CIRCUIT CAPTURE AND THE NATIONAL COURT OF APPEALS

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Confidence in our federal courts is at an all-time low. Mired in ethical scandals and lurching aggressively to the right, the Supreme Court has been a target both for blame and reform. But as important as Supreme Court reform is, that narrow focus misses the bigger picture and perhaps a bigger problem. After all, most cases will never get beyond the twelve regional U.S. Courts of Appeals, which have become just as polarized but without the same level of attention. The intermediate appellate tier's regional organization is an arbitrary product of history, and it no longer makes sense. In fact, it's making things worse. By creating a patchwork of discrete and powerful judicial fiefdoms, the regional circuits are subject to capture: exploitation by partisan actors for political advantage. Capturing a single circuit is enough to wreak havoc on the rule of law, and it's happening. One need not look further than the current Fifth Circuit, an ultraconservative stronghold constantly in the headlines for its sweeping, disruptive, and politically-charged decisions. This structural problem demands a structural solution: replacing the regional circuits with a single, unified National Court of Appeals. This Article argues that a single, centralized intermediate federal appellate court would alleviate the partisan problems generated by captured circuits, promote uniformity of federal law, and streamline the appellate process.

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INTRODUCTION

"[J]udicial reform is no sport for the short-winded."[1]

We are facing a crisis of confidence in our federal courts. Polarization and partisanship in both the judicial selection process and judicial decision-making have yielded a dramatic decline in the public's trust of the judicial branch. Much of the blame lies with the Supreme Court, whose repeated ethical scandals and aggressive rightward tilt have renewed calls for major court reform—from court-packing to jurisdiction stripping, from term limits to lottery dockets, and much more in between.[2] But these proposals only scratch the surface because the problems our courts face run deeper than that, and the Supreme Court is not the only court in need of reform. After all, most cases will go no further than the twelve regional U.S. Courts of Appeals, which increasingly suffer from the same polarization and politicization problems but

1. NAT'L CONF. OF JUD. COUNCILS, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, at xix (Arthur T. Vanderbilt ed., 1949).

2. *See* sources cited *infra* notes 328–30.

without the same level of scrutiny. As a result, public confidence in our federal court system is at an all-time low.[3]

The regional organization of the intermediate appellate tier is a relic of a bygone era that has long since outgrown its initial justification. Perhaps it made sense when the nation's first circuit courts were staffed by Supreme Court Justices who had to contend with the realities of early nineteenth-century travel and communication. But as the country expanded and the circuit courts grew from trial courts to distinct appellate courts focused on error correction, Congress's decision to keep the regional circuit structure paved the way for their ultimate evolution into the powerful, lawmaking U.S. Courts of Appeals we know today. And to make matters worse, partisan entrenchment efforts are aggressively exploiting that structure for political gain. There is no better example than the current Fifth Circuit—an ultraconservative court stacked with appointees by Donald Trump handpicked for their conservative bona fides and constantly in the headlines for its sweeping, disruptive, and politically charged decisions.

This insidious problem—one of circuit capture by partisan actors—is structural, and a structural problem requires a structural solution: the dissolution of the regional circuits. The idea of a single, unified National Court of Appeals is not new. Several commissions, study groups, and committees have unsuccessfully proposed it in one form or another in a never-ending quest to combat the courts' increasing caseloads. But the problems the courts face today are not as simple as rising caseloads. Today's problems challenge the system's legitimacy. And taking aim at the margins and working within the bounds of the current structure will not solve them. To the contrary, it is the bounds of the current structure that exacerbate them.

This Article contributes to the broader court reform discussion in two important ways. First, it seeks to solve a newer, different, and more dangerous problem—one that demands innovative solutions and will only get worse if left unaddressed. Conservatives are reaping the benefits of their decades-long efforts to transform the courts into a political arm of the Republican Party and have no reason to change course now. Liberals, for their part, have eschewed viewing the courts as means to political ends, but there is nothing stopping them from fighting back and following the same playbook. And so, on goes the judicial race to the bottom—taking the system's legitimacy down with it. Second, this Article's proposal for a National Court of Appeals leverages modern advancements in technology and court administration to conceptualize a truly national court that can combat partisan manipulation, promote uniformity of federal law, and streamline the appellate process.

Since their creation, change has been the destiny of the federal courts, although it has never been quick or easy. This proposal, and others that will hopefully follow, can serve as a catalyst for further thoughtful deliberation and eventual concrete action. Section I traces the history and development of the federal appellate courts from trial courts with limited appellate jurisdiction staffed by traveling Supreme Court Justices to full-fledged courts of last resort with tremendous lawmaking authority and minimal

3. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historic Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/2HS7-AL4B].

Supreme Court review. Section II first examines prior unsuccessful efforts at major structural reform and then explains why those proposals were ill-suited at the time to solve the contemporary problem of crushing caseloads. Then, it introduces the modern problem of circuit capture. Focusing on the current U.S. Court of Appeals for the Fifth Circuit, this Section illustrates the havoc that can be wrought by a captured circuit and explains why it will only get worse without meaningful structural reform. Finally, Section III advocates for a single National Court of Appeals in place of the regional circuit system. Drawing in part on the administrative experience of the Ninth Circuit and the success of remote proceedings during the COVID-19 pandemic, this Section explains how the single National Court of Appeals is structured, how it operates, the problems it solves, and why likely criticisms—while not without merit—cannot overcome the need for drastic structural change.

I. THE EVOLUTION OF THE REGIONAL CIRCUITS AND THEIR POWERS

Our judicial system has always had the Supreme Court, trial courts, and intermediate appellate courts in some form. But the function and power of what we now know as the regionally based U.S. courts of appeals has changed dramatically since the introduction of regional judicial circuits in 1789. The first "circuit courts" were the country's primary federal trial courts with only limited appellate jurisdiction.[4] They also had no judges of their own.[5] Instead, they were staffed by a rotating group of local federal district judges and Supreme Court Justices.[6] They were organized into larger, regional circuits—rather than more numerous state-based districts—to accommodate the realities and limits that 1700s travel placed on the circuit-riding Justices.[7] And nearly all their judgments were subject to the full Supreme Court's review.[8] In the eyes of the Framers, uniformity of the nascent federal law was paramount, and that required Supreme Court involvement at every level.[9]

Over the ensuing centuries as the country and the federal courts' jurisdiction expanded, the number and boundaries of the judicial circuits changed to keep up.[10] At the same time, these changes necessitated scaling back the involvement of the Supreme Court, which simply couldn't keep pace with either its circuit-riding obligations or its own docket.[11] In 1891, after a century of marginal structural changes, the Evarts Act overhauled the federal judiciary by creating dedicated intermediate federal appellate courts, staffed by their own judges, that would serve as courts of last resort in the lion's share of cases needing only error-correction review.[12] By 1925, circuit riding was abolished, and Supreme Court review was nearly entirely discretionary.[13] As the

4. *See* sources cited *infra* note 21.
5. *See* sources cited *infra* note 24.
6. *See* sources cited *infra* notes 24–25.
7. *See* sources cited *infra* note 26.
8. *See* sources cited *infra* note 22.
9. *See* sources cited *infra* notes 27–34 and accompanying text.
10. *See* sources cited *infra* notes 50–58 and accompanying text.
11. *See* sources cited *infra* notes 59–72 and accompanying text.
12. *See* sources cited *infra* notes 73–83 and accompanying text.
13. *See* sources cited *infra* notes 84–88 and accompanying text.

dockets of the courts of appeals grew and the docket of the Supreme Court shrank, the opportunity (and power) of each to declare the national law followed in kind.

Today, we still have regional judicial circuits. But the system is woefully out of date and the historical justifications for it can no longer withstand scrutiny in light of today's problems. With only appellate jurisdiction, the modern-day U.S. courts of appeals bear far more lawmaking responsibility than their earlier counterparts. With each circuit having their own dedicated judges, rules, and operating procedures, they have developed their own personalities and idiosyncratic practices. And with Supreme Court review entirely discretionary, they have the final say on nearly all cases and issues that come before them.[14] What started as a means to harmonize federal law has transformed into an unrecognizable patchwork system of discrete, powerful, and independent judicial fiefdoms.[15]

Part I.A details the origins of the federal court system's regional structure and the limited lawmaking influence of the early circuit courts. Then, Part I.B explains how the country's expansion—in terms of geography, population, and federal law—necessitated both constant reorganization and modification of the regional circuits and reduced involvement of the Supreme Court. Finally, Part I.C introduces the modern U.S. Courts of Appeals and tracks their aggregation of lawmaking power.

A. The Origins of Regional Organization

Article III of the Constitution established a single "Supreme Court" but granted to Congress the authority to create "such inferior Courts" as needed.[16] And in 1789, Congress did just that. The Judiciary Act of 1789 created two additional types of federal courts: thirteen district courts and three circuit courts.[17] Each of the thirteen district courts, staffed by a single district judge, sat within a judicial district that generally conformed to existing state lines.[18] The district courts were trial courts of

14. For example, between April 1, 2020 and March 31, 2021, the U.S. Courts of Appeals terminated 47,210 cases. *See Federal Judicial Caseload Statistics 2021*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 [https://perma.cc/QD59-MGZQ] (last visited Oct. 18, 2024). By contrast, during the October 2021 Supreme Court Term, only "70 cases were argued and 63 were disposed of in 58 signed opinions." Chief Just. Roberts, *2022 Year-End Report on the Federal Judiciary*, SUP. CT. 5 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/L56L-HTLB].

15. Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 544–45 (2010) [hereinafter Dragich, *Uniformity*] ("The courts of appeals have evolved from merely decentralized access points into independent adjudicatory bodies within the federal court system.").

16. U.S. CONST. art. III, § 1.

17. *See* An Act To Establish the Judicial Courts of the United States, ch. 20, §§ 2–4, 1 Stat. 73, 73–75 (1789).

18. *Id.* §§ 2–3; *see also* Jon O. Newman, *History of the Article III Appellate Courts, 1789-2021*, FED. JUD. CTR. 3 (Nov. 2, 2021) [hereinafter Newman, *History*], https://www.fjc.gov/sites/default/files/materials/31/Appellate%20Court%20History%2012-14-21.pdf [https://perma.cc/DV2N-GK2H] ("One district was created in nine states (Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, and South Carolina), two districts were created in Massachusetts (the Maine District and the Massachusetts District), two districts were created in Virginia (the Virginia District and the Kentucky District). No districts were created in North Carolina or Rhode Island, neither of which had then ratified the Constitution." (footnotes omitted)).

limited jurisdiction, hearing primarily admiralty and minor criminal cases.[19] The three circuit courts sat within a regionally defined judicial circuit, organized in this first iteration as "the eastern, the middle, and the southern circuit[s]," and were made up of contiguous subsets of the thirteen districts.[20]

But these circuit courts were not exclusively—or even primarily—appellate courts. Instead, they had mixed jurisdiction and sat both as the primary trial courts with original jurisdiction, "concurrent with the courts of the several States," over serious criminal cases, most civil cases with diversity of citizenship and an amount in controversy over $500, and also as appellate courts with appellate jurisdiction over the decisions of the district courts within their respective regions.[21] The Supreme Court was the country's principal appellate court, and final judgments from the circuit courts could be appealed to the Supreme Court by writ of error so long as the matter in dispute exceeded $2,000.[22] As trial courts with Supreme Court review available as a matter of right in many cases, the formal lawmaking influence of the circuit courts was minimal.[23]

The circuit courts also had no permanent judges—instead, each was staffed by two Supreme Court Justices and one district judge from a district within that circuit.[24] At the time, there were six Supreme Court Justices and, to accommodate their involvement, the circuit courts were grouped into three geographic regions.[25] Given the realities of eighteenth-century transportation and communication, it would have been impossible to stretch the Justices' travel commitments further.[26]

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19. ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 23 (2d ed. 2002).

20. An Act To Establish the Judicial Courts of the United States § 4, 1 Stat. at 74–75. The Eastern Circuit covered the districts of New Hampshire, Massachusetts, Connecticut, and New York, the Middle Circuit covered the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, and the Southern Circuit covered the districts of South Carolina and Georgia. *Id.*; *see also* Newman, *History*, *supra* note 18, at 3.

21. An Act To Establish the Judicial Courts of the United States § 11, 1 Stat. at 78–79 ("[T]he circuit courts shall also have appellate jurisdiction from the district courts ").

22. *Id.* § 22, 1 Stat. at 84–85 ("[U]pon a writ of error final judgments and decrees in civil actions" in the circuit courts may "be re-examined and reversed or affirmed in the Supreme Court."); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 4 (1996) ("Appeal in all cases was a right rather than something in the discretion of the appellate court."). Before 1889, there was virtually no avenue for appeal from a conviction in a federal criminal case. *See* Just. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. L. REV. 1, 6 (1986).

23. *See* Thomas B. Bennett, *There Is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1688 (2023) (explaining that the trial-focused circuit courts "were not as exclusively concerned with the law *alone* as purely appellate courts are").

24. An Act To Establish the Judicial Courts of the United States § 4. The Act provided that "any two" of the Justices and district judge "shall constitute a quorum." *Id.*

25. *Id.* § 1 ("That the [S]upreme [C]ourt of the United States shall consist of a [C]hief [J]ustice and five associate [J]ustices ").

26. *See, e.g.*, Martha Dragich, *Back to the Drawing Board: Re-examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201, 211 (2011) [hereinafter Dragich, *Drawing Board*] ("Under conditions then prevailing, travel even to a limited number of districts was difficult for judges; without regional division, constituting the circuit courts would have been virtually impossible." (footnote omitted)); Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 43–44 [hereinafter Dragich, *Century*] ("Dividing the federal courts into regions was prudent when prevailing modes of transportation and communication made it impractical to operate the federal courts on a nation-wide basis."); *see also* Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a*

It was a feature of this design, not a bug, that "the [J]ustices of the Supreme Court would have the responsibility of presiding in the major federal trial court throughout the country."[27] This practice, known as "circuit-riding," yielded several benefits in the eyes of the Framers. For one, it allowed the Justices to answer definitively and authoritatively the burgeoning questions of federal law first raised in the circuit courts.[28] For another, it kept the Justices attuned to the laws of the states in which they heard cases because of the prevalence of diversity suits on the circuit courts' dockets.[29] This was important, too, because issues of state law routinely made their way to the Supreme Court on appellate review.[30] And for another still, it helped legitimize the new (and unusual) federal court system.[31] The Justices' travels—and their rotation through the different circuits[32]—put them in contact with local judges, members of the bar, and the public at large as representatives of a unified branch of the newly formed federal government.[33] As a result (and as intended), there was greater harmony in the

Unified Court of Appeals, 39 ST. LOUIS U. L.J. 455, 464 (1995) [hereinafter Weis, *Overloaded Circuits*] (noting that the initial regional organization of the circuit courts "began when the rate of communication was measured by the speed at which a horse could travel, or a flatboat could float down the Ohio, or a schooner could sail along the Atlantic coast"). Indeed, it has been suggested that Congress forewent creating additional circuit courts "to spare Supreme Court [J]ustices circuit-riding assignments to distant districts." Jon O. Newman, *A Statutory Oddity*, 105 JUDICATURE 46, 50 (2021) [hereinafter Newman, *Statutory Oddity*] (explaining that Congress instead "gave circuit court trial jurisdiction to many district courts").

27. SURRENCY, *supra* note 19, at 35; *see also* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 7 (Dec. 18, 1998) [hereinafter 1998 REPORT] ("This approach saved the money a separate corps of judges would require, exposed the justices to the state laws and legal practices that affected the Supreme Court docket, and promoted familiarity with the government in the country's far reaches.").

28. *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1717 & n.47 (2007) ("[U]niform outcomes among the district courts were more common because of the Justices' recurring contact with local district judges."). *See generally* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 (1990) (discussing the history of the Judiciary Act of 1789).

29. *See* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 797 n.23 (2020); Stras, *supra* note 28, at 1716.

30. *See, e.g.*, Rehnquist, *supra* note 22, at 4 ("Justices needed exposure to state laws in order to decide better the cases which came to the Supreme Court for appellate review "); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1761 (2003) (explaining that "circuit riding allowed the justices to stay attuned to local law," which was important because "[c]ases involving state law claims routinely came before the Supreme Court for appellate review").

31. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 4–5 (1928) (explaining that "[n]o other English-speaking union ha[d] a scheme of federal courts," and thus "[t]he American judicial experiment" was "unique in character"); RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 4 (1989) ("Indeed, 200 years later, few countries with federal forms of government have lower national courts to enforce the law of the national government.").

32. SURRENCY, *supra* note 19, at 43 ("The [1802] Act changed the previous practice of different [J]ustices holding terms of the Circuit Court, and thereafter, it has become customary that a [J]ustice remains the circuit [J]ustice for the same circuit during his tenure on the Supreme Court.").

33. FRANKFURTER & LANDIS, *supra* note 31, at 19 (explaining that the circuit courts and circuit riding [J]ustices "served as symbols of the new nation, which would evoke and foster the attachments of the people to the still tenuous Union"); Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal To Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 919 (1990) [hereinafter Baker, *Circuit Boundaries*] (explaining that the riding circuit "enhanced the federalizing influence of the third branch"); Stras, *supra* note 28, at 1716–17; Glick, *supra* note 30, at 1760–61; *see also*

development of federal laws because, either as a matter of first impression in the circuit courts or on appellate review, the Supreme Court was going to have its say.[34]

But almost immediately, external pressures demanded change that, over time, would diminish the Supreme Court's direct influence throughout the lower courts. One was the growing size of the country. As new states ratified the Constitution or were admitted to the Union, Congress created additional districts and expanded the territorial reach of the regional circuits.[35] In less than a decade, the number of judicial districts had nearly doubled from thirteen to twenty-three. Another was the persistent objections of the Supreme Court Justices to the burdens of circuit riding (which were only getting worse as the country grew and the circuits expanded).[36]

So, in 1801, Congress acted and adopted several reform proposals put forth in the preceding decade. Continuing Congress's trend of modifying the geographical scope of the regional circuits, the Judiciary Act of 1801 ("1801 Act") reorganized the twenty-three judicial districts into six new judicial circuits, now designated numerically (e.g., the "First Circuit").[37] The Act also abolished the Justices's circuit-riding duties and created sixteen new circuit court judgeships.[38] And finally, the Act gave the circuit courts jurisdiction for all cases arising under federal law.[39] This was a dramatic makeover of the original federal court system (and a significant increase in its power).

Timing is everything, and the timing of the 1801 Act was "so tainted by politics" that its changes were short-lived.[40] In the election of 1800, Thomas Jefferson and the Republicans had defeated John Adams and the Federalists.[41] After the election, the lame-duck Federalist Congress passed the 1801 Act and gave the outgoing President Adams the opportunity to fill all the new circuit court judgeships with Federalist Party members—hence the 1801 Act's ominous nickname: the "Midnight Judges Act."[42]

Dragich, *Drawing Board*, *supra* note 26, at 216 ("The presence of both a Supreme Court [J]ustice and the local district judge on the circuit courts incorporated a strong national perspective to balance local ties of district judges "); WHEELER & HARRISON, *supra* note 31, at 9.

34. RITZ, *supra* note 28, at 66 ("No judgment in a circuit court could be entered without the concurrence of at least one..... [Supreme Court Justice]."); Dragich, *Uniformity*, *supra* note 15, at 558–59 ("In theory, no circuit court decision (trial or appellate) could be rendered without the participation of at least one Supreme Court [J]ustice."); *see also* Bennett, *supra* note 23, at 1688.

35. *E.g.*, Newman, *History*, *supra* note 18, at 4 & 32 nn.38–42 (recounting the creation of the Districts of North Carolina, Rhode Island, and Vermont).

