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OVERVALUING UNIFORMITY

Amanda Frost[*]

[*] Associate Professor of Law, American University Washington College of Law. I received valuable comments from Bradford Clark, Heather Elliott, Richard Fallon, Noah Feldman, Jody Freeman, Craig Green, Alexandra Lahav, Amanda Leiter, Daniel Meltzer, Bill Rubenstein, Michael Solimine, David Stras, Stephen Vladeck, Alexander Volokh, and David Zaring, and from the participants at the Boston University and Harvard Law School faculty workshops. Special thanks to Matthew Bohuslav and Andrew Ormes for their valuable research assistance.

INTRODUCTION

ENSURING the uniform interpretation of federal law has long been considered one of the federal courts' primary objectives, and uniformity is regularly cited in some of the most intractable debates about the structure and function of the federal court system. For example, specialized courts are lauded for their ability to ensure uniformity in the areas of law over which they have jurisdiction. Similarly, proponents of exclusive federal jurisdiction contend that the federal courts provide greater consistency in the interpretation of federal law than could fifty different state courts. Some commentators claim that Congress' power to create exceptions to

the Supreme Court's appellate jurisdiction is limited by the need to preserve the Supreme Court's role as harmonizer of divergent interpretations of federal law. Not only is uniform interpretation of federal law assumed to be desirable as a matter of policy, some judges and scholars claim that the Constitution requires federal courts to standardize the meaning of federal law for the nation.

The preoccupation with uniformity is perhaps best illustrated by the U.S. Supreme Court's docket: seventy percent of Court's plenary docket is devoted to addressing legal issues on which lower courts have differed, and law clerks and Justices alike have acknowledged that ensuring uniformity is a driving force in case selection.[1] Although the Supreme Court Rules state that the Court gives priority only to "important" federal questions on which the lower courts have differed,[2] a glance at the cases resolved each term suggests otherwise. In addition to high profile cases addressing issues such as restrictions on abortion and affirmative action, there are a number of decisions resolving circuit splits on matters that are close to trivial. For example, did the Supreme Court really need to weigh in on whether a complaint delivered by facsimile had been properly served,[3] or resolve the dispute about whether a signature on a notice of appeal could be typed?[4] Would the nation's business have been disrupted if the circuits simply maintained their divergent rules on these questions? It appears the Supreme Court selected these issues for review solely because the lower courts were divided, not because the issues were of great significance for the nation.

Considering how frequently uniformity is cited as a desirable goal, it is worth analyzing the arguments in favor of uniform interpretation of federal law[5] in more detail. The first goal of this Article is to look closely at an assumption in federal courts scholarship

[1] See infra Section V.B.

[2] Sup. Ct. R. 10.

[3] Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 349 (1999); see also infra notes 205–07 and accompanying text.

[4] Becker v. Montgomery, 532 U.S. 757, 760 (2001); see also infra notes 205–07 and accompanying text.

[5] Varied interpretation of federal constitutional law raises different, and arguably more troubling, questions, and thus is beyond the scope of this Article. For ease of reference, this Article will use the term "federal law" to mean federal statutes and regulations, and not the U.S. Constitution.

that appears to have been overstated and undertheorized. Why must ambiguous federal statutes be interpreted identically across the nation? Do disagreements over the meaning of federal law lead to social and economic disruption? And even if uniformity is as vital as the rhetoric suggests, are the federal courts the most appropriate institution to provide it? In light of uniformity's recurring appearance in debates over the role of the federal courts, these are questions that deserve more explanation and discussion than has occurred thus far. This Article's second objective is to draw upon this discussion to examine specific judicial practices in which uniformity has been given extraordinary weight, and to question whether the fixation on standardizing the interpretation of federal law is worth the effort.

The few scholars who have studied the question assert a number of reasons to promote uniform interpretation of federal law: the legitimacy of the federal court system and the integrity of federal law are undermined by inconsistent interpretations of the same statute; it would be unfair if similarly situated litigants were treated differently due to variations in the reading of federal law; predictability would suffer, raising the costs of doing business and fostering litigation; and multi-state actors would be forced to comply with divergent, and possibly even conflicting, legal standards.[6] Furthermore, some scholars of the federal court system, along with several current and former Supreme Court Justices, claim that uniformity is a constitutionally derived value, and that Article III assigns to the federal courts the task of harmonizing divergent interpretations of federal law.[7]

These arguments in favor of uniformity are worthy of greater scrutiny. At least in some categories of cases, judicial disagreements over the meaning of federal law have few, if any, negative consequences. If Congress enacts an ambiguous statute, why should reasonable variations in judicial interpretation undermine the integrity of the law or the legitimacy of the judiciary? Indeed, such variations might better accord with a divided Congress' intentions and with differing regional preferences than would the adoption of a single, nationwide interpretation. Nor is it necessarily un-

[6] See infra Section II.A.
[7] See infra Part I.

fair that similarly situated litigants obtain different outcomes when a statute is susceptible to more than one reading. Ambiguous federal laws can be understood as giving judges the discretion to adopt interpretations that fall within a range of reasonableness, much as the doctrine of *Chevron* deference gives agencies such discretion to fill gaps in the statutes they administer.[8] Admittedly, multistate actors must absorb the costs of complying with the disparate interpretations of the laws that affect them, but it is hard to take these costs too seriously in the United States, where the legal variations that accompany federalism are touted as one of this country's great strengths. Although this Article does not claim that heterogeneity is never problematic, it does question whether uniformity for its own sake is always worth the (sometimes significant) costs of trying to achieve it, and contends that under some circumstances nonuniformity may even be preferable.[9]

Furthermore, there is little evidence that the Framers of the Constitution were concerned with the need for uniformity. Article III grants the federal courts the power not only to hear cases "arising under" federal law, but also extensive authority to preside over interstate and international disputes in cases devoid of federal questions, suggesting that the federal courts were not to be primarily concerned with resolving disagreements over the meaning of federal law. Even more telling, the Judiciary Act of 1789, enacted by a Congress that included many of the Constitution's drafters and supporters, did not grant the lower federal courts general fed-

[8] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."). As many legal scholars have noted, Congress similarly delegates resolution of statutory ambiguity to courts when agencies are unavailable to perform that task. See Jack Goldsmith & John F. Manning, The President's Completion Power, 115 Yale L.J. 2280, 2299 (2006) ("Congress can legitimately give either courts or agencies ultimate authority to resolve statutory ambiguities or fill up statutory interstices," although "it is more consistent with the background premises of our constitutional democracy to embrace a default rule that Congress prefers to leave such completion power in the hands of the more accountable executive."); William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1377–78 (1988) (stating that "Congress has implicitly given the responsibilities for filling in the details of common law statutes" to courts, just as it has given such authority to agencies to fill gaps in the statutes they administer).

[9] See infra Section II.B.

eral question jurisdiction and limited the U.S. Supreme Court to reviewing only those state court decisions that rejected a federal claim of right. Indeed, with the exception of one brief period, Congress did not grant the federal courts general federal question jurisdiction until 1875,[10] or provide the Supreme Court with the power to review all state court decisions addressing federal issues until 1914.[11] These jurisdictional choices indicate that the standardization of federal law was low on a list of original federal courts values, falling well below the need to supply neutral tribunals for interstate and international disputes and to ensure the supremacy of federal law.[12]

In any case, standardizing federal law is no longer possible as a practical matter. The Supreme Court's membership has rested at nine since 1869, while the number of state and federal judges, as well as the number of federal statutes requiring interpretation, has grown exponentially. Thirteen different federal courts of appeals issue decisions every day on the meaning of federal statutes and regulations, and they are not required to follow each other's lead. Fifty state supreme courts are an even greater source of potentially conflicting views of federal law, and none of these courts are compelled to adopt the precedent of the federal circuits that have already ruled on these questions. Accordingly, the U.S. Supreme Court cannot hope to address more than a tiny fraction of cases involving differences over the meaning of federal law. Even if harmonizing statutory interpretation were worthwhile in theory, it is no longer possible in practice.

Part I of this Article will briefly describe some of the major debates in federal courts scholarship in which arguments based on uniformity are ubiquitous. These examples demonstrate the substantial role that uniformity plays in the dialogue among jurists, policymakers, and federal courts scholars over the appropriate structure and function of the federal courts. They also serve to frame this Article's analysis of uniformity from a normative per-

[10] See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 470. Congress very briefly granted the federal courts original federal question jurisdiction in the Midnight Judges Act, ch. 4, § 11, 2 Stat. 92 (1801), but that provision was repealed in 1802.

[11] See Judiciary Act of Dec. 23, 1914, 38 Stat. 790.

[12] See infra Part IV.

spective (Part II), from an institutional capacity perspective (Part III), and as a matter of constitutional necessity (Part IV).

Part II will question whether uniformity merits such a significant place in these debates. When uniformity is cited in support of federal judicial policies and practices, it is assumed to have some significant value that counters competing considerations. This Part examines the claimed rewards of uniform interpretation of federal law more closely to gauge whether uniformity is worth the costs it takes to attain. This Part then draws upon recent Supreme Court "conflict" grants to illustrate that uniformity's benefits are often either absent or overstated. Indeed, in some cases nonuniformity is preferable, as it allows for laws to be tailored to regional preferences and better accords with a divided Congress' preferences.

Part III will question why, even if uniformity is a worthwhile goal, federal courts should be the governmental institution responsible for providing it. Congress, not the courts, is responsible for drafting legislation in which it makes policy choices for the nation, and Congress has the political accountability and the resources to engage in that task. Congress would thus do a better a job of deciding when uniformity is truly important and then resolving lower court disagreement over the meaning of federal law in that subset of cases. In contrast, the federal judiciary's unique independence from political pressure makes it better suited to protect individual rights, police the activities of the other two branches, and ensure the supremacy of federal law than to fill gaps in ambiguous statutes. Of course, judges are forced to engage in gap filling when faced with a dispute over the meaning of a statute, but they need not expend additional resources to eliminate the interpretive differences that inevitably crop up when they engage in this task. Accordingly, Part III will advocate that the courts take a back seat to Congress in eradicating nonuniformity.

Some scholars and jurists conclude that standardizing the meaning of federal law is not only good policy, but is also one of the federal courts' constitutional obligations. Thus, Part IV will examine whether the Constitution assigns this role to the federal courts. This Part will review the evidence from the text of Article III, the First Judiciary Act, and the Constitutional Convention to conclude that uniformity did not occupy a central role in the minds of the Framers or their contemporaries, and that they did not intend for

the federal courts to provide a single, nationwide interpretation of federal law.

Part V will return to the longstanding debates over federal judicial structure and function described in Part I to note how a new understanding of uniformity alters the discussion. This Part will then hone in on one particular judicial practice in which uniformity plays a predominant role: the Supreme Court's case selection. This Part will draw on Professor Arthur Hellman's and Professor David Stras's empirical analyses of the Supreme Court's plenary docket and the factors affecting certiorari grants to conclude that resolving lower court conflicts has become an unjustifiably significant portion of the Supreme Court's docket, and suggests that the Court reconsider whether uniformity, in and of itself, is a goal worth pursuing. This Article will also suggest that instead of occupying itself with resolving circuit splits, the Court should adopt a variation of *Chevron* deference when reviewing lower court disagreements over the meaning of federal law. If the lower courts reach varied but reasonable conclusions about the meaning of a federal statute, and the differences do not create significant disruption or inequality, then the Court should decline to resolve the conflict.

I. UNIFORMITY AND THE FEDERAL COURTS

This Part describes some of the most significant debates over the structure and function of the federal courts in which uniformity plays a substantial role. A few caveats: First, the list is not comprehensive; the claimed need for uniformity arises in countless questions about the role of the federal courts, all of which cannot be summarized in the space available here. Second, uniformity is usually one of several arguments cited by those debating the issues below, and their views do not stand or fall on the strength of the uniformity argument alone. Third, a number of judicial practices are at odds with uniformity—for example, the lack of intercircuit stare decisis is an obvious impediment to achieving a single, nationwide interpretation of federal statutes. This Part does not mean to suggest that a desire for uniformity always prevails in disputes over the role of the federal courts, but rather seeks to show how often it is a significant part of the debate.

A. Supreme Court Case Selection

The emphasis on uniformity is most visible in the Supreme Court's self-selected docket, which is dominated by cases raising issues over which the lower courts disagree. Seventy percent of the Court's caseload involves questions that have divided the lower courts, and the presence of a circuit split greatly increases the chances of having certiorari granted.[13] As will be discussed in more detail in Section V.B, the Court's focus on circuit splits cannot be explained away on the ground that splits are a good proxy for an issue's importance, nor does it appear that splits are used as a method of triaging important cases. Empirical work by Professors Arthur Hellman and David Stras, as well as anecdotal evidence gathered by Professor H.W. Perry, shows that the Court is focused on promoting uniformity for its own sake.

Although the Supreme Court has been criticized of late for not hearing enough cases—its docket shrank to a modern low of sixty-eight cases in the 2006 Term—its focus on resolving conflicts among the lower courts has not been cause for concern. To the contrary, the Court is far more often chided for failing to resolve splits than for addressing too many of them.[14] Defending the recent drop off in certiorari grants, Justices Souter and Breyer have publicly speculated that the Court is hearing fewer cases because the lower courts are generating fewer conflicts, which Justice Souter attributes to greater "homogeneity" in the courts of appeals.[15] The evidence does not appear to support this conclusion,[16] but even if true, it does nothing to answer the question being asked here:

[13] See infra Section V.B.

[14] See, e.g., Comm'n on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 209–10 (1975) [hereinafter Hruska Commission Report].

[15] Arthur D. Hellman, Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts, 63 U. Pitt. L. Rev. 81, 146 (2001) (quoting Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the House Comm. on Appropriations, 104th Cong., 2d Sess., pt. 6, at 23–24 (1996) (testimony of Justice Souter)); id. (quoting Pamela A. MacLean, Justices Defend High Court's Taking Fewer Cases, Daily Journal (Los Angeles), July 29, 1999, at 3).

[16] See Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 Sup. Ct. Rev. 403, 414–17 (1997) (finding that empirical data refuted Justice Souter's "homogeneity" claim).

should the Supreme Court's primary role be to provide for uniform interpretation of federal law?

B. Original Federal Question Jurisdiction

The appropriate breadth of original federal question jurisdiction turns, in part, on the claimed benefits of uniformity.[17] Providing the federal district courts broad original federal question jurisdiction is claimed to promote uniform interpretation of federal law because federal judges are fewer in number and arguably have greater expertise in interpreting federal law than state judges, and thus will reach more consistent conclusions about the meaning of federal law.[18]

The Supreme Court recently made these same points in *Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing*, in which it reaffirmed that a federal district court had subject matter jurisdiction to hear a state law claim if resolution of that claim turned on a "substantial" federal question, citing the "experience, solicitude, and *hope of uniformity* that a federal forum offers on federal issues."[19]

[17] Justice Brennan claimed that Congress granted the federal district courts general federal question jurisdiction in 1875 to promote uniform interpretation and application of federal law. See Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting) (stating that one of the "reasons Congress found it necessary to add [federal question] jurisdiction to the district courts" is "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution" (internal quotation omitted)); see also Am. Law Inst., Study of the Division of Jurisdiction Between State and Federal Courts 165–66 (1969) ("There is reason . . . to believe that greater uniformity results from hearing [federal question] cases in a federal court."); id. at 166 ("[L]ack of uniformity in the application of federal law stemming from misunderstandings as to that law, and the body of decisions construing it, would be less in the federal courts than in the state courts.").

[18] Id. at 164–68 ("[G]reater uniformity results from hearing [federal question] cases in a federal court.").

[19] 545 U.S. 308, 312 (2005) (emphasis added); see also H.R. Rep. No. 94–1487, at 32 (1976) (stating that the Foreign Sovereign Immunities Act of 1976 "give[s] foreign states clear authority to remove to a Federal forum actions brought against them in the State courts" because of "the importance of developing a uniform body of law in this area"); id. at 13 ("Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision . . . ."). Some scholars have questioned whether uniformity is, in fact, promoted by providing for concurrent jurisdiction over federal question cases. *Members of the Working Group on Principles to Use When Considering the Federalization of Civil Law* questioned whether federal jurisdiction, whether

C. Exclusive Federal Question Jurisdiction

The benefits of uniformity also underlie arguments for granting the federal courts exclusive jurisdiction over certain federal causes of action.[20] Federal crimes, for example, can only be heard in federal court, and a number of different federal statutes vest exclusive jurisdiction in the federal courts.[21] The American Law Institute explained that in these classes of cases, "Congress has seemingly made a judgment that there is a national interest in uniform construction of the applicable law, and is unwilling to permit the litigants to choose a state forum."[22]

D. Specialized Courts

Supporters of specialized courts often invoke the need for a coherent and consistent interpretation of statutes governing a specific area of federal law by judges steeped in that subject.[23] In discussing the role of bankruptcy courts, for example, Professor Erwin Chemerinsky wrote that "[s]pecialization offers two major advantages: expertise and uniformity. . . . [S]pecialization might produce uniformity by having fewer courts and fewer judges dealing with particular issues."[24] Similarly, ensuring the uniform interpretation of federal patent law provided the impetus for the creation of the specialized United States Court of Appeals for the Federal Circuit in 1982.[25]

exclusive or shared with state courts, would actually promote uniformity. See Erwin Chemerinsky, Reporter's Draft for the Working Group on Principles to Use when Considering the Federalization of Civil Law, 46 Hastings L.J. 1305, 1313–14 (1995). No one, however, questioned the benefit of uniform interpretation of federal law.

