BREAKING THE VICIOUS CYCLE FRAGMENTING NATIONAL LAW

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One of the most troubling and increasingly overlooked problems plaguing the federal judiciary has been the reduction of throughput at the Supreme Court and the resulting fragmentation of national law. The imperative to resolve circuit splits has taken a back seat as the Court grapples with high-profile battles and the relentless crush of certiorari petitions. This fuels confusion and greater fragmentation of national law. Add in the general expansion of national law, and the vicious cycle intensifies.

This Article proposes a solution for expanding structural capacity to address fragmentation that does not require legislative reform or constitutional amendment. It utilizes a procedure already within the Supreme Court's toolbox, although with a twist: where the Justices encounter a clear circuit split that does not rise to the Court's certiorari threshold, the Court should grant, vacate, and remand ("GVR") the matter to the circuit court for en banc review. The Supreme Court would, of course, retain authority to review the en banc decision.

This reinvigoration of one of the judiciary's core functions holds the promise of enhancing the rule of law, curtailing forum shopping, reducing litigation costs, and promoting equity and economic productivity. It would require the Supreme Court to take on a more managerial approach to percolating national law and ask the appellate courts to assume greater responsibility for confronting intercircuit and intracircuit divisions.

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We thank Aaron-Andrew Bruhl, Judge Arthur Gajarsa (ret.), John Greabe, Arthur Hellman, Tejas Narechania, and Judge Jon O. Newman for their helpful comments on an earlier draft, and Milica Degges and Tiana Wang for their excellent research assistance.

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I. INTRODUCTION

One of the most troubling and increasingly overlooked problems plaguing the federal judiciary has been the reduction of throughput at the Supreme Court and the resulting fragmentation of national law. It is especially prevalent in areas of low political salience and division, such as business and intellectual property law. The Court is resolving only about sixty-six cases on the merits per year.[1] The imperative to resolve circuit splits has taken a back seat as the Court grapples with high-profile battles and the relentless crush of certiorari petitions.[2] This, unfortunately, fuels confusion and greater fragmentation of national law. Add in the general expansion of national law, and the vicious cycle intensifies.

The fragmentation challenge has grown due to legislative gridlock over adding judges, expanding funding, and confronting structural limitations plaguing the federal judiciary.[3] Half a century ago, even the most ardent skeptic of structural change warned that reform would be needed in the coming decades, yet the concerns continue to fall on deaf ears.

Fragmentation of the law imposes significant costs on the public and private sectors as well as the judiciary. It generates confusion and inefficiencies in business planning, promotes forum shopping, undermines the rule of law by providing unequal treatment, harms competition, produces wasteful litigation, and burdens district and circuit court judges already grappling with increasing caseloads.[4] Unfortunately, President Biden's judiciary reform commission failed

1. Over the past five years, the number of full merits decisions has averaged sixty-six per Term. *See Supreme Court Cases, October Term 2021-2022*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2021-2022 (last visited Oct. 26, 2023) [perma.cc/TG96-2FBA]; *Supreme Court Cases, October Term 2020-2021*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2020-2021 (last visited Oct. 26, 2023) [https://perma.cc/RYJ2-PZA9]; *Supreme Court Cases, October Term 2019-2020*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020 (last visited Oct. 26, 2023) [https://perma.cc/65SJ-9PG3]; *Supreme Court Cases, October Term 2018-2019*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2018-2019 (last visited Oct. 26, 2023) [https://perma.cc/79EF-2RQB]; *Supreme Court Cases, October Term 2017-2018*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2017-2018 (last visited Oct. 26, 2023) [https://perma.cc/8KHU-NFM4]; *Supreme Court: The Statistics*, 135 HARV. L. REV. 491, 491 (2021) (sixty-two opinions of court); *Supreme Court: The Statistics*, 134 HARV. L. REV. 610, 610 (2020) (fifty-nine opinions of court); *Supreme Court: The Statistics*, 133 HARV. L. REV. 412, 412 (2019) (seventy-two opinions of court); *Supreme Court: The Statistics*, 132 HARV. L. REV. 447, 447 (2018) (seventy-one opinions of court).

2. *See generally* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 456–58 (2019).

3. Judiciary reform has been especially difficult throughout U.S. history. There has been no major structural judiciary reform since the Evarts Act of 1891. *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. 787, 795–843 (2020).

4. *See infra* Part II.

to achieve consensus on judiciary reform,[5] and Congress does not appear poised to take on this task.[6]

This Article proposes a solution for expanding structural capacity to address fragmentation that does not require legislative reform or constitutional amendment. It utilizes a procedure already within the Supreme Court's toolbox, although with a twist: where the Justices encounter a clear circuit split that does not rise to the Court's certiorari threshold, it should grant, vacate, and remand (GVR) the matter to the circuit court for en banc review. The Supreme Court would, of course, retain authority to review the en banc decision. In this way, the Supreme Court could significantly expand the judiciary's capacity to address fragmentation and make greater, and more efficient, use of the appellate courts.

This approach would require the Supreme Court to take on a more managerial approach to percolating national law and ask the appellate courts to assume greater responsibility for confronting both intra-circuit and inter-circuit divisions through en banc review, something that some circuit courts have been reluctant to do. Nevertheless, as we explain, the combination of greater managerial delegation by the Supreme Court and stepping up by the appellate courts can ameliorate the nation's growing fragmentation challenge.

Part II traces the causes and costs associated with fragmentation of national law. Part III examines the emergence of en banc review, its evolution, and its declining use. Part IV proposes and evaluates the GVR En Banc (or GVREB) procedure for enhancing percolation and reducing fragmentation of national law. Part V examines potential objections.

II. FRAGMENTATION OF NATIONAL LAW: A SCOURGE

Fragmentation, or lack of uniformity in the law, has been a concern since the nation's founding. In the early 1790s, Founding Father and U.S. Supreme Court Justice James Wilson delivered a series of *Lectures on Law* at the College of Philadelphia.[7] In *Of the Nature of Courts*, he explained that because judicial systems fragment the law, a superior tribunal—the Supreme Court—needs to oversee the lower courts to avoid and resolve fragmentation:

> According to the rules of judicial architecture, a system of courts should resemble a pyramid. Its base should be broad and spacious: it should lessen as it rises: its summit should be a single point. To express myself without

5. Charlie Savage, *'Court Packing' Issue Divides Commission Appointed by Biden*, N.Y. TIMES (Dec. 7, 2021), https://www.nytimes.com/2021/12/07/us/politics/supreme-court-packing-expansion.html [https://perma.cc/2RWY-BHQU]; Gabe Roth, *The Biden SCOTUS Commission Ends Up Disappointing Everyone*, BLOOMBERG L. (Dec. 13, 2021, 3:00 AM), https://news.bloomberglaw.com/us-law-week/the-biden-scotus-commission-ends-up-disappointing-everyone [perma.cc/Z6SY-5CCY]; Madison Alder, *Biden's Supreme Court Commission Members Still Await Response*, BLOOMBERG L. (Aug. 15, 2022, 3:45 AM), https://news.bloomberglaw.com/us-law-week/bidens-supreme-court-commission-members-still-await-response [perma.cc/GS59-UZ7L].

6. *See* Seung Min Kim & Robert Barnes, *Supreme Court Term Limits Are Popular—and Appear to Be Going Nowhere*, WASH. POST (Dec. 28, 2021, 6:00 AM), https://www.washingtonpost.com/nation/2021/12/28/supreme-court-term-limits [perma.cc/SQB3-NTFC].

7. Mark David Hall, *History of James Wilson's Law Lectures*, *in* 1 COLLECTED WORKS OF JAMES WILSON 401, 403–04 (Kermit L. Hall & Mark David Hall eds., 2007).

