellowstone National Park. 28 U.S.C. § 131.

245. The 1789 Act provides that “the before mentioned *districts*, except those of Maine and Kentucky, shall be divided into three circuits.” Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 73 (emphasis added).

circuit split a state. And with but a few early exceptions, when states were divided into two or more federal judicial districts, all the districts of a state were assigned to the same federal circuit. One exception involved the inclusion of only the Eastern District of Arkansas in the Ninth Circuit in the 1850s.²⁴⁶

The whole-state criterion made sense when the federal courts in the majority of their cases applied state law. State law is a meaningful unit, deriving as it does from a single political authority. It is intended to apply indivisibly throughout the whole state. Therefore, to the extent that federal judges play a role in applying state law, the design of federal courts would do well to facilitate intra-state uniformity in that exercise. Structural ways to encourage that uniformity would be to minimize the number of individual federal actors authorized to affect state law (even provisionally),²⁴⁷ and to ensure that federal judges have occasion to master the law and legal culture of the particular states whose law they are expected to apply.

State law is no less relevant a concept today than in 1789, so this criterion may continue to have considerable relevance for the design of the federal courts. What has changed in the interim is the extent of federal courts' engagement in applying state law. Given the marked shift in the federal courts' caseload from diversity to federal question cases, the federal courts today far more often apply federal law (whether constitutional, statutory, or "genuine" federal common law) than state law. That change suggests that the whole-state criterion may be somewhat less compelling now than in earlier times. The Hruska Commission in fact recommended splitting California between two circuits.²⁴⁸ Some difficulties exist, however, including the

246. See *White Commission Report*, *supra* n. 7, at 9 (Figure 2-B). At the time, the Western District of Arkansas remained outside the boundaries of any federal circuit. *Id.*

247. The rulings of federal judges on questions of state law do not bind the highest court of the state. See *R.R. Commn. of Tex. v. Pullman Co.*, 312 U.S. 496, 499–500 (1941) (discussing possibility that federal ruling on state law questions might be displaced by subsequent state court decision because "it cannot escape being a forecast and not a determination," and noting that where the decision of a federal court sitting in equity turns on an interpretation of state law, it can give only "a tentative answer which may be displaced tomorrow by a state adjudication").

248. The Commission stated:

The realignment plan we have recommended would divide the judicial districts of California between the new Ninth Circuit and the proposed Twelfth Circuit. The division of a state between two circuits would be an innovation in the

possibility that two federal circuits will differently interpret and apply the same state statute.²⁴⁹

V. IS REFORM FEASIBLE WITHIN THE GEOGRAPHIC ORGANIZING PRINCIPLE?

This article assumes that Congress remains committed to the enduring characteristics of the federal courts of appeals as relatively small, generalist courts that provide each litigant one robust appeal as of right. It further assumes that Congress will not depart from the general principles of geographic organization and decision by panels of judges. This Part considers whether reform is possible given those strictures, particularly the geographic organizing principle.

Whether meaningful reform is possible depends on what objectives (within the strictures just mentioned) Congress has in mind. One set of objectives relates to efficiency in handling appeals. If Congress values expediency most highly, it could achieve that objective by increasing the corps of federal judges, by truncating appellate procedures, or perhaps by creating specialist rather than generalist courts. If Congress's highest priority is to equalize workload among judges or circuits and thereby to expedite decisionmaking, it could do so by adding more judges where needed or redrawing circuit boundaries. A competing objective is to preserve federal appellate justice in its traditional form, involving one appeal as of right, to a multi-member court of Article III judges, with oral argument and a

history of the federal judicial system. . . . However, after full consideration, we are convinced that any problems that might arise are of lesser magnitude and significance than those created by a single state circuit, or any of the other proposals that have been suggested to us.

Geographical Boundaries, *supra* n. 13, at 238.

249. See Hellman, *supra* n. 16, at 1192–93 (discussing variety of consequences of splitting a state among federal circuits). The Hruska Commission viewed these problems as capable of resolution:

The problems that may be anticipated fall into two broad classes: those involving actual or potential conflicting orders to a litigant, and those involving the promulgation of inconsistent rules of law in suits involving different litigants. Special concern has been voiced over the possibility of conflicting decisions as to the validity of state statutes or practices under federal law. . . . In any event, the[se problems] can be resolved by existing mechanisms and others that could readily be developed.

Geographical Boundaries, *supra* n. 13, at 238.

written opinion in every case. If this is Congress's goal, then it must add more judges or perhaps eliminate whole categories of federal jurisdiction, such as diversity. All of these options involve some sacrifice to one or more of the essential characteristics of the federal courts of appeals, such as their relatively small size or their generalist jurisdiction.