36. SURRENCY, *supra* note 19, at 25–27, 42–47; FRANKFURTER & LANDIS, *supra* note 31, at 21–22; Stras, *supra* note 28, at 1718–19.

37. An Act To Provide for the More Convenient Organization of the Courts of the United States, Ch. 4, § 6, 2 Stat. 89, 90 (1801).

38. *See id.* §§ 6–7, 2 Stat. at 90–91; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 185–86 (1926); Newman, *History*, *supra* note 18, at 11–12.

39. An Act To Provide for the More Convenient Organization of the Courts of the United States § 11, 2 Stat. at 92.

40. PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 33–34 (2d ed. 2018); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 30 (1993).

41. FRANKFURTER & LANDIS, *supra* note 31, at 26 & n.72.

42. *See* An Act To Provide for the More Convenient Organization of the Courts of the United States § 7; FRANKFURTER & LANDIS, *supra* note 31, at 21 (dubbing the "second major Judiciary Act" as "the law of the 'Midnight Judges'").

Less than a year later and after Jeffersonian Republicans had taken power, the new Congress repealed the 1801 Act, abolishing the new circuit court judgeships, and reimposing circuit-riding duties.[43]

Despite the ominous circumstances under which it was enacted, many of the 1801 Act's reforms had been urged long before the 1800 presidential election.[44] And so, a month after repealing the 1801 Act, Congress passed another act that preserved the 1801 Act's increase in judicial circuits from three to six, kept the 1801 Act's numerical designations, and established new circuit courts within each judicial circuit.[45] However, believing that the increase in federal judges and federal jurisdiction was an affront to state sovereignty, Congress did not create any new circuit court judgeships or reimpose federal question jurisdiction.[46] Instead, Congress reintroduced a modified version of the old circuit court staffing system. With six circuits and six Supreme Court Justices, each circuit court now consisted of one district judge and one Supreme Court Justice (rather than two) to ease circuit-riding obligations while maintaining Supreme Court influence, albeit to a lesser extent.[47]

In the end, the circuit courts were left largely unchanged—they remained the country's primary federal trial courts with minimal supervisory responsibilities over the district courts. But Supreme Court influence was already starting to wane.

B. The Balance of Power Starts To Shift

For the century following its creation in 1789, the federal judiciary remained a work in progress. As the nation expanded westward, Congress routinely altered the number and structure of the regional circuits to cover the new territory. New judicial circuits were created and abolished, and states were shuffled from circuit to circuit as Congress saw fit. At the same time, population growth, a robust national economy, and the corresponding extension of federal jurisdiction buried the courts in work.[48] The Supreme Court fell years behind its docket and circuit-riding went by the wayside.[49]

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43. *See* An Act To Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes, ch. 8, § 1, 2 Stat. 132, 132 (1802).

44. SURRENCY, *supra* note 19, at 25–30. For example, Attorney General Edmund Randolph, in response to a request by Congress for proposals to reform the budding federal judiciary, suggested that the federal courts be given exclusive federal question jurisdiction and that the circuit courts be staffed only by district judges because "'[i]nferior [c]ourts ought to be distinct bodies from the Supreme Court.'" *Id.* at 26.

45. An Act To Amend the Judicial System of the United States, ch. 31, § 4, 2 Stat. 156, 157–58 (1802).

46. SURRENCY, *supra* note 19, at 27–32 ("[The 1801 Act] was a conspiracy to enlarge the number of federal judges and to expand the jurisdiction of the Federal Courts at the expense of the State Courts.").

47. An Act To Amend the Judicial System of the United States § 4; Newman, *History*, *supra* note 18, at 12; *see also* Menell & Vacca, *supra* note 29, at 798 ("[T]he 1802 Act provided that a quorum of only one judge could sit as the circuit court. This flexibility, as well as subsequent legislation, gradually led to the decline of circuit riding, but it remained a tremendous burden into the late nineteenth century." (footnote omitted)); Stras, *supra* note 28, at 1721–26.

48. FRANKFURTER & LANDIS, *supra* note 31, at 60 ("This swelling of the dockets was due to the growth of the country's business, the assumption of authority over cases heretofore left to state courts, the extension of the field of federal activity.").

49. Stras, *supra* note 28, at 1725 & n.108 ("By 1888, the Court was nearly three years behind in adjudicating the cases on its plenary docket." (citing Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650 (2000))).

Congress tried piecemeal solutions—creating additional judgeships and further reducing formal circuit-riding obligations—but none could stem the tide of new cases or stop the havoc they wreaked on the circuit court system. As the federal judiciary prepared to celebrate its centennial anniversary, it barely functioned.

1. Modifying Structure

The constantly shifting composition of the circuit courts—their number, size, and geographic reach—during the preceding century reflected the reality that their regional organization was a matter of practical convenience: Congress could and did adjust that structure as needs required. By 1860, the Union had admitted thirty-three states and had substantial western territories. As those new states were admitted, Congress created additional judicial districts within them and assigned them to a judicial circuit—some of which already existed, and others of which were created to accommodate the nation's growth. Congress created the Seventh Circuit in 1807, the Eighth and Ninth Circuits in 1837, and the Tenth Circuit in 1863.[50]

During this time, Congress frequently redrew the boundaries of the circuits and regrouped states from one circuit to another.[51] For example, when Congress established the Eighth and Ninth Circuits in 1837, it added the newly admitted states of Illinois and Michigan to the Seventh Circuit and moved Tennessee and Kentucky from the Seventh Circuit to the Eighth Circuit.[52] In 1862, Congress similarly moved Illinois and Michigan to the Eighth Circuit and reshuffled Tennessee and Kentucky into the Sixth Circuit.[53] In addition to adding and modifying existing circuits, Congress was not afraid to abolish them either. In 1866, just three years after establishing it, Congress abolished the first iteration of the Tenth Circuit.[54] When it did so, it moved districts from California and Oregon into the Ninth Circuit (along with newly admitted Nevada).[55]

In all, between 1789 and 1866, Congress adjusted the number and composition of the circuit courts thirteen times.[56] In doing so, Congress demonstrated that there was no fundamental principle underlying either the regional circuit system or specific circuit boundaries—it all was subject to change if circumstances required.[57]

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50. Newman, *History*, *supra* note 18, at 8.

51. *See id.* at 5–11; Baker, *Circuit Boundaries*, *supra* note 33, at 920 ("Back then Congress was quite willing to redraw circuit boundaries to shift a state from one circuit to another as, for example, when Indiana was moved from the Seventh Circuit to the Eighth Circuit."); Dragich, *Uniformity*, *supra* note 15, at 560 ("Congress's willingness to change circuit boundaries highlights the structural insignificance of the circuit other than for convenience in convening courts around the country.").

52. Newman, *History*, *supra* note 18, at 9.

53. *Id.* at 8–9.

54. *Id.* at 8.

55. *Id.* at 10–11.

56. 1998 REPORT, *supra* note 27, at 8.

57. *See* Dragich, *Drawing Board*, *supra* note 26, at 233 (discussing how Congress "freely group[ed] states into new combinations as necessary or desirable"); Newman, *History*, *supra* note 18, at 11; POSNER, *supra* note 22, at 5–6 (reasoning that although "[t]he basic organizing principle of the federal court system has always been regional, . . . [t]he example of the Federal Circuit shows that there is nothing inevitable about organizing courts along regional lines").

Congress could freely make such changes because existing law was not defined (or confined) by the boundaries of any particular circuit. Concepts like law of the circuit had yet to develop, and for good reason. Much of the courts' dockets at the time concerned state law and, to the extent an important federal question was raised, the Supreme Court maintained its supervisory role through its circuit-riding obligations—at least in theory.[58]

2. Shifting Power

The country's westward expansion pushed the circuit-riding system to the brink.[59] President Abraham Lincoln rightfully declared during his 1861 State of the Union address that "the country generally has outgrown our present judicial system."[60] Congress, however, was between a rock and a hard place. The size of the country required more circuits, but more circuits required increasing either the current Justices' circuit-riding duties or the number of Justices.[61] The Justices were already woefully behind in their circuit-riding obligations, and continuing to add Supreme Court Justices risked making the Supreme Court "altogether too numerous for a judicial body of any sort,"[62] to say nothing of the contemporary political challenges of making those appointments in the Civil War era.[63]

In 1869, Congress found a temporary solution. The Act to Amend the Judicial System of the United States (the "1869 Act") increased the size of the Supreme Court from eight to nine to match the number of circuits, and authorized the appointment of one circuit judge in each circuit with "the same power and jurisdiction" of the assigned Supreme Court Justice.[64] To further ease the burden on the circuit-riding Justices,

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58. *See, e.g.*, Bennett, *supra* note 23, at 1688–89; Dragich, *Drawing Board*, *supra* note 26, at 235 ("When federal judges applied mainly state law to decide mostly local controversies, and when federal law was made and supervised effectively by the Supreme Court alone, circuit boundaries could change as necessary without disrupting existing law.").

59. Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687, 692 (1981) ("The federal judicial system, ill-equipped to handle the pre-Civil War demands on its resources, nearly ground to halt during this post-war period, buried in work.").

60. President Abraham Lincoln, First Annual Message (Dec. 3, 1861) (transcript available at https://millercenter.org/the-presidency/presidential-speeches/december-3-1861-first-annual-message [https://perma.cc/ENJ4-9L72]); *see also* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 1 (2013) ("For more than a century after that notable achievement, however, Congress continually experimented with the federal court system, and it is probably not too strong to say that it took Congress a long time to make sense out of the federal judiciary.").

61. FRANKFURTER & LANDIS, *supra* note 31, at 14 ("More circuits meant either more circuit riding for the Justices or more Justices for the circuit riding."); *see also id.* at 35–38 ("The legislative calendar shows the recurring effort to divorce the Supreme Court from the circuit courts. The Federalist scheme of 1801 [to add circuit judges] was revived by Webster A less radical remedy was sought in a bill calling for separate circuit judges for the western circuits. The third expedient was the familiar device of increasing the membership of the Supreme Court." (footnote omitted)).

62. Lincoln, *supra* note 60.

63. *Id.* (noting that there were already three vacant seats on the Supreme Court, two of which were previously held by "judges [who] resided within the States now overrun by revolt").

64. An Act To Amend the Judicial System of the United States, ch. 22, §§ 1–2, 16 Stat. 44, 44–45 (1869); *see also* Newman, *History*, *supra* note 18, at 12; FRANKFURTER & LANDIS, *supra* note 31, at 86–87; 1998 REPORT, *supra* note 27, at 9 ("Congress created nine circuit judgeships because the Supreme Court

Congress permitted the circuit court to be convened by either the circuit judge or a district judge sitting alone.[65] But taking with one hand what it gave with the other, Congress shortly thereafter in 1875 imposed on federal courts general jurisdiction over all claims arising under federal law, making them the primary venue "for vindicating every right given by the Constitution, the laws, and treaties of the United States."[66]

The effect on the circuit court system was dramatic and swift. The Supreme Court, still obliged to hear nearly every case brought to it, saw its docket explode from 636 cases in 1870 to more than 1,800 by 1890, making it near impossible for the Justices to attend the circuit courts at all.[67] And the ten circuit judges, responsible for holding court in sixty-five districts, didn't fare much better.[68] Most of the work fell to single district judges, who went from handling two-thirds of the circuit court work in the 1870s to nearly ninety percent in the 1880s—often hearing appeals from their own district court decisions.[69] As a later commission on the structure of the federal judiciary summed it up, "[t]his large increase in work, almost no increase in judgeships, and a structure designed for a different era, resulted in 'the nadir of federal judicial administration.'"[70]

[J]ustices could attend only a fraction of the circuit court sessions."). In 1887, Congress authorized an additional circuit judgeship on the Second Circuit. Act of Mar. 3, 1887, Ch. 347, 24 Stat. 492.

65. An Act To Amend the Judicial System of the United States §§ 1–2; *see also* Newman, *Statutory Oddity*, *supra* note 26, at 48.

66. FRANKFURTER & LANDIS, *supra* note 31, at 65 ("[A]ny suit asserting . . . a [federal] right could be begun in the federal courts; any such action begun in a state court could be removed to the federal courts for disposition."); Act of Mar. 3, 1875, ch. 13, §§ 1–2, 18 Stat. 470, 470–71.

67. Rehnquist, *supra* note 22, at 6; *see also* WHEELER & HARRISON, *supra* note 31, at 21 ("In 1860, the Court had 310 cases on its docket. By 1890, the 623 new cases filed that year brought the docket to 1,816 cases. The Court was years behind in its work and, unlike today, was obliged to decide almost all the cases brought to it."); Jonathan Steinberg, *Deciding Not To Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 4 (2008) ("After the Civil War, however, the number of cases the Court was obligated to decide under the 1789 Act's system 'grew dramatically,' because of 'the array of legal issues multiplied with the growing scale and complexity of federal law in American life.'" (quoting Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 392 (2004))); Glick, *supra* note 30, at 1824 (citing ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 89 (2003)); FRANKFURTER & LANDIS, *supra* note 31, at 34 ("Conditions compel the Justices either to slight their Supreme Court work with an undue delay in the disposition of appeals or to slight their circuit court work by insufficient attendance on circuit, or both.").

68. FRANKFURTER & LANDIS, *supra* note 31, at 86–87 ("But by 1890 the statutory duty of the Justices to attend circuit was practically a dead letter. Equally impossible was it for nine circuit judges, and, after 1887, ten, to hold circuit courts in sixty-five districts." (footnotes omitted)).

69. WHEELER & HARRISON, *supra* note 31, at 21 ("In the 1870s, single district judges handled about two thirds of the circuit court caseload. In the next decade, the figure was much closer to 90%."); *see also* 1998 REPORT, *supra* note 27, at 11 ("By the 1880s, district judges sitting alone handled close to 90% of the circuit court caseload and often sat on appeals from their own decisions."); FRANKFURTER & LANDIS, *supra* note 31, at 77 ("In almost every circuit, to the great complaint of suitors, the circuit court was held by a single judge, and in many instances the circuit judge was unable to sit in all his districts."); *id.* at 129 ("Circuit judges could pay only sporadic visits to the different districts and for brief periods. Very soon the old conditions were revived in aggravated form. Circuit courts fell into the hands of single judges and, in the main, judges of the district courts did circuit court work."); Menell & Vacca, *supra* note 29, at 800.

70. 1998 REPORT, *supra* note 27, at 10–11 (quoting PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 37 (3d ed. 1988)).

Congress knew it had to act again and considered a wide range of proposals to both relieve pressure at the Supreme Court and adapt the lower courts to modern times.[71] Reformers recognized that something had to be done, and that a dedicated intermediate court of appeals would solve many of the system's problems.[72] The result: the Circuit Court of Appeals Act of 1891.

C. The Modern U.S. Courts of Appeals and a Radical Realignment of Power

As the nineteenth century came to a close, the federal judiciary found itself in crisis. The nine dedicated circuit judges added by the 1869 Act couldn't keep up with the rising appellate caseload. That same caseload continued rising up to the Supreme Court where the Justices could not keep abreast of their own docket, let alone balance it with riding circuit. In a vacuum, these circumstances would put a strain on any court system. But these problems were exacerbated by the particular structure of the federal judiciary at the time. District judges and Supreme Court Justices had to do nearly all the work of the intermediate tier that sat between them. This structural problem demanded a structural solution: a new dedicated intermediate court of appeals.

But Congress didn't stop there. In the ensuing decades and culminating in the Judiciary Act of 1925 (colloquially known as the Judges' Bill), Congress gave the Supreme Court its much sought-after and near total discretion to choose its own cases. Taken together, the turn of the nineteenth century yielded far more than a structural reorganization of the federal judiciary. In truth, it saw a radical realignment of power and responsibility.

The Circuit Court of Appeals Act—known colloquially as the Evarts Act, after New York Senator William Evarts—established a new intermediate appellate court, called the "circuit court of appeals," in each of the nine existing regional judicial circuits and gave that court the power to hear appeals from the district and preexisting circuit courts.[73] The Evarts Act also increased the total number of circuit judges to

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71. FRANKFURTER & LANDIS, *supra* note 31, at 70 ("Direct relief of the Supreme Court was the focal point of Congressional discussion. Every one agreed that the labors of the Justices must be lightened."); *id.* at 129 ("[B]eginning with the seventies, the abolition of the circuit courts and some form of intermediate appellate tribunal were the two chief planks in every program for judicial reform.").

72. *See, e.g.*, Glick, *supra* note 30, at 1819 ("The only possible adequate remedy for the existing evil [is] . . . the establishment of a court of appeals in each of the circuits into which the country is now divided—a court intermediate between the Supreme Court and the circuit courts." (alteration in original) (omission in original) (quoting William Strong, *The Needs of the Supreme Court*, 132 N. AM. REV. 437, 445 (1881))); *id.* ("[I]t will probably compel the adoption of the plan which has always had my preference, an intermediate appellate court in each circuit " (quoting CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT: 1862-1890, at 404 (1939))); SCHWARTZ, *supra* note 40, at 177.

73. Circuit Court of Appeals Act of 1891, ch. 517, §§ 2, 6, 26 Stat. 826, 826, 828 ("That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act "); *see also* Bennett, *supra* note 23, at 1691 (citing § 4) ("The Evarts Act also stripped the preexisting 'circuit courts' of their appellate jurisdiction and gave it to the newly created courts of appeals."); WHEELER & HARRISON, *supra* note 31, at 24 ("Deference to tradition temporarily spared the old circuit courts, but the Act abolished their appellate jurisdiction."). Left largely obsolete, the original circuit courts—and all accompanying circuit-riding obligations by the Justices—were formally abolished in 1911. *See* Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167; FRANKFURTER & LANDIS, *supra* note 31, at

nineteen by authorizing the appointment of one additional circuit judge per circuit, giving each court at least two judges.[74] Supreme Court Justices were permitted but not required to sit on the courts of appeals. Rather, the assigned circuit justice, the circuit judges, and the local district judges were all competent to convene the three-member panels.[75]

The Evarts Act reflected Congress's view that federal law should be uniform, and the Supreme Court should remain its primary and final arbiter. In furtherance of that view, Congress gave the Supreme Court the power to more effectively control its docket by choosing its own cases through the writ of certiorari.[76] But cases that raised issues of constitutional interpretation or that challenged the constitutionality of a federal law were still entitled to mandatory Supreme Court review (and, in fact, could skip the courts of appeals altogether).[77] Cases that raised less important issues but did so in greater number went to the courts of appeals and typically no further.[78] Barring certification by the panel to or the grant of certiorari by the Supreme Court, the courts of appeals were effectively courts of last resort for a wide swath of relatively low-stakes suits.[79] Thus, the courts of appeals assumed the error-correction function, leaving to the Supreme Court the responsibility for enunciating uniform federal law.[80] Indeed, this division of responsibility was essential to the Evarts Act's passage.[81]

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134 ("Their epitaph was written by the Act of March 3, 1911, and on January 1, 1912, the circuit courts had ceased to be." (footnote omitted)).

74. Circuit Court of Appeals Act of 1891, ch. 517, § 1, 26 Stat. 826, 826.

75. *Id.* § 3, 26 Stat. at 827 ("[T]he Chief-Justice and the associate [J]ustices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits "); Newman, *History*, *supra* note 18, at 19.

76. Circuit Court of Appeals Act of 1891 § 6, 26 Stat. at 828 ("And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.").

77. *Id.* § 5, 26 Stat. at 827–28; *see also* FRANKFURTER & LANDIS, *supra* note 31, at 262–63 ("Even after the Circuit Courts of Appeals Act, cases which entirely involved the 'construction or application of the Constitution of the United States,' 'the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority,' or the jurisdiction of the district court as a federal court, and cases in which a state constitution or law was 'claimed to be in contravention of the Constitution of the United States,' together with prize cases, went directly from the district courts to the Supreme Court." (quoting Act of Mar. 3, 1911, ch. 231, § 238, 36 Stat. 1087, 1157)).