> a metaphor—in every judicial department, well arranged and well organized, there should be a regular, progressive gradation of jurisdiction; and one supreme tribunal should superintend and govern all the others.
>
> An arrangement in this manner is proper for two reasons: (1) The supreme tribunal produces and preserves a uniformity of decision through the whole judicial system; and (2) It confines and it supports every inferiour court within the limits of its just jurisdiction.
>
> If no superintending tribunal of this nature were established, different courts might adopt different and even contradictory rules of decision; and the distractions, springing from these different and contradictory rules, would be without remedy and without end. Opposite determinations of the same question, in different courts, would be equally final and irreversible. But when, from those opposite determinations, an appeal to a jurisdiction superiour to both is provided, one of them will receive a sentence of confirmation, the other, of reversal. Upon future occasions, the determination confirmed will be considered as an authority; the determination reversed will be viewed as a beacon.
>
> *Ampliare jurisdictionem* [to enlarge the jurisdiction] has been a principle avowed by some judges: it is natural, and will operate where it is not avowed. It will operate powerfully and irresistibly among a number of coordinate and independent jurisdictions; and, without a tribunal possessing a control over all, the pernicious and interfering claims could neither be checked nor adjusted. But a supreme court prohibits the abuse, and protects the exercise, of every inferiour judiciary power.[8]

As Wilson described, unless otherwise directed by the Supreme Court, lower courts will inevitably adopt legal rules that differ across jurisdictions, which leads to different resolutions of the same question—a "pernicious" result.

This concern was echoed by Wilson's colleague, Alexander Hamilton, who aptly noted "the necessity of uniformity in the interpretation of the national laws . . . ."[9] He explained that having multiple independent courts deciding cases "arising upon the same laws is a hydra in government from which nothing but contradiction and confusion can proceed."[10]

Several decades later, Justice Joseph Story remarked upon "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[11] If there was no method of making federal law uniform amongst the lower courts, Justice Story explained, then "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely

8. James Wilson, *Of the Nature of Courts*, *in* 2 COLLECTED WORKS OF JAMES WILSON 943, 945 (Kermit L. Hall & Mark David Hall eds., 2007).

9. THE FEDERALIST NO. 80 (Alexander Hamilton).

10. *Id.* Hamilton was referring to state supreme courts having the final interpretation over federal law. Today's circuit courts of appeal did not exist at the time that the Constitution was ratified. In fact, they would not exist for another century. *See* Menell & Vacca, *supra* note 3, at 800–01 (describing the Evarts Act of 1891).

11. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

the same construction, obligation, or efficacy, in any two states. The public mischief that would attend such a state of things would be truly deplorable."[12]

Attorney General Merrick Garland powerfully expressed the importance of the rule of law in administering the Oath of Allegiance to new American citizens on Citizenship Day:

> The protection of law—the Rule of Law—is the foundation of our system of government.
>
> The Rule of Law means that the same laws apply to all of us, regardless of whether we are this country's newest citizens or whether our [families] have been here for generations.
>
> The Rule of Law means that the law treats each of us alike: there is not one rule for friends, another for foes; one rule for the powerful, another for the powerless; a rule for the rich, another for the poor; or different rules, depending upon one's race or ethnicity or country of origin.
>
> The Rule of Law means that we are all protected in the exercise of our civil rights; in our freedom to worship and think as we please; and in the peaceful expression of our opinions, our beliefs, and our ideas. . . .
>
> The Rule of Law is not assured. It is fragile. It demands constant effort and vigilance.
>
> The responsibility to ensure the Rule of Law is and has been the duty of every generation in our country's history. . . .
>
> The United States is no stranger to what our Founders called the risk of faction. Alexander Hamilton and James Madison wrote about it in the Federalist Papers. George Washington warned against it in his Farewell Address.[13]

In this Part, we first describe the two species of fragmentation in the modern federal system and explain the "pernicious" and "deplorable" effects of fragmentation. We then discuss how although the Supreme Court has primary (and indeed supreme) responsibility for harmonizing the law, its capacity to carry out this critical function has been severely diminished over the past half century or more. Finally, we describe several attempts to resolve the fragmentation of the law that ultimately failed to take hold.

A. Circuit Splits and their Effects

Fragmentation within the federal judiciary arises from two types of circuit splits: intercircuit and intracircuit. Intercircuit splits are those where two or more circuits have different interpretations of the same law. Until the Supreme Court conclusively decides the matter, each circuit interprets the law as it deems correct; decisions of other circuit courts are merely persuasive authority.[14] That said, circuit court judges seriously consider other circuits' decisions and tend to be

12. *Id.* at 348.

13. Merrick B. Garland, Attorney General, Oath of Allegiance and Remarks at Ellis Island Ceremony in Celebration of Constitution Week and Citizenship Day (Sept. 17, 2022).

14. Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1407 (1987).

wary of creating intercircuit splits.[15] As such, intercircuit splits regularly involve important questions in need of resolution.[16]

Intracircuit splits involve different interpretations of the same law by different panels within the same circuit. In theory, intracircuit splits should not exist. Every circuit follows a rule where each panel decision is binding on later panels unless the earlier panel decision was overruled by the circuit en banc or by the Supreme Court.[17] But, mistakes, oversight, and insignificant distinctions between cases cause intracircuit splits to arise.[18]

The growing complexity of federal law over the years[19] and the circuit courts' expanding caseloads[20] have made inter- and intracircuit splits unavoidable and widespread. Justice Story noted the truly deplorable public mischief associated with fragmentation,[21] but it is nonetheless worthwhile to explicate the deleterious effects.

First, circuit splits complicate planning.[22] For multi-circuit actors such as businesses, labor unions, and pension fund administrators, intercircuit splits force these actors to either structure their operations differently across the circuits or to conform to the most restrictive circuit's interpretation of the law.[23] This causes disruptions, inefficiencies, and forum shopping.[24]

For single-circuit actors, intracircuit splits unnecessarily complicate planning in a similar way; the single-circuit actor struggles to determine which course of action to pursue. If a major objective of law is to influence behavior, then providing inconsistent legal rules deprives actors of a key input into that decision-making process.[25]

And the indeterminacy of the law caused by circuit splits carries over onto actors in circuits that have not yet weighed in on the issue.[26] Much like actors facing intracircuit splits, actors in undecided circuits face a dilemma. They must

15. *See* Beim & Rader, *supra* note 2, at 450; Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 129–31 (2002).

16. Beim & Rader, *supra* note 2, at 450.

17. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1038 (1999).

18. *Id.*; Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 166 (2006).

19. *See* Menell & Vacca, *supra* note 3, at 808 (noting the growing complexity of federal law, the economy, and social issues during the 1950s, 60s, and 70s leading to more circuit splits).

20. *See id*. at 851–84 (analyzing the increasing caseload on circuit court judges).

21. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

22. Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544–45 (1989); 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 13 (1993) [hereinafter 1993 FJC REPORT] ("Some fear that the resulting uncertainty makes it difficult for citizens to conform their behavior to the law [and] complicates business transactions . . . .").

23. 1993 FJC REPORT, *supra* note 22, at 60; Beim & Rader, *supra* note 2, at 451.

24. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 748–51 (1995); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 617–19 (1989).

25. Meador, *supra* note 24, at 618–19.

26. *Id.*

plan their affairs according to the law but cannot predict which side of the split their circuit may come down on.[27]

Second, circuit splits offend our notions of justice and fairness, and undermine the legitimacy of the legal system. When different circuits (or different panels within the same circuit) apply identical law to similarly situated individuals, but arrive at disparate results, the discrepancy undermines equal treatment and the rule of law.[28] Why should an activity be a crime, unfair labor practice, or unreasonable search and seizure in one jurisdiction, but not be a crime, unfair practice, or illegal search in another?[29] Similarly, is it fair that a "citizen[] in one circuit . . . not pay the same taxes that those in other circuits must pay"?[30] The "accident of geography" should not dictate different outcomes for federal law that was intended to bind everyone.[31]

Intracircuit splits are perhaps more egregious because the similarly situated parties are not even geographically separated. Panel dependence undermines the legitimacy of the legal system because justice based on random panel selection is hardly a compelling justification.[32]

Third, and closely related to notions of justice and fairness, is that the disparate consequences of intercircuit splits may impact competition. Two companies engaged in similar businesses, but located in different circuits, may be subject to the same federal regulation.[33] If their respective circuits have different interpretations of the regulation, then one company may be competitively disadvantaged simply on the basis of its location.[34] Not only is the different treatment unjust to one competitor, but it also reduces competition, which leads to higher prices or stifled innovation, both of which negatively impact consumers.