[20] See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483–84 (1981) (stating that "uniform interpretation" is advanced by the grant of exclusive federal jurisdiction).

[21] See, e.g., 18 U.S.C. § 3231 (2000).

[22] Am. Law. Inst., supra note 17, at 478.

[23] See, e.g., Richard L. Revesz, Specialized Courts and the Administrative Lawmaking System, 138 U. Pa. L. Rev. 1111, 1116–18 (1990).

[24] Erwin Chemerinsky, Decision-Makers: In Defense of Courts, 71 Am. Bankr. L.J. 109, 115 (1997).

[25] Rochelle Cooper Dreyfuss, The Federal Circuit: A Case Study in Specialized Courts, 64 N.Y.U. L. Rev. 1, 7 (1989).

E. Congressional Power to Strip the Supreme Court of Appellate Jurisdiction

Uniformity is also cited as grounds for limiting Congress' power to strip the Supreme Court of appellate jurisdiction over categories of cases. Scholars such as Professors Henry Hart and Leonard Ratner have claimed that Congress' power to carve out exceptions to the Supreme Court's appellate jurisdiction cannot be used to prevent the Court from engaging in its "essential functions," which Ratner defined as ensuring "the uniformity and supremacy" of federal law.[26] Although many others disagree with the claim that uniformity is constitutionally prescribed,[27] uniformity is nonetheless cited as a normative basis for Congress to limit its authority to make exceptions to the Supreme Court's appellate jurisdiction.[28]

F. Conflicts Among the Lower Courts

The courts of appeals are generally hesitant to depart from precedent set in other jurisdictions, despite being under no obligation to adhere to decisions by sister circuits.[29] Some go so far as to create a presumption against creating a conflict, claiming that they

[26] Hart made the point in his dialectic, and thus it is not clear whether he actually believed that Congress' power to create exceptions to the Supreme Court's appellate jurisdiction was limited by the need to preserve the Supreme Court's "essential functions." See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364–65 (1953); Leonard G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 201–02 (1960).

[27] A number of scholars have criticized the "essential functions" thesis on the ground that it lacks textual support. See, e.g., Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030, 1039–40 (1982); Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to an Ongoing Debate, 36 Stan. L. Rev. 895, 903 (1984) ("[T]here is simply no 'essential functions' limit on the face of the exceptions clause."); Daniel J. Meltzer, The History and Structure of Article III, 138 U. Penn. L. Rev. 1569, 1609–10 (1990) (concluding that the essential functions theory "lacks historical and textual support").

[28] Gunther, supra note 27, at 911.

[29] See, e.g., Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket.").

must avoid generating circuit splits unless they have a "compelling" reason to do so.[30] And when a panel does diverge from that of another appellate court, the decision is prime fodder for review by the entire circuit sitting en banc. Federal Rule of Appellate Procedure 35 expressly states that a question is of "exceptional importance," and thus merits rehearing en banc, if "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."[31]

II. QUESTIONING THE UNIFORMITY RATIONALE

Uniformity has for so long simply been assumed to be a worthy goal that its supposed benefits have not been discussed in much detail or analyzed with any rigor. Indeed, most federal court treatises and scholarly articles simply assert that uniformity is good and nonuniformity is bad, without much explanation.[32] A host of scholarly articles cite the preeminent role of the federal courts in harmonizing the interpretation of federal law.[33] Several judicial deci-

[30] See, e.g., Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 31 (1st Cir. 2004) ("A court of appeals should always be reluctant to create a circuit split without a compelling reason . . . ."); Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co., 346 F.3d 1190, 1192 (9th Cir. 2003) ("[W]e decline to create a circuit split unless there is a compelling reason to do so."); Wagner v. Pennwest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997) (same).

[31] Fed. R. App. P. 35(b)(1) ("[A] petition must begin with a statement that . . . the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, . . . if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United State Courts of Appeals that have addressed the issue."). Admittedly, however, the circuit courts rarely explain why they chose to grant rehearing en banc. It is difficult, therefore, to determine whether courts of appeals are, in fact, likely to use the en banc procedure to resolve intercircuit splits, as the Rule suggests they should. See Tracey E. George, The Dynamics and Determinants of the Decision to Grant En Banc Review, 74 Wash. L. Rev. 213, 220 (1999) (observing that intercircuit conflict is not a prime factor affecting courts' decisions to grant rehearing en banc).

[32] See, e.g., Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 509 (5th ed. 2003) [hereinafter Fallon, Hart & Wechsler's] ("A significant purpose of Article III (now implemented by [28 U.S.C.] § 1257) is to permit the Supreme Court to unify federal law by reviewing state court decisions of federal questions.").

[33] See, e.g., Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 635 (1981) (discussing the "need for federal appellate review of state court judgments on questions of federal law" in order to provide "uniform and authoritative pronouncements of federal law" (emphasis omitted)); Anthony J. Bellia Jr., State Courts and the Interpretation of Federal Statutes, 59 Vand.

sions affirm the value of uniformity.[34] There are a few exceptions,

L. Rev. 1501, 1553 (2006) ("[A]t an appropriate level of generality federal law should have a uniform meaning in any state or federal court."); Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 38 (1994) [hereinafter Caminker, Precedent and Prediction] ("Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process." (footnotes omitted)); Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 237 (1988) ("[T]he Supreme Court's role in assuring the uniformity . . . of federal law has not been the subject of substantial debate."); Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 BYU L. Rev. 67, 83–85 (asserting that one of the major functions of the federal court system is to assure "uniformity in the interpretation and application of federal law"); Samuel Estreicher & John E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 722 (1984) (stating that resolution of conflicts between lower courts is "one of the Court's principal tasks"); Richard H. Fallon, Jr., & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1813 n.451 (1991) ("[E]ven an intercircuit split jeopardizes the ideal of integrity or consistency, because we do have a single federal judicial system in which uniformity is a prominent aspiration."); Sandra Day O'Connor, Our Judicial Federalism, 35 Case W. Res. L. Rev. 1, 4 (1984) ("[A] single sovereign's laws should be applied equally to all . . . ."); John F. Preis, Reassessing the Purposes of Federal Question Jurisdiction, 42 Wake Forest L. Rev. 247, 247 (2007) ("For ages, judges and legal academics have claimed that federal question jurisdiction has three purposes: to provide litigants with a judge experienced in federal law; to protect litigants from state court hostility toward federal claims; and to preserve uniformity in federal law."); Ratner, supra note 26, at 166 ("From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law . . . ."); Revesz, supra note 23, at 1155 (describing uniformity of federal law as "a generally undisputed goal"); Kenneth W. Starr, The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft, 90 Minn. L. Rev. 1363, 1364 (2006) (describing the Supreme Court's two principal objectives as: "(i) to resolve important questions of law and (ii) to maintain uniformity in federal law"); Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1096–97 (1987) ("In general, we think it more aggravating if citizens of Maine and Florida are threatened with having to live under different understandings of the same federal statute (as put in place by the judgments of their respective courts of appeals) than if citizens of Illinois are faced with a unique, and possibly erroneous, reading of another statute.").

[34] Some representative judicial decisions affirming the value of uniformity include: Kansas v. Marsh, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, § 2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416 (1821) ("[T]he necessity of *uniformity*, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in

however,[35] and these empirical and qualitative analyses of uniformity provide a useful starting point for discussion. Section II.A begins by reviewing congressionally-sponsored studies of lower court conflicts over the meaning of federal law, and then turns to the handful of scholarly articles that seek to explain and defend the need for nationwide uniformity in the interpretation of federal law. After laying out these arguments on behalf of uniformity, Section II.B then analyzes whether they are as compelling as most commentators assume.

To be clear, the claim here is not that uniformity is worthless or that inconsistent interpretation of federal law is never problematic, but rather that eradicating nonuniformity has too often been given priority at the expense of other values. If the asserted benefits of harmonizing federal law are questionable, then perhaps some of the policies that promote uniformity—such as the Supreme Court's emphasis on resolving circuit splits—should be reconsidered as well. Reevaluating the need for uniformity can also serve to clarify what is truly at stake in some of the most vexing disputes over the structure and function of the federal courts. For example, once uniformity is downgraded as an argument for limiting Congress' power to strip the Supreme Court of appellate jurisdiction in certain classes of cases, the debate can focus on the more compelling reasons to object to such a move, such as concern that lower federal courts lack the fortitude to conclude that the other branches of government have exceeded their constitutional authority.[36]

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the last resort, all cases in which they are involved." (emphasis added)); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (stressing "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution," and contending that were there no means of providing for uniform interpretation of federal law, "[t]he public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution").

[35] A few articles that have questioned the value of uniformity include J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 Cal. L. Rev. 913 (1983), and Michael E. Solimine, The Future of Parity, 46 Wm. & Mary L. Rev. 1457, 1472 (2005).

[36] For further discussion of this issue, see infra Subsection V.A.1.

A. Arguments in Favor of Uniformity

The proliferation of lower court conflicts over the meaning of federal law has led to several federally-sponsored studies to determine the scope of the "problem." In 1972, Congress established the Commission on Revision of the Federal Court Appellate System, led by Senator Roman Hruska and commonly referred to as the Hruska Commission.[37] The Commission's mission was "to study the structure and internal procedures of the Federal courts of appeal system" and to report its recommendations for change.[38] In its final report, the Commission explained that the "multiplicity" of federal circuits, combined with the expansion of federal legislation, had led to "inter-circuit conflict" and "disharmony." The Report noted that "differences in legal rules applied by the circuits result in unequal treatment of citizens . . . solely because of differences in geography." Even in the absence of actual conflicts, the Commission concluded that the potential for conflicts could lead to "years of uncertainty and repetitive litigation."[39]

The Hruska Commission's proposed solution was the creation of a national court of appeals.[40] Such a court would "assure consistency and uniformity by resolving conflicts between circuits after they have developed" and "eliminate years of repetitive litigation and uncertainty as to the state of federal law."[41] Although the proposal was unenthusiastically received,[42] and was eventually aban-

[37] An Act to Create a Commission on Revision of the Federal Court Appellate System of the United States, Pub. L. No. 92–489, 86 Stat. 807 (1972).

[38] Id. § 1(b).

[39] Hruska Commission Report, supra note 14, at 206–07.

[40] This was the second such proposal. In 1972, a study group of lawyers, practitioners, and judges headed by Harvard Law Professor Paul Freund published a report suggesting reforms to the Supreme Court's case load. Fed. Judicial Ctr., Report of the Study Group on the Caseload of the Supreme Court (1972), *reprinted in* 57 F.R.D. 573 (1973). The Freund Committee also proposed that Congress establish a national court of appeals that would decide a large number of "conflict" cases. Id. at 590. The Freund Committee's proposal also gave the new court the power to screen cases for the Supreme Court, giving it control over the Supreme Court's docket. Id. Primarily for this reason, it was widely criticized and never adopted. See Thomas E. Baker, A Generation Spent Studying the United States Courts of Appeals: A Chronology, 34 U.C. Davis L. Rev. 395, 399–400 (2000).

[41] Hruska Commission Report, supra note 14, at 208–09.

[42] Arthur D. Hellman, By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts, 56 U. Pitt. L. Rev. 693, 696 (1995) [hereinafter Hellman,

doned, almost none of the participants in the debate questioned the desirability of greater uniformity in the interpretation of federal law or whether the federal courts should be the institution responsible for promoting it.[43]

In 1990, the Federal Courts Study Committee again examined intercircuit conflicts. Although the Committee expressly rejected the idea of a national court of appeals, it, too, was concerned about problems that could be caused by unresolved circuit court conflicts. The Committee recommended that the Federal Judicial Center "study the number and frequency of unresolved conflicts" to determine how many were "intolerable." The Committee concluded that a conflict was "intolerable" when it resulted in some or all of the following consequences:

> (1) "impose[s] economic costs or other harm to multi-circuit actors";
> (2) "encourage[s] forum shopping among circuits";
> (3) "create[s] unfairness to litigants in different circuits—for example by allowing federal benefits in one circuit that are denied elsewhere"; or
> (4) "encourage[s] 'non-acquiescence' by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions."[44]

In response to the Committee's report, Congress directed the Federal Judicial Center to study the problem using these four factors as part of the analysis.[45] The Center commissioned Professor Arthur Hellman to design and conduct the study. Professor Hellman first determined that the number of intercircuit conflicts was larger than had previously been suspected. He then set out to examine the degree to which the conflicts were "intolerable," using

By Precedent Unbound] ("[T]he proposal aroused little interest among judges and lawyers.").

[43] Judge J. Clifford Wallace was the one exception. See Wallace, supra note 35, at 916.

[44] Judicial Conference of the U. S., Report of the Federal Courts Study Committee 124–25 (1990) [hereinafter Federal Courts Study Committee Report].

[45] Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101–650, § 302, 104 Stat. 5089, 5104.

the factors listed above.[46] His valuable empirical data, as well as the conclusions he draws from it, are included in the discussion below.

Although there has been little written on uniformity from a theoretical perspective, a few legal scholars have sought to articulate the values underlying uniformity.[47] For example, Professor Eric Stein has written about the various "forces" that push towards greater legal uniformity, such as the desire for equal treatment of citizens, greater efficiency, and a "theoretical concern" for "structural harmony."[48] Likewise, Professor Evan Caminker has touted the benefits of what he calls "uniformity values,"[49] arguing that uniform interpretation of federal law fosters predictability, ensures that similarly situated citizens receive equal treatment under the law, and protects the "perceived legitimacy" of the federal courts.[50] The federally sponsored studies, together with the legal scholarship, articulate the arguments in favor of uniformity, and thus provide a starting point for a conversation about whether eliminating inconsistent interpretation of federal law should be a federal judicial priority.

B. Questioning the Case for Uniformity

1. Legitimacy

Proponents of uniformity argue that it is necessary to protect the law's integrity and the legitimacy of judicial decisionmaking.[51] As

[46] Hellman, By Precedent Unbound, supra note 42, at 697.

[47] A number of scholars and practitioners have written articles proposing reforms to eliminate lower court conflicts over the meaning of federal law, but for the most part these articles simply assume uniformity is worthwhile without exploring the theoretical bases for that conclusion. See, e.g., Todd E. Thompson, Increasing Uniformity and Capacity in the Federal Appellate System, 11 Hastings Const. L.Q. 457 (1984).

[48] Eric Stein, Uniformity and Diversity in a Divided-Power System: The United States' Experience, 61 Wash. L. Rev. 1081, 1090–91 (1986). Professor Stein's article was focused on the trend toward standardizing state laws, but his observations regarding uniformity apply as well to conflicts over the meaning of federal law.

[49] Caminker, Precedent and Prediction, supra note 33, at 38.

[50] Id. at 38–40; see also Thompson, supra note 47, at 468 (describing the "substantial disadvantages" of unresolved conflicts as including "the sense of injustice caused by different interpretations of ideally uniform federal law, the advantage given to litigants able to forum shop, and the uncertainty and unpredictability engendered in [the] circuits which have not yet ruled on the issues").

[51] Michael E. Solimine & James L. Walker, Respecting State Courts: The Inevitability of Judicial Federalism 71 (1999).

Professor Richard Fallon explained, legitimacy can be broken down into three distinct concepts, and conversations about the legitimacy of laws and government institutions are more productive when these concepts are discussed separately.[52] "Legal legitimacy" is closely related to the rule of law: if a judicial pronouncement accords with the written law, it satisfies this strand of legitimacy.[53] "Sociological legitimacy" is determined by public opinion: a judicial interpretation that is justified or appropriate from the public's perspective is sociologically legitimate.[54] "Moral legitimacy" refers to the moral justifiability of a rule or practice.[55] All three types of legitimacy are claimed to be at risk when courts issue inconsistent decisions about the meaning of federal law.[56]

a. Legal Legitimacy

Advocates for uniformity contend that disparate interpretations of federal statutes undermine the rule of law.[57] These scholars and jurists start with the assumption that a federal statute can legitimately have one, and only one, interpretation.[58] As a matter of democratic theory, however, varied judicial interpretations of a single legal text are perfectly legitimate in cases where that text can reasonably be given more than one meaning. Generally speaking, courts differ over the meaning of statutes only when they are ambiguously worded; straightforward language will usually be read

[52] Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1794 (2005).

[53] Id.

[54] Id. at 1795.

[55] Id. at 1796.

[56] Professor Caminker made these points particularly succinctly:

> If federal law means X in the First Circuit and Y in the Second Circuit, then the public might presume that one or both circuit courts are (1) unprincipled in their interpretative process, (2) in error due to incompetence, or (3) in error due to the indeterminate nature of legal reasoning. Each of these alternatives subverts the courts' efforts to be seen as oracles of exogenous, objective, and determinant legal principles.

Caminker, Precedent and Prediction, supra note 33, at 40.

[57] Strauss, supra note 33, at 1116 (asserting that the proliferation of unresolved circuit splits is a "troubling development[] for a nation committed, as ours is, to the rule of law").

[58] In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987) ("[T]here is ultimately a single proper interpretation of federal law . . . ."); see also Caminker, Precedent and Prediction, supra note 33, at 38–40.

the same way by multiple jurists, and the few aberrant interpretations quickly will be overruled or disregarded.[59] When statutory language is genuinely unclear, however, there is no one "right" interpretation of the law, but rather a range of reasonable interpretations, all of which are equally valid. In sum, inconsistent judicial decisions are usually the product of open-ended statutory language that reasonably can be read in more than one way, and not the adoption of an unsupported, and thus legally illegitimate, interpretation.