78. Circuit Court of Appeals Act of 1891 § 6, 26 Stat. at 828; FRANKFURTER & LANDIS, *supra* note 31, at 99 ("Evarts bifurcated the appellate stream from the district and circuit courts by sending one branch of intrinsically more important issues straight to the Supreme Court and diverting the more numerous but less difficult issues to the nine new appellate courts.").

79. Circuit Court of Appeals Act of 1891 § 6 ("[E]xcepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."); *see also* Menell & Vacca, *supra* note 29, at 801 ("These panels were courts of last resort for diversity suits and patent, revenue, criminal, and admiralty cases.").

80. Paul D. Carrington, *The Function of Civil Appeal: A Late Century View*, 38 S.C. L. REV. 411, 416 (1987) [hereinafter Carrington, *The Function of Civil Appeal*] ("The perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts. No one thought [intermediate] appellate courts necessary or useful in making law or policy."); Dragich, *Uniformity*, *supra* note 15, at 580 ("At the time

In the ensuing years, the two-track system of appeals worked. New cases docketed in the Supreme Court fell precipitously from 623 in 1890 to 275 in 1892.[82] The Supreme Court was able to reduce the total number of cases pending on its docket from the high watermark of 1,816 in 1890 to 692 by 1899.[83] But by the 1920s, caseloads were again on the rise and the Supreme Court again in arrears.

At the insistence of then-Chief Justice Taft, Congress passed the Judiciary Act of 1925 and made the Supreme Court's docket almost entirely discretionary.[84] By eliminating nearly all mandatory direct appeals to the Supreme Court from the district courts, Congress effectively granted to each court of appeals the same power vested in the Supreme Court in the pre-Evarts Act system.[85] Absent the Supreme Court's discretionary intervention, each court of appeals could have its own final say on all manner of cases, including the interpretation of federal statutes and the Constitution.[86]

This was a drastic pivot from the compromise that permitted the Evarts Act's passage, and it dramatically increased in the courts of appeals the power to declare law—for their own particular region, at least.[87] Prior to the Evarts Act, the boundaries of a judicial circuit divvied up the trial court responsibilities of Supreme Court Justices. After the Judges' Bill, those boundaries defined the jurisdiction of independent courts empowered to develop their own law subject to minimal review by the Supreme Court.[88]

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of their creation, the courts of appeals were clearly designed as error-correction courts; the whole point of the Evarts Act was to restore the Supreme Court's ability to enunciate and develop federal law.").

81. FRANKFURTER & LANDIS, *supra* note 31, at 258 ("The circuit courts of appeals could not have been established if a fair share of appellate review over claims of a federal character had not been reserved to the Supreme Court directly from the district courts. It was then only natural that distrust should be felt towards conferring on new and untried courts power over cases theretofore traditionally within the competence of the Supreme Court."); *see also id.* (explaining that providing direct review by the Supreme Court of important federal questions "prove[d] how unquestioned was the assumption that the Supreme Court was, as a matter of course, the guardian of all constitutional claims").

82. Rehnquist, *supra* note 22, at 7.

83. *Caseloads: Supreme Court of the United States, 1878-2017*, FED. JUD. CTR., https://www.fjc.gov/history/work-courts/caseloads-supreme-court-united-states-1878-2017 [https://perma.cc/7PVH-W36P] (last visited Jan. 2, 2025).

84. Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat. 936, 937–38 ; Menell & Vacca, *supra* note 29, at 804.

85. Act of Feb. 13, 1925 § 237; *see also* Menell & Vacca, *supra* note 29, at 804.

86. Rehnquist, *supra* note 22, at 8 (describing how the Judges' Bill gave the courts of appeals "much more finality in their decisions"); *see also* Bennett, *supra* note 23, at 1695 ("The courts of appeals thus have, as a practical matter, many more opportunities to declare the content of the law than the Supreme Court does.").

87. Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 602 (1969) ("The structure of the courts of appeals was not intended to allow regional adaptation of federal law. On the contrary, the legislative history of the Evarts Act indicates that these courts were intended to harmonize and unify the national law, not to fragment it." (footnote omitted)); *see also* RICHMAN & REYNOLDS, *supra* note 60, at 5 ("The combination of all these developments has caused profound changes in the role of the circuit courts, for now it is they, and not the Supreme Court, that must do most of the heavy lifting of maintaining federal case law."); Dragich, *Uniformity*, *supra* note 15, at 566 ("Thus, each circuit now functions as an independent adjudicatory body that develops its own law.").

88. Weis, *Overloaded Circuits*, *supra* note 26, at 459 ("Congress put in place a system that led to a balkanization of federal jurisdiction that haunts us today."); *see also* 1998 REPORT, *supra* note 27, at 12.

II. PRIOR REFORM EFFORTS AND TODAY'S PROBLEMS

Court reform has been dubbed "the dog that didn't bark," and aptly so.[89] In the past half century, more than a dozen committees, commissions, study groups, and the like have made various recommendations to reform the U.S. Courts of Appeals. The proposals ran the gamut. Some were modest, like limiting the size of en banc courts. Others were more aggressive, like splitting existing circuits or creating specialized courts. Many considered a new court: some version of a national court of appeals. The details varied from group to group—for some, it supplemented the existing regional circuits in a new tier; for others, it replaced them. But in all cases, the idea went nowhere.

That's not all that surprising given that the common instigator for these reform efforts was the persistent problem of growing appellate caseloads.[90] The simpler solution, and the one adopted most over the last fifty years, was to increase the total number of active circuit judgeships, which Congress did from 108 in 1977 to 179 by the end of 1990.[91]

The problem the courts face today is different. It is not one of caseload volume, but one of legitimacy. In 2022, the public's trust in the federal judiciary hit an all-time low of just forty-seven percent—a remarkable twenty percent drop from just two years before.[92] It is no coincidence that this sharp drop in confidence overlaps with the ascendence of Donald Trump's appointees—mostly white, male, and young, all with

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89. Menell & Vacca, *supra* note 29, at 843 (citing ARTHUR CONAN DOYLE, *The Adventure of Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 1, 42 (1894)).

90. *See, e.g.*, FED. JUD. CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 1–9 (1972) [hereinafter FREUND REPORT] ("The Courts of Appeals have encountered a dramatic rise in their own business, with a proportionate outflow to the Supreme Court We are concerned that the Court is now at the saturation point, if not actually overwhelmed."); COMM'N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 1–2 (1975) [hereinafter HRUSKA COMMISSION REPORT], *reprinted in* 67 F.R.D. 195, 204–05 ("Since 1960 the number of cases filed in [the courts of appeals] has increased 321[%], while the number of active judges authorized by the Congress to hear these cases increased only 43[%]."); FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5 (1990) [hereinafter FCSC REPORT] ("The number of cases filed in federal courts began to surge as the 1950s drew to a close, and the surge has continued without surcease to this day."); *see also* Weis, *Overloaded Circuits*, *supra* note 26, at 455 ("In each instance, caseload volume was the most basic of the myriad problems confronting the appellate courts.").

91. *See* Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 3(a), 92 Stat. 1629, 1632 (codified as amended at 28 U.S.C. § 44 note) (adding thirty-five circuit judgeships); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 346 (codified as amended at 28 U.S.C. 44 note) (adding twenty-five circuit judgeships); Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5098, 5098 (codified as amended at 28 U.S.C. § 44 note) (adding eleven circuit judgeships). Some structural changes were made as well, although they largely stayed within the existing regional circuit system. The Fifth Circuit was split in 1981, yielding a new Eleventh Circuit covering Alabama, Georgia, and Florida. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994. And in 1982, Congress created the Federal Circuit, giving it specialized jurisdiction over appeals involving patents, trademarks, and government contracts, among others. Federal Courts Improvement Act of 1982, Pub. L. 97-164, sec. 127, § 1295, 96 Stat. 25, 37–38 (codified as amended at 28 U.S.C. § 1295).

92. Jones, *supra* note 3. A 2023 poll found that 51% of Americans had either "not very much" confidence or "none at all" in the judicial branch, up from 38% in 2020. *In Depth: Topics A to Z*: *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/NN3S-2AMT] (last visited Mar. 24, 2025).

unimpeachable movement conservative credentials, and eager to make their mark on the law.[93] Nowhere was President Trump more aggressive (and successful) than his six appointments to the southern U.S. Court of Appeals for the Fifth Circuit, already regarded as the country's most conservative court. Emboldened by its supermajority status, the Fifth Circuit's archconservative bloc has exerted its influence over seemingly every hot-button issue of national importance, from abortion to guns to vaccines to immigration, and everything in between.

This aggression is the product of circuit capture. Circuit capture is a localized form of judicial partisan entrenchment through which a political party is able to advance its agenda nationwide by appointing enough judges to a particular regional circuit. And it is a problem created and exacerbated by the regional structure of the current circuit court system.

Part II.A reviews previous proposals to create some form of a national court of appeals to either supplement or replace the existing regional circuit courts and examines why those proposals were unsuccessful. Then, Part II.B explains the modern problem of circuit capture and why major structural reform is necessary to maintain the court system's legitimacy.

A. The Right Solution for the Wrong Problem

Growing caseloads have long been a thorn in the side of the federal court system and, in the last fifty years, several major study groups, blue-ribbon commissions, scholars of judicial administration, and the like have sought to find a workable solution.[94] Several were charged specifically with reviewing and making proposals about the structure of the circuit courts of appeals.[95] One proposal that kept popping up was that of a national court of appeals in one form or another. In some iterations, it supplemented the existing regional circuit system.[96] In others, it supplanted it.[97]

1. Proposals To Supplement the Existing Court Structure

Early proposals for a national court of appeals considered how the court might aid the Supreme Court in serving its monitoring function. The first group to float some iteration of a national court was the American Bar Foundation (ABF) in its 1968 report, which called for, among other reforms, a "national circuit."[98] This court would operate

93. *See* John P. Collins, Jr., *The Confirmation Death Spiral* 48–55 (Geo. Wash. L. Sch. Pub. L. Research Paper No. 2022-32, 2021) (describing the common traits of Donald Trump's circuit court appointees).

94. RICHMAN & REYNOLDS, *supra* note 60, at 128 ("[T]hirteen separate committees, commissions, study groups, reports, and plans have addressed the circuit courts' problems ").

95. *See* HRUSKA COMMISSION REPORT, *supra* note 90, at 1–10; FED. JUD. CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 1–2 (1993) [hereinafter 1993 REPORT]; 1998 REPORT, *supra* note 27, at 1–2.

96. *See infra* Part II.A.1.

97. *See infra* Part II.A.2.

98. AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS 7 (1968) [hereinafter ABA REPORT]. Prior to the creation of the circuit courts of appeals, Senator John T. Morgan of Alabama championed the creation of a single federal court of appeals "to avoid the conflict of

akin to a division of the existing courts of appeals, situated between the regional circuits and the Supreme Court, and would be manned on a rotating basis by judges drawn from the existing regional circuits.[99] The court would hear cases when a conflict arose between the circuits, and its decisions would set precedent nationally.[100] Review by the Supreme Court would be permitted but was "expected to be the exception rather than the rule."[101]

As concerns about the Supreme Court's ability to manage its own docket grew, additional high-profile study groups considered augmenting the existing court structure to relieve the pressure at the top. The Federal Judicial Center, headed by Chief Justice Burger, commissioned a study group chaired by Harvard Law School Professor Paul Freund ("Freund Group") to study the rising caseload of the Supreme Court. Building on the ABF's proposal, the Freund Group proposed a similar new division of the courts of appeals to screen cases appropriate for Supreme Court review.[102] In this iteration, the National Court of Appeals would consist of seven current circuit judges drawn from their regional circuits on a rotating basis to serve staggered three-year terms.[103] The court would conduct an initial review of all cases eligible for Supreme Court review and would certify to the Supreme Court some number of cases—the Freund Group proposed four to five hundred per year—worthy of Supreme Court review.[104] The Supreme Court, in turn, would accept some subset of that number for argument and decision.[105] When a conflict arose between the regional circuits but the issue did not warrant Supreme Court review, the National Court of Appeals would have the power to hear the case itself, sitting as a full seven-member court.[106]

The Freund Group's attempt to meddle with the Supreme Court's autonomy was sharply criticized on various grounds and went nowhere. Some, like Yale Law School Professor Charles Black, considered the Freund Group's National Court of Appeals

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decisions inherent in nine co-ordinate tribunals." AM. ENTER. INST. FOR PUB. RSCH., PROPOSALS FOR A NATIONAL COURT OF APPEALS 3–4 (1977); *see also* FRANKFURTER & LANDIS, *supra* note 31, at 83 ("Senator Morgan, as we have seen, urged that nine new appellate tribunals would beget further confusion "); Edward Dumbauld, *A National Court of Appeals*, 29 GEO. L.J. 461, 461 (1941) (proposing a "National Court of Appeals, intermediate between the Supreme Court of the United States and the several circuit courts of appeals").

99. ABA REPORT, *supra* note 98, at 7.

100. *Id.*

101. *Id.*

102. FREUND REPORT, *supra* note 90, at 18–24.

103. *Id.* at 18–19.

104. *Id.* at 21.

105. *Id.* at 22.

106. *Id.* at 21 (noting that the decision of the National Court of Appeals "would be final, and would not be reviewable in the Supreme Court"). The Freund Group considered, but ultimately rejected, other national court proposals that created a new layer between the courts of appeals and the Supreme Court. *Id.* at 16. In one proposal, the new court would decide cases referred to it by the Supreme Court. *Id.* This proposal functions almost in the inverse of the one ultimately proposed, because the burden would still lie with the Supreme Court to review initially the ever more burdensome number of petitions filed with it—one of the very problems the Freund Group was charged with alleviating. Another, dubbed the National Court of Review, would be a single fifteen-member court, divided into civil, criminal, and administrative subject-matter divisions, with appellate jurisdiction co-extensive with the Supreme Court. *Id.* at 17.

unconstitutional.[107] Sitting Supreme Court Justice William Brennan found the premise that the Supreme Court was overworked "unsupportable," and emphasized that the Court's Justices' participation in the case screening process was central to their "ability to perform the responsibilities conferred on [them] by the Constitution."[108] And Second Circuit Judge Henry Friendly, one of the nation's most respected and influential judges, questioned the effect of such a court "on the prestige and morale of the courts of appeals."[109]

Around the same time, Congress established the Commission on Revision of the Federal Court Appellate System, chaired by Nebraska Senator Roman Hruska ("Hruska Commission").[110] The Hruska Commission was charged with studying "the structure and internal procedures of the Federal courts of appeal system" and recommending changes to advance the "expeditious and effective disposition" of the courts' exploding caseload.[111] With its focus on the courts of appeals rather than the Supreme Court, the Hruska Commission recommended a national court of appeals that could take cases on referral from the Supreme Court or by transfer from a U.S. court of appeals panel, but had discretion not to do so.[112] Transfer was appropriate in the case of a circuit split or when the case raised an issue of federal law "applicable to a recurring factual situation."[113] Rather than draw from the existing court of appeals bench, the National Court of Appeals would have its own judges appointed by the President and confirmed by the Senate.[114] It likewise went nowhere.[115]

Undeterred by the failure of the Freund Group's and Hruska Commission's fourth-tier proposals, Chief Justice Burger promoted a modified version dubbed the Intercircuit Tribunal.[116] This temporary court would be made up of some number of active and senior circuit judges who would hear cases in larger panels—five or nine judges—the decisions of which would be binding nationally.[117] The court would take

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107. *See* Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 885 (1974). In Professor Black's view, the usurpation of the Supreme Court's screening function made the National Court of Appeals "a 'Supreme Court' in everything but name, and the Constitution provides for [only] *one* Supreme Court, quite as clearly as it provides for [only] one President." *Id.*

108. William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 475–76 (1973).

109. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 51–54 (1973) ("One does not like to imagine what Judge Learned Hand would have said about having his decisions reviewed by anything like the National Court. To be sure, not every circuit judge now regards each member of the Supreme Court as his intellectual superior, but all have a respect and reverence for the Court as an institution that they could never entertain for a body like the proposed National Court.").

110. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

111. HRUSKA COMMISSION REPORT, *supra* note 90, at 8–9.

112. *Id.* at 72–73.

113. *Id.* at 79.

114. *Id.* at 69.

115. Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395, 401 (2000) [hereinafter Baker, *Generation*].

116. Warren E. Burger, *The State of the Judiciary Address: The Time Is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86, 88.

117. Menell & Vacca, *supra* note 29, at 829; Burger, *supra* note 116, at 88. There were a few variations in contemporary proposals that differed at the margins. *Compare* 129 CONG. REC. 3402 (1983) (statement of Sen. Robert Dole) (proposing that two judges be selected from each of the thirteen circuits and cases heard in

cases on referral from the Supreme Court, and its decisions would be binding in the absence of further Supreme Court review.[118] The court would run for five years, after which Congress could make an informed decision about what to do next.[119]

Although some of these proposals interfered with the Supreme Court's business more than others, all affected the Supreme Court in some respect. And the reformers learned the hard way that the Supreme Court was "the lethal third rail of judicial policymaking."[120] Moreover, none got to the heart of the problems in the courts of appeals—rising caseloads, yes, but also conflicts among the circuits. The next round of study would focus more directly on the courts of appeals, the problems of their current structure, and ways to fix them.

2. Proposals To Abolish the Regional Circuit Courts

In 1988, Congress established the Federal Courts Study Committee ("Study Committee") to examine, among other things, "the structure and administration of the Federal court system," including "methods of resolving intracircuit and intercircuit conflicts in the courts of appeals."[121] The Study Committee, whose members were appointed by Chief Justice Rehnquist, sought input from a wide range of stakeholders, including judges, court personnel, bar associations, scholars, think tanks, and others.[122] Several submitted proposals that went beyond those offered by the Freund Group and Hruska Commission and advocated for, in some form or other, abolition of the regional circuits altogether.

Professor Paul Carrington of Duke Law School proposed a single U.S. court of appeals, with general divisions, special divisions, and a national administrative panel.[123] General divisions (of which there would be approximately forty) would be comprised of four circuit judges from proximate states.[124] Appeals would be heard by three-judge panels drawn from those four judges, which would give both district judges and litigants near certainty in who would hear their cases on appeal.[125] Each general division would have jurisdiction to hear appeals from some number of specifically designated district judges from the states in which the general division circuit judges

five-judge panels), *with* Burger, *supra* note 116, at 88 (proposing that the court consist of one judge from each of the thirteen circuits with cases heard in a nine-judge panels), *and with* Thomas E. Baker, *An Elaborate Intercircuit Panel* 1, 5–7, *in* 2 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART III: WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) [hereinafter FCSC WORKING PAPERS AND SUBCOMMITTEE REPORTS] (proposing a fourth-tier court that would take cases on referral from the Supreme Court and whose members would be drawn from the regional courts of appeals in a manner akin to the method "for selecting the chief judge of the circuit").

118. Menell & Vacca, *supra* note 29, at 829; Burger, *supra* note 116, at 88.

119. Menell & Vacca, *supra* note 29, at 829; Burger, *supra* note 116, at 88.

120. Baker, *Generation*, *supra* note 115, at 402.

121. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 102, Stat. 4642, 4644 (1988) (codified as amended at 18 U.S.C. § 331 note).

122. FCSC REPORT, *supra* note 90, at 31–32.

123. Letter from Paul D. Carrington to Joseph F. Weis, Jr., Chairman, Fed. Cts. Study Comm. (May 21, 1989), *in* FCSC WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 117.

124. *Id.* at 8–9.