27. *Id.* ("Decisional incoherence frustrates this objective where the projected activity takes place . . . in a circuit that has not yet addressed the pertinent matter, because citizens are unable to plan with confidence a course of conduct so as to avoid running afoul of the law.").

28. Hellman, *supra* note 22, at 544; Hellman, *supra* note 17, at 1039; Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1154 (2012) ("Affording law enforcement such latitude [in one circuit, but not others] . . . raises obvious rule of law concerns.").

29. Hellman, *supra* note 24, at 756 (quoting U.S. Supreme Court Justice Byron White).

30. *Id.* (quoting U.S. Supreme Court Justice Byron White); Meador, *supra* note 24, at 618 ("For example, if citizen A is taxed on a transaction and citizen B is not taxed on an identical transaction merely because he lives in another part of the country, our sense of fundamental fairness is offended.").

31. Hellman, *supra* note 24, at 757; William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11–12 (1986):

> But surely it is hard to dispute that, in a country with a national government such as ours, Congress should not be held to have laid down one rule in North Carolina and another rule 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.

Another complaint of intercircuit splits is that it encourages forum shopping. But, there is nothing inherently bad with forum shopping. Forum shopping only becomes problematic when the choice of forum changes the law, which is intended to be uniform. These concerns are, in effect, raising inconsistent obligations for multi-circuit actors and offending notions of equality and justice by treating parties differently based on geography. *See* Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 119–20 (2001).

32. Beim & Rader, *supra* note 2, at 451.

33. Meador, *supra* note 24, at 618.

34. *Id.*

Fourth, intracircuit splits produce wasteful litigation.[35] Because each party in a dispute can point to supporting authority within the circuit, they are encouraged to push forward with this issue in litigation. This is not to say that resolving the circuit split will completely eliminate all litigation on that issue. Subsequent litigants may attempt to limit the law or factually distinguish their cases from the clarified precedent. But having a uniform understanding of the current state of the law within the circuit will dissuade some litigants and potential litigants from pursuing the issue. In an overburdened system, any effort to reduce litigation is helpful.[36]

Fifth, and relatedly, is that intracircuit splits burden district court judges, circuit court judges, and attorneys.[37] Unlike intercircuit splits, where district court judges can ignore authority from outside the circuit, district court judges cannot ignore binding precedent from within the circuit.[38] Instead, the district court judges must do their best to resolve insuperable conflicts.[39] Attorneys advising clients in a circuit with an intracircuit split also cannot ignore the inconsistent binding authority.[40] They too, must try to resolve the split and advise their clients how to proceed without violating conflicting laws.[41] Finally, intracircuit splits burden circuit court judges. Upon appeal, the assigned panel will struggle to distinguish the conflicting cases or draw fine lines without adequate reasoning. Such decisions compound the confusion.

In sum, circuit splits complicate the lives of judges, attorneys, litigants, and nonlitigating actors within and outside their circuit. They frustrate planning, fuel forum shopping, increase the burden on already overworked judges, produce needless litigation, distort competition, and undermine our notions of justice and fairness. Such public mischief, as Justice Story observed, is deplorable.

B. The Supreme Court's Uniformity Failure

As Justice Wilson noted in his *Lectures on Law*, the court at the apex of the judicial pyramid—the Supreme Court—should superintend and govern the lower courts to ensure uniformity throughout the system.[42] The Supreme Court, especially over the last century, has defined itself as a tribunal engaged in resolving important federal matters and maintaining uniformity in the law.[43] The Judiciary

35. Hellman, *supra* note 22, at 544; 1993 FJC REPORT, *supra* note 22, at 13 (1993); Beim & Rader, *supra* note 2, at 451.

36. *See generally* Menell & Vacca, *supra* note 3 (describing the caseload growth of the federal judiciary and efforts to reduce the capacity crisis).

37. Hellman, *supra* note 22, at 544 ("[T]he existence of apparently inconsistent appellate decisions will add to the costs and other burdens of court proceedings.").

38. *Id.* at 544–45.

39. *Id.* at 545.

40. *Id.* The same difficulty arises for attorneys advising multi-circuit clients in the face of intercircuit splits.

41. *Id.*

42. Wilson, *supra* note 8, at 945.

43. Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 272–73 (2006); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 53–54 (2009); Samuel Estreicher & John E. Sexton, *A Managerial*

Act of 1925 largely eliminated mandatory direct appeals from district courts and expanded the Supreme Court's discretionary power to hear appeals from the circuit courts of appeals via petitions for writs of certiorari.[44] In 1988, Congress eliminated nearly all remaining bases for mandatory appeals and effectively made the Court "a virtually all-certiorari tribunal."[45] Given this freedom to control what cases it decides, the Court has fully embraced its law-clarifying function and almost completely eschewed mere error correction as a basis for deciding cases.[46]

Supreme Court Rule 10 reflects the Court's role as the harmonizer of federal law and adjudicator of important federal issues. Rule 10, which establishes the standard for granting petitions for a writ of certiorari, provides that the Court considers 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 . . . ."[47] It further provides that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[48]

With the Court's long history focused on uniformity and current rules specifically aimed at harmonizing federal law, we would expect that the harms occasioned by circuit splits would be quickly quelled by Supreme Court intervention. Unfortunately, this is not the case.

The Supreme Court regularly refuses to hear cases involving intracircuit splits. As Justice John Harlan explained, conflicting decisions from different panels within the same circuit are not considered reviewable conflicts; rather, they are intramural matters that should be resolved by the circuit court itself via en banc review.[49]

Intercircuit splits are a different matter. They are the province of the Supreme Court.[50] Political scientists Deborah Beim and Kelly Rader found that the

Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. REV. 681, 715 (1984); *see also* SUP. CT. R. 10 (listing the bases for granting a petition for a writ of certiorari).

44. *See* Judiciary Act of 1925, ch. 229, 43 Stat. 936; Menell & Vacca, *supra* note 3, at 804.

45. *See* Supreme Court Case Selection Act of 1988, Pub. L. No. 100–352, 102 Stat. 662; Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 FED. R. DECISIONS 81, 94–98 (1988); Menell & Vacca, *supra* note 3, at 836.

46. Shapiro, *supra* note 43, at 278–79 (citing addresses by Justices Fred Vinson and William Brennan describing how the Supreme Court is not an error-correction court); *see also* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) ("Rather than correcting error, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one.").

47. SUP. CT. R. 10(a).

48. SUP. CT. R. 10.

49. John M. Harlan, *Manning the Dikes*, 13 REC. ASS'N BAR CITY N.Y. 541, 552 (1958); Joseph v. United States, 574 U.S. 1038, 1038 (2014) (noting Justice Kagan's statement respecting the denial of certiorari); *see also* Michael A. Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 827–28 (1993) ("[T]he Supreme Court cannot, and should not, be required to be the arbiter of intra-circuit conflicts.").