Two cases from the Supreme Court's 2006 Term help to illustrate the point. *Howard Delivery Service, Inc. v. Zurich American Insurance Co.* involved a provision of the Bankruptcy Code giving priority status to a bankrupt employer's unpaid contributions to "an employee benefit plan."[60] Howard Delivery Service had purchased an insurance policy to cover its potential workers' compensation liability, but then later declared bankruptcy, and the insurance company argued that the overdue premiums should be given priority under that provision of the Code. The circuits split three to two on the question of whether a workers' compensation insurance policy was "an employee benefit plan" deserving of priority status, leading the Supreme Court to grant certiorari.[61] A six-Justice majority held that the unpaid premiums were not entitled to priority, though only after admitting that the "question is close."[62] The Court reasoned that although workers' compensation programs "might be typed 'employee benefit plan[s],'" they also benefited employers, who received immunity from suit under these programs. Accordingly, the Court concluded that workers' compensation insurance is akin to other liability insurance intended to protect employers, such as fire and theft insurance, and thus the unpaid workers' compensation premiums did not qualify for priority.[63] The three Justices in dissent argued that the Bankruptcy Code spoke only of prioritizing payments owed to "employee benefit

[59] See Ruth Bader Ginsburg, A Plea for Legislative Review, 60 S. Cal. L. Rev. 995, 996 (1987).

[60] 547 U.S. 651 (2006).

[61] Id. at 656–57. The Fourth Circuit panel that heard this case below could not agree on a single rationale for the decision, and thus they split three ways on this question. See id.

[62] Id. at 655.

[63] Id.

plans," and did not suggest that payments to employee benefit plans that also happened to benefit employers should be excluded from priority status.[64]

Burlington Northern & Santa Fe Railway Co. v. White,[65] also decided in the 2006 Term, provides another good example of a case in which federal law can reasonably be interpreted in several ways. In that case, the Court addressed the meaning of the anti-retaliation provision in Title VII. Title VII forbids workplace discrimination based on race, ethnicity, religion, or gender, and also bars an employer from retaliating against anyone seeking to enforce these guarantees. Specifically, Title VII's anti-retaliation provision prohibits an employer from "discrimat[ing] against" an employee or job applicant who asserted his rights under Title VII or participated in a Title VII investigation.[66] The courts of appeals had differed over the meaning of the term "discriminate against." The Third, Fourth, Fifth, Sixth, and Eighth Circuits held that the retaliation had to be related to employment to constitute discrimination, while the Seventh, Ninth, and D.C. Circuits' interpretation was "not so limited."[67] The Supreme Court agreed with the minority circuit's view, concluding that if the anti-retaliation provision were "limited to employment-related actions" it would "not deter the many forms that effective retaliation can take" and thus "would fail to fully achieve the antiretaliation provision's 'primary purpose.'"[68] The circuits were also widely split over the type of conduct constituting actionable retaliation. On that question, the Court concluded that the antiretaliation provision applied only to actions that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination," and thus did not encompass minor slights.[69]

In cases like *Burlington Northern* and *Howard Delivery Service*, where the statutes at issue provide no clarity, it is hard to see how division over the statutes' meaning undercuts the legal legitimacy of the law or the judicial process. The Bankruptcy Code's reference

[64] Id. at 672 (Kennedy, J., dissenting).
[65] 548 U.S. 53 (2006).
[66] 42 U.S.C. § 2000e–3(a) (2000).
[67] *Burlington Northern*, 548 U.S. at 60.
[68] Id. at 64.
[69] Id. at 60 (internal quotations omitted).

to an "employee benefit plan" could reasonably be read to encompass workers' compensation programs, or to exclude them. Likewise, the anti-retaliation provisions in Title VII could reasonably be construed as applying only to significant, employment-related retaliation, or could be interpreted more broadly to cover any adverse action by an employer. These are just two cases out of many, but they are typical of the types of circuit splits that the Court feels obliged to resolve, and thus suggest that discrepancies in the interpretation of federal law are not as threatening as perceived. Rather than diminish a statute's legitimacy, varied interpretations acknowledge that in some cases there is no universal meaning to be found. Arguably, when Congress has enacted an ambiguous statute, it has implicitly delegated to courts the discretion to choose among reasonable alternatives.[70] Different readings of the same statute should thus no more threaten the integrity of the statute than different judicial choices regarding whether to certify a class, admit hearsay testimony, or grant a non-party's request for permissive intervention—choices over which district courts have considerable latitude under federal law.[71]

Chevron deference similarly recognizes that there is more than one legally legitimate interpretation of a federal statute. Under the precedent established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, agencies have discretion to resolve ambiguities in the statutes they administer, and judges must defer to an agency's reasonable interpretation even if they would have reached a different conclusion about the statute's meaning. Indeed, agencies are permitted to change their minds about the best reading of a statute, so that the interpretation of an ambiguous statute adopted by one administration need not bind a subsequent administration. Admittedly, agencies are permitted to adopt only *one* interpretation at a time.[72] Indeed, one of *Chevron*'s claimed benefits

[70] Richard A. Posner, The Federal Courts: Crisis and Reform 288 (1985); Fallon, Hart & Wechsler, supra note 32, at 705–07.

[71] All three of these decisions are reviewed under the deferential "abuse of discretion" standard, which acknowledges that different courts may reach different conclusions on these questions.

[72] In some cases, however, agencies permit states to tailor the application of the law to accommodate the differing circumstances of different communities. Such practices emphasize the benefits of regional variation over monolithic application of federal law. See, e.g., 40 C.F.R. § 131.13 (2007).

is that it results in a uniform nationwide interpretation of federal law.[73] Yet *Chevron*'s rationale supports the conclusion that statutes can often plausibly be interpreted in a number of ways, and thus that varied interpretations of a statute can all be legally legitimate.[74]

Chevron deference is premised on the possibility that Congress has not "directly addressed the precise question at issue," rendering the statute indeterminate. Once the possibility of statutory indeterminacy is acknowledged, there is no reason to assume it arises only in statutes administered by federal agencies.[75] In short, the *Chevron* premise of intractable statutory indeterminacy undermines any claim that federal statutes must have one, and only one, legitimate interpretation. Furthermore, when Congress has failed to speak clearly in a statute that no agency administers, judges ultimately must choose among reasonable interpretations of the statute's vague language. One of the rationales for *Chevron* deference is that by enacting an ambiguous statute, Congress implicitly delegated to the agency administering that statute the authority to extrapolate, define, and fill gaps where needed. When a statute is ambiguous, and yet does not fall within an agency's purview, judges legitimately exercise similar authority to make choices about statutory meaning that Congress left unresolved.[76]

Indeed, reasonable variations in the interpretation of federal law are arguably *more* legitimate than a single, nationwide interpretation because they better reflect the diverse preferences of federal legislators and their constituencies. Public choice theory suggests that differing judicial constructions of an ambiguous statute may better approximate Congress' intentions than would a uniform, nationwide interpretation. Public choice adherents contend that legis-

[73] Strauss, supra note 33, at 1121 (suggesting that *Chevron* deference promotes nationwide uniform interpretations of indeterminate statutes).

[74] Id. at 1122–26 (arguing that *Chevron* abandoned the "illusion of statutory precision").

[75] Id.

[76] Admittedly, judges do not view differences in statutory interpretation as an exercise of judicial discretion. Although sometimes courts will candidly admit that a law is susceptible to more than one interpretation, more often they will claim that the text, structure, and legislative history compels the result. Perhaps judges would do better to drop these rhetorical disguises and acknowledge more frequently the hard choices judging requires.

lators are motivated by a single goal—reelection—that leads them to enact vaguely worded statutes susceptible to multiple interpretations so as to avoid criticism that could hurt their reelection chances.[77] If members of Congress face conflicting interest group pressures and are unable to reach a compromise that pleases everyone, then they have good reason to obfuscate rather than legislate because broad statutory language gives each legislator political cover to argue that she intended the law to please her interest groups or constituents.[78] Under these circumstances, a variety of judicial interpretations may reflect Congress' preferences more accurately. In some jurisdictions, one faction's view will prevail; in others, the opposing faction will win out. This approach better accords with legislative intent and satisfies more of the general public than would a single interpretation of the law in question.[79]

Furthermore, differences in the interpretation of federal law are more likely than not to align with the preferences of the citizens and lawmakers of each region. The state court judges who interpret federal law are likely to share the values of the states' citizens, since they are either elected by them, or are appointed by elected state officials. Federal judges are at least mildly affected by regional ideology as well.[80] Almost all active federal judges are re-

[77] William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 288 (1988).

[78] See, e.g., id. (describing the public choice theorists' view that legislators will try to support either a compromise law or an ambiguous law so that the legislator "will be able to assure each group that it won"). *Chevron* itself acknowledged this possibility, commenting that statutory ambiguity may result because "Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency." 467 U.S. at 865.

[79] Eskridge has concluded that Congress might want courts to engage in dynamic statutory interpretation to answer the hard questions that it left unresolved, and thus that "dynamic statutory interpretation [might] subserve[] legislative supremacy." William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 Geo. L.J. 319, 324 (1989). Assuming Eskridge is correct, it is not clear that Congress would prefer a uniform interpretation of the statute to a variety of interpretations, in which some legislators are happy with one court's interpretation, and others with another. If Congress would prefer courts to adopt a single, nationwide interpretation, it could say so. And if the nonuniformity that results displeases Congress, it can always take action to clarify the law. See infra notes 127–45 and accompanying text (describing Congress' power to standardize federal law).

[80] Carl Tobias, Sixth Circuit Federal Judicial Selection, 36 U.C. Davis L. Rev. 721, 746 (2003) ("A jurist who is stationed in a specific jurisdiction will often have greater familiarity with its substantive law, which can facilitate disposition of appeals that in-

quired by statute to reside in the jurisdictions in which they sit, and a state's Senators often play a crucial role in selecting the judicial nominees for their region.[81] So it is not surprising that federal judges in the red-state Fourth Circuit are significantly more conservative than those in the blue-state-dominated Ninth or First Circuits.[82] When presented with an ambiguous federal law, judges in the Fourth Circuit will often adopt the more politically conservative reading, and the judges in the First and Ninth Circuits the more liberal one.[83] Rather than decry that result as illegitimate, these regional differences could be viewed as the best way to deal with the problem of legislative ambiguity.[84]

b. Sociological Legitimacy

Even if nonuniformity does not threaten the rule of law, however, it could still undermine the sociological legitimacy of both the law and the judges who interpret it. If Title VII were to have one meaning in Virginia and another in California, the public's respect

volve diversity of citizenship, and with the state's legal and other cultures, which may help to reconcile federal and local policies. Those living in a jurisdiction might also be more confident about, and more readily accept, the determinations of a court which has a resident judge." (footnotes omitted)).

[81] 28 U.S.C. §§ 44(c), 134(b) (2000) (providing that all active (i.e., non-senior status) federal judges aside from those serving on courts in the District of Columbia or the Southern and Eastern Districts of New York must reside in the judicial district in which they are appointed to serve); Michael J. Gerhardt, Toward a Comprehensive Understanding of the Federal Appointments Process, 21 Harv. J. L. & Pub. Pol'y 467, 529–31 (1998) (describing the practice by which Senators play a role in the confirmation of nominees for judgeships in their home states); see also Posner, The Federal Courts: Crisis and Reform, supra note 70, at 156 ("We think of the federal court system as a unitary national system, but it is very rare that someone is appointed to the district court who is not a resident, usually a long-time resident, of the district, or that someone is appointed to the court of appeals unless he is a resident not only of the circuit but of the particular state of the circuit to which the judgeship has been informally allocated.").

[82] Michael Abramowicz, En Banc Revisited, 100 Colum. L. Rev. 1600, 1606 (2000) ("[E]ntire circuits seem to have ideological casts, with the liberal Ninth Circuit and the conservative Fourth Circuit currently perceived as being on the opposite sides of the spectrum").

[83] Id. at 1605 n.21 (citing a number of studies showing that judicial outcomes are correlated with judicial ideology); see also Strauss, supra note 32, at 1113 (noting that federal courts "reflect to some degree the political tone of their community").

[84] Cf. Hruska Commission Report, supra note 14, at 235 (opposing the creation of specialized nationwide courts because they "would tend to dilute or eliminate regional influence in the decision of those cases").

for that statute might be degraded by a suspicion that the law is being "made up" by the courts rather than enacted by Congress. As Professor Caminker has declared, divergent interpretations of the same law "subverts the courts' efforts to be seen as oracles of exogenous, objective, and determinant legal principles."[85] Federal courts are countermajoritarian institutions authorized to apply law, not make it; state judges, whether elected or not, have no authority to draft federal law. So when judges reach varying conclusions about the meaning of federal law, it looks as if the law is simply being invented by these jurists, decreasing the likelihood that the public will respect and obey it and that officials will enforce it. The conventional wisdom is that law should have one and only one meaning, period.

Perhaps for this reason, the most widely accepted methods of statutory interpretation all claim the ability to locate the one true meaning of a federal statute. For example, textualists insist that most questions about statutory meaning can be answered by reference to the text alone; intentionalists believe that when the text cannot provide clear meaning, legislative history and other evidence of legislative intent will assist judges in locating the one "right" interpretation; and purposivists take the view that ambiguities can be resolved by identifying the statute's overarching purpose and then determining how the text can best be read to accomplish that goal.[86] By cabining their discretion through these theories of interpretation, judges seek to legitimize their decisions as neutral law-interpretation, not ideological law-making.[87] When different judges reach different conclusions about the meaning of the same statutory text, scholars and jurists alike worry that the public's faith in the neutrality of the interpretive process will be diminished.

If divergent interpretations are all reasonable variations on an ambiguous statutory text, however, there should be much less

[85] Caminker, Precedent and Prediction, supra note 33, at 40.

[86] See Amanda Frost, Certifying Questions to Congress, 101 Nw. U. L. Rev. 1, 11–13 (2007), and sources cited therein.

[87] Admittedly, these theories do leave room for the conclusion that the text is indecipherable, as evidenced by the fact that jurists who employ them will, on occasion, find that a statute is unclear under *Chevron* step one. Usually, however, judges use one of these theories of interpretation to locate what they believe is the one correct interpretation of a given statute.

cause for concern. Again, administrative law doctrines demonstrate that society can accept and support the idea of a statute susceptible to more than one meaning; under *Chevron*, courts must defer to an agency's reasonable interpretation of its governing statute even when that reading departs from the agency's previously-held views.[88] That the meaning of statutes can fluctuate with the politics of each administration is arguably more threatening to the public's respect for the law than judicial disagreement over statutory meaning, and yet agency waffling has not caused a crisis of public confidence in agencies, courts, or the decisions they reach.

The sociological legitimacy critique turns entirely on whether the public has lost confidence in judges, and in federal law itself, as a result of inconsistent interpretations of federal law. Professor Lawrence Sager addressed the same sociological legitimacy concern while defending his claim that the Supreme Court should refrain from reviewing state court decisions that define federal constitutional rights too broadly.[89] Sager responded to arguments that if differing state and federal interpretations of the U.S. Constitution were allowed to stand, the public's respect for the law might be diminished by pointing out how "empirically weak" this criticism is: "[I]t assumes a populace which is simultaneously well informed about nationwide adjudication of constitutional issues yet sufficiently naive to think that the decisions of the Supreme Court are 'correct' in a way differing decisions by other courts are not."[90]

Moreover, because sociological legitimacy is a question of fact, and not of theory, advocates for uniformity should be able to provide evidence of public disaffection with varied judicial interpretations of the same law. Yet the only evidence available shows no cause for concern. Despite the increasing frequency of circuit splits, there is no evidence that federal law is less respected or followed. Opinion polls regularly record that the public has higher confidence and trust in federal judges, and in particular the Supreme

[88] NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990); see also Kathryn A. Watts, Adapting to Administrative Law's Erie Doctrine, 101 Nw. U. L. Rev. 997, 1008–09 n.60 (2007).

[89] Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1250–53 (1978).

[90] Id. at 1252.

Court, than the other branches of government.[91] Perhaps this is because minor differences in the interpretation of what constitutes an employee benefit under the Bankruptcy Code or retaliation under Title VII are simply not the kind of inconsistencies that make citizens question the legitimacy of judicial interpretation—especially when they are all reasonable variations on the meaning of ambiguous statutory language.[92] Or, more likely, perhaps the public isn't paying much attention to judicial disagreements on that level. The point here is not that the polls prove much, but rather that there is no evidence to support the claim that the public is losing faith in the judiciary. Those who favor expending judicial resources to promote uniformity on sociological legitimacy grounds should first provide some evidence that this is a real concern.

c. Moral Legitimacy

Another objection to nonuniformity is that it fails the equality principle, and thus is morally illegitimate.[93] Supporters of uniformity contend that the laws of the nation should apply equally to all U.S. citizens. When courts differ over the meaning of federal law, the result is that similarly situated individuals will be treated differently simply because of where they live or do business, which, they claim, is unfair.[94] As the Hruska Commission noted: "[D]ifferences in legal rules applied by the circuits result in unequal treatment of citizens . . . solely because of differences in geography."[95]

Yet the federal system established by the U.S. Constitution ensures that U.S. citizens will be treated differently because of "dif-

[91] Thomas R. Marshall, Public Opinion and the Supreme Court 139–41 (1989); Barbara A. Perry, The Priestly Tribe: The Supreme Court's Image in the American Mind 5 (1999).