125. *Id.*

sit.[126] Most decisions would be made orally from the bench after argument and without conference or written opinion.[127]

However, when a case raised a substantial issue of federal law, it could be designated for a precedential written opinion and decided by a seven-member special division panel.[128] Special division assignments would supplement assignments to a general division, so most active judges would have assignments to both divisions.[129] Special divisions would be organized by subject matter (e.g., antitrust, taxation, bankruptcy, labor, and any other "field in which a substantial number of opinions are likely to be written").[130]

Professor Daniel Meador of the University of Virginia School of Law had a similar proposal to combat the problems caused by "the existing balkanized structure" and promote uniform national law.[131] Under Professor Meador's plan, the regional circuits would be replaced with a single "United States Court of Appeals" as the "sole federal appellate court between the district courts and the Supreme Court."[132]

It too would have several different divisions: numbered, lettered, and named. Numbered divisions would consist of nine judges and bear the weight of error-correction review.[133] Decisions of the numbered divisions would be subject to discretionary review by five lettered divisions, each with seven judges. The lettered divisions would bear the lawmaking responsibility and act as an en banc court for the numbered divisions within their jurisdiction, "provid[ing] authoritative decisions on important issues of federal law."[134] Finally, the named divisions would provide "non-regional, nationwide appellate review" in certain categories of cases (such as administrative law, tax law, admiralty law, and decisions of state supreme courts on issues of federal law).[135] The jurisdictional boundaries of the various divisions would be set by Congress with power given to the Judicial Conference of the United States ("Judicial Conference") to redraw divisional lines and create or abolish divisions as business required.[136] It would be expected that judges—all denominated as U.S. circuit judges without reference to any division—"would likely serve on more than one division and would be rotated among divisions from time to time."[137]

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126. *See id.*

127. *Id.* at 9.

128. *Id.* at 9–10.

129. *Id.* at 10.

130. *Id.*

131. Memorandum from Daniel J. Meador to the Subcommittee on Structure of the Federal Courts Study Committee Regarding Reorganization of the Federal Intermediate Appellate Courts 2 (Aug. 18, 1989) [hereinafter Meador Memorandum], *in* FCSC WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 117.

132. *Id.*

133. *Id.* at 3 (explaining that the "primary mission of a numbered division would be to provide expeditious review of district court judgments to ensure that substantial, prejudicial errors had not been committed," and that "[a] very high percentage of these divisions' decisions would be unpublished").

134. *Id.* at 4.

135. *Id.* at 4–5.

136. *Id.* at 7.

137. *Id.* at 8.

Finally, recognizing that the courts of appeals had become "increasingly regionalized" and "consider[ed] themselves autonomous," Judge Joseph Weis Jr., of the U.S. Court of Appeals for the Third Circuit, proposed a "unified Court of Appeals."[138] In Judge Weis's view, the regional circuit system no longer made sense given modern advancements in communication and travel.[139] Similar to Professor Carrington's proposal, the unified court would have small, localized divisions of nine judges, with appeals from specific districts assigned to each division.[140] To reduce the risk of intracourt conflicts, Judge Weis proposed prefiling review of opinions and requiring sign-off from six of the division's nine judges before issuance.[141] Although he did not propose anything specific, Judge Weis accepted that the court would require some form of special division to resolve the conflicts inevitable on a court of that scale.[142]

Ultimately, the Study Committee declined to formally recommend any particular structural alternatives, but it encouraged further study of the issue and offered five structural options to start that discussion.[143] One of the five options was a "single, centrally organized" court of appeals in place of the regional circuits.[144] The report is short on details, but it suggested that the new court could "create (and abolish) subject-matter panels as appropriate."[145] The Study Committee highlighted the nationalized court's flexibility, noting that it "would allow easy allocation of judges and resources to places of particular need," and "would eliminate intercircuit conflicts."[146] At the same time and given its size and scope, the Study Committee cautioned that this court "could have all the earmarks of a large bureaucracy."[147]

Congress permitted further study of the national circuit proposals by the Federal Judicial Center but without much consequence.[148] After recounting many of the same proposals considered by the Study Committee, the Federal Judicial Center Report rejected any need for structural change to the current system.[149] Having concluded that caseloads remained the primary stress on the courts of appeals, the Federal Judicial

138. Joseph F. Weis, Jr., *A Proposal for a Unified Court of Appeals* 1–2, *in* FCSC WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 117.

139. Weis, *Overloaded Circuits*, *supra* note 26, at 464 ("Although electronic communications and air travel have all but obliterated the concepts that made the circuit system a necessity, the federal courts still remain its prisoners today.").

140. *Id.* at 465–67.

141. *Id.* at 465 ("Panel opinions that have been subjected to pre-filing review by a reasonable number of judges can be better opinions and less subject to error."). Judge Weis noted that this would only work in smaller divisions, and that divisions of "15, 20, 28, or 38" would prove unmanageable. *Id.* at 465–66.

142. *Id.* at 466.

143. FCSC REPORT, *supra* note 90, at 117–22. Notably, the Study Committee "d[id] *not* favor" the National Court of Appeals proposed by the Hruska Commission, as it "would not solve the problem of growth within the courts of appeals." *Id.* at 117.

144. *Id.* at 121.

145. *Id.*

146. *Id.*

147. *Id.*

148. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5104 (codified as amended at 28 U.S.C. § 620 note).

149. 1993 REPORT, *supra* note 95, at 105–21.

Center Report determined that such stress would not "be significantly relieved by structural change to the appellate system."[150] Similarly, in 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals likewise "propose[d] no general realignment of the circuit structure."[151] The White Commission, as it was known, was created in response to congressional disagreement about whether the Ninth Circuit was too big to function properly and should be split (and in what way).[152] It concluded that although regional "circuit boundaries are, to be sure, the product of history more than logic," they were nevertheless "firmly established in the American legal order" and had "not outlived [their] usefulness."[153]

B. The Problem of Circuit Capture

In the end, these proposals went nowhere. They stalled because the problem they sought to solve was primarily one of overburden, and that problem has an easier solution—adding more judges. The problems of today are a different story. They smack of partisanship and political power grabs, and they undermine the fundamental source of judicial legitimacy—judicial independence. And a driving force behind them is circuit capture.

1. Circuit Capture Defined

Circuit capture is a blend of two related but distinct phenomena. The first is partisan entrenchment. Partisan entrenchment is "[t]he temporal extension of partisan representation," achieved in the judicial context by appointing judges sympathetic to the appointing party's political aims.[154] Because judges in the federal system have life tenure,[155] if appointed in sufficient overall numbers or at the highest levels, they can affect political outcomes long after the presidential administration that appointed them ends.[156] This concept is not novel—indeed, it dates back to the Founding era. The

150. *Id.* at 155.

151. 1998 REPORT, *supra* note 27, at 59.

152. *Id.* at 1. The Commission was charged with "study[ing] the present division of the United States into the several judicial circuits" and "the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit." *Id.* at 2 (quoting Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 305(a)(1)(B)(i)–(ii), 111 Stat. 2440, 2491.

153. *Id.* at 59.

154. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) ("When a party wins the White House, it can stock the federal judiciary with members of its own party.").

155. U.S. CONST. art. III, § 1 (stating that judges "shall hold their Offices during good Behaviour").

156. Balkin & Levinson, *supra* note 154, at 1067 ("They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution."); *see also* Mark Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 FORDHAM L. REV. 755, 764 (2006) ("[T]he coalition about to lose power can rely on the judges already in position, who were appointed when that coalition's dominance was unchallenged and seemingly permanent, to carry the coalition's policies forward."); Collins, *supra* note 93, at 35 ("[L]egislative achievements come and go, but judges are for life.").

canonical example of judicial partisan entrenchment—attempted, at least—is the Midnight Judges Act of 1801.[157]

The second is court capture. Court capture is a spin-off of agency capture, where an outside industry exerts undue influence over the agency charged with its regulation such that the agency "end[s] up serving the interests of the industry, rather than the general public."[158] We tend to view courts—generalist Article III federal courts in particular—as immune from capture by outside influences for both structural and practical reasons.[159] Structurally, life tenure and a guaranteed salary theoretically shield federal judges from outside influences, affording them greater political independence than agency regulators.[160] Practically, the influence of any one captured judge (and particularly a lower court judge) is minimal given the rules of venue, the random assignment of cases, and the sheer volume of federal judges—890 authorized federal judgeships.[161]

Partisan entrenchment, however, changes that calculus because there is no need for outside influences. Rather, the influence is of a decidedly inside nature—it comes from the political party responsible for selecting and appointing the judges in the first place. It wasn't always easy to appoint judges at either extreme of the political spectrum. Procedural safeguards like the blue slip (which required the sign-off of home state senators)[162] or the filibuster (which required a sixty-vote supermajority to end debate on a nominee) encouraged moderation and consensus, limiting the risk of successful partisan entrenchment efforts.[163] But times have changed. Senate Democrats "nuked" the filibuster for judicial nominees in 2013, and Senate Republicans did away with blue slips for circuit court nominees during the first Trump administration.[164] Now, as long as the White House and Senate are controlled by the same party, they can appoint whomever they want to the bench. Partisan entrenchment, therefore, is much

157. Tushnet, *supra* note 156, at 763 ("The Federalist Congress and President John Adams attempted to pack the federal courts by reorganizing them in a way that created new positions filled by the Federalist 'midnight judges.'"); *see also supra* notes 40–43 and accompanying text**.**

158. Wood v. Gen. Motors Corp., 865 F.2d 395, 418 (1st Cir. 1988).

159. J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1565 nn.137–38 (2018) (collecting authorities); *see also* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636 (2023) ("[C]ourts are able to wrap their power grab in the disembodied language of 'law.'").

160. Anderson, *supra* note 159, at 1566.

161. *Id.* at 1572. The Northern District of Texas is the exception that proves the rule. *See* N.D. Tex. Special Order No. 3-344 (Sept. 14, 2022) ("The clerk of court is to assign each new case filed in the Amarillo Division to Judge Matthew Kacsmaryk.").

162. For more on blue slips, see Collins, *supra* note 93, at 8–9.

163. *Cf.* Courtney Bublé, *What a Second Trump Term Could Mean for the Courts*, LAW360 (Sept. 20, 2024, 4:49 PM), https://www.law360.com/articles/1859552/what-a-second-trump-term-could-mean-for-the-courts (showing that [ninety-seven percent] of President H.W. Bush's forty-two circuit court appointees were confirmed without a single "no" vote, but none of President Biden's forty-four appointees to date have been confirmed without at least one "no" vote).

164. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html; Chuck Grassley, *100 Years of the Blue Slip Courtesy*, THE HILL (Nov. 15, 2017, 2:40 PM), https://thehill.com/blogs/congress-blog/judicial/360510-100-years-of-the-blue-slip-courtesy/ [https://perma.cc/WN4P-ZWTU].

easier. The judge in a partisan entrenchment scenario today doesn't need to be wooed after they take the bench—they are already on the team, and that is the reason they were selected in the first place.[165]

Circuit capture is a localized form of partisan entrenchment. The influence of even a significant number of appointees can be blunted if they are spread out across the system. But, when a concentrated force—a majority, if not supermajority—of judges is appointed by one political party or particular president to a discrete regional circuit, the influence can be such that the circuit becomes captured by that political movement.[166] And in our regional system, it can take only one captured circuit to wreak havoc on the rule of the law and undermine faith in the judicial system.

Circuit capture is more than just a numbers game, and it is more than objecting to particular outcomes. Rather, it is about how those numbers use their collective strength to achieve partisan ends. Beyond the numbers, the telltale signs of a captured circuit are that it (1) actively frustrates the policy goals of the opposing party's administrations, (2) contorts the normal appellate process in favor of partisan outcomes in politically charged cases, and (3) aggressively uses the rehearing en banc process to usurp panel autonomy and stifle the views of the minority. The Fifth Circuit easily satisfies these criteria.

2. The Captured Fifth Circuit

The Fifth Circuit covers just three states—Texas, Louisiana, and Mississippi—but the decisions it makes are felt nationwide.[167] Widely regarded as the most conservative appeals court in the country,[168] a supermajority of the Fifth Circuit's judges—twelve of

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165. Anderson, *supra* note 159, at 1570 ("Some scholars believe that life tenure is a means to achieve 'partisan entrenchment,' by which they mean political parties using life-tenured judges to extend their power beyond their time in elected positions."); *see also* Collins, *supra* note 93, at 39–40 (describing White House Counsel Don McGahn's litmus test for judicial nominees).

166. *See* Elena Mejia & Amelia Thomson-DeVeaux, *It Will Be Tough for Biden To Reverse Trump's Legacy of a Whiter, More Conservative Judiciary*, FIVETHIRTYEIGHT (Jan. 21, 2021), https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse/ [https://perma.cc/NWJ9-FNGF] ("Presidents can really have an impact if they can remake a specific, powerful circuit "); *see also* Tushnet, *supra* note 156, at 763 ("But, as we all know, the Federalists had another arrow in their quiver: the appointment of John Marshall to serve as Chief Justice. Marshall's job, it seemed, was to entrench Federalist constitutional theories and interpretations in the Supreme Court, thereby impeding the implementation of Jeffersonian policies.").

167. 28 U.S.C. § 41.

168. *See, e.g.*, Ann E. Marimow, *Trump's Lasting Legacy on the Judiciary is Not Just at the Supreme Court*, WASH. POST (Jan. 29, 2023, 5:00 AM), https://www.washingtonpost.com/politics/2023/01/29/5th-circuit-court-trump-judges-conservative/ ("The U.S. Court of Appeals for the 5th Circuit in New Orleans has long leaned conservative. But the arrival of a half-dozen judges picked by President Donald Trump—many of them young, ambitious and outspoken—has put the court at the forefront of resistance to the Biden administration's assertions of legal authority and to the regulatory power of federal agencies."); Abbie VanSickle, *Abortion Pill Fight to Be Heard by One of Nation's Most Conservative Courts*, N.Y. TIMES https://www.nytimes.com/2023/05/16/us/politics/abortion-pill-fifth-circuit-appeals.html ("By virtually any measure, it is the most conservative appeals court in the country " (internal quotation marks omitted)); Brent Kendall, *Conservative Appeals Court Is Prime Venue for Biden-Era Litigation,* WALL ST. J. (Oct. 22, 2021, 6:34 PM), https://www.wsj.com/articles/conservative-appeals-court-is-prime-venue-for-biden-era-litigation-11634907602 (describing the Fifth Circuit as "one of the nation's leading conservative courts").

seventeen active judges and eighteen of twenty-five judges overall—were appointed by Republican presidents. Six of the court's active judges were appointed by Donald Trump in his first term, the most of any one president.[169] And those six appointees are quite conservative, even by Trump appointee standards.

President Trump's first appointee to the court was Texas Supreme Court Justice Don Willett.[170] Judge Willett is said to have set out to "build such a fiercely conservative record" on the Texas Supreme Court that he would "be unconfirmable for any future federal judicial post—and proudly so."[171] While running for reelection to the Texas Supreme Court, Judge Willett said during an interview that "there is no ideological daylight to the right of me."[172] Another campaign ad boasted that Judge Willett was "the judicial remedy to Obamacare" and said that, as a member of the Texas Attorney General's Office, he "fought the liberals who tried to remove the words 'Under God' from our Pledge."[173]

President Trump's second appointee is probably his most well-known: Judge James Ho.[174] In his first months on the bench, Judge Ho wasted little time making his presence felt. His first opinion was a dissent from the denial of rehearing en banc—by a twelve to two vote—in a case about Austin, Texas's $350 limitation on individual donations to mayoral and city council candidates.[175] The three-judge panel assigned to hear the case originally (of which Judge Ho was not a member) held unanimously that the campaign contribution limit passed constitutional muster.[176] Unwilling to defer to his colleagues, Judge Ho's dissent began with a critique of "[t]he unfortunate trend in modern constitutional law . . . to create rights that appear nowhere in the Constitution"—a dig at abortion rights—yet "disfavor rights expressly enumerated by

169. President Trump's first two appointees filled Texas-based seats vacated in 2012 and 2013, respectively. Because of the Senate Judiciary Committee's blue slip policy, Texas's Republican senators were able to block President Obama from filling the seats. *See* Collins, *supra* note 93, at 35–36 (discussing the hardball tactics used by Republican senators to amass vacancies for President Trump to fill).

170. *Roll Call Vote 115th Congress - 1st Session*, U.S. SEN. (Dec. 13, 2017), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00315.htm [https://perma.cc/RS2C-62LH] (demonstrating the nomination of "Don R. Willet, of Texas, to be a Circuit Judge, United States Court of Appeals for the Fifth Circuit").

171. Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html.

172. *See AFJ Nominee Report: Don Willett*, ALL. FOR JUST. 1 (2017), https://afj.org/wp-content/uploads/2019/12/AFJ-Willett-Report.pdf [https://perma.cc/7MDE-JCB4].

173. Justice Don Willet, *Justice Don Willett Commercial: Conservative*, YOUTUBE (May 7, 2012), https://www.youtube.com/watch?v=WJQFioXc4Mg [https://perma.cc/U7DC-DLLE].

174. In addition to his provocative opinions, Judge Ho is a vocal opponent of "cancel culture" and "wokeness." *See* David Lat, *Free Speech, Wokeness, and Cancel Culture in the Legal Profession*, ORIGINAL JURISDICTION (Dec. 8, 2022), https://davidlat.substack.com/p/free-speech-wokeness-and-cancel-culture [https://perma.cc/2YAF-MYMG]; *see also* Ramirez v. Guadarrama, 2 F.4th 506, 511 (5th Cir. 2021) (Ho, J., concurring in the denial of rehearing en banc) (concluding in a case about granting qualified immunity to police officers who tased a man soaked in gasoline and caused him to catch fire and burn to death that "[a]s judges, we apply our written Constitution, not a woke Constitution").

175. Zimmerman v. City of Austin, 888 F.3d 163, 164 (5th Cir. 2018) (Ho, J., dissenting from the denial of rehearing en banc).

176. Zimmerman v. City of Austin, 881 F.3d 378, 379 (5th Cir. 2018).

our Founders"—a nod to gun rights.[177] The real problem, according to Judge Ho, was not money in politics but rather the size of government. "[I]f you don't like big money in politics," he wrote, "then you should oppose big government in our lives."[178]

His second opinion also concerned abortion—tangentially, at least.[179] The case was about Texas's fetal burial requirements and the burden they placed on women seeking an abortion.[180] But the appeal was about discovery.[181] A nonparty religious organization had stated that it would provide for the burial of fetal tissue across the state without charge, and the plaintiffs sought information about the organization's role in the enactment of the regulations.[182] The district court ordered the organization to comply on an expedited basis, but the Fifth Circuit intervened.[183] Although the issue was procedural, Judge Ho wrote a separate concurrence to warn how the case revealed "how far we have strayed from the text and original understanding of the Constitution," to note the "moral tragedy of abortion," and to accuse the district judge of compelling discovery "to retaliate against people of faith for not only believing in the sanctity of life—but also for wanting to do something about it."[184]

President Trump's remaining appointees were cut from a similar cloth. In private practice, Kyle Duncan served as lead counsel to Hobby Lobby Stores in its challenge to the Affordable Care Act's (ACA) contraception mandate.[185] He also defended Louisiana's ban on same-sex marriage[186] and represented the Gloucester County School Board in its efforts to prevent transgender students from using the bathroom that conforms to their gender identity.[187] On the bench, Judge Duncan wrote an opinion denying a transgender woman's request to refer to her using female pronouns.[188] Cory Wilson, who called the ACA "illegitimate" and voted as a Republican state legislator for bills that banned abortions after fifteen weeks,[189] declared the funding structure of the Consumer Financial Protection Bureau unconstitutional,[190] and held that the Second

177. *Zimmerman*, 888 F.3d at 164 (citing Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari in a case upholding a "10-day waiting period for firearms")).