50. SUP. CT. R. 10(a).

Supreme Court resolved only about one-third of circuit splits that emerged between 2005 and 2013 and that the unresolved splits continue to yield litigation.[51] Furthermore, these unaddressed circuit splits do not resolve on their own or through legislative reform, administrative agency decisions, or circuit court decisions.[52]

The Supreme Court faces a daunting number of certiorari petitions, approximately 7,000 to 8,000 per Term.[53] The Supreme Court's website notes that

> [t]his is a substantially larger volume of cases than was presented to the Court in the last century. In the 1950 Term, for example, the Court received only 1,195 new cases, and even as recently as the 1975 Term it received only 3,940. Plenary review, with oral arguments by attorneys, is currently granted in about 80 of those cases each Term, and the Court typically disposes of about 100 or more cases without plenary review.[54]

The process and standards used to evaluate petitions for certiorari contribute to the failure to resolve circuit splits. The Justices rely heavily on their law clerks to review the thousands of certiorari petitions the Court receives each term.[55] The law clerks in the "cert pool," although very bright and accomplished recent law school graduates, are not experienced lawyers or judges attuned to the pressing practical needs of stakeholders affected by circuit splits.[56] Because of the enormous number of petitions filed each term, the law clerks in the cert pool are trained to quickly work through them.[57] And the law clerks are extremely hesitant to recommend granting certiorari because they "desire [to] preserve their credibility and political capital with the Justices and other law clerks."[58] As one

51. Beim & Rader, *supra* note 2, at 456, 468. *But see* Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247, 255 (concluding that most conflicts unresolved by the Supreme Court in the mid-1980s did not persist for more than a few years).

52. Beim & Rader, *supra* note 2, at 467; *see also* Logan, *supra* note 28, at 1195–1203 (appendix showing a conservative measure of more than three dozen Fourth Amendment circuit splits litigated between 2001 and 2010 and when the split emerged—including several from the 1990s and even one from 1988).

53. *See The Supreme Court at Work*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/courtatwork.aspx (last visited Oct. 26, 2023) [https://perma.cc/EPY2-ZZVG].

54. *See id*.

55. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 224–38 (2d ed. 2001) (describing the evolution of the certiorari petition review process, the important role of law clerks in preparing recommendation memoranda in the "cert pool," and briefing the Justices prior to certiorari conferences). Approximately two-thirds of the petitions are filed in forma pauperis, most of which are filed by federal inmates challenging their incarceration. These petitions are typically disposed of relatively swiftly and are rarely granted, although there are exceptions. *See* ANTHONY LEWIS, GIDEON'S TRUMPET: HOW ONE MAN, A POOR PRISONER, TOOK HIS CASE TO THE SUPREME COURT—AND CHANGED THE LAW OF THE UNITED STATES 1, 36 (Vintage Books ed. 1989). There are approximately 2,000 "paid" certiorari petitions, many of which entail detailed records and briefing. *See* Menell & Vacca, *supra* note 3, at 865–66.

56. Shapiro, *supra* note 43, at 286; *see also* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 975 (2007):

> A related reason for the hesitancy of law clerks to recommend granting a case may be due to relative inexperience. Incoming law clerks, often fresh off of a clerkship with a judge on the United States Courts of Appeals, have little training and even less experience screening petitions for certiorari.

57. Shapiro, *supra* note 43, at 285.

58. *Id.*; *see also* Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376 (2006):

former law clerk observed, "You're in perpetual fear of making a mistake."[59] Another described his practice as "find[ing] every possible reason to deny cert. petitions."[60]

Another contributing cause of the Supreme Court's failure to resolve inter-circuit splits is the hope of the Justices that the problem will resolve itself. Justice Harlan, writing at a time when the Supreme Court was deciding approximately 115 merit cases per year, reflected that even when a circuit split existed, the Court would deny certiorari if it seemed likely that the conflict could be resolved in future cases in the circuit courts.[61] Today, the Court continues to avoid granting certiorari in cases involving circuit splits for a host of reasons, including: it does not consider the conflict important enough to warrant the Court's attention; it prefers to wait for further litigation to produce a consensus or majority view; it could dispose of the case on another ground; or it wants to wait for a final, rather than interlocutory, decision.[62]

Although a primary function of the Supreme Court is to resolve circuit splits and avert their attendant problems, the Court has failed to live up to these expectations. Numerous legal issues are left in disarray and lower court judges, attorneys, litigants, and the public are left without guidance to make informed decisions, to fairly conduct their affairs, or to avoid wastefully expending resources.[63]

Although critics have long called for the Supreme Court to increase its caseload,[64] that plea has fallen on deaf ears. For the last quarter century, the Court

> The prevailing spirit among the twenty-five-year old legal savants, whose life experience is necessarily limited in scope, is to seek out and destroy undeserving petitions. . . . Self-confident law clerks can rest assured that few, if any, recriminations will attend their providing guidance to the Court to deny certiorari.

59. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1235 (2012).

60. *Id.* at 1235–36.

61. Harlan, *supra* note 49, at 552.

62. STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 245, 249 (10th ed. 2013).

63. *See* Shapiro, *supra* note 43, at 275.

64. *See, e.g.*, Catherine Richert, *Specter Says Congress can Tell the Supreme Court What to Consider*, TAMPA BAY TIMES, https://www.tampabay.com/archive/2010/04/29/specter-says-congress-can-tell-the-supreme-court-what-to-consider/ (Apr. 30, 2010) [https://perma.cc/UX47-537G] (Senator Alan Specter stated "[t]he Supreme Court has a very light backlog . . . [t]hey leave a lot of splits among the circuits, a lot of uncertainty. And I think they ought to work a lot harder. . . ."); J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 68–69 (2010) ("Some commentators seem to believe that the Court should be hearing more cases simply to busy itself. They imply that the Justices are underworked, pointing to the Court's talented clerks and three-month-long summer vacation."); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 337 (2005) (statement of John G. Roberts Jr.):

> I do think there is room for the court to take more cases. They hear about half the number of cases they did 25 years ago. There may be good reasons for that that I'll learn if I am confirmed but, just looking at it from the outside, I think they could contribute more to the clarity and uniformity of the law by taking more cases.

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

> So light has the workload of the Justices become that a veteran observer of the Court was recently moved to observe that if the Justices were employed in the private sector they would all have received pink slips. Ample time is left to the Justices to write books, lecture, teach, and travel abroad. Plainly, the Court could

has averaged approximately seventy-five merits decisions per year, down from between 125 and 200 decisions from the late 1950s through the late 1990s.[65] If the Supreme Court cannot significantly increase its merits docket and judiciary reform is unlikely, then innovative case management approaches will be needed to address the fragmentation problem.

C. Failed Alternative Mechanisms

The Supreme Court's dwindling capacity to keep up with its burgeoning caseload and the growing number of circuit splits was widely perceived to be a mounting crisis from the 1960s through the mid-1990s.[66] Chief Justices Warren Burger and William Rehnquist viewed the mounting caseload as a dire threat to the nation's judiciary.[67] Both the judiciary and Congress commissioned studies to address this problem, and each effort proposed innovative solutions to manage the judicial workload and address the rising tide of circuit splits fragmenting national law.[68] Although some proposals came close to fruition, all ultimately failed.

1. The Freund Study Group's National Court of Appeals

In 1971, Chief Justice Warren Burger appointed a group led by Professor Paul Freund to study the Supreme Court's caseload.[69] The Freund Study Group assembled data on Supreme Court operations, conducted extensive interviews, and convened hearings to diagnose and address the growing concerns about the judiciary's capacity to handle mounting caseloads. The Study Group recommended that Congress establish a new federal court—the National Court of Appeals ("NCA").[70] This new court would screen all certiorari petitions and refer several hundred cases per year to the Supreme Court.[71] Of these cases, the Supreme Court would select those it wanted to hear.[72] The NCA would decide the remainder—largely those involving circuit splits.[73]

Shortly after the Study Group issued its recommendations, Second Circuit Judge Henry Friendly, one of the nation's most respected jurists, delivered a trenchant critique as part of a series of lectures exploring the challenges confronting the federal judiciary.[74] While reinforcing and further documenting the concern about the "explosion of federal litigation," Judge Friendly recommended

decide many more cases than it does; Justice White thought that 150 cases a year was the right number; Justice Brennan agreed.