[92] Cf. Sager, supra note 89, at 1252 ("The lower federal courts have been seriously divided on some issues without early Supreme Court resolution; yet I know of no such constitutional issue which excited public attention for this reason." (footnote omitted)).

[93] Caminker, Precedent and Prediction, supra note 33, at 39 ("[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to the rule of law."); Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents? 46 Stanford L. Rev. 817, 852 (1994) [hereinafter Caminker, Inferior Courts].

[94] See id.

[95] Hruska Commission Report, supra note 14, at 206–07.

ferences in geography" on a regular basis, and no one argues that it is unfair that citizens of different states are subject to disparate laws.[96] Texans can be executed for a crime that carries no death penalty in Massachusetts, Californians' cars must pass higher emissions standards than are applied in other states, and Connecticut forbids the sale of alcohol on Sundays. These variations among state laws are not an unfortunate byproduct of federalism; they are lauded as one of its primary benefits. Proponents of muscular federalism contend that it enables each region to tailor laws to best fit its unique needs and satisfy its citizens' preferences, and that these variations among states allow them to serve as laboratories for small-scale experimentation with different legal rules.[97] In short, federalism is valued *because* it allows for such variety. Why is the disparity in treatment of U.S. citizens acceptable when it is a consequence of federalism, but perceived as unfair when it arises from divergent interpretations of ambiguous federal laws?[98]

Differences among state laws can be distinguished from varying interpretations of federal law, however, because they are the product of democratic processes. Capital punishment is substantially more popular in Texas than in Massachusetts, and thus, the legislatures of each state have passed laws that tend to accord with their

[96] John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 710 (1974) (noting that differences among state and federal laws mean that all U.S. citizens are subject to more than one set of legal rules); Sager, supra note 89, at 1249–51 (defending state courts' overprotection of federal constitutional rights on the ground that we permit states to adopt different substantive laws); cf. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("[L]ack of uniformity . . . between federal courts in different states [in diversity cases] is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors."); Eric Stein, Uniformity and Diversity in a Divided-Power System: The United States' Experience, 61 Wash. L. Rev. 1081, 1086 (1986) ("Federal statutes often contain words and embody concepts, the meaning of which is defined by state law.").

[97] See, e.g., David L. Shapiro, Federalism: A Dialogue (1995); Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?, 111 Harv. L. Rev. 2180, 2213–14 (1998); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–1500 (1987) (book review).

[98] Professor Michael Solimine made a similar point in his recent article discussing state court resolution of federal constitutional rights. Solimine, supra note 35, at 1484 ("Given the wide diversity of views on various issues throughout the nation, some disparity in federal law can be tolerable or even welcome.").

citizens' varied preferences.[99] Ambiguous federal laws also have a claim to democratic legitimacy, however. As previously discussed, federal legislators know that judges will be called upon to fill gaps and reconcile inconsistencies in federal legislation. For example, when Congress enacted Title VII, it must have been aware that courts would have to define the parameters of actionable retaliation, and when it enacted the Bankruptcy Code it must have known that judges would have to define an "employee benefit plan." When such ambiguity is by design, Congress has implicitly delegated lawmaking to judges. If the ambiguity is unintentional—a drafting error, for example, or a failure to foresee how the law would apply in an unusual case or under changed circumstances—Congress can always take action to correct or update the legislation if it dislikes the judicially-created solution. Furthermore, if the citizens of California are unhappy with the Ninth Circuit's resolution of an issue—if, for instance, they would prefer that their courts adopt the Fourth Circuit's interpretation of Title VII's anti-retaliation provision—they can always lobby their members of Congress to seek that change. (Although, as discussed above, the ideological correlation between federal judges and the citizens in their jurisdictions suggest that the majority of Ninth Circuit residents will be happier with their own court's interpretation.) In any case, imposition of a nationwide, uniform interpretation of federal law by the Supreme Court is no *more* democratic than leaving circuit court conflicts unresolved.

Moreover, our legal system accepts unequal treatment of similarly-situated individuals as a matter of course. If two bus passengers both sue a bus company for injuries suffered during the same accident, raising the exact same claim of negligence under the same state law, one might prevail and receive a large monetary award while the other walks away with nothing.[100] Both results could be

[99] Death Penalty Information Center, State Polls and Statistics, http://www.deathpenaltyinfo.org/article.php?scid=23&did=210 (last visited Aug. 25, 2008) (listing the results of public opinion polls regarding the death penalty in numerous states).

[100] Cf. Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 6 (1st Cir. 1999) ("We simply have no tradition of court intervention to ensure that similarly victimized plaintiffs who have retained separate counsel and have made different litigation decisions get similar results.").

entirely fair.[101] Perhaps the facts are in near equipoise, and one jury concluded that it was more likely than not that the bus company was negligent, while the other thought the evidence fell a little shy of that standard. Our legal system is perfectly comfortable with these discordant verdicts, and indeed both must stand unless no reasonable juror could have reached one verdict or the other.[102] As the First Circuit recently declared, "We simply have no tradition of court intervention to ensure that similarly victimized plaintiffs who have retained separate counsel and have made different litigation decisions get similar results."[103]

2. Nonuniformity's Effect on Multi-State Actors

Uniformity is claimed to be especially important to multi-state actors, who will be forced to comply with multiple, possibly even conflicting, legal rules when courts differ over the meaning of federal law. Unquestionably, at least some conflicts in interpretation are sure to create complications and inefficiencies, and so differences in interpretation that affect these entities should be kept to a minimum. Yet there are good reasons to think this argument in favor of uniformity is overstated. As discussed, our federal system already compels multi-state actors to comply with different laws in the fifty states. Despite this obstacle, nationwide businesses proliferate, perhaps because it is not so hard to comply with these variations, or perhaps because—as advocates for a robust federal system

[101] Professor William Rubenstein has noted that many of the doctrines governing federal litigation are designed to promote equality of outcome. For example, nonmutual collateral estoppel permits a second plaintiff to piggyback on a previous plaintiff's win against the same defendant, and rules regarding joinder and intervention encourage similarly situated litigants to join together in the same litigation, leading to one uniform result for all parties. See generally William B. Rubenstein, The Concept of Equality in Civil Procedure, 23 Cardozo L. Rev. 1865, 1879–97 (2002). Professor Rubenstein's observations do not undermine the point made here. The procedural rules he describes serve both to streamline litigation and to encourage like cases to be resolved alike, but they also explicitly acknowledge the possibility that different factfinders can reach different conclusions. For example, offensive collateral estoppel is generally not available when juries have reached inconsistent results in previous cases, and, as mentioned above, the standards for summary judgment, directed verdict, and appeals of jury verdicts allow for the possibility that reasonable factfinders could decide cases in more than one way.

[102] Fed. R. Civ. P. 50(a).

[103] *Duhaime*, 189 F.3d at 6.

have long argued—allowing room for regional differences benefits the country as a whole.[104] Concededly, Congress is more likely to enact legislation in areas where uniformity is particularly important, and thus inconsistent interpretation of federal law could be more disruptive than variations in state laws. Nonetheless, it is important to remember that multi-state actors are already forced to take account of different laws and regulations in each state.

Furthermore, many disagreements about the meaning of federal law have no impact on multi-state actors. Professor Arthur Hellman's empirical study of circuit splits concluded that "a substantial majority of the unresolved conflicts would have no impact on the legal position of entities whose activities cross circuit lines."[105] Specifically, he noted that interstate actors are not affected by conflicts over the constitutional rights to be granted criminal defendants, elements of most federal crimes, and the availability of habeas corpus.[106]

Even when a conflict does affect interstate actors, it is not necessarily disruptive. Courts rarely construe the same federal law to make conduct that is compulsory in one jurisdiction illegal in another. Far more often, the disagreements are of degree, not of kind. For example, in its recent decision in *Burlington Northern and Santa Fe Railroad Co. v. White*, discussed above, the Supreme Court resolved a circuit split about the meaning of Title VII's anti-retaliation provision.[107] None of the circuits doubted that retaliation was forbidden, but they disagreed about whether the challenged action had to be related to employment, and over the degree of harm that had to result. No multi-state company could credibly

[104] See, e.g., Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Proponents of a strong federal system argue that it allows states to serve as laboratories for the testing of ideas, a process that weeds out the bad ones before they cause too much damage and leads to widespread adoption of the good ones when they have proven themselves effective on the state level.

[105] Hellman, Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience, 1998 Sup. Ct. Rev. 247, 253 (1999) [hereinafter Hellman, Light on a Darkling Plain].

[106] Id.

[107] *Burlington Northern*, 548 U.S. at 60.

complain that the differing interpretations of retaliation disrupted their business operations. To avoid liability, companies needed only to abstain from any action that could qualify as retaliation under any circuit's standard.[108] Likewise, the conflicting interpretations of the Bankruptcy Code put to rest by the Supreme Court's decision in *Howard Delivery Service v. Zurich American Insurance Co.*, could not have been debilitating for multi-state employers or insurers. Uncertainty over whether workers' compensation insurance premiums are payments to "an employee benefit plan" deserving priority in bankruptcy would, at most, raise the price of workers' compensation insurance marginally for employers in a jurisdiction in which unpaid workers' compensation premiums do not qualify for priority. In a world in which most unsecured creditors do business knowing they will not be assured of payment should the debtor go bankrupt, it is hard for employers and insurance companies to argue that their businesses were paralyzed because of the possibility that workers' compensation insurance premiums would qualify for special treatment in some jurisdictions but not others.

Admittedly, nonuniformity allows the jurisdictions with the most stringent interpretations of federal law to control activity by multistate actors throughout the rest of the country. For example, prior to the Supreme Court's decision in *Burlington Northern*, if multistate employers wanted to adopt one standard of conduct that would ensure they would not be subject to a successful suit for retaliation in any jurisdiction, they would have had to take care to avoid subjecting a Title VII complainant to minor, non-workplace related slights in all jurisdictions, including those that defined retaliation more narrowly. Even assuming that result is troubling, however, it cannot be attributed to nonuniformity in and of itself. If those jurisdictions that adopted the broadest definition of retaliation erred by reaching a conclusion that Congress would not have supported and that in any case is bad policy, then the fact that their definition of retaliation is at odds with other jurisdictions is beside the point. Indeed, the problem would be worse if *every* court adopted that expansive definition of retaliation, leading to a

[108] See Ely, supra note 96, at 711 (noting that it is usually possible to comply with two different legal standards by adopting the more demanding rule).

uniform, but wrongheaded, interpretation of Title VII's anti-retaliation provision.[109] A poor decision, rather than nonuniformity, is to blame for the additional costs imposed on multi-state actors.

3. Predictability

Clear, stable, and predictable legal rules would seem more important to multi-state actors (indeed, to anyone) than nationwide uniformity. If the law is nonuniform but perfectly stable and predictable, then multi-state actors can tailor their conduct to each region, or, if possible, adopt a standard of conduct that would comply with the legal rules in all areas. Predictability is often touted as one of the benefits of uniformity,[110] but predictability and uniformity need not go hand-in-hand. For example, if the Supreme Court issues a crystal clear ruling on the meaning of Title VII's anti-

[109] The executive branch is the ultimate interstate actor. On occasion, federal agencies will refuse to follow circuit court rulings with which they disagree—a phenomenon referred to as agency nonacquiescence. Agencies engaged in nonacquiescence claim the authority to continue to follow the law as they interpret it until the Supreme Court issues a decision on the matter that binds the entire nation. The Federal Courts Study Committee of 1990 listed nonacquiescence by federal agencies as a potential consequence of unresolved splits over the meaning of federal law. The Committee worried that federal agencies would have to choose "between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions." Federal Courts Study Committee Report, supra note 44, at 125. An empirical study by Professor Hellman, however, revealed that agencies almost never responded to circuit splits by engaging in nonacquiescence. Hellman, By Precedent Unbound, supra note 42, at 743–47.

In any case, federal agencies can refuse to follow circuit precedent outside of the circuits that have ruled on the issue even when there is no split regarding the meaning of federal law. Professor Hellman cites the example of the Army Corps of Engineers, which had a policy of refusing to follow, outside of the circuit's geographic bounds, Fourth Circuit precedent requiring it to issue notice and comment regarding its authority to regulate a waterway for migratory birds. Id at 747. Nonacquiescence is thus not the product of multiple interpretations of federal law, but instead is a product of agencies taking the position that a circuit court's ruling has no power over them in other jurisdictions and does not require them to change their conduct nationwide. Id. at 747–48. Moreover, nonacquiescence is a problem that the executive can eliminate more easily than the courts simply by requiring that agencies treat circuit law as binding throughout the nation. If circuit law is in conflict, however, then the agency will have to choose which circuit's interpretation to follow. As previously mentioned, a multi-state litigant (such as an agency) can usually bring their conduct into compliance with the law in all circuits by adopting the most demanding circuit's rule.

[110] See Caminker, Inferior Courts, supra note 93, at 850 (citing predictability as one of the interests served by uniformity).

retaliation provision, only to reverse itself a few years later, it has diminished the law's stability but not its uniformity because at no time between the two decisions was the law interpreted differently in different parts of the country.

Under the Supreme Court's current practice of reviewing cases involving circuit splits, however, nonuniformity leads to unpredictability because a split in the circuits might inspire the Supreme Court to review the issue and overrule some or all of the circuits. As the Hruska Commission noted, division among the circuits can generate litigation by those eager to push the law in a certain direction and obtain Supreme Court review, and thus create uncertainty about whether circuit precedent will be overruled. If the Supreme Court stopped favoring conflict cases, however, this uncertainty would subside. But even if the Court continues to prioritize such cases, lower court conflicts over the meaning of a federal statute do not create *more* uncertainty than exists prior to any judicial ruling. If a federal statute is ambiguous, then the law's requirements are unclear before any court has spoken, which would encourage litigation and leave citizens unsure about how to conduct their business, just as conflicting judicial interpretations would. For example, the uncertainty over whether workers' compensation insurance premiums were entitled to priority under the Bankruptcy Code was not caused by the conflicting circuits' views on that question, but rather by the lack of clarity in the Code itself. Indeed, conflicting decisions by circuit courts may often improve predictability, since at least the citizens in those circuits know what the law requires of them for the time being.

4. Forum Shopping

Some advocates for uniformity complain that unresolved lower court conflicts will lead to forum shopping because each litigant will seek to bring the case in the circuit most favorably disposed to its position. Although the term is usually used pejoratively, forum shopping is often entirely benign. Indeed, forum shopping in federal question cases is only possible because federal statutes provide for choices in venue, suggesting that Congress intended to give litigants options of where to bring and defend cases. The practice gets a bad name because litigants sometimes search out judges, or jury pools, that they believe will be friendlier to their cause of action.

As long as both parties have the latitude to argue for their favored forum, however, there is nothing wrong with each attempting to have the case heard where they prefer—whether because it is more convenient, the jury or judges seem more sympathetic, or the law in that circuit is more favorable.[111] Forum shopping can be problematic if it operates to disadvantage one party over another, or to overwhelm one court system with cases. But, these are not problems that automatically accompany forum selection. As John Hart Ely declared, "forum shopping is not an evil per se. It is evil only if something evil flows from it."[112]

Any discussion of uniformity and forum shopping would be incomplete without reference to the landmark case of *Erie Railroad Co. v. Tompkins*.[113] *Erie* held that in diversity cases, federal courts must follow not only written state law, but also state common law, thereby overruling the precedent set in 1842 in *Swift v. Tyson*.[114] *Swift* had reasoned that federal courts should develop nationwide, uniform rules of common law to govern in diversity cases, with the assumption that state courts eventually would adopt federal general common law as their own. But state courts were not so pliable, and instead continued to follow their own common law in the cases before them. As a result, the common law "rule" in a given case differed depending on whether a federal or state court heard the case.[115] As *Erie* declared: "In attempting to promote uniformity of

[111] The Framers themselves condoned this search for a friendly forum by establishing diversity jurisdiction.

[112] Ely, supra note 96, at 710. Professor Hellman also commented Congress must not believe forum shopping is "an evil in itself" because cases can only be filed in multiple districts if venue rules allow. As Hellman noted, "that litigants take advantage of this choice can hardly be viewed as evidence of malfunctioning in the system." Hellman, By Precedent Unbound, supra note 42, at 755. If Congress is displeased at the prospect of forum shopping among circuits, it could tighten these rules considerably. Admittedly, doing so would sacrifice some of the benefits of providing a choice of forum—such as allowing plaintiffs to litigate in the geographic region most convenient for them. That Congress gave litigants these choices suggests it concluded that the costs of forum shopping are not all that great.

[113] 304 U.S. 64 (1938).

[114] 41 U.S. 1 (1842).

[115] *Erie* was just such a case. Tompkins had been injured while walking on a path alongside the defendant railroad's tracks in Pennsylvania. The railroad argued that under the common law of Pennsylvania Tompkins should be treated as a trespasser, meaning that it could only be liable for "willful" or "wanton" disregard for his safety. The Second Circuit, exercising its "independent judgment" on that question, con-

law throughout the United States, the [*Swift*] doctrine had prevented uniformity in the administration of the law of the State."[116]

The inevitable result of the vertical nonuniformity created by the *Swift v. Tyson* regime was vertical forum shopping in diversity cases; plaintiffs chose to file their cases in federal or state court depending on which judicial system had the more favorable common law rules. Although defendants had the option to remove to federal court a case filed against them in most state courts, they were barred by statute from removing a case filed in their home state on the ground that they had no reason to fear that court would be biased against them.[117] Thus, as the Supreme Court noted in *Erie*, *Swift* put in-state defendants at a disadvantage, since they were the only party unable to remove to the more favorable forum.[118] The Court also commented that the variations between state and federal general common law encouraged litigants to manufacture diversity jurisdiction by moving out of state.[119] In a subsequent case, the Court explicitly stated that the "twin aims of the *Erie* rule" were "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[120]

Despite *Erie*'s broad rhetoric, the rationales underlying the Court's hostility to nonuniformity between state and federal general common law, and the forum shopping that resulted, do not apply to conflicts over the meaning of federal law. *Erie* was premised on a concern for state sovereignty.[121] State laws were being dis-

cluded that the federal common law permitted recovery for negligence. *Erie* overruled this decision, explaining that from here on federal courts would follow state common law. 304 U.S. at 79–80.