178. *Id.* at 170.

179. *See* Whole Woman's Health v. Smith, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring).

180. *Id.* at 364–65 (majority opinion).

181. *Id.* at 366.

182. *Id.* at 365.

183. *Id.* at 367.

184. *Id.* at 376 (Ho, J., concurring) (describing the district court proceedings as "troubling"); *see also* Hon. Lee H. Rosenthal, *Ambition and Aspiration: Living Greatly in the Law*, 103 MARQ. L. REV. 217, 227–28 (2019) (using Judge Ho's opinion as an example of judicial "ambitio[n] for promotion").

185. *See* S. COMM. ON THE JUDICIARY, 115TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 35–36 (Comm. Print 2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

186. Robicheaux v. Caldwell, 791 F.3d 616, 617 (5th Cir. 2015).

187. Petition for Writ of Certiorari, Gloucester Cnty. Sch. Bd. v. G.G., (No. 16-273) (Aug. 29, 2016).

188. United States v. Varner, 948 F.3d 250, 252–58 (5th Cir. 2020); *see also id.* at 259–60 (Dennis, J., dissenting) (noting that "though no law compels granting or denying such a request" to use a litigant's preferred pronouns, "many courts and judges adhere to such requests out of respect for the litigant's dignity").

189. Tim Ryan, *Mississippi Judicial Pick Grilled Over Record as Lawmaker*, COURTHOUSE NEWS SERV. (Jan. 8, 2020), https://www.courthousenews.com/mississippi-judicial-pick-grilled-over-record-as-lawmaker/ [https://perma.cc/2BYY-JF2T].

190. Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616, 635–42 (5th Cir. 2022), *rev'd*, 144 S. Ct. 1474 (2024).

Amendment prevents states from restricting access to firearms by persons subject to domestic violence restraining orders.[191] Judge Andrew Oldham, a former law clerk to Justice Alito and general counsel to Texas Governor Greg Abbott, held that the Biden administration could not rescind the Trump administration's Migrant Protection Protocols, which required the non-Mexican aliens detained for attempting to enter the United States illegally to return to Mexico.[192] He also upheld a controversial Texas law limiting the ability of social media companies to moderate content—such as "pro-Nazi speech, terrorist propaganda, [and] Holocaust denial[s]"—on their platforms.[193]

Even Judge Kurt Engelhardt, a longtime district court judge with a moderate record and whose confirmation received bipartisan support, has thrown caution to the wind. In 2021, Judge Engelhardt stayed the Occupational Safety and Health Administration's (OSHA) emergency temporary standard requiring that most workers either get vaccinated against COVID-19 or submit to weekly COVID-19 tests and wear masks.[194] Judge Engelhardt's mocking of COVID-19 as a "supposedly 'grave danger'"[195] as the virus's domestic death toll hit 750,000[196] is not what made the decision remarkable—the procedural timing was.[197] Because OSHA's emergency rule was challenged in lawsuits in all twelve regional circuits, the case entered the multi-circuit lottery.[198] The Biden administration asked the Fifth Circuit to stay its decision pending the outcome of the lottery, but Judge Engelhardt declined. On November 12, the Fifth Circuit stayed OSHA's rule. Four days later, the lottery reassigned the case to the Sixth Circuit, which promptly dissolved the Fifth Circuit's stay and permitted OSHA's rule to go forward.[199] Judge Engelhardt also signed onto

191. United States v. Rahimi, 61 F.4th 443, 454–61 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024). Judge Ho concurred to note that restraining orders "are too often misused as a tactical device in divorce proceedings" and therefore do not justify restricting a person's Second Amendment rights. *Id.* at 465 (Ho, J., concurring).

192. Texas v. Biden, 20 F.4th 928, 941 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528, 2543 (2022) (explaining that the Fifth Circuit's decision impermissibly "imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico" by "forc[ing] the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate," and "supervis[ing] its continuing negotiations with Mexico to ensure that they are conducted 'in good faith'").

193. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445, 452 (5th Cir. 2022) (alterations in original) (quoting Brief for Appellee at 1, NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178)), *rev'd sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

194. BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 609 (5th Cir. 2021).

195. *Id.* at 612.

196. *See Trends in United States COVID-19 Deaths, Emergency Department (ED) Visits, and Test Positivity by Geographic Area*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths_select_00 [https://perma.cc/69SR-RUR6] (last visited Mar. 24, 2025).

197. *See BST Holdings*, 17 F.4th at 612.

198. *See* 28 U.S.C. § 2112(a)(3).

199. *In re* MCP No. 165, 21 F.4th 357, 366, 388 (6th Cir. 2021). Judge Engelhardt would get other chances to block vaccine requirements. The following year, he wrote another opinion affirming a preliminary injunction blocking President Biden's executive order requiring federal contractors to ensure employees were vaccinated against COVID-19, *see* Louisiana v. Biden, 55 F.4th 1017, 1019 (5th Cir. 2022), and joined an opinion refusing to stay an injunction barring the Navy from requiring special warfare personnel to be vaccinated against COVID-19, *see* U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 339 (5th Cir. 2022) (per curiam); *see also* Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1302 (Kavanaugh, J., concurring)

decisions permitting Texas's Senate Bill 8 ("SB 8") abortion restrictions—which banned all abortions after six weeks—to go into effect even before the Supreme Court overruled *Roe v. Wade*,[200] and holding that the ACA's individual mandate was unconstitutional.[201]

It is not just Trump appointees either. Perhaps emboldened by their numerical superiority,[202] the Fifth Circuit's other conservatives have recently declared unconstitutional the Securities & Exchange Commission's (SEC) near-century-old practice of bringing enforcement actions in agency proceedings,[203] second-guessed the Food & Drug Administration's (FDA) approval of the abortion medication mifepristone,[204] and enjoined both the military and private companies from requiring vaccination against COVID-19.[205] Nowhere has the court's old guard been more aggressive than in cases involving abortion. Well before the Supreme Court stripped women of their constitutional right to abortion, the Fifth Circuit upheld Louisiana's burdensome abortion restrictions that were identical to those held unconstitutional three years earlier in *Whole Woman's Health v. Hellerstedt*.[206] It also repeatedly stayed district court orders enjoining Texas's controversial six-week abortion ban—one that plainly violated *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[207] Post-*Dobbs v. Jackson Women's Health Organization*,[208] the court has set its sights on restricting abortion access nationwide. In *Alliance for Hippocratic Medicine v. FDA*, the Fifth Circuit upheld part of a nationwide injunction staying the FDA's 2016 decision to ease restrictions to access of mifepristone.[209]

("Under Article II of the Constitution, the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces.").

200. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see also* Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 3919252, at *1 (5th Cir. Aug. 29, 2021) (denying a motion to vacate the Fifth Circuit's administrative stay of a district court preliminary injunction hearing and denying a motion to stay SB 8's abortion restrictions from taking effect during pendency of the case).

201. Texas v. United States, 945 F.3d 355, 369 (5th Cir. 2019), *rev'd sub nom*, California v. Texas, 5141 S. Ct. 2104 (2021).

202. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8–13 (2006) (explaining that a judge's ideological predisposition can be amplified when sitting with other judges appointed by the same political party).

203. Jarkesy v. SEC, 34 F.4th 446, 450–51 (5th Cir. 2022) (Elrod, J.), *aff'd*, 144 S. Ct. 2117 (2024).

204. All.for Hippocratic Med. v. FDA, 78 F.4th 210, 222–23 (5th Cir. 2023) (Elrod, J.), *rev'd*, 144 S. Ct. 1450 (2024).

205. Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *1 (5th Cir. Feb. 17, 2022) (per curiam); U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 339.

206. 579 U.S. 582 (2016); June Med. Servs. L.L.C., v. Gee, 905 F.3d 787, 791 (5th Cir. 2018) (Smith, J.), *rev'd*, 140 S. Ct. 2103 (2020).

207. 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228; United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021); Whole Woman's Health v. Jackson, 13 F.4th 434, 440–41 (5th Cir. 2021).

208. *Dobbs*, 142 S. Ct. 2228.

209. 78 F.4th at 245–47.

C. Procedural Irregularities

"Procedure can be just as consequential as substance," and the Fifth Circuit has been no stranger to unusual procedural maneuvers in politically charged cases—particularly in its use of administrative stays.[210] Administrative stays "freeze legal proceedings until the court can rule on a party's request for expedited relief."[211] The purpose is to "preserve the status quo without taking any position on the merits of an appeal."[212] This differs from a stay pending appeal, which requires a court apply the four-factor test set forth in *Nken v. Holder*,[213] including "an assessment of the applicant's likelihood of success on the merits."[214] That kind of assessment requires an opinion justifying the court's reasoning. But administrative stays "rarely generate opinions," because they are more reflective of a court's "docket-management authority" than its view of the merits.[215] As a result, administrative stays "should last no longer than necessary to make an intelligent"—and reviewable—"decision on the motion for a stay pending appeal."[216]

The Fifth Circuit, however, has recently developed a practice of granting administrative stays and leaving them in place throughout the appeal.[217] For example, after the district court issued a preliminary injunction requiring Texas to remove a "1,000-foot floating barrier in the Rio Grande River,"[218] the Fifth Circuit issued an administrative stay and left it in place for eighty-five days before resolving the appeal on the merits and denying Texas's motion for a stay pending appeal as moot.[219] This practice is unusual and problematic for at least two reasons. First, it permits "a court [to] avoid *Nken* for too long" and, as a result, "evade effective review" of its decisions.[220] Second, the Fifth Circuit practice often permits controversial laws held unconstitutional by the district courts to nevertheless go into effect, which *disrupts* the status quo, rather than preserves it.

Here are a few examples. In one case, the Fifth Circuit granted an administrative stay of a district court injunction blocking a Texas law that required book vendors "to issue sexual-content ratings for all library materials they have ever sold (or will

210. United States v. Texas, 144 S. Ct. 797, 802 (2024) (Sotomayor, J., dissenting); *see also* Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1959–60 (2022).

211. Bayefsky, *supra* note 210, at 1942.

212. *Id.* at 1957.

213. 556 U.S. 418, 434 (2009).

214. United States v. Texas, 144 S. Ct. at 798 (Barrett, J., concurring).

215. *Id.* at 798–99.

216. *Id.* at 799.

217. *See id.* at 803 n.* (Sotomayor, J., dissenting) ("The Fifth Circuit recently has developed a troubling habit of leaving 'administrative' stays in place for weeks if not months." (collecting cases)); *see also, e.g.*, Book People, Inc. v. Wong, 91 F.4th 318, 328 (5th Cir. 2024) ("A different panel of this court granted the administrative stay and ordered that the motion to stay pending appeal be carried with the case.").

218. United States v. Abbott, 690 F. Supp. 3d 708, 714 (W.D. Tex.), *aff'd*, 87 F.4th 616, 635 (5th Cir. 2023), *vacated*, 90 F.4th 870 (5th Cir. 2024).

219. United States v. Abbott, 87 F.4th 616, 635 (5th Cir. 2023) *vacated*, 90 F.4th 870 (5th Cir. 2024).

220. United States v. Texas, 144 S. Ct. at 799 (Barrett, J., concurring); *see also id.* at 803 (Sotomayor, J., dissenting).

sell)."[221] In another, in the litigation concerning Texas's Senate Bill 4 ("SB 4")—a controversial immigration law which criminalizes at the state level illegal entry into the United States—the district court granted a preliminary injunction and declined to stay the injunction pending appeal.[222] Texas sought to enforce SB 4 while it appealed and asked the Fifth Circuit for both an administrative stay and a stay pending appeal. Without waiting for the United States's response to the stay motion, the Fifth Circuit granted the request for an administrative stay of the district court's injunction. The court also expedited the appeal and deferred consideration of the full stay request to the panel that would hear the appeal on the merits.[223]

The Supreme Court declined to vacate the stay, but Justice Barrett criticized the Fifth Circuit's use of administrative stays.[224] Noting that "Texas's motion for a stay pending appeal was fully briefed . . . almost two weeks ago," Justice Barrett warned that "[i]f a decision" on the stay motion "does not issue soon," the United States "may return to this Court."[225] The Fifth Circuit got the message—at least in that case. Mere hours after the Supreme Court's decision, the Fifth Circuit panel hearing the case scheduled oral argument on the stay motion and lifted the administrative stay, putting the district court's injunction blocking SB 4 back into effect.[226]

The Fifth Circuit has been similarly disruptive even when granting full stays pending appeal. Before the Supreme Court overruled *Roe* and *Casey*, the Fifth Circuit stayed an injunction of a Texas law banning abortions after six weeks, effectively eliminating the right to abortion in Texas.[227] In a particularly curious example, the Fifth Circuit blocked enforcement of an election map that it acknowledged was lawful under current circuit precedent. In *Petteway v. Galveston County*, the district court found that Galveston County's precinct boundaries violated Section 2 of the Voting Rights Act by diluting the voting power of the county's Black and Hispanic voters.[228] Bound by circuit precedent, the Fifth Circuit panel affirmed—but called on the full court to reconsider that precedent en banc, which it swiftly agreed to do.[229] So far, nothing unusual. But then, the full court stayed the district court's order requiring the county to draw new maps pending en banc review, which the court scheduled for May 2024 rather than the upcoming January 2024 en banc session.[230] Justice Kagan aptly summed up the problem with the Fifth Circuit's approach when she dissented from the Supreme Court's refusal to vacate the stay:

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221. *Book People, Inc.*, 91 F.4th at 324.

222. United States v. Texas, 719 F. Supp. 3d 640, 651, 700–02 (W.D. Tex. 2024).

223. United States v. Texas, 144 S. Ct. at 802 (Sotomayor, J., dissenting).

224. *See id.* at 799–800 (Barrett, J., concurring).

225. *Id.* at 800.

226. United States v. Texas, 96 F.4th 797, 798 (5th Cir. 2024).

227. United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021). The entirety of the Fifth Circuit's reasoning was: "The emergency motions to stay the preliminary injunction pending appeal are granted for the reasons stated in *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), and *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021)." *Id.*

228. 86 F.4th 214, 216 (5th Cir. 2023), *rev'd en banc*, 111 F.4th 596 (5th Cir. 2024).

229. *Id.* at 218; Petteway v. Galveston County, 86 F.4th 1146, 1147 (5th Cir. 2023) (ordering rehearing en banc).

230. Petteway v. Galveston County, 87 F.4th 721, 723 (5th Cir. 2023) (stay order).

> The Fifth Circuit's stay itself disrupted the status quo—an election map concededly lawful under Circuit precedent and nearly identical to the maps that have governed the election of Galveston County's commissioners for decades. In imposing a different map, acknowledged to violate current law—on the theory that the Circuit might someday change that law—the Court of Appeals went far beyond its proper authority.[231]

D. En Banc Abuse

The Fifth Circuit's conservatives have also, to borrow a phrase, weaponized the en banc rehearing process—particularly when the original panel had at least two judges appointed by Democratic presidents.[232] In the last three years, the court has repeatedly granted rehearing in politically charged cases, including decisions upholding board of director diversity requirements,[233] enjoining Texas's construction of a barbed wire fence in the Rio Grande,[234] concluding that the Mississippi Constitution's restrictions on voting violate the Eighth and Fourteenth Amendments,[235] and dismissing a complaint filed by a White student alleging race-based harassment in retaliation for wearing a "Make America Great Again" hat.[236] All were decided in the first instance by majority-liberal panels.[237] Three were reversed largely along partisan lines,[238] and only one was affirmed by an equally divided court.[239]

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231. Petteway v. Galveston County, 144 S. Ct. 36, 36 (2023) (Kagan, J., dissenting).

232. *See* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1405 (2021) [hereinafter Devins & Larsen, *Weaponizing En Banc*] ("[W]hen the minority party has two or more members on the panel, the majority party can use en banc review to vacate the panel decision and put in place a decision that comports with the majority party's view [E]n banc review is more likely to be seen as a weapon to advance majority party preferences.").

233. All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226, 236–37 (5th Cir. 2023), *rev'd en banc*, 125 F.4th 159, 185 (5th Cir. 2024).

234. United States v. Abbott, 87 F.4th 616, 620 (5th Cir. 2023), *rev'd en banc*, 110 F.4th 700, 707 (5th Cir. 2024).

235. Hopkins v. Hosemann, 76 F.4th 378, 388 (5th Cir. 2023), *rev'd en banc sub nom.*, Hopkins v. Watson, 108 F.4th 371, 375 (5th Cir. 2024).

236. B.W. *ex rel.* M.W. v. Austin Indep. Sch. Dist., No. 22-50158, 2023 WL 128948, at *1 (5th Cir. 2023) (per curiam), *aff'd by equally divided court*, 121 F.4th 1066, 1066 (5th Cir. 2024) (per curiam).

237. I define a liberal panel as one with at least two Democratic appointees.

238. *All. for Fair Bd. Recruitment*, 125 F.4th at 185, (reversing by a vote of nine to eight, with nine of eleven eligible Republican appointees voting to reverse and all six Democratic appointees voting to affirm); *Abbott*, 110 F.4th at 707 (reversing by vote of eleven to seven, with eleven of twelve Republican appointees voting to reverse and all six Democratic appointees voting to affirm); *Hosemann*, 108 F.4th at 375 (reversing by vote of thirteen to six, with all twelve Republican appointees voting to reverse and six of seven Democratic appointees voting to affirm). In *Hosemann*, one Democratic appointee, Judge Ramirez, voted to reverse but concurred only in the judgment. *Id.* at 374 n.†.

239. *B.W. ex rel. M.W.*, 121 F.4th at 1066. For more examples of partisan reversals, see Petteway v. Galveston County, 86 F.4th 214, 216 (5th Cir. 2023) (voting rights), *rev'd en banc*, 111 F.4th 596, 599 (5th Cir. 2024) (reversing by vote of twelve to six, with twelve of thirteen Republican appointees voting to overturn prior precedent and reverse and all five Democratic appointees voting to affirm); Feds for Med. Freedom v. Biden, 30 F.4th 503, 504 (5th Cir. 2022) (vaccine mandates), *rev'd en banc*, 63 F.4th 366, 369 (5th Cir. 2022) (reversing by vote of twelve to four, with eleven of twelve Republican appointees voting to reverse); Cargill v. Garland, 20 F.4th 1004, 1006 (5th Cir. 2021) (guns), *rev'd en banc*, 57 F.4th 447, 450–51 (5th Cir. 2022) (reversing by vote of thirteen to three, with all twelve Republican appointees voting to reverse); Whole Woman's Health v. Paxton, 978 F.3d 896, 900 (5th Cir.) (abortion), *rev'd en banc*, 10 F.4th 430, 435–36 (5th

Even moderate panels with Republican appointees in the majority do not fare much better when there is room to move to the right.[240] For example, the full Fifth Circuit has recently reversed moderate panel decisions concerning dilution of Black votes in Louisiana,[241] a finding that Tesla engaged in unfair labor practices,[242] and constitutional challenges to Congress's delegation of authority to the Federal Communications Commission.[243] It also granted rehearing in other cases decided by moderate panels holding that the removal of books from public libraries based on their content violated the First Amendment,[244] and that environmental groups had standing to sue Exxon for unauthorized emissions.[245] By that same token, the court's Democratic appointees have little power to check the excesses of conservative majority's sweeping decisions.[246]

The most recent data suggests a continuation of the Trump-era trend in partisan en banc behavior identified by Professors Neal Devins and Allison Larsen.[247] Looking back at the Fifth Circuit's forty-one grants of rehearing en banc since January 2020, approximately two-thirds of the decisions reviewed were issued by moderate or liberal panels.[248] Although the court has voted to rehear cases decided by conservative panels,[249] those cases often involve less politically charged issues (like criminal law)[250]

Cir. 2021) (reversing by vote of nine to five, with all nine eligible Republican appointees voting to reverse and all five Democratic appointees voting to affirm).