65. Menell & Vacca, *supra* note 3, at 865.
66. *Id.* at 808, 813, 872.
67. *Id.* at 815, 835.
68. *See infra* Subsections II.C.1–4.
69. FED. JUD. CTR., REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT IX (1972).
70. *Id.* at 18.
71. *Id.*
72. *Id.*
73. *Id.*
74. *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 51–54 (1973).

streamlining federal jurisdiction and establishing specialized appellate patent and tax tribunals as the best ways to address mounting federal caseloads.[75] Judge Friendly questioned the effect of the NCA on the "prestige and morale" of the courts of appeals.[76]

The Freund Study Group's NCA failed to gain traction.[77] Commentators, including Justice William Brennan and then-retired Chief Justice Earl Warren, were critical of the proposal.[78] Two major critiques carried the day. First, the NCA screening all certiorari petitions and referring cases to the Supreme Court restricted the Supreme Court's ability to control its docket and establish national priorities.[79] Second, circuit judges were concerned that establishing the proposed NCA would negatively affect the prestige and morale of the courts of appeals.[80] Congress declined to enact the Freund Study Group's NCA proposal.

2. The Hruska Commission's National Court of Appeals

Notwithstanding the demise of the Freund Study Group's NCA proposal, Chief Justice Burger, the Chief Judges of all of the Courts of Appeals, the Judicial Conference of the United States, the Federal Judicial Center, and the American Bar Association renewed the call for judiciary reform.[81] Thereafter, Congress instituted its own study of the judicial capacity crisis. In 1972, Congress charged a bipartisan, cross-branch commission with two tasks: (1) recommend changes that will promote expeditious and effective disposition of judicial business based on the Commission's study of the geographical boundaries of the federal judicial circuits; and (2) recommend changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process" based on the Commission's study of the structure and internal procedures of the appellate courts.[82] This commission, chaired by Senator Roman Hruska, convened nu-

75. *See id*. at 1–55, 153–171.

76. *See id*. at 53.

77. *See* Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617, 627.

78. *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721, 728 (1973) [hereinafter *Chief Justices Attack and Defend*]; *see also* William H. Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313, 1332–42 (1974) (considering the disadvantages surrounding the creation of a National Court of Appeals); James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 911–20 (1973) (examining the virtues and risks of limiting the Supreme Court's discretionary jurisdiction); Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 257 (1973) (noting that the proposal would "isolate[]" the Supreme Court "from many nuances and trends of legal change throughout the land"); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973) (discussing the importance of the screening function).

79. *Chief Justices Attack and Defend*, *supra* note 78, at 728.

80. *See* FRIENDLY, *supra* note 74, at 53.

81. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 36 (1994).

82. *See* Act of Oct. 13, 1972, Pub. L. No. 92–489, § 1(b), 86 Stat. 807, 807. The Hruska Commission was also charged with recommending changes based on the geographical boundaries of the circuits. The Commission

merous hearings, appointed consultants, conducted studies, and solicited comments over several years. Notably, Congress limited the Commission's mandate to studying reform of "the Federal courts of appeal system."[83] The Hruska Commission issued its recommendations targeting the capacity crisis and fragmentation challenge in June 1975.[84]

The Hruska Commission recommended that Congress establish a National Court of Appeals, although with a different role and structure than the Freund Study Group's NCA.[85] The Hruska NCA retained the Supreme Court's control of its docket.[86] It would not screen cases for the Supreme Court and would only consider cases referred to it by the Supreme Court or transferred to it by the circuit courts.[87] The Supreme Court could decline to refer cases to the Hruska NCA if it thought further percolation in the circuit courts would be beneficial, and the Hruska NCA could decline transfers from circuit courts if it concluded that the issue was best heard in the circuit court.[88] Decisions from the Hruska NCA would be reviewable by the Supreme Court under its ordinary discretionary standard.[89] From an institutional buy-in standpoint, the Hruska NCA avoided a major problem of the Freund NCA by not supplanting the Supreme Court's certiorari screening function.[90] The Commission believed the Hruska NCA would be able to decide at least 150 cases per year, making a considerable contribution towards resolving circuit splits and thereby "bring[ing] greater clarity and stability to the national law."[91]

issued its report on the geographical boundaries in December 1973. *See The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 FED. R. DECISIONS 223, 225 (1973) [hereinafter *Geographical Boundaries*]. *See generally* Roman L. Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579 (1974).

83. *See* Act of Oct. 13, 1972, Pub. L. No. 92–489, § 1(b), 86 Stat. 807, 807.

84. ROMAN L. HRUSKA ET AL., COMM'N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 76–133, 144–68 (1975) [hereinafter HRUSKA COMMISSION STRUCTURE REPORT].

85. *Id.* at vii–viii, 5–39; Roman L. Hruska, *Commission Recommends New National Court of Appeals*, 61 A.B.A. J. 819, 819 (1975). The Hruska Commission also addressed the geographical boundaries of the several circuit courts of appeals. *See Geographical Boundaries*, *supra* note 82, at 225.

86. Menell & Vacca, *supra* note 3, at 817–18.

87. HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 84, at 32.

88. *Id.* at 33, 35.

89. *Id.* at 38.

90. Menell & Vacca, *supra* note 3, at 818.

91. HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 84, at 39.

The Senate held hearings on the Hruska Commission's proposal in May and November 1976.[92] Unlike the Freund NCA, the Hruska NCA received support from most of the Supreme Court Justices,[93] and the American Bar Association was also initially behind the proposal.[94] There was, however, some reservation about transfer jurisdiction, so Senator Hruska introduced two versions of the bill: one with[95] and one without transfer jurisdiction.[96] After two days of hearings with most witnesses endorsing the proposal, the prospects for establishing one or the other version of the Hruska NCA appeared high.[97] When hearings resumed four months later, however, the momentum stalled as a result of opposition from circuit court judges.[98]

In 1981, Senator Howell Heflin sought to revive the Hruska NCA proposal with modest modifications.[99] The driving forces behind this renewed effort included the Supreme Court's crowded dockets, fragmentation of national law, and the inability of the circuit courts to resolve conflicts.[100] In particular, Senator Heflin noted the Supreme Court's denial of certiorari in *Brown Transport v. Atcon*,[101] a case involving a clear circuit split over the interpretation of federal regulations governing interstate commerce. Justice White, joined by Justice Blackmun, dissented and reported numerous declined petitions presenting circuit splits.[102] The ABA again supported the NCA, but the Department of Justice (DOJ) opposed the bill because it believed it would create additional work for the Supreme Court by having to decide which cases to refer to the NCA, increase litigation by adding another layer of appeals, and diminish the authority of circuit courts.[103] As with the original Hruska Commission proposal, Congress failed to pass this revived attempt to create an NCA.

92. *See National Court of Appeals Act: Hearings on S. 2762 and S. 3423 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 94th Cong. 3 (1976) [hereinafter *1976 NCA Hearings*].

93. HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 84, at 172–88.

94. *See 1976 NCA Hearings*, *supra* note 92, at 29 (Statement of Robert J. Kutak, Esq., American Bar Association). *See also id*. at 38–42 (Statement of Hon. Shirley M. Hufstedler, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, appearing as a member of the ABA Committee on Coordination of Judicial Improvements).

95. *See* S. 2762, 94th Cong. §§ 1271–72 (1975).

96. *See* S. 3423, 94th Cong. § 1271 (1976).

97. Menell & Vacca, *supra* note 3, at 822.

98. *See id*. at 822–23, 875–79.

99. *See* S. 1529, 97th Cong. (1981); *Court Reform Legislation: Hearing Before the Subcommittee on Courts the Senate Committee on the Judiciary*, 97th Cong. 44 (1981) [hereinafter *1981 Court Reform Hearing*].