[116] 304 U.S. at 75.

[117] 28 U.S.C. § 1441(b) (2000).

[118] 304 U.S. at 74–75.

[119] Id. at 76–77 ("In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another State."); see also Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (company reincorporated in a different state to establish diversity jurisdiction and take advantage of federal rule).

[120] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[121] Ely, supra note 96, at 695 ("[Erie] implicates, indeed perhaps it is, the very essence of our federalism."); *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).

carded by federal courts in diversity cases—a result that the Court felt was unwise and possibly unconstitutional.[122] Areas of the law that the Court believed were beyond Congress' Commerce Clause power were nonetheless being taken over by federal courts crafting federal law, undermining states' ability to conduct their own affairs. In addition, the *Erie* Court was concerned about the abuse of diversity jurisdiction that resulted from a system in which federal general common law differed from state common law. Diversity jurisdiction was intended to protect out-of-state litigants from biased state courts.[123] By fostering forum shopping, the *Swift* doctrine inspired litigants to choose the federal forum not out of fear of state court prejudice, but rather because they believed federal common law would produce a more favorable result. Indeed, *Swift* systemically discriminated *against* state citizens, because noncitizens could choose whether to file in state or federal court, and a state citizen was not permitted to remove a case filed against him in his home state.[124]

In contrast, lower court conflict over the meaning of federal statutes does not implicate federalism concerns or threaten any other constitutional values. When federal courts disagree with each other they do not aggrandize themselves at the expense of other political entities. Likewise, state courts have the same right to interpret federal statutes for themselves as the lower federal courts do, and thus they are not overstepping when they disagree with federal circuits, or with each other, about the meaning of federal law. These courts' differing views on statutory meaning simply reflect the array of possible interpretations. Even when they are "wrong" about the meaning of a statute—and, as already discussed, when a statute is ambiguous there is no one "right" answer—these

[122] The constitutional underpinnings of the *Erie* decision have been subject to ongoing debate. See, e.g., Erwin Chemerinsky, Federal Jurisdiction § 5.3, at 326–27 & n.162 (5th ed. 2007). See also Ely, supra note 96, at 700–06.

[123] See, e.g., Guar. Trust Co. v. York, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.").

[124] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938). Of course, another solution to this problem would have been for Congress to have amended the removal statute to permit citizens to remove cases from their state court to federal courts. See Fallon, Hart & Wechsler's, supra note 32, at 635. But either way, under the Swift doctrine, diversity jurisdiction was being manipulated to serve unintended purposes.

courts have not transgressed the boundaries of their authority to interpret and apply federal law.

Differences in the interpretation of federal law may lead to forum shopping by plaintiffs and defendants, but this type of forum selection does not undermine the purpose of federal jurisdiction in the way that the *Swift* doctrine undermined diversity jurisdiction. Suit can only be filed or removed to a jurisdiction that has some interest in the matter, and only when Congress has permitted a choice of venue. In federal question cases, unlike diversity cases, there is no fear of systematic discrimination because plaintiffs as well as defendants, state citizens as well as noncitizens, are all free to seek out the most favorable forum and convince the judge it is the best location in which to hear the dispute.

Possibly, litigants will flock to a single forum, which could overburden some courts. The federal rules already provide many coping mechanisms for multiple lawsuits, such as consolidation of multi-district litigation, that streamline litigation and ease the burdens on courts. The push-pull of plaintiff and defendant interests should also help to spread litigation fairly among the possible fora. Finally, statutory limits on venue, and the inconvenience of filing a case in a distant forum, will keep most litigation in the forum most closely tied to plaintiffs' and defendants' location, or the location at which the events relating to the lawsuit occurred.[125]

In any case, if forum shopping is the main objection to nonuniformity, there are far easier ways to solve the problem than to attempt to standardize the interpretation of federal statutes across the country. Congress could limit choices of venue, or federal courts could choose to apply the interpretation adopted by the circuit with the most significant connections to the dispute. As discussed in Part III, Congress' apparent disinterest in uniform interpretation of federal law is reason for courts to adopt a similar *laissez-faire* attitude.

5. Conclusion

On the whole, then, the arguments against nonuniformity are not compelling. Certainly, some conflicting interpretations of federal law may establish incompatible standards of conduct in the

[125] 28 U.S.C. § 1391(b) (2000).

same jurisdiction, or may cause great expense and inconvenience for multi-state actors. In such cases the conflict should be resolved as quickly as possible. Generally speaking, however, the effects of nonuniformity do not seem all that troubling. Examples of recently resolved circuit splits support this view. Could employers or employees claim desperately to need a nationwide, uniform definition of whether actionable retaliation under Title VII includes retaliation outside the workplace? Do providers of workers' compensation insurance require a uniform rule regarding the priority of unpaid dues under the Bankruptcy Code? As long as the rules in various jurisdictions are clear, it is hard to see how minor variations in the interpretation of Title VII and the Bankruptcy Code were cause for alarm.

Obviously, the stakeholders in these cases all believe it is important that the Supreme Court adopt the interpretation they prefer, but that is not the same as claiming a need for uniformity for its own sake. Perhaps Title VII's goal of ensuring equality in the workplace will be frustrated absent a broad definition of retaliation, or perhaps workers' compensation insurance will be more expensive, or harder to obtain, without priority under the Bankruptcy Code. But these are arguments for Supreme Court reversal of lower court decisions that define retaliation too narrowly or that fail to give priority to unpaid workers' compensation insurance premiums *regardless* of whether other courts have issued conflicting decisions on these questions.

III. COURTS, CONGRESS, AND UNIFORMITY

Even for those who remain convinced that the uniform application of federal law is essential, the question remains whether it should be the federal judiciary that provides it. In *Braxton v. United States*, Justice Scalia, writing for a unanimous Supreme Court, declared that although "Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute . . . . Ordinarily . . . we regard the task as initially and primarily ours."[126] Scalia did not explain why resolving disagreements over the meaning of federal law should be left to the

[126] 500 U.S. 344, 347–48 (1991).

Supreme Court and not Congress, however, and that question deserves greater attention.

A. Congress

Congress is the more appropriate institution to make the kind of policy choices that often lie at the heart of lower court disputes over the meaning of federal law.[127] As then-Judge Ruth Bader Ginsburg stated in testimony before Congress, "There is, of course, an ideal intercircuit conflict resolver . . . . Congress itself. On the correct interpretation of federal statutes, no assemblage is better equipped to say which circuit got it right."[128] Congress, and not the courts, is responsible for drafting legislation that sets policy for the nation; courts only make those kinds of judgment calls when vague statutes force them to do so. For example, if the Bankruptcy Code had stated explicitly that workers' compensation insurance premiums did not receive priority, then there would have been no circuit split for the Court to resolve in *Howard Delivery Service*. Likewise, if Title VII had made clear that its prohibition against retaliation extended to adverse action unrelated to employment, there would have been no disagreement on that question for the Supreme Court to put to rest in *Burlington Northern*. Because these statutes were not clear, it was appropriate, indeed essential, for the lower courts faced with cases challenging their scope to provide an answer that would resolve the dispute for the parties before them. All would agree, however, that Congress has the prerogative to make these decisions in the first instance, or to amend the laws to undo judicial interpretations it dislikes.

And for good reason. Even though courts are sometimes compelled to engage in lawmaking in order to implement vague statutes, Congress is much better suited to that task. Congress has staff, subpoena power, and the capacity to hold hearings—all essential in gathering the information necessary to make policy

[127] As the *Chevron* doctrine recognizes, ambiguous statutes usually require the interpreter to make policy choices. See John F. Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893, 894 (2004) ("Modern interpretive theory . . . suggests that resolving ambiguity almost always entails some degree of policymaking discretion.").

[128] Intercircuit Panel of the United States Act: Hearing on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary, 99th Cong. 115 (1985) (statement of Judge Ruth Bader Ginsburg).

choices. It is easy to imagine a congressional committee obtaining data on the potential harm to employees should employers go bankrupt and be unable to pay workers' compensation premiums, or hearing testimony from employees about the kind of retaliation they faced when reporting Title VII violations. Members of Congress represent constituencies who can weigh in on these questions, and can hold their representatives accountable if they are unhappy with the legislative result. In short, Congress has the resources and the political accountability to make these judgment calls; courts do not.[129]

Yet courts end up making these decisions in Congress' stead when they are presented with a case requiring application of an ambiguous statute.[130] Understandably, Congress cannot foresee every circumstance in which a statute may be employed, or perfectly integrate statutes into prior and subsequent legislation. As previously discussed, public choice theory suggests that sometimes bills will only become law if controversial issues are left unresolved, allowing each legislator to claim victory and leaving the question for the courts to resolve.[131] In these situations, judges must make policy choices and weave statutes into the background tapestry of law. Although such judicial lawmaking is appropriate, it is not ideal. The answers that come from courts on such questions will be justified by necessity, not by expertise or political accountability. Consequently, whenever possible, courts should adopt practices that encourage Congress to draft better statutes in the first instance, and to amend statutes that need fixing.[132] If courts disengaged from the task of standardizing federal law, they might encourage Congress to take on this role.

[129] Perhaps for this reason, the Constitution's few references to uniform federal law come in Article I, not Article III. See infra note 168 and accompanying text.

[130] See Ginsburg, supra note 59, at 996 ("'The more precise and coherent a statute, the less it permits and requires creative judicial interpretation . . . .'" (quoting Harry Edwards, The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication, 32 Clev. St. L. Rev. 385, 424 (1983–84))).

[131] See supra notes 77–79 and accompanying text.

[132] Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 886, 900 (2003).

Political scientists Stefanie Lindquist and David Yalof studied the frequency with which Congress seeks to resolve circuit splits.[133] Their review of legislative activity between 1990 and 1998 revealed that Congress takes note of at least some disputes over the meaning of federal law and on occasion seeks to resolve the ambiguities that have resulted in divergent judicial outcomes. The authors concluded that "Congress adopts some role in ensuring that its statutes are applied uniformly throughout the country, although Congress is not nearly as active as the Supreme Court in this area."[134] Lindquist and Yalof also found that Congress was more likely to resolve a lower court split when the Supreme Court did not appear prepared to do so.[135] In short, Congress is capable of resolving judicial disagreements over the meaning of federal law, is better suited to that task, and is more likely to do so when courts stay their hand.

Legal scholars debate the causal relationship between statutory ambiguity and the judiciary's active role in making policy choices left unclear by Congress. Judge Richard Posner contends that Congress' refusal to enact clearly written statutes and to quickly correct ambiguities leaves courts no choice but to be policymakers.[136] Professors Adrian Vermeule and Cass Sunstein respond that perhaps if judges were more formalistic in their interpretations, they might push Congress to make the hard choices in the first instance, and they suggest that "the relatively independent, policy-oriented approach to interpretation taken by American courts" may itself by the cause of legislative ambiguity.[137] Under either view, however, a strong argument can be made that courts should not take on the primary role in standardizing the interpretation of ambiguous statutes for the nation. Even if Posner is correct that Congress' abdication of its legislative oversight function forces courts to make policy choices when interpreting statutes, courts are

[133] Stefanie A. Lindquist & David A. Yalof, Congressional Responses to Federal Circuit Court Decisions, 85 Judicature 61, 66–67 (2001) (demonstrating that between 1990 and 1998, Congress "sought to amend existing statutes or to pass new legislation to resolve at least 19 instances of conflict among the circuits").

[134] Id.

[135] Id.

[136] Richard A. Posner, Pragmatic Adjudication, *in* The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture 235, 250–51 (Morris Dickstein ed., 1998).

[137] Sunstein & Vermeule, supra note 132, at 913.

under no obligation to provide a single interpretation of an ambiguous federal statute. Although an initial determination about statutory meaning is necessary to resolve disputes within a court's jurisdiction, there is no similar imperative to eliminate variations in the interpretation of such statutes across the nation.

Congress could do much more than it has to improve federal uniformity. As several Supreme Court Justices have suggested, Congress could establish a committee to identify and resolve circuit splits as they arise.[138] Or Congress could enact legislation that would promote uniformity in judicial decisionmaking. For example, Congress could require federal circuits to follow the precedent set by other circuits, thereby preventing circuit splits,[139] or Congress could establish specialized courts of appeals to replace the primarily geographic system we have today.[140] Although constitutionally debatable, Congress might be able to require state courts to follow the precedent of federal courts in their jurisdictions. At the very least, it could grant federal courts exclusive jurisdiction over a larger number of federal laws or eliminate stringent application of the well-pleaded complaint rule. These changes to the structure of federal courts and judicial decisionmaking would reduce the number of conflicts over the meaning of federal law.

Adopting these proposals would come at a cost, however. Legislative committees to identify and resolve circuit splits would use up scarce resources. Intercircuit stare decisis would prevent issues from percolating in the lower courts, which arguably assists the Supreme Court in reaching the best conclusion about the meaning of federal law.[141] Specialized courts might not attract the most quali-

[138] Justice Stevens recommended that Congress establish a standing committee that would resolve disputes between the federal circuits. John Paul Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 183 (1982); see also Ginsburg, supra note 59, at 996, 996 ("Congress itself, however, could come to the courts' aid effectively. The first branch could install a system of legislative review and revision under which Congress would take a second look at a law once a court opinion or two highlighted the measure's infirmities.").

[139] Cf. Walter V. Schaefer, Reducing Circuit Conflicts, 69 A.B.A. J. 452, 455 (1983); Note, Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals, 87 Yale L.J. 1219, 1239–40 (1978).

[140] Erwin N. Griswold, Helping the Supreme Court by Reducing the Flow of Cases into the Courts of Appeals, 67 Judicature 58, 65–66 (1983).

[141] See, e.g., Revesz, supra note 23, at 1157–58; Samuel Estreicher & John Sexton, Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial

fied judges and might be captured by the interest groups that appear most frequently before them.[142] Expanding exclusive federal jurisdiction would further tax already overburdened federal courts. The point here is not that Congress necessarily should take any of these steps—as discussed in Section II.B, nonuniform interpretation of federal law is usually harmless, and may even be desirable in some cases as a means of tailoring laws to accord with regional preferences. Rather, the point is that courts should be aware that their own, self-inflicted preoccupation with uniformity also comes with opportunity costs—costs that Congress does not seem interested in imposing on itself or courts by enacting any of these proposals into law.

Congress has never appeared to be terribly concerned about courts' nonuniform interpretations of the laws it enacts. Congress has not instructed the Supreme Court to resolve lower court conflicts; the Supreme Court itself drafted its Rule 10 prioritizing grants in such cases. Nor has Congress enacted laws requiring the federal circuits to resolve inter- or intra-circuit conflicts, although the circuits have adopted such goals for themselves.[143] Congress has left it to generalist courts to resolve most of the nation's legal disputes, establishing specialized courts only in narrow areas and often for limited periods of time.[144] Even *Chevron* deference, which

Process 50–51 (1986); United States v. Mendoza, 464 U.S. 154, 160 (1984); McCray v. New York, 461 U.S. 961, 961–63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

[142] Revesz, supra note 23, at 1149–53 (describing how special interests are more likely to capture specialized courts than generalist courts).

[143] Fed. R. App. P. 35; see also Aldens, Inc v. Miller, 610 F.2d 538, 541 (8th Cir. 1979) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket.").

[144] See generally Revesz, supra note 23, at 1121–38 (describing the types of specialized courts established by Congress); Strauss, supra note 32, at 1124 ("[T]he congressional choice to leave working out the solution to the geographically dispersed courts rather than to a national agency can be seen in some respects as a legislative statement about the relative importance of uniformity.").

promotes uniformity by allowing agencies to establish nationwide interpretations of federal law, is the creation of courts and not Congress.[145] In short, the federal judiciary has assumed the mantle of responsibility for standardizing federal law without any indication from the other branches of government that this should be one of its major roles.

B. The Courts

As just discussed, Congress is well positioned to choose when it is important to eradicate nonuniformity in the interpretation of federal law and then to make the policy choices required to settle the meaning of ambiguous statutes. The federal courts, in contrast, are not. As a practical matter, the federal courts are simply not capable of standardizing all of federal law. The size of the U.S. Supreme Court has not changed since 1869. The nine Justices have the capacity to decide at most a few hundred cases a year, though they have been hearing less than half that amount in recent years.[146] At the same time the number of lower federal and state courts has increased significantly, as has the number of federal laws.[147] In 1924, the Court reviewed approximately one in ten decisions of the federal courts of appeals; in 1984, the Court reviewed just 0.56% of those decisions; and in 2005, it heard approximately 0.23% of those decisions.[148] In short, thousands of additional state and federal

[145] Professor Peter Strauss claimed that Congress established agencies to provide for the "centralized, national determination" of legal and policy issues, and thus he argued that when courts review agency decisionmaking they have an "obligation to produce consistent and coherent results in the areas of the agencies' responsibility." Strauss, supra note 33, at 1114. As Strauss noted, *Chevron* deference promotes uniformity of interpretation in the statutes agencies administer because courts must accept any reasonable agency interpretation of ambiguous language, and that agency interpretation then applies nationwide. Id. at 1121.