240. I define a moderate panel as one with a Democratic appointee and at least one of Judges Richman, Southwick, Haynes, Higginbotham, Davis, or Wiener.

241. Chisom v. Louisiana *ex rel.* Landry, 85 F.4th 288, 292 (5th Cir. 2023), *rev'd en banc*, 116 F.4th 309, 313 (5th Cir. 2024).

242. Tesla, Inc. v. NLRB, 63 F.4th 981, 986 (5th Cir. 2023) (per curiam), *rev'd per curiam*, 120 F.4th 433, 436 (5th Cir. 2024).

243. Consumers' Rsch. v. FCC, 63 F.4th 441, 445 (5th Cir. 2023), *rev'd en banc*, 109 F.4th 743, 748 (5th Cir. 2024).

244. Little v. Llano County, 103 F.4th 1140, 1143 (5th Cir.), *reh'g en banc granted, opinion vacated*, 106 F.4th 426, 427 (5th Cir. 2024) (ordering rehearing en banc).

245. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 413 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 61 F.4th 1012, 1012–13 (5th Cir. 2023) (ordering rehearing en banc). In a bizarre twist, the en banc court apparently could not reach any sort of agreement after eighteen months and purported to dismiss the en banc appeal as improvidently granted. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.,123 F.4th 309, 310–11 & n.2 (5th Cir. 2024).

246. *See, e.g.*, State v. Nuclear Regul. Comm'n, 95 F.4th 935, 935 (5th Cir.) (denying rehearing en banc by a vote of seven (two Republican appointees and five Democratic appointees) to nine (nine Republican appointees)), *cert. granted*, 145 S. Ct. 117 (2024); Argueta v. Jaradi, 94 F.4th 475, 475 (5th Cir. 2024) (denying rehearing en banc by a vote of seven (two Republican appointees and five Democratic appointees) to ten (ten Republican appointees)); Jarkesy v. SEC, 51 F.4th 644, 644–45 (5th Cir. 2022) (denying rehearing en banc by a vote of six (one Republican appointee and five Democratic appointees) to ten (Republican appointees)), *aff'd*, 144 S. Ct. 2117 (2024); Texas v. United States, 949 F.3d 182, 186–87 (5th Cir 2020) (denying rehearing en banc by a vote of six (one Republican appointee and five Democratic appointees) to eight (eight Republican appointees)).

247. Devins & Larsen, *Weaponizing En Banc*, *supra* note 232, at 1413–14 ("The most recent time period we studied—2018 to 2020—contained the most evidence of partisan en banc behavior seen over the past six decades.").

248. Data on file with author.

249. I define a conservative panel as one consisting of at least any two of Judges Jones, Smith, Elrod, Willett, Ho, Oldham, Duncan, Engelhardt, Wilson, Jolly, Barksdale, and Clement.

or were controlled by prior precedent that the conservatives now want and have the power to abandon.[251]

That is not how the en banc process is supposed to work. Just ask other judges. Judge James Browning, formerly of the Ninth Circuit, explained that en banc review is not "to assure that cases are decided in the way the majority of the whole court would have decided them."[252] Using the process that way undermines panel autonomy, and "limit[s] the opportunity for a minority of the court to contribute to the development of the law."[253] The late Judge Robert Katzmann, former Chief Judge of the Second Circuit, echoed the point, emphasizing the Second Circuit's "longstanding tradition of general deference to panel adjudication."[254] And using it this way is destructive, both inside and out of the courthouse. As Professors Devins and Larsen note, the en banc "my-team-versus-your-team dynamic" taxes collegiality and reinforces the public perception that the judges are just proxies for the president who appointed them.[255]

250. *See, e.g.*, United States v. Campos-Ayala, 70 F.4th 261, 264 (5th Cir. 2023) (holding that evidence was insufficient to establish possession of marijuana), *rev'd*, 105 F.4th 235, 238 (5th Cir. 2024); Crawford v. Cain, 68 F.4th 273, 279 (5th Cir.) (affirming the denial of habeas relief), *vacated*, 72 F.4th 109, 109 (5th Cir. 2023) (ordering rehearing en banc); United States v. Vargas, 35 F.4th 936, 938 (5th Cir. 2022) (holding that conspiracy crimes count for purposes of career offender designations), *aff'd en banc*, 74 F.4th 673, 678 (5th Cir. 2023); United States v. Morton, 984 F.3d 421, 423–24 (5th Cir. 2021) (holding that the good faith exception did not apply because police should have known they lacked probable cause to search the defendant's phone for photo evidence of drug possession), *rev'd en banc*, 46 F.4th 331, 333 (5th Cir. 2022).

251. *See, e.g.*, Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga, 109 F.4th 810, 817 (5th Cir.) (Duncan, J., concurring) ("The proper course is for our en banc Court to unweave *Weaver*."), *vacated*, 113 F.4th 1019, 1019 (5th Cir. 2024) (ordering rehearing en banc); Petteway v. Galveston County, 86 F.4th 214, 218 (5th Cir.) ("The district court appropriately applied precedent when it permitted the black and Hispanic populations of Galveston County to be aggregated for purposes of assessing compliance with Section 2. But the members of this panel agree that this court's precedent permitting aggregation should be overturned. We therefore call for this case to be reheard *en banc*."), *vacated*, 86 F.4th 1146, 1147 (5th Cir. 2023) (ordering rehearing en banc); Planned Parenthood of Greater Tex. v. Smith, 913 F.3d 551, 554 (5th Cir. 2019), *rev'd en banc*, 981 F.3d 347, 350 (5th Cir. 2020) (voting along party lines to overrule a controlling 2017 case and holding that Texas was permitted to declare health care providers that perform abortion-related services unqualified to receive Medicaid funds).

252. Arthur D. Hellman, *"The Law of the Circuit" Revisited: What Role for Majority Rule?*, 32 S. ILL. U. L.J. 625, 626 (2008) (quoting Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 162 (1984)) (remarks of Judge James R. Browning).

253. *Id.* (quoting Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 162 (1984)) (remarks of Judge James R. Browning).

254. Ricci v. DeStefano, 530 F.3d 88, 89–90 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing en banc).

255. Devins & Larsen, *Weaponizing En Banc*, *supra* note 232, at 1421; *see also* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html (describing Chief Justice Roberts' response to Donald Trump calling a judge who had ruled against him "an Obama judge").

E. Circuit Capture Is Bipartisan

The Fifth Circuit is not the first or only example of circuit capture, and the phenomenon is not unique to Republicans.[256] In one presidential term—and thanks to a statutory increase in judgeships—President Jimmy Carter appointed fifteen of the Ninth Circuit's twenty-three authorized judgeships, significantly shifting the court to the left.[257] The Ninth Circuit has often played a similar foil to Republican administrations, particularly during the first Trump administration.[258] Indeed, the Ninth Circuit so frustrated President Trump that he sought to "cancel" it by asking Homeland Security Secretary Kirstjen Nielsen to "draft a bill to 'get rid of the f—ing judges.'"[259] Even if the Ninth Circuit was not as liberal as its detractors complained—a view shared by some scholars[260]—the public perception is that it was.[261] And that perception undermined the court's legitimacy.[262]

None of this is good for the federal judiciary. Judges are unelected, and their legitimacy—and that of the entire judicial system—rests on public faith in their role as

256. Although not at the circuit court level, scholars have pointed to the Warren Court era as a successful example of judicial partisan entrenchment efforts by Democrats. *See* Balkin & Levinson, *supra* note 154, at 1068.

257. Susan B. Haire, *Judicial Selection and Decisionmaking in the Ninth Circuit*, 48 ARIZ. L. REV. 267, 272 (2006) ("Scholars examining voting by judicial appointees of Democratic Presidents have found the Carter cohort to be more liberal."); *see also* Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315, 1374 (2022) [hereinafter Larsen & Devins, *Circuit Personalities*] ("From 2000 to 2015, the Ninth Circuit reached liberal outcomes more than any other circuit ").

258. *See* Devins & Larsen, *Weaponizing En Banc*, *supra* note 232, at 1404 (explaining that "the majority of lawsuits challenging President Trump's initiatives were pursued in the formerly Democrat-controlled Ninth and Second Circuits"); Ann E. Marimow, *Trump's Lasting Legacy on the Judiciary is Not Just at the Supreme Court*, WASH. POST (Jan. 29, 2023), https://www.washingtonpost.com/politics/2023/01/29/5th-circuit-court-trump-judges-conservative/ ("Liberal organizations often challenged Trump's policies in Northern California courts, where most judges were picked by Democrats.").

259. Bob Egelko, *Trump Wanted To Eliminate San Francisco-Based Ninth Circuit Court, Book Says*, S. F. CHRON. (Nov. 13, 2022, 12:41 PM), https://www.sfchronicle.com/politics/article/trump-ninth-circuit-court-sf-17578253.php; *see also* David Hasemyer, *With 10 Appointees on the Ninth Circuit, Trump Seeks To Tame His Nemesis*, INSIDE CLIMATE NEWS (May 13, 2020), https://insideclimatenews.org/news/13052020/trump-ninth-circuit-court-nominees-san-franscisco-california-climate-change/ [https://perma.cc/FCJ2-Y75T] ("'Every case that gets filed in the Ninth Circuit, we get beaten,' Trump complained in 2018. 'It's a disgrace.'").

260. Erwin Chemerinsky, *Foreword: The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 1 (2003) ("The popular image of the Ninth Circuit, often expressed in the news media, is that it is a far left court that is reversed more often than any other circuit in the country."); Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 356 (2006) ("This Essay suggests that the Ninth Circuit suffers less from a genuine runaway tendency toward renegade judicial decisionmaking and more from a bandwagon effect of political criticism perpetuated by media commentary.").

261. Alan Abrahamson, *Despite Image, Liberal Judges No Longer Rule 9th Circuit*, L.A. TIMES (Apr. 21, 1992), https://www.latimes.com/archives/la-xpm-1992-04-21-mn-610-story.html [https://perma.cc/6ZBE-Y9ME] ("The U.S. 9th Circuit Court of Appeals, the largest judicial empire in the United States, seemingly cannot escape its reputation as a liberal haven.").

262. Wermiel, *supra* note 260, at 367 app. II (describing a cartoon in which a newsman states that "[i]n a landmark decision, the Ninth Circuit Court of Appeals has declared the *U.S. CONSTITUTION* 'unconstitutional'").

neutral arbiters.[263] There is nothing to suggest that it will stop anytime soon either. Together with the Federalist Society, the Trump administration refined the Republican judicial appointment playbook into its purest form.[264] The Trump appointees were not selected to go along to get along. To the contrary, the administration sought candidates who had already demonstrated their unwavering commitment to their views.[265] The early data suggests they chose well. A study by the *New York Times* found Trump appointees the most likely to agree with their Republican colleagues and most likely to disagree with their Democratic colleagues.[266] I see no reason why any future Republican administration would ease off the gas. And it may get dramatically worse in the second Trump administration, because President Trump's frustration with the lack of success of his election lawsuits may lead him to seek even more extreme and "loyal" candidates.[267] Democrats—though less aggressive in screening their judicial nominees for ideological purity—have little choice but to respond in kind. Thus, the only way to break the cycle is to rid the system of circuits capable of capture.[268]

III. THE NATIONAL COURT OF APPEALS

On its own, the current structure of the regional circuit courts of appeals, with its origins in the eighteenth and nineteenth centuries, no longer makes sense. Not to scholars.[269] Not even to judges.[270] Supreme Court Justices have not ridden circuit in more than a century.[271] And the modern increase in lawmaking responsibility is incompatible with the goal of uniform national law. This balkanized system has persevered not because it is the ideal, but because neither Congress nor the judiciary have been willing to grapple with the challenging task of wholesale reorganization.[272]

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263. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (explaining that the public must see the Court's decisions "as grounded truly in principle, not as compromises with social and political pressures").

264. *See* Collins, *supra* note 93, at 38–47 (describing the Trump administration's process for selecting judicial nominees).

265. Donald F. McGahn II, *The Third Circuit in the Era of Trump*, 29 WIDENER COMMW. L. REV. 159, 164 (2020) (explaining that nominees were chosen because they had publicly "stood for [their] principles and paid the price").

266. Ruiz et al., *supra* note 171 ("[W]hen a Trump appointee wrote an opinion for a panel with a lone Democrat, or served as the only Republican appointee, the dissent rate rose to 17[%]—meaning the likelihood of dissent was nearly 1.5 times higher if a Trump appointee was involved.").

267. *See* Jay Willis, Opinion, *Trump's Next Supreme Court Picks Would Break the Mold*, N.Y. TIMES (July 9, 2024), https://www.nytimes.com/2024/07/09/opinion/trump-supreme-court.html.

268. Tushnet, *supra* note 156, at 764 ("Eventually the former opposition will be in a position to place its own supporters in the courts.").

269. *See, e.g.*, Meador Memorandum, *supra* note 131 (criticizing "the existing balkanized structure" of the regional courts of appeals); *see also supra* notes 123–37 and accompanying text.

270. Weis, *Overloaded Circuits*, *supra* note 26, at 464 ("The jerry-built system of the courts of appeals that has grown up over the last 100 years is obviously out of date."); Letter from Levin H. Campbell to Daniel J. Meador 3 (July 18, 1989), *in* FCSC WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 117 ("But I agree the present circuit divisions, by now a historical accident, are a crazy-quilt.").

271. *See supra* note 73.

272. Weis, *Overloaded Circuits*, *supra* note 26, at 464 ("The system has developed in this fashion because of an unwillingness on the part of Congress—and to be candid, many judges and lawyers as well—to tackle the difficult task of completely reorganizing the federal appellate courts."); Rehnquist, *supra* note 22, at

But the problem goes beyond just an out-of-date system. The failure to act is now coming to a head as increasingly polarized regional circuits threaten to undermine the whole system. Circuits with rosters dominated by appointees of one political party can run roughshod over the decisions of the court's minority members, particularly with the Supreme Court's limited ability (or perhaps willingness) to weigh in.[273]

My proposal for a National Court of Appeals reflects these realities. A National Court of Appeals, with panels drawn from a nationwide and more evenly balanced cadre of judges, can combat the deleterious effects of circuit capture. Drawing largely on the successful procedures developed over decades by the U.S. Court of Appeals for the Ninth Circuit—by far the largest regional circuit—the proposal leverages economies of scale as well as advancements in travel, technology, and case management procedures to streamline operations and diffuse partisan dominance.

Part III.A details the court's structure and operations and demonstrates how it can mitigate the problematic effects of circuit capture. Part III.B highlights other benefits from this new court structure, like uniform policies and procedures for oral argument and publication. Finally, Part III.C offers responses to likely objections.

A. Structure and Operations

Before getting into what will be different, let us start with what will remain the same. Vertically, the structure of the federal courts will look largely just as it does today. A single Supreme Court sits at the top, composed of whatever number of justices Congress thinks is appropriate. At the base, the federal district courts with their present geographic distributions. And in between, a single layer of intermediate appellate review. Unlike prior reform efforts aimed at more effectively managing the Supreme Court's docket, this proposal neither creates a fourth tier of the federal court system nor affects the Supreme Court's power to choose what cases it hears.[274] That intermediate level of appellate review, however, will look a little different. This Part will not—and indeed cannot—detail all the inner workings of the new court. That will require input from the various stakeholders. But I do want to offer a framework and some suggestions that will further the proposal's twin goals of increased uniformity and reduced partisan gamesmanship.

Here's the basic structure. The boundaries of the current twelve regional circuits will be dissolved and replaced by a single National Court of Appeals with nationwide jurisdiction to hear appeals from the federal district courts.[275] The authorized judgeships for those twelve circuits—167 active service judgeships plus those on senior status—will be recommissioned as U.S. Judges for the National Court of Appeals without reference to any geographic region or subject-matter division.

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12 ("[The legal profession is] familiar with a certain way of doing things and would prefer not to see that system change.").

273. Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1604–05 (2000) ("A number of scholars have shown that judicial ideology, even when crudely measured by political affiliation, is a statistically significant predictor of case outcomes.").

274. *See supra* Section II.

275. This proposal does not affect the Federal Circuit.

1. Administration

Broadly speaking, the National Court of Appeals will need at least two layers of administration. At the top, it will require some sort of central office that, among other things, (1) sets uniform rules and internal operating procedures for the nationwide court and (2) coordinates panel composition and assignments. Below the central office will be regional administrative offices. These will function largely as current clerks' offices do. They will handle everything up from the district courts under their auspices. Rather than mirror the old circuit boundaries, these will be configured to try and normalize caseloads and other judicial resources across each and can be adjusted by the central office as conditions change.

The court will have several chief judges who will collectively share administrative responsibilities. Some number, depending on necessity, can be drawn from each region using the current criteria for selection.[276] Each region should also have a judicial council, consisting of the chief judge(s) and some appropriate number of appellate and district judges whose duty stations are within that region.[277] The judicial councils can provide region-specific feedback that the central office can use to develop and refine court-wide policies and procedures.

2. Cases, Calendaring, and Argument

When filed with the regional offices, cases will be processed in much the same way they are now—except that the specific processes will be uniform across offices. Initially, cases will be sorted by those that are eligible for submission without oral argument, in which case regional office staff attorneys will prepare memorandum dispositions for review by three-judge screening panels, and those that should be placed on a hearing calendar for oral argument.[278]

So, let's say the New England region covers Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut. Appeals from the district courts in those states will be managed by the New England regional office. The regional office will be located, and oral argument—if deemed necessary—will be heard primarily in Boston.[279] The National Court of Appeals will continue to use three-judge panels to decide appeals.[280] But, instead of discrete regional circuits drawing predictable panels from a limited number of participating active and senior judges, the National Court of Appeals will compose panels from the significantly larger nationwide roster of 271 active and senior judges. The central office will use a matrix of all participating judges

276. *See* 28 U.S.C. § 45.

277. *See id*. § 332.

278. Under Federal Rule of Appellate Procedure 34(a), oral argument is "unnecessary" when "the appeal is frivolous," "the dispositive issue or issues have been authoritatively decided," or "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." FED. R. APP. P. 34(a)(2). But the courts of appeals vary dramatically in their processes for selecting cases for argument. *See* discussion *infra* Part III.B.

279. The court will also, from time to time, hear arguments in each state when required—just as the regional circuits do now. *See* 28 U.S.C. § 48(a)–(b).

280. Another option would be to use five-judge panels to decide cases designated for oral argument. These modestly larger panels may better reflect the views of the entire court and would permit more judges to build working relationships with each other.

to compose panel assignments, striving to ensure that judges sit with a mix of colleagues over time.[281] Panels will then be assigned to sittings across the country, similarly taking care to equalize travel burdens to the greatest extent possible.

It is important to note that travel is already part of the job for most judges. Every court of appeals has designated cities in which they are required to hold regular court sessions, and judges from around the circuits travel there several times a year.[282] The largest circuit, the Ninth Circuit, has its roster of judges—twenty-nine active and twenty-three seniors—traveling to and from the nine states it encompasses.[283] The same happens in smaller geographic circuits, even if to a lesser extent. Sixth Circuit arguments are heard in Cincinnati, Ohio, even though only one of the court's twenty-nine active and senior judges is stationed there.[284] Nineteen come in from neighboring states. The Fifth Circuit's twenty-six active and senior judges travel to and from sessions in Louisiana, Mississippi, and Texas.[285] The First Circuit holds sittings in Puerto Rico and the Third Circuit holds sittings in the U.S. Virgin Islands.[286] While I acknowledge that there will be more travel, the National Court of Appeals structure is not introducing a completely new part of the job.