100. *1981 Court Reform Hearing*, *supra* note 99, at 2.

101. Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1014 (1978).

102. *Id.* at 1016–23 (White, J., dissenting).

103. *1981 Court Reform Hearing*, *supra* note 99, at 120–25 (prepared statement of Jonathan Rose).

3. The Intercircuit Tribunal

Congress again took up judiciary reform two years later. Legislators proposed the establishment of an intercircuit tribunal ("ICT")—a more modest experiment aimed at addressing fragmentation of national law.[104] Under the 1983 bill, the ICT would be a flexible, temporary court consisting of two judges from each circuit that would sit in panels of seven judges.[105] The Supreme Court would refer cases involving intercircuit conflicts to the ICT, and its decisions would be binding on all circuit and district courts unless the Supreme Court otherwise disposed of the case.[106] The ICT would sunset after five years unless Congress reauthorized it.[107]

The ICT proposal was strongly supported by advocates of the Hruska NCA[108] and even won over some NCA opponents.[109] Chief Justice Burger actively campaigned for its adoption.[110] Yet despite this more modest approach to resolving circuit splits, criticism abounded, mostly from circuit court judges and the DOJ.[111] After extensive debate, the ABA also shifted its position and opposed the ICT.[112] Just as with the Freund and Hruska NCA proposals, Congress failed to establish the ICT.[113]

104. H.R. 1970, 98th Cong. (1983); Menell & Vacca, *supra* note 3, at 828.

105. H.R. 1970, 98th Cong. (1983).

106. *Id.*

107. *Id.* A similar bill was introduced in the Senate but had a different number of judges and mechanism for filling those slots. *See* S. 704, 99th Cong. §§ 1260(a), 8(c) (1985).

108. *Supreme Court Workload: Hearings on H.R. 1968 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 98th Cong. 149 (1983) (testimony of Hon. Collins J. Seitz, C.J., U.S. Court of Appeals for the Third Circuit) ("I also fully agree with the five year experiment, not only because it is more politically expedient but also because it requires Congress to evaluate the experiment and translate its findings into a more permanent solution.").

109. *Id.* at 37 (testimony of Professor Daniel J. Meador, School of L., Univ. of Va.) ("I came relatively late to endorse this idea myself; that is, late in relation to the proposal of the Hruska Commission . . . ."). *Compare id.* at 62–63 (statement of Lloyd N. Cutler) (endorsing ICT), *with 1976 NCA Hearings*, *supra* note 92, at 125–26 (statement of Lloyd N. Cutler) (opposing NCA).

110. *See* Warren E. Burger, Chief Justice of the United States, Remarks at the 60th Annual Meeting of the American Law Institute (May 17, 1983), *in Supreme Court Workload: Hearings on H.R. 1968 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 98th Cong. 320–26 (1983); Warren E. Burger, Chief Justice of the United States, Annual Report on the State of the Judiciary, Remarks at the Annual Mid-Year Meeting of the American Bar Association (Feb. 6, 1983), *in Supreme Court Workload: Hearings on H.R. 1968 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 98th Cong. 306–19 (1983).

111. Menell & Vacca, *supra* note 3, at 830 (citing testimony from several circuit court judges opposing creation of the ICT).

112. *See* Letter from Robert D. Evans on behalf of the American Bar Association, to Hon. Robert W. Kastenmeier (Feb. 20, 1986), *in The Supreme Court and Its Workload Crisis: Hearings on H.R. 4149 and H.R. 4138 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 99th Cong. 128–31 (1986).

113. Menell & Vacca, *supra* note 3, at 831.

4. Federal Courts Study Committee En Banc Recommendation

While the ICT proposal was being debated, Justice White offered a novel approach: if there was an existing intercircuit split or if a panel was not inclined to follow the interpretation of another circuit, then the circuit court would hear and decide the case en banc.[114] That circuit court's en banc decision would then be binding across all circuits until the Supreme Court determined otherwise.[115]

A variation of this proposal was taken up several years later by the Federal Courts Study Committee (FCSC).[116] The FCSC recommended that Congress establish two four-year pilot programs.[117] For the first program, the FCSC requested that Congress permit the Supreme Court to refer a circuit-split case seeking certiorari to a randomly selected circuit court for en banc resolution.[118] The en banc decision would become national precedent, binding all circuit and district courts.[119]

For the second program, Congress would mandate that a circuit court grant en banc review of any panel decision (1) conflicting with a decision of another circuit and (2) in which a majority of active judges of the circuit thought uniform interpretation was needed.[120] The en banc decision would become binding on all other circuit and district courts.[121]

Furthermore, a committee consisting of the Chief Justice, two additional Supreme Court Justices, and two circuit court judges would monitor these pilot programs.[122] The Federal Judicial Center would assist by counting and analyzing the seriousness and need for resolution of the various circuit splits.[123] Before the conclusion of the four-year period, the committee would report to Congress about the success or failure of the pilot programs and recommend further action for Congress or the courts to undertake.[124]

Although the FCSC proposal to reduce circuit splits was a greatly scaled-back version of the NCA and ICT proposals, it too failed to muster Congressional approval. Since then, there have not been any serious attempts by Congress or the Supreme Court to address the persistent and growing fragmentation problem.[125] Even Judge Friendly, who steered the nation away from structural reform in the 1970s, acknowledged that more drastic judiciary reforms than his own

114. Milton Handler, *What to Do with the Supreme Court's Burgeoning Calendars?*, 5 CARDOZO L. REV. 249, 273 (1984); *see also* William Alsup & Tracy L. Salisbury, *A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts*, 11 HASTINGS CONST. L.Q. 359, 360–61 n.10 (1984).

115. Handler, *supra* note 114; *see also* Alsup & Salisbury, *supra* note 114.

116. 2 FED. CTS. STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 41–42 (1990).

117. *See id.* at 41.

118. *Id.* at 41–42.

119. *Id.* at 41.

120. *Id.* at 42.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Beim & Rader, *supra* note 2, at 456 (finding worsening of the national law fragmentation).

proposals, most of which were not adopted, would be needed by the year 2000.[126] We are now half a century past those warnings.

III. EN BANC REVIEW AND RESISTANCE

With Congress perpetually gridlocked, judiciary reform stalled, and the Supreme Court increasingly capacity-constrained,[127] the fragmentation problem will continue to worsen without redeploying judicial resources. The most promising means of defragmenting national law is to make fuller use of en banc review. The circuit courts can alleviate circuit splits and position the Supreme Court to more efficiently alleviate fragmentation of national law. This pathway, however, must overcome the reluctance of many appellate judges to take on this responsibility. In this Part, we explain how en banc review could be an effective tool to combat fragmentation and explore why circuit court judges have been unwilling to use it.

A. An Effective Tool to Combat Fragmentation

At the time that the modern circuit courts were established in 1891, Congress was focused on the insufficient number of intermediate circuit judgeships and unmanageable burdens on the Supreme Court.[128] The prospect of intracircuit splits was not yet a possibility. The Evarts Act "created in each circuit a circuit court of appeals . . . consist[ing] of three judges, of whom two . . . constitute[d] a quorum."[129] Because no circuit had more than three appellate judges, all circuit courts sat en banc, and there was no occasion to consider whether en banc review was permitted.[130]

But as Congress gradually expanded the number of circuit court slots in the twentieth century to address expanding caseloads, intracircuit splits emerged.[131] After the Ninth and Third Circuits diverged on whether circuit courts could sit

126. *See Hearings Before the Comm. on Revision of the Fed. Ct. App. Sys.: Second Phase, Volume I*, 93rd Cong. 204–05 (1975) (testimony of Judge Henry Friendly). Judge Friendly stated that adoption of jurisdiction streamlining proposals:

> would not solve the problems of the courts of appeals for all time. As the country continues to grow and Congress subjects still more areas to federal regulation, the savings effected by these measures will gradually be eroded . . . . Hopefully, by the year 2000, we will have learned where to preserve the adversary system and where to substitute something else.