Another set of objectives focuses on the role of the courts of appeals in maintaining the supremacy and uniformity of federal law. If Congress wishes to provide for greater uniformity in the interpretation and application of federal law—and to do so within current organizational and decisional structures—its task is exceptionally difficult. Consolidating circuits or redrawing circuit boundaries unsettles federal law in the short run. Adding judges or subdividing courts into smaller units tends to decrease uniformity. But without more judges, appellate procedures may be truncated in some cases, and quicker processing probably equates with less robust consideration of the issues, including attention to potential conflicts.

Maintaining the geographic organization of the courts of appeals helps preserve the federal courts of appeals as small, generalist courts with clear paths of appeal. Regional organization imposes a practical, if not an absolute, cap on the number of judges assigned to any one circuit.²⁵⁰ Adhering to the current structure also continues the tradition of one appeal as of right without affording the possibility of additional avenues of review and maintains the courts of appeals (with the exception of the Federal Circuit) as generalist courts. The current structure also avoids jurisdictional disputes among the courts of appeals

250. Even after the nine-judge criterion faded into history, the Eleventh Circuit has decided that it cannot function properly with its full complement of authorized judges, and therefore has operated ever since its creation in 1980 with a self-imposed cap of twelve, the number initially authorized. See Dragich, *Uniformity*, *supra* n. 5, at 583 n. 326. The Ninth Circuit's cadre of authorized judgeships, though by far the largest of any circuit, still falls far short of the number that would be authorized under a strict ratio of filings to judges. *Id.* The Judicial Conference's 2011 Judgeship Recommendations include one temporary and four permanent additional judges for the Ninth Circuit, two additional permanent judges for the Second Circuit, and an additional permanent judge each for the Third and Sixth Circuits. Administrative Office of the United States Courts, *Judicial Conference Judgeship Recommendations—March 2011*, <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/2011JudgeshipRecommendations.pdf>.

because it is generally obvious to which regional circuit a particular decision may be appealed.²⁵¹

But even within these constraints, some structural reform is possible, particularly if Congress frees itself from the prison created by the Hruska Committee's "irreconcilable"²⁵² criteria for circuit structure. In particular, Congress should consider which of these criteria remain relevant to the contemporary role of the courts of appeals. The diversity-of-business criterion remains important so long as the federal courts are to be generalist courts. For much the same reason, the three-state criterion should remain and perhaps be strengthened by grouping more states together into larger circuits. Doing so would reduce inter-circuit conflicts and thus promote uniform interpretation of federal law. The whole-state criterion implicates federal-state relations in a way that suggests its retention, at least as long as federal courts continue to have diversity jurisdiction. The contiguity criterion, on the other hand, is of little real relevance to circuit structure today.

The changes made possible by loosening the hold of these criteria are achievable only if Congress is willing to tolerate a certain amount of disruption. Congress cannot, in other words, both insist on retaining the specific current structure of the courts of appeals (to prevent disruption) and enact reforms that preserve appellate justice in its traditional, robust form. Congress should take care to preserve the generalist character of the federal courts and the role of these courts in safeguarding the supremacy of federal law. Given advances in administration, travel, and communications technology, the practical consequences of changing circuit boundaries are minimal. Rather, the major potential for disruption arises from the problem of circuit structure itself: variations in law among the circuits. Congress or the Supreme Court could minimize any such disruption by weakening the hold of the law of the circuit

251. One exception is that many statutes "permit petitions for review [of agency action] to be filed in either the D.C. Circuit or the geographical circuit in which the aggrieved party resides." Jeffery C. Dobbins, *Structure and Precedent*, 108 Mich. L. Rev. 1453, 1466-67 (2010).

252. David Carlson, Student Author, *Adapting Integer Programming Techniques to Circuit Restructuring*, 96 Cornell L. Rev. 583, 605 (2011).

doctrine.²⁵³ Changes in that doctrine would then make other reforms possible.

One might ask what structural options exist if the law of the circuit doctrine persists in its current form. The answer, simply put, is that little can be accomplished. Disruption to settled circuit law would be greatest if states were shifted into entirely new circuit alignments. The least disruption results from the split of an existing circuit; both new circuits start from a defined base, shared by all citizens and all federal judges within the new circuits. This option, however, is likely to run afoul of the three-state and diversity-of-business criteria, and it exacerbates inter-circuit conflict by increasing the number of independent circuits. Further dividing circuits (or creating divisions within existing circuits) is a step in the wrong direction. The next least disruptive option would be to combine two or more existing circuits in their entirety. If Congress decided that maintaining high quality appellate justice required equalization of caseloads, or that the number of circuits should be reduced to minimize potential inter-circuit conflicts, it could move in this direction by combining existing circuits and retaining the current relationship of comity among the circuits. For example, Congress could consolidate the existing regional circuits²⁵⁴ as follows:

253. Dragich, *Uniformity*, *supra* n. 5, at 583–88.

254. This analysis excludes the D.C. and Federal circuits. The D.C. Circuit is structurally a “regional” circuit but has a specialized caseload owing to its location in the nation’s capital. The Federal Circuit is a specialized, not geographically defined, court. For purposes of comparison to the other circuits, 1,097 appeals were filed in the D.C. Circuit during the year ended September 30, 2009. Administrative Office of the United States Courts, *Judicial Business of the U.S. Courts*, <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/B03Sep09.pdf> (tbl. B-3: “U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, during the 12-Month Periods Ending September 30, 2005 through 2009”) [hereinafter Table B-3]. In the Federal Circuit 1,367 appeals were filed during the year ending September 30, 2009. Administrative Office of the United States Courts, *Judicial Business of the U.S. Courts*, <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/B08Sep09.pdf> (tbl. B-8: “U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending During the 12-Month Period Ending September 30, 2009”). The caseloads of these two courts are the lowest (closely followed by the First Circuit) of all the courts of appeals. Even if they were to be combined with one or more other circuits, the effect on the combined court’s caseload would be fairly minor. And it does not seem likely that Congress would choose to combine the Federal Circuit, which Congress has decided to organize by subject matter, with one or more geographical circuits.

New Combined Circuit	Appeals Commenced in 2009*
First and Second	7,493
Third and Fourth	9,061
Fifth	7,246
Sixth and Seventh	8,196
Eighth and Tenth	5,441
Ninth	12,211
Eleventh	6,995

* Figures are from Table B-3, *supra* n. 254.

This structure achieves little, even toward the modest goal of equalizing workloads. It is a short-term measure at best, for demographic shifts will continue to skew caseloads. It reduces regional circuits only from eleven to seven, leaving room for much inter-circuit conflict. Yet even this possibility may entail considerable disruption.

Numerous other variations are possible, but all run headlong into the Hruska Commission's criteria for circuit structure. If disruption of circuit law were not a problem, states such as Arizona, Idaho, and Montana could be shifted from the current Ninth Circuit to a new circuit combining the present Eighth and Tenth Circuits. This option magnifies disruption yet still doesn't eliminate a large caseload imbalance between the Ninth Circuit and all others.²⁵⁵ If states could be split between circuits, the California districts could be split so that the Northern and Eastern districts remained with the Ninth Circuit while the Southern and Central districts moved to the new circuit combining the Eighth and Tenth circuits plus Arizona, Idaho, and Montana.²⁵⁶ Although this arrangement comes closer

255. The new circuit comprising the current Eighth and Tenth Circuits plus the states of Arizona, Idaho, and Montana (all from the current Ninth Circuit) would have had a caseload of 6,595 for the statistical year ending Sept. 30, 2009, while the new Ninth Circuit (minus Arizona, Idaho, and Montana) would still have had 11,057 cases.

256. For the year ending September 30, 2009, that arrangement would have moved another 2,643 appeals out of the Ninth Circuit and into the new circuit, leaving the Ninth with 8,414 appeals and the new circuit with 9,238.

to equalizing caseloads, significant variations still exist. The price of moving toward equality of caseloads is splitting California between two circuits and creating a geographically huge circuit spanning the midwestern, inter-mountain west, and southwestern states. Disruption is great, as states from three preexisting circuits (each with distinct bodies of law) are lumped together, and one state is split between two circuits. It hardly seems worth the trouble, particularly when political considerations likely to affect Congress are factored in.²⁵⁷

VI. CONCLUSION

Attempts to restructure the lower federal courts are, and always have been, highly politicized endeavors.²⁵⁸ The 1862 reforms were explicitly linked to the slavery issue and were intended to redress “sectional imbalances” resulting from the 1837 restructuring.²⁵⁹ Much of the struggle surrounding the division of the old Fifth Circuit hinged on civil rights.²⁶⁰ Many discussions of recent proposals to divide the Ninth Circuit are viewed as attempts to shape environmental law in one way or

257. A recent analysis used computer programming techniques to generate several models for circuit realignment. See generally Carlson, *supra* n. 252. The author concluded that reform is possible but problematic. *Id.* at 605–07. For example, in order to ensure that most courts had no more than seventeen judges each, five new circuits had to be added, many states had to be shifted among circuits, some states had to be split, and some of the circuits could have only two states. *Id.* at 600–02.