[146] Id. at 1100 (asserting that the Court could not be expected to hear more than approximately 150 cases per year).

[147] Id. at 1098 (noting that in 1925, there were 4.7 circuit court judges and 14.2 district court judges for each Supreme Court Justice; in 1987, there were 17.3 circuit court judges and 62.6 district court judges for each Supreme Court Justice).

[148] Thomas E. Baker & Douglas D. McFarland, The Need for a New National Court, 100 Harv. L. Rev. 1400, 1405–06 (1987) (providing the percentages for 1924 and 1984). I calculated the numbers for 2005 based on the Federal Judicial Center's figures reporting that 34,580 appeals were terminated on the merits after oral hearings or submissions on the brief during the 12-month period ending September 30, 2006, and that the Supreme Court granted 78 cases for review during the 2005 Term. See

judges are writing opinions addressing thousands of federal questions, only a very small fraction of which could ever be reviewed by the Supreme Court. Although the Supreme Court has chosen in recent years to hear significantly fewer cases than it is institutionally capable of deciding, even if it added 100 more cases to its docket, it could not hope to reconcile all the divisions that emerge each year. Absent major structural changes to the federal court system, federal judges cannot be expected to harmonize divergent interpretations of federal law.[149]

Even if the task were more manageable, it is not one for which the federal judiciary is well suited. The federal courts differ from the other two branches in important respects. Unlike the President and Congress, they cannot set their own agenda, but rather have to await cases to be brought before them. Because the U.S. judicial system is adversarial, not inquisitorial, federal courts rely on the parties to provide them with arguments about statutory meaning and do not conduct independent investigations of the consequences that could flow from various interpretations of a statute. True, when the stakes are high and the stakeholders well organized, amicus briefs can inform courts of the costs and benefits of one policy choice over another, but because judges are supposed to interpret the law and not make it, they cannot seek out information on their own. Furthermore, judicial decisions must apply retroactively, whereas most legislation is prospective. Most importantly, unlike members of the other two branches, federal judges are relatively insulated from political pressures through their life tenure and salary protection.

These attributes hamper judicial attempts to standardize interpretation of federal law. Courts' limited control over their agenda means that they cannot systematically improve flawed legislation, but rather must address statutory ambiguity piecemeal. As a result of the adversarial system, courts may be forced to make decisions

Admin. Office of the U. S. Courts, 2006 Judicial Business of the United States Courts: Annual Report of the Director (2007).

[149] Bator, supra note 33, at 635–36 ("Serious questions can . . . be raised about whether the appellate jurisdiction of the United States Supreme Court constitutes sufficient appellate capacity to perform this function [reviewing state court decisions addressing federal questions]."); Strauss, supra note 33, at 1105 ("[The]small proportion of lower court decisions the Supreme Court's resources allow it to review contributes . . . to increasing the incoherence of federal law.").

about statutory meaning without having the most important facts and the best arguments before them. Because their decisions must be retroactive, courts are more hesitant to make sweeping changes to a statute's meaning, even when such changes would be the best way to standardize federal law. Finally, their lack of accountability certainly does not help federal judges make policy choices that will bind the nation, and should make the public reluctant to give them this power as well.

IV. THE FEDERAL COURTS AND UNIFORMITY: THE ORIGINAL UNDERSTANDING

In many of the debates over function and structure of the federal courts described in Part I, uniformity is claimed to be not only a worthwhile goal but also a constitutionally mandated one. Professor Leonard Ratner argued that the Supreme Court's constitutionally prescribed "essential functions" are to establish the uniformity and supremacy of federal law. Justice Scalia has asserted that "a primary basis for the Constitution's allowing [the Supreme Court] to be accorded jurisdiction to review state-court decisions, see Art. III, cls. 1 and 2, is to ensure the integrity and uniformity of federal law."[150] Some scholars contend that abolishing the lower federal courts is no longer a constitutionally permissible option, despite the Madisonian compromise, because these courts ensure the supremacy and uniformity of federal law in an era in which the Supreme Court cannot possibly review all lower court decisions.[151] This Part examines the founding generation's original understanding of the federal courts' role in harmonizing divergent interpretations of federal law to determine the strength of these claims.[152]

[150] Kansas v. Marsh, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

[151] Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 506–13 (1974) (arguing that the federal courts were "intended . . . to be able to hear and do justice in all cases within its jurisdiction" and arguing that, due to expansion of federal law, the Supreme Court can no longer accomplish this through review of all state court decisions).

[152] The term "original understanding" is intentionally used loosely here. Some originalists would limit themselves to the Constitution's text alone, some would look to the Framers' intentions, and some would rely on the general public's contemporaneous understanding of the text. See, e.g., Randy E. Barnett, An Originalism for Nonoriginalists, 45 Loy. L. Rev. 611, 620–21 (1999) (describing the difference between original intent and original meaning); Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82

Article III is remarkably terse, and there is little in the notes from the Constitutional Convention or other documents by the Framers or their contemporaries to shed light on the question whether the federal courts were intended to provide uniformity in the interpretation of federal law.[153] Accordingly, this Part starts with a richer source of information—the Judiciary Act of 1789—to examine the original understanding of the relationship between the federal courts and uniformity, and only then turns to Article III to see whether additional information can be gleaned from its text and from the discussions that surrounded its enactment.

A. The First Judiciary Act

The Judiciary Act of 1789,[154] enacted by a Congress made up of many of the same men who drafted the Constitution and supported its ratification, informs the original understanding of Article III.[155] The Act created the framework for the federal judiciary, and it spelled out in detail the areas over which the federal courts could exercise jurisdiction. Most importantly, the first Congress exercised

Nw. U. L. Rev. 226, 229–31 (describing the difference between textualism, original intent of the Framers, and original understanding of the Constitution by those who enacted it); David Krinksy, Note, A Plan Revised: How the Congressional Power to Abrogate State Sovereign Immunity Has Expanded Since the Eleventh Amendment, 93 Geo. L.J. 2067, 2069–70 & n.24 (2005) and sources cited therein. This Article does not take a position on which version is the best, or for that matter whether originalism itself is the most appropriate method of constitutional interpretation, but rather seeks to examine uniformity from a wide variety of perspectives and sources.

[153] Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1423 (describing Article III as "maddeningly terse, vague, and open-ended").

[154] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[155] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) ("[The Act]was passed by the first Congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."); Fallon, Hart & Wechsler's, supra note 32, at 29 ("[T]he first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress' constitutional obligations concerning the vesting of federal jurisdiction."); see also Akhil Reed Amar, America's Constitution: A Biography 229 (2005) (noting that the first Congress included eight representatives and eleven senators who had served as delegates at the Constitutional Convention). But see Meltzer, supra note 27, at 1610–11 (noting debate over the First Judiciary Act revealed that members of the first Congress were "confused" about the content of Article III, and cautioning that these legislators may have been "re-fighting old battles about the Constitution" rather than seeking to carry out constitutional commands).

its option under the Madisonian Compromise to create lower federal courts, establishing a system of district and circuit courts that has remained in existence in some form ever since. From the perspective of the uniformity rationale, however, the First Judiciary Act is most interesting for what it did *not* do: Congress deprived the lower federal courts and the Supreme Court of jurisdiction over many of the subject matter areas that Article III would have permitted them to hear.[156] Contrasting the subjects that Congress did select for federal court review with those that it did not gives insight into the first Congress' conception of the role of the federal courts.

Significantly, the Act did not grant the federal courts general federal question jurisdiction, but instead provided the lower courts with original jurisdiction over only a few areas of federal law. District courts had "exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States."[157] The circuit courts were given exclusive jurisdiction over most federal criminal cases.[158] District courts also had concurrent jurisdiction with state and circuit courts over "all causes where an alien sues for a tort only in violation of . . . a treaty of the United States."[159] This limited grant of original jurisdiction to the lower federal courts omitted a significant number of federal question cases, leaving them to be resolved by state courts.[160]

[156] See Richard A. Posner, The Federal Courts: Challenge and Reform 42 (1996) ("Conspicuous in the first Judiciary Act is an evident parsimony in the creation of federal jurisdiction.").

[157] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77.

[158] Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79. (district courts had concurrent jurisdiction over a few minor offenses).

[159] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77.

[160] See Bradford Clark, The Supremacy Clause as a Constraint on Federal Power, 71 Geo. Wash. Univ. L. Rev. 91, 104 (2003) ("[T]he vast majority of federal question cases throughout history have been decided not by federal courts but by state courts, subject only to appellate review by the Supreme Court."); William R. Casto, An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction, 7 Const. Commentary 89, 93 (1990) ("[The Act]completely excluded a number of federal question cases from original and appellate federal jurisdiction."). Congress very briefly granted the federal courts original federal question jurisdiction in the Midnight Judges Act, ch. 4, § 11, 2 Stat. 92 (1801), but that provision was repealed in 1802. It was not until 1875 that the district courts were given the broad fed-

The Act also barred the Supreme Court from reviewing important categories of federal question cases decided in the lower federal courts. The high Court lacked appellate jurisdiction over federal question cases that were reviewed in the circuit courts by writ of error, permitting review only of cases that reached the circuit court by appeal, and its review was further limited to cases where the amount in controversy exceeded $2,000.[161] The Act made no provision for Supreme Court review of criminal cases, though it could do so in some cases by granting petitions for writs of habeas corpus.[162] These limitations meant that the Supreme Court could not review significant categories of cases from the lower federal courts interpreting federal law, and thus would have no power to ensure uniformity in those areas.[163] Nor did the Act give the Supreme Court appellate jurisdiction to review all state courts' rulings concerning federal law. Section 25 of the Act assigned the Supreme Court appellate jurisdiction over final judgments by the highest court of a state only in cases in which the federal right or privilege claimed was *rejected* by a state court; if the federal claim prevailed, the Supreme Court could not review the state court's decision.[164] In short, Supreme Court review was designed to prevent state court insubordination, not state court incompetence.[165]

eral question jurisdiction that they exercise today. See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 470.

[161] § 22, 1 Stat. 73, 84–85; see also United States v. Nourse, 31 U.S. (6 Pet.) 470, 496 (1832). The distinction between a writ of error and an appeal was defined by the Supreme Court as follows: "An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and retrial: but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796). Professor Ratner argues that Congress corrected this problem in legislation enacted in 1803, but that the Supreme Court erroneously concluded that legislation applied only to admiralty cases. Ratner, supra note 26, at 191–92. Either way, the Judiciary Act of 1789 originally limited Supreme Court review of lower court decisions regarding the meaning of federal law, further undermining the notion that the federal courts were intended to make federal law uniform.

[162] Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73, 84–85 (failing to provide Supreme Court review of lower federal court rulings in criminal cases); Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81 (providing for review of habeas petitions).

[163] Ratner, supra note 26, at 192 ("[This] jurisdictional limitation . . . impeded resolution of conflicting interpretations of federal law in nonadmiralty cases within the exclusive jurisdiction of the district courts").

[164] Section 25 of the Act limited Supreme Court review of state court decisions to the following categories of cases: (1) "where is drawn in question the validity of a treaty

The omission of general federal question jurisdiction, together with the limitations on the Supreme Court's appellate jurisdiction over federal question cases, speaks volumes about the first Congress' priorities when it came to the federal courts. The first Congress could not have seen harmonizing varied interpretations of federal law as the federal judiciary's primary, or even secondary, role in the national government. If uniform interpretation of federal law was a goal, the first Congress would have given the Supreme Court jurisdiction over all, or at least many, lower federal and state court decisions discussing federal law, including those that upheld federal rights and interests.[166] In addition, the first

or statute of, or an authority exercised under the United States, and the decision is against their validity"; (2) "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity"; or (3) "where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed." Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

[165] Gunther, supra note 27, at 907 (referring to Section 25 as "essentially a supremacy-assuring device; it was *not* primarily concerned with uniformity").

[166] Professor Ratner disagrees with this reading of Section 25. He argued that the Supreme Court originally misinterpreted Section 25 by assuming that it withheld jurisdiction to review state court decisions upholding a federal statute or granting a benefit claimed under federal law. Ratner asserts that such decisions were reviewable because any state court decision upholding the constitutionality of a statute, or granting a right or benefit under it, "necessarily denies to the losing party" a right or immunity under federal law to have a judgment in his favor. He claims that the Supreme Court came to that conclusion itself in the early Twentieth Century. See Ratner, supra note 26, at 185 & n.137. Even the Court's original, more limited, interpretation of Section 25 did not prevent the Court from resolving lower court conflicts, Ratner argued, because if a state court created a conflict by upholding a federal claim after an earlier state court had rejected that claim, the Court could always choose to hear and resolve the next state court decision that followed the precedent set by the first. Id. at 185–86 & n.137.

Professor Ratner's explanation is hard to reconcile with the language of Section 25, however. Why would the first Congress have so carefully limited the Supreme Court's appellate jurisdiction if it in fact intended for the Court to hear appeals from cases upholding and rejecting federal claims of right? Indeed, Ratner acknowledges as much later in his article, speculating that members of the First Congress might not have been "aware" of the "broad scope of appellate jurisdiction implicit in the third clause of section 25," and admitting that "the absence of an express provision for review of state court decisions upholding a federal statute or right, or invalidating a state statute, may have evidenced a legislative purpose to exclude such decisions from the Court's jurisdiction." Id. at 187. His claim that even under the more restrictive reading of Section 25 the Court could resolve lower court conflicts is also highly de-

Congress would have granted the lower federal courts either concurrent or exclusive original federal question jurisdiction, again to ensure that such cases were handled by a federal court system better equipped to issue consistent decisions about the meaning of federal law than the state court judges in the thirteen former colonies.[167] That the first Congress left so many federal issues to be resolved by state courts and the lower federal courts strongly suggests that the uniform interpretation of federal law was not a priority.

B. The Uniformity Rationale and the Constitution

Although Article III provides frustratingly little information about the Framers' intentions for the federal courts, its text is perfectly consistent with the first Congress' jurisdictional choices. At best, Article III appears to be neutral with regard to uniformity,

batable. Lower courts could differ over the reading of federal law in ways that did not reject a federal claim of right, creating inconsistent interpretations of federal law that could not be reviewed by the Court. And even under Ratner's view, the nonuniformity would remain unremedied until the next case came along raising the same issue and the parties appealed to the Supreme Court. Id. at 186 & n.138 (acknowledging this problem).

[167] Some scholars claim that the first Congress assigned the six Supreme Court justices the burdensome task of "riding circuit" to promote consistency in the interpretation of federal law. See, e.g., Thomas E. Baker, Siskel and Ebert at the Supreme Court, 87 Mich. L. Rev. 1472, 1483 (1989); Martha J. Dragich, Once a Century: Time for a Structural Overhaul of the Federal Courts, 1996 Wisc. L. Rev. 11, 44 n.184; David R. Stras, Why Supreme Court Justices Should Ride Circuit Again, 91 Minn. L. Rev. 1710, 1717 (2007). But it is not obvious how the tradition of circuit-riding would accomplish that goal. Under the Act, two justices were to join together with a district court judge to constitute each circuit court, and thus there was no guarantee that a circuit court's decision would be in accord with the other circuits or be affirmed by the Supreme Court. Were the current Supreme Court Justices to ride circuit today, it is not clear that federal law would be interpreted more consistently, as illustrated by modern Supreme Court decisions overruling precedent set by a circuit panel that includes a recently-elevated member of the Court. One article on circuit riding asserted that the contact between Justices and district court judges led to more consistent interpretations among the district courts. Id. at 1717. But that result is not self-evident. As already stated, the Justices might disagree with each other while riding circuit, leaving the district court no clear lead to follow; where they agree, the district courts are likely to obey the precedent set whether or not they come into personal contact with the Justices. In any case, because the circuit courts had only very limited federal question jurisdiction, most of the cases they sat on concerned state, not federal, law, and thus it is hard to believe that assigning the Justices to ride circuit was intended to promote consistent interpretation of federal law.

and several of its provisions can be read as antithetical to the idea that the federal judiciary was to devote significant resources to that project.

1. The Absence of the Term "Uniformity" from Article III

As a threshold matter, Article III does not explicitly assign to the federal courts the task of establishing uniform interpretation of federal law. Indeed, that term is never mentioned. In contrast, Article I provides Congress with the power to establish "an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States," and mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States," suggesting that the Framers were concerned about uniformity of federal law only in these narrow areas.[168] Furthermore, the Constitution specifically instructs that federal law is supreme over state law, providing a textual basis for federal judicial protection of the supremacy of federal law that is absent when it comes to protecting the uniformity of federal law. Admittedly, arguments from omission are weak, but the lack of a particular textual instruction on the need for uniformity is nonetheless worth noting.

2. The Madisonian Compromise

The very first sentence of Article III suggests that standardizing the interpretation of federal law was not intended as the federal judiciary's primary purpose. Section One begins: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This was the compromise, orchestrated by James Madison, between those who wanted to establish lower federal courts and those who thought they were unnecessary. The two camps split the difference by leaving the creation of the lower federal courts to Congress' discretion.