Thus, when a case is filed in and working its way up through a particular district court, neither the litigants nor the district judges will know with any level of certainty who they will draw on any potential appeal. That is an essential feature of this design because "judges might make better decisions when the identities of those who will review the decisions are unknown."[287] It is also one of the biggest differences between this and prior national court proposals, all of which would provide even greater predictability in appellate panel composition than currently exists in the regional circuit system. In the Freund Group model, the national court would have only seven judges.[288] In the slightly larger Hruska Commission iteration, the court had its own lifetime-appointed judges, providing for even greater roster certainty.[289] Even in the Carrington and Meador proposals, district courts were assigned to specific divisions, so everyone—lawyers and district judges alike—knew who would review the decisions on

281. *See, e.g.*, 9th CIR. GEN. ORDER 3.1(e) ("Insofar as possible, over time, each active judge should sit with every other active and senior judge approximately the same number of times.").

282. *See* 28 U.S.C. § 48(a) ("The courts of appeals shall hold regular sessions at the places listed below "). The D.C. Circuit and the Federal Circuit are exceptions, because all of their respective judges are stationed where the court hears argument.

283. *See* 9TH CIR. GEN. ORDER 3.1(a) ("It is policy of the Court that there shall be Court calendars each year in the following places: San Francisco; Pasadena; Seattle; Portland; Honolulu; and Anchorage. Court calendars may be set in other locations within the circuit subject to the approval of the Chief Judge."); 9TH CIR. L.R. CT. STRUCTURE & PROCS. E.4 (providing for twelve weeklong sittings in each of San Francisco, Pasadena, and Seattle, six in Portland, three in each of Phoenix and Honolulu, and two in Anchorage).

284. *See* 6TH CIR. R. 202(a) ("All sessions are at the Potter Stewart U.S. Courthouse in Cincinnati, Ohio, unless otherwise ordered.").

285. *See* 5TH CIR. R. 47.2.

286. 1ST CIR. L.R. 34.1(b)(1); 3D CIR. L.R. 102.1(a).

287. Abramowicz, *supra* note 273, at 1603.

288. *See* FREUND REPORT, *supra* note 90, at 18–19.

289. *See* HRUSKA COMMISSION REPORT, *supra* note 90, at 30.

appeal.[290] And that predictability can be weaponized by both aggressive litigants and partisan district judges.

The current Fifth Circuit is a prime example of this problem. It has seventeen active judges: twelve were appointed by Republicans and five were appointed by Democrats.[291] Given that breakdown, there is an eighty-one percent chance of drawing a panel with at least two Republican-appointed judges, compared to only a nineteen percent chance of drawing a panel with at least two Democratic-appointed judges. That panel with two Republican-appointed judges is likely to be more extreme because a judge's ideological predisposition is amplified when sitting with a likeminded colleague.[292] And litigants and district judges know it and act accordingly. Between January 2021 and September 2024, Texas filed at least forty-seven challenges to Biden administration policies in Texas's district courts—often in single-judge divisions.[293] And those district judges, mostly appointees of President Trump, have struck down key provisions of the ACA, stayed the FDA's initial approval of an abortion medication, nullified workplace protections for LGBTQ people, and altered immigration policy, among others, betting that their far-right decisions will be reviewed favorably by the Fifth Circuit's conservatives. And usually, they are.[294]

But the National Court of Appeals would draw judges from across the entire roster, where the political divide is nearly even. As of March 2025, there are eighty-four active circuit judges appointed by Republicans and eighty appointed by Democrats. The divide remains just as even when you factor in senior judges: 134 Republican appointees and 132 Democratic appointees. Thus, the probability of drawing a majority Republican panel is virtually the same as drawing a majority Democratic panel. This structure reinforces the system's legitimacy, because it can't be gamed the same way by litigants or district judges. That, in turn, may have a moderating effect on the positions they take, limiting the likelihood (or at least the breadth) of extreme outcomes.

Back to my prior example. This National Court of Appeals panel hearing cases from the New England region will sit in Boston, where they will have access to chambers used by visiting judges. But, for this hypothetical, the panel will be drawn from judges stationed in San Francisco, New Orleans, and Kentucky. Sittings should last at least a week, and judges should hear as many cases as is practicable during each sitting for which they are traveling. Maximizing that should reduce the number of times a given judge needs to travel to hear their allotment of argued cases. Although the

290. *See supra* notes 123–30, 133–37 and accompanying text.

291. *United States Court of Appeals for the Fifth Circuit: Active Judges*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Fifth_Circuit [https://perma.cc/6W6U-FN7R] (last visited Mar. 24, 2025).

292. SUNSTEIN ET AL., *supra* note 202, at 8–13.

293. Orin Kerr, *Stephen Vladeck Replies to Judge Reed O'Connor on Forum Selection and Judge-Shopping*, VOLOKH CONSPIRACY (Sept. 25, 2024, 5:32 AM), https://reason.com/volokh/2024/09/25/stephen-vladeck-replies-to-judge-reed-oconnor-on-forum-selection-and-judge-shopping/ [https://perma.cc/UP2V-GPW7].

294. *See, e.g.*, Eleanor Klibanoff, *Again and Again, U.S. Supreme Court Slaps Down 5th Circuit*, TEX. TRIB. (July 2, 2024, 5:00 AM), https://www.texastribune.org/2024/07/02/5th-circuit-appeals-supreme-court-texas/ [https://perma.cc/G6U2-ZUGC].

frequency of argument hearings varies dramatically from circuit to circuit—nearly every week from September to June for the Second Circuit but only one week a month (but every month) for the Fifth Circuit—a typical session runs Monday through Thursday. Extending those hearing sessions to include Fridays would be one way to do that. Another might be to permit judges to elect to serve for two consecutive weeks in a given location. It may be easier for some to be away for that amount of time, and they might prefer that to traveling more frequently.

Advancements made in videoconferencing technology and lessons learned in court administration during the COVID-19 pandemic can be used to further offset increased travel burdens.[295] For one, the court can permit the parties in cases selected for oral argument to opt in to designated virtual hearings that will not require travel. For another, individual judges can be permitted to participate remotely in some subset of their required in-person sittings (a benefit that can increase when they assume senior status).

3. Conflict Mitigation

Published panel opinions will set precedent nationwide. Early in the process, when cases are placed on a hearing calendar, they will be screened by case management attorneys who will, among other things, identify the issues in each case and look for similar issues across cases for conflict prevention purposes.[296] Cases from the same region that raise the same issues can be assigned to the same panel to help develop consistency. And, when similar cases arise in different regions and are assigned to different panels, the system can inform later panels that the same issue is with an earlier panel that has priority.

However, despite best efforts to ensure panel priority and that other conflict prevention procedures are followed, the volume of hearings nationwide on a court of this size may permit two panels to inadvertently reach conflicting decisions on the same issue. To mitigate this risk, the National Court of Appeals should establish a predisposition review practice, whereby staff attorneys or other court staff check for blatant conflicts—such as divergent interpretations of the same statutory provision. Any potential issues can then be flagged for the panel, which will then have the opportunity to adjust before publication if they agree. In the event something slips through the cracks, panel rehearing remains an available option.[297]

4. En Banc Proceedings

To work on a national level, the process for rehearing a case en banc will also require reform in a few respects. Here's how the current process generally works. Once

295. *See, e.g.*, *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology [https://perma.cc/AM9B-JG4J]; *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW CHARITABLE TRS. (Dec. 2021), https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf [https://perma.cc/3CSD-M667].

296. *See, e.g.*, 9TH CIR. GEN. ORDER 4.1; *see also* Baker, *Circuit Boundaries*, *supra* note 33, at 939 (explaining that the Ninth Circuit has had a similar system since the 1980s).

297. Fed. R. App. P. 40.

a three-judge panel issues a decision, the court can consider rehearing en banc in one of two ways: (1) the parties can request rehearing en banc, or (2) a member of the court can sua sponte call for a vote. If the parties file a petition, the original three-judge panel will vote on it and inform the rest of the court of their decision. If the panel votes to deny the petition or no petition is filed, a non-recused active judge can call for a vote by the full court (that is, by all the other non-recused active judges). This typically requires the judge calling for the vote to circulate a memorandum stating the reasons for rehearing the case, after which other judges can circulate additional memoranda in response. Then the full court votes. If a majority vote to rehear the case, the panel opinion is vacated and the case set for reargument. In the absence of a majority, the petition is denied.

That is just not possible to do if all 167 active judges can participate in the process. To make the process more manageable, a call for a vote by the full court will first trigger review by a twenty-member en banc screening panel. The panel will be evenly divided politically—ten appointed by Republicans and ten appointed by Democrats. A screening panel of this size can be said to effectively speak for the entire court and should capture a broad range of views on any issue, limiting the influence of polar extremes.[298] Screening panel members may circulate memoranda in response to the reasons given by the judge calling for the vote. If a majority of the screening panel votes to rehear the case, the case will be heard by a separate eleven-member en banc merits panel.[299] The merits panel will be similarly divided—five appointed by Republicans, five appointed by Democrats, and one chief judge—none of whom shall have sat on the panel that decided the case they are reviewing. Importantly, the screening panel will not know the identity of the merits panel when voting to rehear.[300] Decisions of the en banc merits panel will be binding nationwide (subject to Supreme Court review).

5. Senior Status

Eligibility for retirement will remain the same, although the size of the National Court of Appeals could create some additional incentives. Under 28 U.S.C. Section 371, any active federal judge "may retire from the[ir] office" with full benefits when their service time plus their age equals eighty, so long as they have served for at least ten years and reached the age of sixty-five.[301] This is more commonly known as

298. Abramowicz, *supra* note 273, at 1629 ("A panel with six judges from one party and five from the other is likely to have individuals with strong feelings on both sides of a controversial issue, as well as moderates whose votes will ultimately be the deciding ones."); *see also* Maura Dolan, *Trump Has Flipped the 9th Circuit—and Some New Judges are Causing a 'Shock Wave*,*'* L.A. TIMES (Feb. 22, 2020) (explaining that as the partisan balance on the court narrowed, members became increasingly "reluctant to ask for 11-judge panels to review conservative decisions because the larger en banc panels, chosen randomly, might be dominated by Republicans").

299. The number of screening and merits panels sitting at any one time can be adjusted as needed. Service on each can be for one or two years, with staggered terms so the composition of each full panel changes regularly.

300. In the event of a tie vote by the screening panel, the en banc merits panel could grant review if at least eight of the eleven judges agree. This would ensure bipartisan agreement that the issue warrants review.

301. 28 U.S.C. § 371 (a), (c).

taking "senior status," and any judge who elects to take it vacates their seat, permitting the president to appoint a successor.[302]

In some circuits—especially larger ones like the Ninth Circuit—senior judges get to reduce their travel burden and can limit their hearing schedule to their home duty stations.[303] The National Court of Appeals should adopt a similar policy. Senior judges should be given the option to choose to hear cases only from a subset of the regional divisions (the specific parameters of which can be set by the Administrative Office depending on need). So, for example, a senior judge located in Virginia could elect only to hear cases from East Coast regions, sparing them West Coast travel. The court could similarly permit senior judges to attend more arguments remotely, making retirement a more attractive option. And encouraging more frequent retirements can serve as a means of combatting long-term partisan entrenchment.[304]

6. Vacancies

Under the current system, judgeships are tied to a particular regional circuit.[305] By statute, active judges must reside within the circuit they serve, and each state within that circuit must have at least one active judge.[306] When a judge retires (say, on the Third Circuit), the president, with the advice and consent of the Senate, gets to appoint a new judge—but only to the Third Circuit. This ensures that local interests have a voice in the collective development of national law.

That balance—and perhaps an even better balance—is possible without the regional circuits. Congress should formally allocate a certain number of seats to each state and require that at least one active circuit judge sit in every federal judicial district. This will ensure that National Court of Appeals vacancies, now untethered from a specific regional circuit, do not funnel judgeships only to a few select locations.[307] It will also ensure that the corps of judges have experience with different state law regimes.

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302. *See id.* § 371(d).

303. *E.g.*, 9TH CIR. GEN. ORDER 3.2(c).

304. *Cf.* Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1251–60 (2021) (discussing ways to lower the barrier to retirement).

305. *See* 28 U.S.C. § 44(a) (assigning to each circuit a specific number of judgeships).

306. *See id.* (providing that each circuit judge be a resident of the circuit to which they are appointed, both at the time of appointment and thereafter while in active service, and that there be at least one active circuit judge appointed from each state in that circuit).

307. This is already something of a problem, even in the regional circuit system. Take New York, for example. New York has four judicial districts: the Northern, Eastern, Southern, and Western districts. 28 U.S.C. § 112. Until recently, active circuit judges sat in the Northern District (Judge Rosemary Pooler) and the Western District (Judge Richard Wesley). But when Judges Pooler and Wesley retired, their replacements came from Manhattan. *See* Press Release, White House, Off. of the Press Sec'y, President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees (Apr. 26, 2018), https://trumpwhitehouse.archives.gov /presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-uni ted-states-marshal-nominees/ [https://perma.cc/BT2H-3HGB] (nominating Richard J. Sullivan to replace Judge Wesley); Press Release, White House, Off. of the Press Sec'y, President Biden Names Tenth Round of Judicial Nominees (Nov. 17, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/11 /17/president-biden-names-tenth-round-of-judicial-nominees/ [https://perma.cc/ZV7K-96Z7] (nominating Alison J. Nathan to replace Judge Pooler). Now, none of the nine active circuit judges sitting in New York have their chambers north of Foley Square in southern Manhattan.

B. Other Problems Solved

A National Court of Appeals would also solve several other problems either caused or exacerbated by the regional circuit system.

1. Uniformity of Law

It is axiomatic that without regional circuits there can be no circuit splits. Circuit splits are problematic because they permit federal law—law that is meant to be national—to mean different things in different parts of the country.[308] Although the Supreme Court can and does resolve some of them, its capacity (or willingness) to do so is limited.[309]

In the absence of Supreme Court review, the National Court of Appeals is capable of setting uniform national law. Either by initial decisions of a three-judge panel or final determination by an en banc panel, the National Court will provide an authoritative view. And it may be a better view. The National Court's broader, nationwide composition permits more voices to participate in the law's development.[310]

2. Uniformity of Practices and Workloads

The National Court of Appeals also presents a real opportunity to normalize and streamline appellate policies and procedures across the country.[311] Right now, there are dramatic differences across the regional circuits in workloads and circuit procedures governing decisions about which cases get the benefit of oral argument and which result in published or unpublished decisions. In her meticulous study, Professor Merritt McAlister explores not just what those differences are but the powerful impact those differences have on the meting out of justice.[312]

Take workloads for example. According to data from 2020, the adjusted filings per three-judge panel ranged from as low as 182 for the D.C. Circuit to as high as 782 for the Fifth Circuit.[313] The same kind of disparity exists in terms of per-judge filings. On the low end, the D.C. Circuit had 102 and the Tenth Circuit had 145, whereas the Second Circuit had 361, the Fifth Circuit had 377, the Ninth Circuit had 359, and the

308. Dragich, *Century*, *supra* note 26, at 37–38 ("[T]he present structure of the federal court system, by allowing conflicts to develop, is at odds with societal expectations that expanding federal law be applied uniformly across the country."); Weis, *Overloaded Circuits*, *supra* note 26, at 463.

309. Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 456 (2019) (finding that "only about one-third of intercircuit splits are resolved by the Supreme Court" and that "those that are currently unresolved are likely to remain so"); *see also* FREUND REPORT, *supra* note 90, at 6.

310. *See* Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 974 (1964) (noting that the federal courts of appeals are "best able" to serve the "national interest" by applying a "national system of law" when they are "composed of judges who have practiced in different states, who have a wide variety of experience, [and] who are free from the prejudices and provincialisms which color the thinking of lawyers in any one state").

311. *See* Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1136, 1143–44 (2022) (explaining that "inexplicabl[e]" variations in appellate policies and procedures across the circuits "are not the kinds of circuit splits that receive Supreme Court review").

312. *Id.* at 307.

313. *Id.* at 1202 tbl. 12.

Eleventh Circuit had 443.[314] The National Court of Appeals model can more efficiently and equitably allocate those filings across the entire intermediate tier.

The regional circuits also differ significantly in their use of oral argument. As Professor McAlister details, from 2016 through 2020, the D.C., Second, and Seventh Circuits on average heard oral argument in at least 33.4% of their merits cases.[315]

By contrast, the Third, Fourth, Sixth, and Eleventh Circuits heard argument in 13.8% or less. The gap at the extremes is even larger: The D.C. Circuit heard oral argument in 47% of their cases, compared to just 9.2% in the Fourth Circuit. The Fourth and Eleventh Circuits publish decisions in less than 7% of their cases.[316] Meanwhile, the D.C. and Seventh Circuits publish decisions in more than a third of their cases.[317]

These are not distinctions without a difference. The various procedures subject similar litigants and similar cases to different treatment, and that can lead to "a disparate impact" in outcomes "based on race and, to a lesser extent, class."[318] Whatever the optimal practice for oral argument and publication—either as a normative or theoretical matter—the National Court of Appeals will subject all cases to the same standard nationwide.

Some scholars suggest that imposing uniform practices across the circuits would stifle innovation.[319] But it is not all that clear that the regional circuits currently derive any collective benefit from experimentation undertaken by individual circuits. Indeed, as recently as the 2024 Association of American Law Schools' Annual Meeting, several circuit judges acknowledged that there is no mechanism through which different circuits can share their innovative successes and failures with other courts.[320] Moreover, innovation will be possible in the National Court of Appeals model. The central office, together with the regional judicial councils, could develop pilot programs to test new policies or procedures before implementing them court wide.

C. Other Objections

Any proposal to alter the composition or structure of the federal courts is likely to encounter significant opposition from the political branches, the bench, the bar, and the academy. While many likely objections have merit, they are ultimately not convincing enough to overcome the need for major structural change.

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314. *Id.* at 1205 tbl. 14.

315. *Id.* at 1177 tbl. 4.

316. *Id.* at 1176 tbl. 3.

317. *Id.*

318. *Id.* at 1187–89 ("[T]he Fifth, Ninth, and Eleventh Circuits are the most diverse, and in particular, the Fourth and Eleventh Circuits have the greatest concentrations of Black Americans. Recall that these are also the circuits with the smallest first tier and the largest second tier of federal appellate procedure, as reflected in the overall volume of unpublished decisions and use of oral argument.").

319. *See, e.g.*, Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 382 (2011) ("To impose uniformity would be to deprive circuits of the ability to experiment and might result in great inefficiencies.").

320. McAlister, *supra* note 311, at 1175 ("[C]ourts aren't really experimenting—they're just doing things differently for 'no apparent reason,' thus 'mocking the notion of equal treatment under the law.'" (quoting RICHMAN & REYNOLDS, *supra* note 60, at 94)).

1. Political Feasibility

The most likely objection is also the most practical: It will never get through Congress. It's true—this proposal, like any other restructuring of the federal court system, would require an act of Congress. And that seems unlikely. As a historical matter, despite repeated crises of one form or another, not all that much has changed structurally.[321] It is not for a lack of considering structural change either. As the prior sections illustrate, double-digit studies were conducted in the last half century, several of which at least floated the idea of major structural realignment.[322] Instead, Congress mostly added judgeships (which it also has stopped doing).[323]

Add to that backdrop the current polarization of both Congress and the courts and change seems even less likely. Republicans have finally succeeded in their decades-long effort to stack the courts with young conservative firebrands, and the current regional structure is decidedly to their advantage.[324] They have no incentive to reduce the influence of the supermajority of conservative judges on courts like the Fifth and Eighth Circuits.[325] Democrats, for their part, seem to see court reform—and Supreme Court reform in particular—as a political third rail to be avoided at all costs.[326] President Biden's Supreme Court Reform Commission was widely seen as an

321. Menell & Vacca, *supra* note 29, at 869–70 ("Notwithstanding broad recognition that federal litigation had exploded and that the judiciary was in serious need of reform in the 1970s, 1980s, and 1990s, the nation failed to make significant changes." (footnote omitted)).