127. The Justices choose how many and which cases to hear. They could decide additional circuit split cases but have opted to spend their limited resources on other matters. *See infra* notes 166–67 and accompanying text.

128. *See* Menell & Vacca, *supra* note 3, at 800–01.

129. Act of Mar. 3, 1891, ch. 517 § 2, 26 Stat. 826, 826–27.

130. *See* Menell & Vacca, *supra* note 3, at 806.

131. *Id.*

en banc for the purpose of resolving such splits,[132] the Supreme Court ruled that the Judicial Code authorized en banc review.[133]

Writing for a unanimous Court, Justice Douglas not only confirmed the legal basis of en banc review, but praised its logic and desirability:

> Certainly the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.[134]

Congress codified the Supreme Court's *Textile Mills* interpretation a few years later.[135] Section 46(c) of the Judicial Code of 1948 provided that circuit courts could convene en banc panels upon a majority vote of active judges in the circuit. Congress specified that "[a] court in banc shall consist of all active circuit judges of the circuit,"[136] but left the specific procedures and standards to the circuit courts.

Each circuit court developed its own en banc review rules.[137] These rules varied between the circuits and did not fully explicate the process for conducting en banc review.[138] The Supreme Court brought greater consistency to en banc procedures when it adopted Rule 35 of the Federal Rules of Appellate Procedure in 1967.[139] Today, Rule 35(a) specifies that en banc review "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[140]

As Justice Douglas observed, and as Rule 35(a)(1) specifically provides, en banc review is ideally suited to resolve intracircuit splits.[141] And as noted by Justice Harlan, intracircuit splits are not a sufficient basis for the Supreme Court to grant certiorari; instead, en banc review should be used.[142]

Although the original language of Rule 35 was ambiguous, many circuit court judges considered intercircuit splits to fall within the bounds of this rule.[143]

132. *Compare* Lang's Estate v. Comm'r, 97 F.2d 867, 869–70 (9th Cir. 1938) ("[T]here [was] no method of hearing or rehearing by a larger number" of members of a circuit court of appeals and hence no circuit-level methods for resolving intracircuit splits) *with* Comm'r v. Textile Mills Sec. Corp., 117 F.2d 62, 67–71, 75 (3rd Cir. 1940) (holding that Congress intended for circuit courts of appeals to comprise all of the active members of the circuit court and that the Judicial Code did not stand in the way of en banc review).

133. *See* Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 335 (1941).

134. *Id.* at 334–35.

135. Act of June 25, 1948, ch. 646, 62 Stat. 869.

136. *Id.*

137. Peter Michael Madden, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 403 (1974).

138. *Id.*

139. *See* FED. R. APP. P. 35.

140. FED. R. APP. P. 35(a).

141. Stein, *supra* note 49, at 827–28.

142. Harlan, *supra* note 49, at 552.

143. *See, e.g.*, Hartman Tobacco Co. v. United States, 471 F.2d 1327, 1330 (2d Cir. 1973) ("[W]e think it best to clear up any confusion on the issue that there may be in this circuit and to align the Second Circuit with every other circuit which has confronted the question."); Fin. Inst. Emps. of Am., Local No. 1182 v. NLRB, 750

It is especially appropriate if the panel decision creates a circuit split, because en banc review can preemptively resolve the split.[144] In fact, one Ninth Circuit judge recommended rehearing en banc because of the *possibility* of an intercircuit split.[145]

In 1998, the Advisory Committee on Appellate Rules clarified that intercircuit splits qualified as issues "of exceptional importance" under Rule 35(a)(2).[146] It explained that

> [g]iven the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.[147]

Thus, intracircuit and intercircuit splits are important bases for en banc review. En banc review resolves intracircuit splits and can potentially resolve intercircuit splits if the circuit sitting en banc is the outlier.[148] En banc review can also be valuable when the intercircuit split involves multiple circuits.[149] Even though the circuit court cannot fully harmonize national law, its decision can further percolate the question.[150] This rests "on the notion that more heads are better than one—that an en banc court of appeals would engage in more thorough consideration of the issues presented in the case."[151] This more thorough consideration from different perspectives tees up the issue for Supreme Court review and provides the Court with a wider range of options to harmonize the law.[152]

F.2d 757, 757–58 (9th Cir. 1984) (Kennedy, J., dissenting from denial of rehearing en banc) ("I dissent from the court's failure to hear this case en banc and to consider the conflict we create with the Fifth Circuit on an important issue of labor law."); *see also* Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 26 (2001) ("Thus, at least for some judges, intercircuit conflicts are sufficiently important to make a case causing one to be 'en banc-worthy.'").

144. Wasby, *supra* note 143, at 26–27.

145. Espinoza-Gutierrez v. Smith, 109 F.3d 551, 554 (9th Cir. 1997) (Kozinski, J., dissenting from denial of rehearing en banc) ("A direct conflict with another circuit doesn't yet exist, but one may be on the horizon.").

146. Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 178 n.19 (2001); Wasby, *supra* note 143, at 27.

147. FED. R. APP. P. 35 advisory committee's note to 1998 Amendment.

148. *See, e.g.*, United States v. Jose, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc) (providing an instructive example where the Ninth Circuit, following remand from the Supreme Court on an issue on which the Supreme Court was evenly divided, went en banc sua sponte to resolve an intercircuit split with the Fifth Circuit); Holbein v. TAW Enters., Inc., 983 F.3d 1049, 1053 (8th Cir. 2020) (rehearing the case en banc to eliminate a "lopsided circuit split" concerning the forum-defendant rule).

149. *See, e.g.*, Uviedo v. Steves Sash & Door Co., 760 F.2d 87, 88 (5th Cir. 1985) (Rubin, J., dissenting from denial of rehearing en banc) ("I respectfully dissent from the court's refusal to reconsider this decision en banc. Only the Fifth and the Eleventh Circuits make it so difficult for a plaintiff who obtains a judgment in a lawsuit to be identified as the prevailing party.").

150. *See* Wasby, *supra* note 143, at 31.

151. *Id.*

152. *Id.*

The Supreme Court can then make better-informed decisions when it eventually resolves the conflict.[153]

B. Judicial Resistance to En Banc Review

Despite the potential for en banc review to eliminate intracircuit and intercircuit splits and the percolation benefits it provides for intercircuit splits it cannot fully resolve, en banc review has been on the decline since the late 1980s.[154] In an earlier study of the federal judiciary, we showed that en banc review reached a high of 117 cases in 1988 but has steadily slowed to a trickle of just forty cases per year.[155] As a percentage of the circuit courts' total caseload, en banc review has fallen from over 1% in the 1960s and early 1970s to less than 0.1% today.[156]

Circuit court judges are not shy in expressing their aversion to en banc review.[157] Their reasons are manifold and can usefully be broken down into internal-facing and external-facing objections. Internal-facing objections are those affecting the judges or the particular circuit court.[158] External-facing objections are based on harms to those other than the judges or particular circuit courts.[159]

1. Internal-Facing Objections

As the quantity and complexity of federal law increased along with circuit court caseloads in the mid-twentieth century, en banc review came into more common usage and gradually expanded from the 1950s through the mid-1980s.[160] Following President Reagan's election and his administration's shift toward appointing conservative judges, however, political scientists, judicial commentators, and journalists came to see en banc review not just as a vehicle for harmonizing law but for changing the law.[161] Numerous prominent judges

153. *Id.*; *see also* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1026 (2d Cir. 1973) (Oakes, J., dissenting from denial of rehearing en banc) ("There is no reason why the Supreme Court should not have before it some view, even if it is not a majority one, from this court, different from the panel's if, as I think is undoubtedly the case, an en banc vote would result in such."). *But see* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 366–67, 432 (2021) (suggesting that the Supreme Court declining certiorari to further percolate an issue may not be justified in many instances).