That some of the Framers opposed the very existence of the lower federal courts, and that most were willing to live with the possibility that Congress might choose not to establish them, suggests that the Framers did not intend for the judiciary to take a

[168] U.S. Const. art. I, § 8, cls. 1 & 4.

lead role in harmonizing divergent interpretations of federal law. The U.S. Constitution established a federal government capable of producing laws and treaties that some court system—whether state or federal—would be called upon to interpret. Even at the time of the Framing, when the population was a fraction of what it is today, there were thirteen states with thirteen separate state judicial systems, all capable of resolving federal issues in different ways. Furthermore, the Framers crafted a document intended to survive for centuries, and the founding generation foresaw that the number of states—and thus the number of state supreme courts capable of issuing conflicting decisions—would increase in the years to come.[169] If the third branch of the federal government could consist of no more than a handful of jurists on the Supreme Court, then its stamp on federal law could not hope to be comprehensive.[170]

Although Congress has always provided for lower federal courts, the Madisonian compromise continues to shape our understanding of their role. Because Congress has the greater power to eliminate the lower federal courts, it is understood to have the lesser power to exclude cases from their jurisdiction,[171] and Congress has not hesitated to exercise its discretion to eliminate categories of cases from their purview. Arguably, this congressional control is also at odds with the view that the federal courts were intended to promote uniformity in the interpretation of federal law. As many legal scholars have observed, the lower federal courts serve as a small, expert body capable of interpreting federal law with the minimum of inconsistencies.[172] If they are prevented from issuing decisions on

[169] In fact, the Framers prepared for this certainty by laying out in the Constitution itself the rules governing the admission of new states to the union, see U.S. const., art. IV, § 3, cl. 1, and it was only a few years after its drafting that Vermont was added to the original thirteen.

[170] But see Statement of John Rutlidge, 1 The Records of the Federal Convention of 1787, at 124 (M. Farrand rev. ed. 1937) [hereinafter Federal Convention Records] (quoting John Rutlidge's assertion that the Supreme Court alone could ensure uniformity).

[171] Sheldon v. Sill, 49 U.S. (8 How.) 441, 448–49 (1850) ("Congress, having the power to establish the [lower federal] courts, must define their respective jurisdictions."). In fact, the lower federal courts only have the power to hear cases for which Congress has specifically granted them jurisdiction. Id. at 449 ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[172] See, e.g., Erwin Chemerinsky, Federal Jurisdiction § 5.2.1, at 252 (2d ed. 1994) ("Another frequently offered justification for federal question jurisdiction is the need

certain federal questions, then those subject areas will be left to the more numerous state courts, leading to greater disarray.[173] While the Supreme Court can review some of these decisions—at least, when Congress permits it to do so—the task would be too large for it to accomplish on its own.

3. Subject Matter Jurisdiction

Section 2 of Article III defines the subject matter jurisdiction of the federal courts, listing nine categories of "cases" or "controversies" over which federal courts have jurisdiction. Although Congress has the discretion to exclude some of these subject areas from federal jurisdiction, the courts have no power to hear cases that fall outside of these categories.

Article III's first subject matter heading gives federal courts the authority to hear "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This grant of "federal question" jurisdiction is consistent with the idea that the federal courts were assigned the task of standardizing the interpretation of federal law, though it is also compatible with other goals, such as protecting the supremacy of federal law. The other eight Article III subject matter headings, however, suggest that the Framers' primary concern was to provide a neutral forum for international and interstate disputes. The federal courts were given jurisdiction over cases involving foreign citizens, foreign countries, and their officials. They were empowered to hear "all Cases affecting Ambassadors, other public Ministers, and Consuls," "all Cases of admiralty and maritime jurisdiction," and "controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The Framers feared that state courts would favor state interests at the expense of international relations, or at least that foreign litigants might worry that they would do so. These provisions pro-

to ensure uniformity in the interpretation of federal law."); Chemerinsky & Kramer, supra note 32, at 85 (claiming that the "availability of a federal forum significantly advances th[e] goal [of uniformity]"); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 164–68 (1965).

[173] Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 101 (2d ed. 1990) ("[P]recedential confusion [may be] caused by the dramatic increase in the number of interpreting courts").

vided an unbiased forum with a national perspective to resolve disputes that could affect the United States' relationship with foreign nations.[174]

Similarly, Article III's grant of jurisdiction over "controversies between two or more States," "between a State and Citizens of another State," "between Citizens of different States," and "between Citizens of the same State claiming Lands under Grants of different States" all place the federal courts in the role of "interstate umpire."[175] When hearing cases brought under the courts' so-called "diversity jurisdiction," the federal courts serve not to articulate a standardized version of federal law—such cases by definition are governed by state law—but rather to provide the parties with a nonpartisan forum in which to resolve their disputes. Article III also gives the federal courts jurisdiction over controversies to which the United States is party. Many such cases would involve federal law and thus would fall within the courts' federal question jurisdiction. For those disputes arising under state law, the federal forum again serves to protect federal interests against potentially biased state courts, and not to standardize federal law.

Although some legal scholars insist that federal question jurisdiction is the most important subject matter heading in Article III, Professor Daniel Meltzer has observed that "it is far from clear that contemporaries considered the [] subject matter heads to be more important than all of the party-based heads."[176] Hamilton, Madison, and Randolph, among others, declared that federal jurisdiction over interstate and international disputes was essential to ensure national and international peace and harmony, and the historical context suggests that this was the Framers' first concern.[177]

[174] See Fallon, Hart & Wechsler's, supra note 32, at 13. That point is obvious with respect to cases involving foreign diplomats and foreign citizens and states. Cases that fall within the courts' admiralty and maritime jurisdiction also touch upon the relations between the U.S. and its trading partners, because, as James Wilson noted during the Constitutional Convention, disputes with foreign countries were most likely to arise in the form of admiralty cases. 1 Federal Convention Records, supra note 170, at 124. See also Meltzer, supra note 27, at 1599 ("[A]dmiralty jurisdiction . . . was thought necessary because maritime matters were viewed as part of the law of nations, and frequently affected foreign sovereigns.").

[175] See Fallon, Hart & Wechsler's, supra note 32, at 13.

[176] Meltzer, supra note 27, at 1582.

[177] The Federalist No. 80 (Alexander Hamilton); 3 Elliot's Debates at 532–34 (remarks of James Madison to Virginia Ratifying Convention); id. at 570–71 (remarks of

After the Revolution, creditors claimed that their disputes with debtors were not handled fairly by the courts located in debtor states.[178] The problem was particularly severe in cases involving British creditors and Loyalist property holders. Madison made the case for lower federal courts by raising the possibility of "improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury."[179] Indeed, one academic commentator has insisted that, in light of these concerns, "alienage jurisdiction was the most important head of jurisdiction in article III."[180]

4. The Supreme Court's Appellate Jurisdiction

As the only court with nationwide jurisdiction, the U.S. Supreme Court is the judicial institution best suited to the task of harmonizing federal law, and yet the Framers did not ensure that the Supreme Court would exercise comprehensive appellate jurisdiction over questions of federal law. After listing the narrow categories of cases over which the Supreme Court has original jurisdiction, Article III provides that "[i]n all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make." Congress has not hesitated to carve out "Exceptions" to the Court's appellate jurisdiction.[181] If resolving conflicts over the meaning of federal law was to be among the Supreme Court's primary goals, then one would have expected the Court to be given mandatory appellate review of all cases raising a federal question.

Some might argue that Congress' control over both the Supreme Court's and the "inferior" courts' jurisdiction is not at odds with the uniformity rationale. Perhaps the Framers wanted to give Con-

Edmund Randolph to Virginia Ratifying Convention); 4 Elliot's Debates at 158–59 (remarks of William Davie to North Carolina Ratifying Convention).

[178] See, e.g., Holt, supra note 153, at 1467; see also Meltzer, supra note 27, at 1581 (noting that for Hamilton, "some party-based cases were at least as important as federal question cases").

[179] Holt, supra note 27, at 1461 (quoting 1 Federal Convention Records, supra note 170, at 124).

[180] Id. at 1466 n.170.

[181] See supra Section I.B.

gress the discretion to shape original and appellate federal jurisdiction because they thought Congress could best pick and choose the areas in need of the harmonizing influence of the federal courts. If one area of federal law proved to be straightforward and easy to interpret, then Congress could leave it to the state courts to address, while another field might be so complex and contentious as to require unifying pronouncements by the smaller group of expert federal judges. But it is at least curious that the Framers gave Congress free rein to limit federal courts' jurisdiction if, in fact, standardizing federal law was to be one of the federal judiciaries' first priorities.

5. Judicial Independence

The founding generation appeared to value judicial independence over judicial consensus. The Constitution grants federal judges life tenure and protections against diminution of their salaries, which insulates them from various political and social pressures. Those guarantees allow courts to make unpopular rulings, to stand up to the other two branches of government without fear of retribution, and to assure litigants that judges are not beholden either to state or federal interests. They do nothing, however, to promote consistent judicial interpretation of federal law. Judges are free to disagree not only with the other branches and the general public, but also with one another. The Supreme Court's ability to keep the lower courts in line is hobbled by the lower courts' complete independence from the high court. As Professor Akhil Amar points out, the "supreme" Court was not provided the means to live up to its name; the Constitution gave the high Court no role in selecting, removing, or penalizing the judges of the "inferior" courts, in stark contrast to Congress' power to remove errant members or the President's authority to dismiss executive officials.[182] True, the Supreme Court can reverse the lower federal courts' decisions, and its review is final. But, it has no means of

[182] Amar, supra 145, at 210 ("Article III judges were almost as independent of one another as they were of other branches."); cf. Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324 (2006) (questioning whether Article III gives the Supreme Court supervisory power over the lower courts).

punishing recalcitrant judges who ignore its precedents.[183] This federal judicial autonomy is useful for many reasons, but it is not conducive to establishing uniformity in the interpretation of federal law.

C. Conclusion

It is difficult to draw definitive conclusions about the role of the federal courts from Article III alone. Its few short paragraphs leave many gaps to be filled and provide little guidance as to the Framers' intentions or the original understanding. Nor is there much to be gleaned from the debates at the Constitutional Convention.[184] Perhaps all that can be said for certain is that many of the Framers' choices seem either antithetical to the uniformity rationale, or at least to put uniformity low on a list of federal court priorities. The Judiciary Act of 1789 provides clearer evidence of the contemporary understanding of the role of the federal courts—evidence that undermines the uniformity rationale. Most of the first Congress' jurisdictional choices are incompatible with the goal of standardizing interpretation of federal law, leaving the strong impression that federal courts were not viewed as the protectors of uniformity.

V. RECONSIDERING THE ROLE OF UNIFORMITY

This Article contends that standardizing the interpretation of federal law is neither constitutionally required nor always as beneficial as has been assumed—indeed, at times it can be detrimental—and in any case is a task for which Congress is better suited than the courts. From a purely academic perspective, it is worth examining more closely a value that is often cited and yet rarely discussed. As a practical matter, debates over the structure and function of the federal courts in which uniformity plays a prominent role—such as those raised in Part I—deserve to be revisited

[183] In one of the most extreme examples of what Professor Charles Fried terms lower court "impudence," the Ninth Circuit issued multiple stays of execution in the same case over the course of one evening, and each time was reversed by the Supreme Court. See Charles Fried, Impudence, 1992 Sup. Ct. Rev. 155, 165–66.

[184] Meltzer, supra note 27, at 1610; Holt, supra note 153, at 1460 ("Little space in members' sparse notes of the Convention's debates . . . is devoted to the judiciary branch, and there is no recorded debate on the extent of its jurisdiction.").

with a new focus on the limited benefits and significant opportunity costs that seeking uniform interpretation of federal law often entails.

Section V.A returns to the disputes over federal judicial structure and practice raised in Part I to briefly discuss how a new understanding of uniformity might alter the focus of the debates and possibly change the outcomes. Section V.B examines in greater detail one judicial practice in which uniformity has taken on a dominant role—the Supreme Court's case selection—and argues that the Court should reorder its priorities when setting its agenda.

A. Revisiting Debates About Federal Judicial Structure and Practice

1. Original Federal Question Jurisdiction

The scope of original federal question jurisdiction, still debated at the margins, need not be read broadly for uniformity's sake. As a threshold matter, nonuniformity would remain even if all cases raising federal questions were heard exclusively in the federal courts, because the sixty-four federal district courts and thirteen courts of appeals can generate considerable nonuniformity on their own. Adding state court judges to the mix might increase the number of conflicting interpretations, but that is not certain. If there are only two or three plausible readings of a statute, it is unlikely that exclusive federal jurisdiction will produce greater consistency. More to the point, for all the reasons discussed in Part II, uniformity in and of itself is not a good reason to burden the federal courts.

Other arguments for broad original federal question jurisdiction remain, of course. Perhaps federal courts should hear cases raising federal issues to give the parties an opportunity to be heard in a more sympathetic federal forum, or to alleviate the pressure on state courts. The availability of a federal forum is also more convenient for multi-state litigators who have become specialists in the Federal Rules of Civil Procedure and in the culture and practices of the federal courts. As Professor Gil Seinfeld argues in a forthcoming article, federal courts can be understood as providing all the benefits of a "franchise"—that is, a familiar forum providing standardized procedures of operation and a high level of compe-

tence and professionalism among judges and lawyers.[185] The debate over the scope of federal question jurisdiction should focus on these benefits of the federal forum, and not on the federal courts' claimed ability to provide uniformity.

2. Exclusive Federal Jurisdiction

As discussed above, providing for exclusive federal jurisdiction does not ensure uniform interpretation of federal law, since the numerous lower federal courts may reach divergent interpretations of federal law, but even if it did, uniformity alone would not be worth the costs. Establishing exclusive federal jurisdiction burdens the federal courts and deprives state courts of a role in shaping the meaning of federal law, and thus comes at a cost. If state courts are hostile to out-of-state litigants or to federal interests, or if state courts are incompetent, then providing an exclusive federal forum is necessary. Likewise, if repeat litigators find it more efficient to litigate in federal fora then providing for exclusive jurisdiction may make sense. For example, granting federal courts exclusive jurisdiction over the prosecution of federal crimes is valuable to federal prosecutors, who undoubtedly prefer to litigate such cases in a familiar forum. By removing uniformity as a primary rationale for exclusive federal jurisdiction, policymakers can focus on whether other benefits of exclusivity justify removing jurisdiction from state courts and vesting it solely with the federal courts.

3. Specialized Courts

Although uniformity is one of the primary rationales for establishing specialized courts, its slim benefits will often be outweighed by the potential for capture by the stakeholders who appear before it regularly, as well as by the absence of intercircuit dialogue on difficult federal questions.[186] As scholars of specialized courts have long noted, although specialized courts are often lauded for their policy-neutral benefits, such as efficiency and uniformity, specialization has a noticeable effect on the substance of judicial deci-

[185] Gil Seinfeld, The Federal Courts as Franchise: Rethinking the Tripartite Mantra of Federal Question Jurisdiction, Cal. L. Rev., (forthcoming) available at http://ssrn.com/abstract=1162329.

[186] Revesz, supra note 23, at 1156–57.

sions.[187] For example, the Supreme Court's recent reversal of several of the Federal Circuit's patent law decisions has raised anew the concern that the Federal Circuit's near-monopoly in this area has led it to adopt a pro-patent bias.[188] Indeed, at least one scholar has claimed that Congress often provides for specialized courts to further specific policy goals, such as to provide a more favorable forum for government litigation against private parties.[189] Uniform results in some areas may be important enough to justify the use of specialized courts that provide a single interpretation of federal law for the nation, but the claimed benefits of uniformity—benefits that are often entirely absent or overstated—should be carefully measured against the significant costs of specialization.

4. Congress' Power to Create Exceptions to the Supreme Court's Appellate Jurisdiction

Uniformity is a shaky justification for limiting Congress' power to strip the Supreme Court of jurisdiction over categories of cases. As discussed in Part IV, there is little evidence to support the claim that the Constitution assigned the courts the task of providing for uniform interpretation of federal law. Nor is uniformity so essential to our system of government that the Supreme Court should retain plenary appellate jurisdiction for that reason alone.

Nonetheless, there are many very good reasons to limit Congress' power to strip the Supreme Court of appellate jurisdiction. Removing uniformity from the debate may serve to clarify the more pressing constitutional and policy reasons for restricting Congress' authority. For example, ensuring the supremacy of federal law remains an obvious reason to protect the full range of the Supreme Court's appellate power. Supremacy has textual support in the Constitution and is in accord with the First Judiciary Act's

[187] Lawrence Baum, Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?, 74 Judicature 217, 217 (1991); Rochelle Cooper Dreyfuss, Specialized Adjudication, 1990 BYU L. Rev. 377; Revesz, supra note 23, at 1149–53 (describing how special interests are more likely to capture specialized courts than generalist courts).

[188] Michael A. Carrier, Cabining Intellectual Property Through a Property Paradigm, 54 Duke L.J. 1, 17 (2004).

[189] Baum, supra note 187, at 220.

provisions granting the Supreme Court the power to review state law decisions adverse to federal claims of right.

Admittedly, safeguarding the supremacy of federal law is less of a concern when it comes to Supreme Court review of the decisions of the lower federal courts, because all Article III judges have the same life tenure and salary protections to enable them to protect federal rights and police the conduct of the other two branches without fear of retribution. Nonetheless, Supreme Court review of lower federal court decisions remains important due to the difference in stature between Supreme Court justices and the judges on the "inferior" courts. A single district court judge, or three appellate judges, may lack the fortitude, as well as the national and historical perspective, to protect federal interests from executive or legislative encroachment. On the most pressing issues of the day, only the Supreme Court is likely to have the mettle to reject the sky-is-falling claims of Congress and the President.