322. *See supra* Part II.A. *See generally* Baker, *Generation*, *supra* note 115 (cataloguing thirteen different studies about the courts of appeals and their structure).

323. The number of permanent circuit court judgeships has not increased since 1990, and the number of permanent district court judgeships has not increased since 2003, despite repeated pleas by the Judicial Conference of the United States. *See, e.g.*, BARRY J. MCMILLION, CONG. RSCH. SERV., IN11639, RECOMMENDATION FOR NEW U.S. CIRCUIT AND DISTRICT COURT JUDGESHIPS BY THE JUDICIAL CONFERENCE OF THE UNITED STATES (117TH CONGRESS) (2021), https://crsreports.congress.gov/product/pdf/IN/IN11639 [https://perma.cc/RQ68-Y6PD]; *Federal Judiciary Seeks New Judgeship Positions*, U.S. CTS. (Mar. 14, 2023), https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions [https://perma.cc/349T-9C26]. In 2024, the Senate passed the JUDGES Act, which would add 66 new federal district court judgeships over 10 years. Daniel Wiessner & Nate Raymond, *US Senate Approves Bill To Create 66 New Federal Judgeships*, REUTERS (Aug. 2, 2024, 11:44 AM), https://www.reuters.com/legal/government/us-senate-approves-bill-create-66-new-federal-judgeships-2024-08-01/ [https://perma.cc/V4SS-WYBE]. However, President Biden later vetoed the legislation. *See* Anthony Adragna, *Biden Vetoes Bill that Would Have Created Dozens of New Federal Judge Slots*, POLITICO (Dec. 23, 2024, 10:27 PM), https://www.politico.com/news/2024/12/23/biden-vetoes-bill-federal-judge-slots-00195981 [https://perma.cc/EZ92-4N6Z].

324. *See* Collins, *supra* note 93, at 37–55.

325. *See* Mattathias Schwartz, *How a Federal Court in New Orleans Is Driving the Conservative Agenda*, N.Y. TIMES (Aug. 26, 2024), https://www.nytimes.com/2024/08/26/us/new-orleans-appeals-court-trump.html (quoting Texas Senator Ted Cruz as describing the Fifth Circuit as "the finest appellate court in the country" with judges whose "legal acumen matches or exceeds any other group of judges in the country").

326. Even though a majority of Americans support increasing the number of Supreme Court Justices, *see D8: Increase # of Justices*, MARQUETTE UNIV. L. SCH. POLL (Sept. 7–14, 2022), https://law.marquette.edu/poll/wp-content/uploads/2022/09/MLSPSC10Toplines_CourtIssues.html#D8:_Increase__of_justices [https://perma.cc/8UZU-NLSR], Senator Ed Markey's proposal to add four seats to the Supreme Court garnered only two cosponsors in the Senate—his fellow Massachusetts Senator Elizabeth Warren and Minnesota Senator Tina Smith, *see Cosponsors: S.1141 — 117th Congress (2011-2022)*,

effort to buy time without having to take a definitive position on a hot button issue.[327] But the problem facing our judiciary is real and it is dangerous, and the conversation about how to fix it has to start somewhere.

Also, this proposal is less politically fraught than some others currently in mainstream discussion for a few reasons. First and foremost, it does not affect the composition or jurisdiction of the Supreme Court.[328] Some Supreme Court reform proposals, like term limits, would require a constitutional amendment.[329] Others, like "court-packing," run the risk of perceived gamesmanship and further erosion of the system's legitimacy.[330] Similarly, this proposal does not require adding any new judgeships. Even though it used to be Congress's go-to response, and the Judicial Conference has continued to recommend the creation of additional judgeships, the number of authorized judgeships on the courts of appeals has not increased since 1990. The creation of new judgeships raises the attendant (and politically charged) question of who gets to fill them and when, especially if the new seats threaten to flip the balance of a particular court. That concern is dampened on a court of this size, given the number of flips it would take to meaningfully affect panel compositions.

2. Collegiality

Judges themselves may levy the longstanding complaint that a larger court would erode collegiality among its members.[331] Collegiality is important because it creates "conditions for principled agreement."[332] A collegial atmosphere, one in which judges act with civility and respect, gives rise to a "willingness on the part of every panel

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CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/1141/cosponsors [https://perma.cc/FKZ6-TDLB] (last visited Mar. 24, 2025).

327. *See, e.g.*, Aaron Blake, *Biden's Supreme Court Commission Successfully Removes Pie From Sky*, WASH. POST (Oct. 15, 2021), https://www.washingtonpost.com/politics/2021/10/15/bidens-supreme-court-commission-successfully-removes-pie-sky/.

328. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1721–28 (2021) (explaining various reform options like court-packing and jurisdiction-stripping); Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. L. REV. 1519, 1523 (2020) (arguing that "[i]f the Democrats sweep the November 2020 elections . . . they should add at least four justices to the Court, increasing its size to thirteen"); Daniel Epps & Ganesh Sitaraman, *How To Save the Supreme Court*, 129 YALE L. J. 148, 181–86 (2019) (proposing appointing "every judge on the federal courts of appeals" as an associate justice and "randomly select[ing]" nine to hear appeals).

329. *See* U.S. CONST. art. III, § 1 (providing that judges "shall hold their Offices during good Behaviour"); *see, e.g.*, Doerfler & Moyn, *supra* note 328, at 1754–55; Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 26–31 (2021) (cataloging existing Supreme Court term limit proposals).

330. Feldman, *supra* note 328, at 1523–25 (2020) (defining "court-packing" as "simply adding justices to shift the partisan balance of the Court").

331. *See, e.g.*, Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOK. L. REV. 355, 369–70 (1989) (describing collegiality as "one of the essential assets of a judicial institution"); Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CALIF. L. REV. 905, 908 (2020) (suggesting that a National Court of Appeals would come with "a clear loss in collegiality, which most [judges] believe promotes not only a pleasant work environment but also, more importantly, the internal resolution of significant disputes about the language of opinions").

332. Harry T. Edwards, *Collegial Decision-Making in the US Courts of Appeals*, *in* COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE 57, 84 (Birke Hacker & Wolfgang Ernst eds., 2020).

member in a given case to consider their colleagues' point of view in an open objective manner, untinged with any resentment or chagrin that a colleague differs from one's own point of view."[333] And that, in turn, leads to higher quality decision-making.[334]

The conventional wisdom is that collegiality is only achievable when judges work in smaller groups because that is a necessary condition for developing effective working relationships.[335] Those conditions can be replicated to an extent even on a larger court. For one, judges will continue to socialize with the other judges in their courthouse. For example, fifteen current Second Circuit judges are stationed in Foley Square. Seven Fifth Circuit judges are based in New Orleans. At least five Third Circuit judges sit in each of Philadelphia, Pittsburgh, and Wilmington. It's true that they may not be working on any of the same cases, but "a strong norm in most socializing traditions" that build those working relationships is "no case talk."[336]

Then there are the judges assigned to the same panels. Those weeklong sittings will provide additional opportunities to develop relationships across a broader range of colleagues. By drawing from a larger nationwide roster, judges will be exposed to a wider spectrum of viewpoints, styles, approaches, and personalities. This helps foster collegiality because "[r]epetitive active engagement with judges appointed by a different President seems critical to establishing rapport."[337] The regional circuit system can make that harder, given the extreme partisan imbalance on several courts of appeals. Five of six seats on the First Circuit were filled by Presidents Obama and Biden, and only one of its five senior judges was appointed by a Republican.[338]

Conversely, of the Eighth Circuit's twelve active and senior judges, only one—Judge Jane Kelly—was appointed by a Democratic president.[339] Although more evenly divided, half of the Eleventh Circuit's active judges were appointed by one president—Donald Trump.[340]

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333. Hon. Richard J. Cardamone, *How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 BROOK. L. REV. 281, 282–83 (1999) (describing a collegial decision-making process as requiring "a sacrifice of one's ego, and a willingness to compromise and make concessions"); *see also* 1993 REPORT, *supra* note 95, at 106 (describing collegiality "as the relationship of circuit judges who are part of a unitary institution" and noting that it is "critical to the quality of the appellate court's product").

334. *Id.* ("When members of a court feel a sense of responsibility to issue opinions reflecting as faithfully as possible the overall sense of the court, radical shifts in the law of the circuit may become less likely.").

335. Dragich, *Drawing Board*, *supra* note 26, at 210 ("Collegiality . . . is enhanced when the corps of judges is small enough that judges know one another well." (citing Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 401 (1989))).

336. Larsen & Devins, *Circuit Personalities*, *supra* note 257, at 1335 (quoting Interview with D.C. Cir. Judge (Apr. 19, 2021)).

337. *Id.* at 1337.

338. *United States Court of Appeals for the First Circuit: Active Judges*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_First_Circuit [https://perma.cc/37PL-N2HK] (last visited Mar. 24, 2025).

339. *United States Court of Appeals for the Eighth Circuit: Active Judges*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Eighth_Circuit [https://perma.cc/BC7Z-9CSC] (last visited Mar. 24, 2025).

340. *United States Court of Appeals for the Eleventh Circuit: Active Judges*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Eleventh_Circuit#Active_judges [https://perma.cc/Z9E6-5GYH] (last visited Mar. 24, 2025).

Moreover, it is not all that clear that collegiality can survive in the current system—and some data suggests it is already waning.[341] Disagreement taxes collegiality, but it is a cost Trump appointees are happy to pay. Indeed, it's what they were chosen to do.[342] Consider the Fifth Circuit's recent decision in *Young Conservatives of Texas Foundation v. Smatresk*, in which a unanimous panel of Republican-appointed judges held that illegal aliens in Texas are eligible for lower in-state tuition rates at Texas universities.[343] Rather than defer to the decision of his colleagues, Judge Ho requested to rehear the case en banc. Federal Rule of Appellate Procedure 35(a) makes clear that "rehearing is not favored" and should not be ordered unless "necessary to secure or maintain uniformity of the court's decisions" or the case "involves a question of exceptional importance."[344] Neither criteria was satisfied, which is why all fifteen of Judge Ho's colleagues voted to deny rehearing.[345] Judge Ho's dissenting opinion made no effort to claim otherwise—he only said that he "agree[d] with the district court, and disagree[d] with the panel."[346] Similarly, Ninth Circuit Judge Daniel Collins, another Trump appointee, called for rehearing en banc of five decisions by other three-judge panels before he had been assigned to his first.[347]

It is not just the increased quantity of disagreement but the lack of its quality that should give even the most optimistic court watcher pause. In one case, Ninth Circuit Judge Lawrence VanDyke accused his colleagues of playing "dirty" and "get[ting] creative on appeal to achieve [their] preferred result," said they "should be embarrassed," and called them "obtuse."[348] In another, he went so far as to attach to his own majority opinion a concurring opinion styled as an en banc majority opinion overruling himself so the liberal "majority of [the] court can get a jump-start on calling this case en banc."[349] And more recently, he claimed that "17/29ths of our bench" is not "interested in faithfully applying" Supreme Court precedent.[350]

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341. Devins & Larsen, *Weaponizing En Banc*, *supra* note 232, at 1436 ("One thing we know for sure, though: 2018 to 2020 was a period of time marked by the erosion of well-entrenched norms of judicial independence and collegiality.").

342. *See* Collins, *supra* note 93, at 39–40 (explaining how the Trump administration wanted judicial nominees "who had publicly 'stood for [their] principles and paid the price,'" with "a paper trail demonstrating the veracity of the candidate's views" (alteration in original) (quoting McGahn, *supra* note 261, at 164)).

343. 73 F.4th 304, 307 (5th Cir. 2023).

344. FED. R. APP. P. 35(a)(1)–(2).

345. Young Conservatives of Tex. Found. v. Smatresk, 78 F.4th 159 (5th Cir. 2023) (denying rehearing en banc).

346. *Id.* at 160 (Ho, J., dissenting).

347. Dolan, *supra* note 298.

348. Cordero-Garcia v. Garland, 44 F.4th 1181, 1195, 1201 (9th Cir. 2022) (VanDyke, J., dissenting), *rev'd sub nom.*, Pugin v. Garland, 143 S. Ct. 1833 (2023).

349. McDougall v. County of Ventura, 23 F.4th 1095, 1120 (9th Cir. 2022) (VanDyke, J., concurring), *vacated*, 26 F.4th 1016 (9th Cir. 2022).

350. United States v. Duarte, 108 F.4th 786, 788 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc).

3. Percolation

Another objection may be that the National Court of Appeals would deprive the Supreme Court of the benefits of lower court "percolation."[351] Percolation is the Supreme Court's "practice of awaiting multiple lower courts' answers to a legal question" before weighing in itself.[352] The percolation process allows for "an extended, nationwide brainstorming session" that generates important information—legal arguments, key facts, workability, public reaction, to name a few—that the Supreme Court can use "to reach sound, effective, or otherwise 'correct' resolutions of the issues it confronts."[353]

Percolation can be costly in several respects. There are literal costs—the legal bills to litigants whose cases serve as guinea pigs and the increased costs of compliance across varying legal regimes in different parts of the country.[354] There are also more philosophical costs—the incongruity of the same federal law meaning different things in different places, and the negative effect that has on the rule of law. [355]

To outweigh those costs, percolation must provide some real value. It is not clear that it does. A recent analysis concluded that "percolation's value is simply too contingent and context-specific to support any generalized presumption in its favor."[356] That accords with the views of some judges. Then-Associate Justice Rehnquist wrote that the percolation process "makes very little sense" in a country with a national

351. AM. ENTER. INST. FOR PUB. RSCH., *supra* note 98, at 5 ("Opponents of the national court argue that issues should be allowed to 'percolate,' that is to receive repeated attention by lower courts before being considered at the national level perhaps many years later.").

352. Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 371 (2021); *see also* California v. Carney, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) ("[P]ercolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."); Calvert v. Texas, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting the denial of certiorari) ("The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review."); SUP. CT. R. 10(a) (providing that the Supreme Court will consider whether "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").

353. Coenen & Davis, *supra* note 352, at 389–90; *see also* Weis, *Overloaded Circuits*, *supra* note 26, at 461 ("Justification for the practice rests on the assertions that differing opinions among courts of appeals will ultimately lead to the 'right' result, either by consensus or by a ruling of the Supreme Court."); Abramowicz, *supra* note 273, at 1640 ("One might argue, however, that what the [Supreme] Court sometimes needs is the experience of different circuits living under different rules. For example, the [J]ustices might care about the workability of different solutions, and actual experience by those seeking to comply with rules of different circuits may be better than mere speculation.").

354. Coenen & Davis, *supra* note 352, at 387; Carrington, *The Function of Civil Appeal*, *supra* note 80, at 428 ("We seldom hear talk of the virtues of percolation from the litigants who must pay its bill and lawyers who must endure repetitious and dilatory proceedings."); HRUSKA COMMISSION REPORT, *supra* note 90, at 33 ("In many cases there are years of uncertainty during which hundreds, sometimes thousands, of individuals are left in doubt as to what rule will be applied to their transactions.").

355. Coenen & Davis, *supra* note 352, at 387 (noting that one cost of percolation is that it "undermin[es] the rule of law"); Rehnquist, *supra* note 22, at 11–12. *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008) ("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.").

356. Coenen & Davis, *supra* note 352, at 369.

government because "Congress should not be held to have laid down one rule in North Carolina and another in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute."[357] In cases raising questions of federal law requiring Supreme Court review, Second Circuit Judge Henry Friendly encouraged the Supreme Court to bypass the courts of appeals entirely and "grant certiorari before decision," believing that lower courts have little to contribute in such cases.[358] Even assuming percolation's value, it still should be weighed against the likelihood that the current Supreme Court is even interested in waiting for the lower courts to brainstorm about certain issues.[359]

4. Regional Specialty

Conventional wisdom also suggests that regional organization breeds expertise. Substantively, regional circuits can develop an expertise in the types of cases that they hear more frequently than others.[360] More practically, the judges of the courts of appeals are more familiar with the district judges whose decisions they regularly review. They know which judges are workmanlike and careful, and which judges aren't, and can adjust their review accordingly.

On the substantive point, the data on regional specialization is not so clear cut. In her comprehensive study, which grouped appeals into criminal, U.S. prison petitions, U.S. civil, private prisoner petitions, private civil, bankruptcy, agency appeals, and original proceeding categories, Professor McAlister found that "most of the twelve geographic courts of appeals see roughly the same kinds of appeals in roughly the same percentages."[361] But assuming they do develop expertise in certain subcategories, the federal court system has largely resisted specialization.[362] Article III judges are generalists and are expected to be able to handle the broad panoply of cases that come before them, regardless of subject matter. Indeed, the development of the law may be

357. Rehnquist, *supra* note 22, at 11–12.

358. Henry J. Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 407 (1972) ("I am unable to share the view, expressed on occasion by some polite Justices and entertained by some of my colleagues, that we have much to contribute in such cases; I doubt whether many of the Justices even read our opinions, at least on constitutional issues, except as these are filtered through the briefs of counsel or the memoranda of law clerks.").

359. Ann E. Marimow, *Trump's Lasting Legacy on the Judiciary Is Not Just at the Supreme Court*, WASH. POST (Jan. 29, 2023), https://www.washingtonpost.com/politics/2023/01/29/5th-circuit-court-trump-judges-conservative/ (explaining that Trump appointees on the Supreme Court "are more aggressive and willing to follow the law as they see it and let the chips fall where they may," and they are "not going to sit and wait for the percolation that might happen otherwise.").

360. Dragich, *Century*, *supra* note 26, at 44 & n.186 ("For example, the Second and Third circuits are considered experts in commercial law, the Fifth in admiralty law, and the Fifth and Ninth in immigration law.").

361. McAlister, *supra* note 311, at 1182–84 & tbl.6 (explaining that, with the exception of the D.C. Circuit (administrative appeals), the First Circuit (bankruptcy), and the Second Circuit (private civil appeals), "no other circuit exceeds two standard deviations with respect to any category of appeals based on five-year means").

362. *See* Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1765–67 (1996).

enhanced by incorporating more perspectives and experiences. Moreover, the composition of the bench is not static. To the contrary, it changes regularly, and new judges must constantly acclimate themselves to all the issues raised by their court's docket.[363]

There is also frequent turnover on the district court benches, which diminishes the force of the more practical objection. So too does the reality that reputations are hard to shake but quick to spread, especially in an insular group like a court. And in any event, it may actually be more beneficial to scrutinize all decisions the same way.

CONCLUSION

Tweaking the federal judiciary at the margins is no easy feat, to say nothing of wholesale reform. Nevertheless, this Article proposes to do just that: eliminate the regional U.S. Court of Appeals, and replace them with a single, centralized, and unified National Court of Appeals. Unlike prior unsuccessful proposals aimed at reducing workloads, this proposal is necessary to combat the real and growing problem of circuit capture. And this Article contributes a detailed blueprint for how we can do it.

But it's just one blueprint, and hopefully this Article can serve as a catalyst for a broader, more robust discussion about reform. Donald Trump's reelection has all but ensured that things will get worse before they get better, both for the judiciary and for the country. When the opportunity to make the court system better arises, we need to be up to the task of promoting and protecting the judicial independence so central to the Framers constitutional design. I hope this Article gets us one step closer to doing so.

363. For example, in the five years from 2018 to 2023, eleven of the thirteen authorized judgeships on the Second Circuit changed hands. Nothing suggests that any of the eleven nominees were selected because of a perceived expertise in securities or copyright law. But rather, like any other judge, they would be able to draw from the extensive body of decisional work.