258. Cf. Collins, *supra* n. 56, at 331–34.

259. Kutler, *supra* n. 79, at 14 (noting that prior to 1862 the federal court system—including the Supreme Court—“reflected the disproportionate southern influence” that resulted from the creation in 1837 of additional southern circuits). At the time, there were nine circuits, five of which “consisted exclusively of slave states, with a population of a little over eleven million, while the remaining four contained over sixteen and a half million.” *Id.* The Supreme Court was affected by virtue of the tradition of drawing one justice from (and to serve as circuit justice for) each circuit. Thus, the Supreme Court too included a disproportionate number of justices from the South. Cf. *id.* Meanwhile, “[e]ight of the newer states, six of them free states, were not assigned to any circuit” and thus had no representation on the Supreme Court. *Id.* The 1862 Act “reconstructed the judicial system at the expense of the seceded [southern] states [, telescoping the five slave-state circuits] into three.” *Id.* at 61–62. The 1866 legislation set the size of the Supreme Court and the number of circuits at nine, leaving only one circuit “composed exclusively of former slave states [, while the] remaining slave states were appended to free ones.” *Id.* at 62.

260. See Barrow & Walker, *supra* n. 18, at 32, 55–61 (linking struggle over division of Fifth Circuit with civil rights conflicts).

another.²⁶¹ Such political struggles, along with the desires of the Presidents and Senators involved to preserve their prerogatives in the nomination and confirmation of federal judges,²⁶² make any reform difficult to achieve. Reform proposals that eventually led to the Evarts Act were under consideration in Congress for at least a decade.²⁶³ The struggle to divide the old Fifth Circuit took at least as long.²⁶⁴ And discussions about division of the Ninth Circuit date back to the early 1890s at least.²⁶⁵

Given the difficulty of the task, it is perhaps not surprising that Congress has taken no action with respect to the Ninth Circuit despite the regular introduction of proposed legislation. All recent proposals address the Ninth Circuit alone. Congress appears to be stuck in the mindset that guided its first effort to ameliorate caseload burdens in 1929: to restructure an existing circuit only within its own boundaries. Congress's inclination over recent decades to pursue a "patchwork" of "routine and ordinary solutions" rather than "broad[er] and [more] imaginative" reforms²⁶⁶ suggests that lawmakers accept the criteria for circuit structure propounded by the Commission on revision of the Federal Appellate System in 1973. At the very least, these criteria give Congress cover to do nothing. This article argues that Congress should think more broadly about the role and function of the courts of appeals. It outlines the major themes that should shape any restructuring of the courts of appeals that Congress may decide to undertake in the future.

261. See e.g. David S. Law, *How to Rig the Federal Courts*, 99 Geo. L.J. 779, 789, 789 nn. 37, 38 (2011) (citing additional sources); Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 Ky. L. J. 679, 777–81 (1998–99) (discussing political motivations surrounding debate on splitting Ninth Circuit).

262. See e.g. 21 Cong. Rec. 10222–23 (1890) (remarks of Sen. Evarts) (discussing political implications of creating many new circuit judgeships all at once).

263. 21 Cong. Rec. 3399 (remarks of Rep. Cannon) (1890). In fact, a bill proposing the creation of intermediate appellate courts was introduced as early as 1866. Kutler, *supra* n. 79, at 55. The more pressing matter at the time was the size of the Supreme Court, which went forward without the circuit court reform proposal. *Id.* at 55–56.

264. Barrow & Walker, *supra* n. 18, at 1–2 (describing "often bitter eighteen-year controversy").

265. *White Commission Report*, *supra* n. 7, at 33 (noting that "[c]alls to split the Ninth and other circuits have been heard since 1891").

266. Reinhardt, *supra* n. 12, at 1507.

As I have argued elsewhere, Congress must determine the proper balance between inferiority and uniformity of decision in the courts of appeals.²⁶⁷ Organization of the federal courts of appeals into regional circuits still has some merit on the inferiority ground. It may be difficult to devise a workable structure for the federal appellate courts that preserves sufficient inferiority to the Supreme Court while departing altogether from regional organization. But adherence to the general concept of regional circuits does not mean that Congress must maintain inviolate the current boundaries. More importantly, it does not follow from the general soundness of the regional structure that each of the accepted criteria for circuit structure remains appropriate or essential.

The real question for Congress is the necessary degree of uniformity in the interpretation and application of federal law. Congress could facilitate greater uniformity while respecting the “inferiority” mandate by retaining the concept of regional organization but revising it to reflect contemporary demographics and other considerations. In so doing, Congress should pay particular attention to the criteria that promote the federal court objectives of supremacy and uniformity. Most importantly, Congress should openly admit that any meaningful reform will entail disruption in the short run.



267. See generally Dragich, *Uniformity*, *supra* n. 5, at 587–89.