5. Conflicts Among the Lower Courts

Uniformity is also a poor rationale for lower courts to adopt the interpretations of federal statutes favored by sister circuits or to expend limited *en banc* resources to hear cases solely on the basis that a panel of the court split with those of other circuits. Without question, any circuit court presented with a question of statutory interpretation should closely examine the views of the other circuit courts that have addressed the same issue. For the benefit of the litigants and future courts to address the issue, Courts should carefully explain any decision to deviate from sister circuits' prior decisions. But just as the Supreme Court should deemphasize uniformity as a pressing concern, the circuit courts should as well. Getting a question of statutory meaning right should be just as important, if not more so, than avoiding minor variations in the interpretation of federal statutes.

B. Uniformity and Supreme Court Case Selection

This Part engages in a more detailed discussion of the Supreme Court's case selection practice because it is an area in which uniformity is given extraordinary weight. Subsection V.B.1 describes how uniformity has taken over the Supreme Court's agenda, and

Subsection V.B.2 suggests that the Court adjust its case selection process to de-emphasize uniformity in favor of other values.

1. Uniformity Dominates the Court's Agenda.

Even the most casual observer of the Court recognizes that a lower court conflict significantly increases the chances that the Court will hear the case. Some might argue, however, that uniformity is not the Court's primary concern. Perhaps the Court's agenda is driven by issues, rather than conflicts, and the presence of a conflict is merely a second-order consideration that inspires the Court to address an issue sooner rather than later. Or perhaps lower court divisions are simply a good proxy for determining when a question of law is important and complicated enough to be litigated frequently, and with differing results. This Part canvasses the data from recent studies of the certiorari process to demonstrate that ensuring uniformity for its own sake is the Supreme Court's central preoccupation; it is the Court's first order of business and the task to which it devotes the great majority of its time.

Supreme Court Rule 10, which lists the reasons the Court might choose to grant certiorari, states that a relevant factor is whether a state court of last resort or federal court of appeals "has entered a decision in conflict with the decision" of another such court on a federal question. In 1995, Rule 10 was amended to provide that the Supreme Court's review should be limited to conflicts on an "important federal question."[190] Nonetheless, the presence of a conflict

[190] Supreme Court Rule 10 provides in full:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

remains by far the most important criteria in the Court's case selection; the "importance" of the question is decidedly secondary. The Stern and Gressman treatise on Supreme Court practice notes that "the Court continues to grant certiorari in many cases that do not appear to be 'certworthy' for any reason other than the existence of a conflict, real or alleged."[191]

The Court's focus on resolving lower court conflicts is obvious from the high percentage of certiorari grants involving questions over which the lower courts have differed. Professor David Stras reviewed petitions for certiorari, lower court opinions, and Supreme Court opinions for all the cases decided in the 2004, 2005, and 2006 terms and discovered that approximately seventy percent of the cases resolved by the Court during those years involved a split among the lower courts.[192] Professor Hellman conducted similar research for the 1983-1985 terms and the 1993-1995 terms, but limited his study to conflicts between federal courts of appeals.[193] From 1983-1985, forty-five percent of the Court's cases concerned a conflict, and from 1993-1995, that percentage increased to sixty-nine percent. Professor Stras reviewed cases from the 2003-2005 terms using criteria identical to Professor Hellman's and found that

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

[191] Robert L. Stern et al., Supreme Court Practice § 4.4, at 228 (8th ed. 2002) [hereinafter Stern & Gressman].

[192] David R. Stras, The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 Tex. L. Rev. 947, 981 (2007). In the 2003 Term, 45 cases (58.4%) involved a lower court conflict; in the 2004 Term, 60 cases (78.9%) involved a conflict, and in 2005, 60 cases (70.6%) involved a conflict. Id. at 982. Professor Stras excluded from the study cases that were dismissed as improvidently granted, cases involving three-judge panels, and cases arising under the Court's original jurisdiction. Id. at 981 n.200.

[193] Hellman, supra note 16, at 415–16. Professor Hellman included only cases in which the Supreme Court's opinion stated that it granted review to resolve an intercircuit conflict or that made the presence of an intercircuit conflict clear, or cases in which an explicit recognition of a conflict by one or more circuit court opinions was brought to the Court's attention before certiorari was granted.

approximately sixty percent of the cases involved a conflict between the courts of appeals.[194]

Of course, the high percentage of conflict cases, standing alone, does not prove that the Court has prioritized standardization of federal law over other values. Perhaps the presence of a circuit split is a relatively minor factor and serves only to move an issue higher up the Supreme Court's queue. The Justices may have a short list of areas of law they think important to clarify, and they will first take up those issues that have continually produced a difference of opinion among the circuits and state supreme courts. Thus, the presence of a split may simply be a reason to prioritize the resolution of an issue the Court would have eventually chosen to address in any case. Another possibility is that divisions among the lower courts are just a proxy for other factors that make a case certworthy. For example, a complicated statute affecting large numbers of people is likely to produce more divergent judicial opinions than a straightforward statute that generates little litigation.

The evidence does not support these alternative explanations, however. In his book *Deciding to Decide: Agenda-Setting in the United States Supreme Court*, political scientist H.W. Perry investigated the factors involved in the current Court's case selection. His data came primarily from interviews with five Supreme Court Justices and sixty-four former Supreme Court law clerks about the certiorari process.[195] Time and again, these individuals emphasized the importance of lower court conflicts in determining whether a case was "certworthy." When Professor Perry asked one Justice "[w]hat would make a case an obvious grant?" the Justice replied, "Conflict among the circuits might."[196] At least one Justice believed that "virtually every conflict should be taken as long as the issue is not completely trivial."[197] While other Justices were more circumspect, all viewed conflicts as "very important." As Perry put it, "[a]

[194] Stras, supra note 192, at 983.

[195] H.W. Perry, Deciding to Decide: Agenda Setting in the United States Supreme Court 9 (1991) (most of the clerks and all of the justices he interviewed served during the 1976–1980 terms).

[196] Id. at 246.

[197] Id. at 247.

circuit split is not simply a formal criterion for cert.; it is probably the single most important criterion."[198]

The Justices and former law clerks interviewed by Perry described a split as a primary, not secondary, factor affecting the certiorari determination. Perry reported that "informants almost invariably would say that first they looked to see if there were a circuit conflict, and then they looked to see if the conflict involved an important issue."[199] One law clerk told Perry, "I really do believe that a conflict is the reason that most cases are taken. In some ways it is the driving force."[200] Another explained, "[conflicts] really dominated and were clearly the most important reason for taking cert."[201] Although Perry acknowledged that a conflict was neither a necessary nor sufficient factor in determining whether to grant certiorari, he wrote that the "overwhelming majority of my informants, indeed almost all, listed this as the first and most important thing they looked for in a petition."[202] In short, conflicts seem to drive the Court's interest in a case, rather than serving merely as a method of triaging the issues the Court wished to address.[203]

Furthermore, some of the Supreme Court's recent cases involve trivial legal questions that would never have come before the Court absent lower court disagreement. Admittedly, no one could accuse the Roberts or Rehnquist Courts of dodging the hard cases, as well illustrated by their decisions upholding the partial birth abortion ban, striking down anti-sodomy laws, rejecting military

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[198] Id. at 251.
[199] Id. at 253.
[200] Id. at 246.
[201] Id.
[202] Id.
[203] The comments of Kevin Russell, a former Supreme Court law clerk and a partner at the Supreme Court litigation boutique Howe & Russell, exemplify the conventional wisdom that a split is by far the most important factor in the Court's case selection. Russell recently authored a blog post on how to write a "convincing cert. petition when there is no direct circuit split." His post acknowledged that:

> the Supreme Court's most important criteria for granting certiorari is the existence of a significant division of authority on an important question of federal law. The Court views its principal role as ensuring uniformity of federal law and, as a result, the vast majority of cases granted implicate circuit splits (or splits involving state courts of last resort).

Kevin Russell, Commentary: Writing a Convincing Cert. Petition When There Is No Direct Circuit Split (May 17, 2007), http://www.scotusblog.com/wp/commentary-writing-a-convincing-cert-petition-when-there-is-no-direct-circuit-split/.

commissions, and resolving disputes over presidential elections. Yet sprinkled among these blockbuster cases are a host of issues so minor as to be laughable. As the leading Supreme Court practice treatise rather dryly puts it: "[A] reading of the opinions often leaves the impression that cases are sometimes taken solely because of a conflict, the issue not otherwise appearing to be important."[204]

Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc. provides a good example.[205] In that case, the Court addressed whether a defendant's "receipt" of a complaint transmitted by facsimile, rather than delivered by mail, triggered the 30-day time limit for removal from state to federal court under 28 U.S.C. Section 1446(b). The Court explained that it had granted certiorari "[b]ecause lower courts have divided on th[at] question."[206] Likewise, in *Becker v. Montgomery*, the Court tackled the question whether a typewritten name on a notice of appeal could satisfy the signature requirement in the Federal Rules of Civil Procedure, and, if not, whether that defect deprived a federal court of jurisdiction—a question over which the circuits disagreed.[207]

It would appear that the *only* reason these cases merited review was that they involved a question over which the lower courts were divided. Yet there was no special need for uniformity in these areas of the law. The issues in these two cases primarily affected lawyers who practice in the federal courts—a group that has a professional responsibility to keep abreast of the rules governing the practice of law in their jurisdictions. Moreover, the conflicts were not debilitating. If the lower courts had remained divided on these questions, lawyers would either have had to keep track of which jurisdictions followed which rules, or they could have played it safe and made sure to remove every case within thirty days of receipt of the com-

[204] Stern & Gressman, supra note 191, § 4.4, at 232.

[205] 526 U.S. 344 (1999).

[206] Id. at 349.

[207] 532 U.S. 757 (2001). As Dale Becker stated in his petition for certiorari, the Sixth Circuit's decision in his case conflicted with the Fifth, Seventh, and Eleventh Circuits, which held that a timely, but unsigned, notice of appeal satisfies the jurisdictional requirements of Rule 4(a). Robinson v. City of Chicago, 868 F.2d 959, 963 & n.2 (7th Cir. 1989); McNeil v. Blackburn, 802 F.2d 830, 832 (5th Cir. 1986); Thiem v. Hertz Corp. 732 F.2d 1559, 1562 (11th Cir. 1984); see Petition for Writ of Certiorari, Becker v. Montgomery, 532 U.S. 757 (2001) (No. 00-6374), available at 2000 WL 34005502.

plaint, whether by fax or regular service of process, and to handwrite rather than type any signature—hardly a great inconvenience. Although *Murphy Brothers* and *Becker* are the most vivid examples, dozens of other certiorari grants over the last few years are more notable for the depth of the splits involved than for their legal significance. Cases such as these illustrate more vividly than statistics the Court's focus on resolving lower court conflict.

The Supreme Court's docket has been shrinking year by year, reaching a low of sixty-eight cases in the 2006 Term. Two sitting Justices have publicly speculated that the Court's docket is smaller because there are fewer circuit splits to resolve.[208] Justice Souter told a House subcommittee that he believed the reduction in the Court's caseload was caused by

> [twelve] years of the sort of Reagan-Bush appointments which resulted in a greater degree . . . of [philosophical] homogeneity in the Courts of Appeals . . . than you are likely to find in too many judicial epochs. The result of that was that there were simply fewer conflicts in the circuits than historically you will find to be the case.[209]

At the Judicial Conference of the Ninth Circuit, Justice Breyer commented: "For a number of years there have been fewer conflicts in the circuit, so perhaps we are entering an era of harmony in the circuits."[210] Even if true,[211] a decrease in circuit splits is not a reason for the Supreme Court to hear fewer cases unless it considers providing uniformity to be its primary role in our system of government.

[208] See supra note 15 and accompanying text.

[209] Arthur D. Hellman, Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts, 63 U. Pitt. L. Rev. 81, 146 (2001) (quoting Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the House Comm. on Appropriations, 104th Cong., 2d Sess. Part 6 at 23–24 (1996) (testimony of Justice Souter)).

[210] Id. (quoting Pamela A. MacLean, Justices Defend High Court's Taking Fewer Cases, Daily Journal (Los Angeles), July 29, 1999, at 3).

[211] See Hellman, supra note 16, at 414–16 (finding that empirical data refuted Justice Souter's "homogeneity" claim).

2. Readjusting the Supreme Court's Priorities.

The Supreme Court could radically alter its caseload if it applied a version of *Chevron* deference to decisions by the lower courts. If the lower courts reach varied but reasonable conclusions about the meaning of a federal statute and the differences do not create significant disruption or inequality, then the Court should stay its hand. The Court should put more emphasis on whether a lower court has *erred* in its interpretation on an important question than on whether there is a disagreement among the circuits, particularly if Justices Souter and Breyer are correct that the judges on the courts of appeal agree with each other more now than in the past. The Supreme Court is likely to do a better job of statutory interpretation than the lower courts, and thus there are good reasons for the Court to search out and correct lower court decisions that misread federal law. All nine justices focus on the problem, and they have more time and resources to devote to each case they address than do the lower federal courts. If the Court has the capacity to address nonuniformity after it has resolved these kinds of cases, it should do so. But the presence of a split, standing alone, should be low on its list of criteria for granting certiorari.

Certainly there are cases for which standardizing federal law is important—cases in which inconsistent interpretations would negate the utility of the law, would be too difficult for interstate actors to follow, would lead to confusion, or would place unfair burdens on the citizens of some jurisdictions. In his thorough examination of circuit splits, Arthur Hellman listed these as characteristics of intolerable circuit splits demanding Supreme Court attention.[212] But as Professor Hellman noted, these cases make up a small minority of circuit splits.

The Court need not abandon its reliance on lower court conflict as a means of identifying worthwhile cases altogether, but it should do more than just ask petitioner to assert that the split is on an "important" question, as Rule 10 currently provides. This amorphous criteria has not enabled the Court to identify cases in which uniformity is truly vital, rather than merely preferable. After demonstrating the existence of a split, petitions should explain why it is a problem: Does it create two or more incompatible standards of

[212] See Hellman, By Precedent Unbound, supra note 42.

conduct? Does it impose unfair burdens on some regions of the country? Does the existence of the split undermine the effectiveness of the law? Even if the question of law is one that affects many people in many parts of the country, the Court should not find it necessary to resolve the dispute unless a lingering split creates these types of problems.

Changes to Rule 10 would signal to the federal bench and bar that the Supreme Court will now be reviewing different types of cases. Deemphasizing uniformity would likely produce some interesting reactions from other participants in the legal system. Lawyers might be slower to file certiorari petitions in cases involving a split, and more likely to do so when a case involves a more significant issue over which there has been no divergence of opinion. Some observers of the federal courts claim that circuit splits create uncertainty and inspire litigation, but those problems would diminish if the Court were willing to let most go unresolved. Congress might get more involved in promoting uniformity were it to see the Court relinquish this role. Finally, the "outlier" circuits—that is, the most frequently reversed circuits viewed as being at the edges of the ideological spectrum—would no longer dominate the Court's agenda, since the Court would not need to devote the time and energy to keep them in line.

If the Supreme Court were to downgrade resolution of circuit splits, what types of cases should it review instead? That question is not one that can be answered thoroughly here. But it is worth at least noting the types of cases in which the Supreme Court is uniquely situated to add value. The federal courts are the only branch of government insulated from political pressure, and as a result are uniquely capable of making the kinds of unpopular decisions that would be political suicide for politicians. Courts can rein in an overzealous executive aggrandizing power during wartime, strike down laws targeting unpopular minorities, insist that the Constitution's procedural hurdles be faithfully adhered to, and demand that the government provide due process before depriving citizens of life, liberty, or property. Of course, all of the federal courts share life tenure and salary protections, and thus some contend that the Supreme Court is not needed to protect the supremacy of federal law when the lower courts are available to hear such cases. As noted previously, however, it is more difficult for a single

district judge, or a panel of three circuit judges, to contradict the position of either or both of the political branches, especially when they are told by government lawyers that a ruling against them would jeopardize the safety of the United States. The Supreme Court alone has the stature to consider these issues on equal footing with the executive and legislative branches, and thus these are the kinds of cases that should be the Supreme Court's first priority.

CONCLUSION

This Article makes the admittedly counter-intuitive claim that the federal courts have overvalued uniformity in the interpretation of nonconstitutional federal law. The text of Article III does not assign federal courts that task, and evidence from the First Judiciary Act and other sources suggest that the founding generation did not intend for the federal courts to harmonize interpretation of federal law. Federal courts were established primarily to protect the supremacy of federal law and to provide a neutral forum for disputes between states and foreign nations—tasks that were sure to keep them busy enough in the years following the nation's founding.

Nor is uniformity for its own sake worthy of so much of the third branch's time and attention. Reasonable variations in the interpretation of ambiguous laws are not necessarily unfair, illegitimate, or disruptive. The federal system itself demands that citizens comply with the different laws of the different states, so it is unreasonable to claim that varied interpretations of federal law are automatically problematic. In any case, the federal judiciary lacks the institutional capacity to establish a single, nationwide interpretation of ambiguous federal laws. Congress is better suited than courts to making the policy choices at the heart of many disputes over the meaning of federal law, and is also better at determining when uniformity is truly important. Uniformity might generally be preferable, and in a small percentage of cases essential, but it should not be among the judiciary's first concerns.