154. *See* Menell & Vacca, *supra* note 3, at 860–61.

155. *See id*. at 860.

156. *See id.*

157. Even though en banc decisions appear more partisan than ever, the number of en banc decisions has continued to decline. *See* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1409, 1413–16 (2021).

158. *See infra* Subsection III.B.1.

159. *See infra* Subsection III.B.2.

160. *See* Menell & Vacca, *supra* note 3, at 831–34.

161. *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 292, 343 (1997); HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 60 (1988) (chronicling the historical background and impact of conservative court-packing); Lawrence H. Tribe, *Amending the Constitution by Default*, N.Y. TIMES (Sept. 29, 1985) https://www.nytimes.com/1985/09/29/opinion/amending-the-constitution-by-default.html [https://perma.cc/9EBX-LYY9] (criticizing political obedience to President Reagan's judicial appointments).

publicly addressed the use of en banc review, leading to retrenchment of en banc review.[162] The effort to downplay the politicization of en banc review provided a window into how judges perceived en banc review.

Many appellate judges complained that en banc review saddles already overburdened circuit court judges with additional complex cases.[163] D.C. Circuit Judge Douglas Ginsburg described en banc review as increasing the amount of required judicial resources by a factor of four, noting that the author of the opinion must circulate it to a larger group of colleagues for their feedback, address any dissenting opinions, and secure a concurrence from each member of the majority after each revised opinion.[164] Similarly, then-D.C. Circuit Chief Judge Patricia Wald commented that en banc review "normally take[s] an inordinate time to schedule, let alone decide" and that, "[a]s a result, [they] are not undertaken lightly."[165] Second Circuit Judge Irving Kaufman echoed these concerns:

> And where rehearings en banc are granted, the inefficiencies become glaring. En banc opinions must be written and circulated among the members of the en banc court; invariably they spark a blizzard of memoranda in an effort to forge a consensus. It is axiomatic that three judges, in an intimate conference, will find the heart of a case more quickly than will eleven.[166]

Appellate judges have also noted that the Supreme Court is the best institution for resolving circuit splits and that it, unlike the circuit courts, has the capacity to do so.[167] Ninth Circuit Judge Alfred Goodwin expressed his reluctance to decide cases en banc, stating, "I was never convinced that a court taking 80 cases a year was so overworked that we had a public duty to hold en bancs to lighten their burden."[168] Along similar lines, appellate judges observed that en banc review might not necessarily resolve the split, and because the Supreme Court is the only institution that can do so, it is a waste of time to come down on one side of the conflict or to offer a new version of the existing split.[169]

Some appellate judges expressed concern that en banc review eroded collegiality among jurists.[170] D.C. Circuit Judge Wald commented that, "en bancs

162. *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1679 (2003); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1009 (1991); Jon O. Newman, *In Banc Practice in the Second Circuit, 1984–1988*, 55 BROOK. L. REV. 355, 369 (1989); Patricia M. Wald, *The Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 482 (1986); Irving R. Kaufman, *Do the Costs of En Banc Proceeding Outweigh its Advantages?*, 69 JUDICATURE 7, 7 (1985).

163. Madden, *supra* note 137, at 417–18 ("The major problem with an in banc proceeding is the resulting loss of efficiency . . . . The in banc procedure is inherently and unavoidably time-consuming."); Stein, *supra* note 49, at 829–30 ("Most of the criticisms of en banc rehearings have focused on its alleged inefficiency."); Wasby, *supra* note 143, at 24 ("Judges might believe that it is not worth the court's time and energy to rehear the case, because of the required additional in-chambers work necessary to decide the case and the possible disruption of calendars caused by having to bring together judges who live scattered throughout the circuit . . . .").

164. *See* Ginsburg & Falk, *supra* note 162, at 1018–19.

165. *See* Wald, *supra* note 162, at 482–83.

166. Kaufman, *supra* note 162.

167. *See* Wasby, *supra* note 143, at 33.

168. *Id.* (quoting 1999 email from Judge Alfred T. Goodwin to Professor Stephen L. Wasby).

169. *Id.* at 35; Ginsburg & Falk, *supra* note 162, at 1025.

170. *See* Edwards, *supra* note 162, at 1644–45.

heighten[] tensions on the court," that "[n]o judge likes to have her opinions en banced, and although she may expect it from those with whom she frequently disagrees, she may resent it from usual allies," and that "[s]ome judges do indeed regard a vote in favor of en bancing their cases as tantamount to betrayal."[171] Judge Jon Newman remarked that he believed one reason Second Circuit opinions were "relatively free of vitriolic language unfortunately found in the writings of some other appellate courts" was because the Second Circuit rarely sat en banc.[172]

Judge Douglas Ginsburg further noted that en banc review erodes the finality of three-judge panel decisions.[173] As a general matter, a panel decision represents the final decision of the court.[174] But an en banc decision vacating the panel decision indicates that panel decisions are merely another step along the appellate path and that losing parties will routinely request rehearing en banc.[175] Furthermore, this lack of finality would encourage panels to "stake out an adventuresome position" because the circuit could always sit en banc if it disagreed.[176]

Another internal-facing objection to en banc review relates to its arbitrary use. En banc review requires a majority of the active circuit judges to grant an en banc petition.[177] Judges exercise their wide discretion based on their particular interests, resulting in questions in the judges' "zone of indifference" from being considered regardless of whether a panel creates a new split.[178]

The internal-facing objections to en banc are legitimate concerns. But, they all fail to appreciate the positive benefits that en banc review confers on other stakeholders in the legal system—clarity for district judges, attorneys, litigants, and others who are trying to comply with fragmented law, as well as uniform treatment for similarity situated individuals, businesses, and organizations.

171. Wald, *supra* note 162, at 488.

172. Newman, *supra* note 162. This view, however, is not universally held. Ninth Circuit Judge James Browning believed that en banc review enhanced collegiality, noting that his colleagues "'thoroughly enjoy[ed] participating in en banc proceedings' and viewed en banc gatherings as an 'opportunity for interchange that leads to improved personal communication and to the development of the attitude of trust and respect that is essential to judicial deliberation.'" *See* Stein, *supra* note 49, at 844–45; *see also* Wald, *supra* note 162, at 488–89 (wherein author emphasizes "the integrity of the circuit's law" stands above interpersonal concerns, that judges' regard for colleagues "survives" case disagreements, and that "even if an en banc does materialize, it is usually preferable to being reversed by the Supreme Court"); Albert Branson Maris, *Hearing and Rehearing Cases In Banc*, 14 FED. R. DECISIONS 91, 96 (1954) (Third Circuit judges thought en banc review was "very helpful in maintaining the very high esprit de corps . . . .").

173. Ginsburg & Falk, *supra* note 162, at 1021 ("If cases were reheard en banc too frequently, the prospect of en banc review would weaken the presumption of finality that otherwise attaches to a panel opinion."); Stein, *supra* note 49, at 837.

174. Stein, *supra* note 49, at 837.

175. *Id.* at 837–38.

176. Ginsburg & Falk, *supra* note 162, at 1021.

177. FED. R. APP. P. 35(a).

178. Wasby, *supra* note 143, at 24.

2. External-Facing Objections

The external-facing objections to en banc review consider the impact on those outside of the circuit court judges. En banc review imposes additional delay and costs upon the parties.[179] Rehearing cases en banc causes the parties to incur attorneys' fees connected with rebriefing and rearguing the cases.[180] In addition, the delay in final disposition can cost the parties additional resources.[181] Furthermore, en banc review delays cases that may ultimately arrive at the Supreme Court.[182] With reargument occurring a few months after the panel decision and then several more months for producing an en banc opinion, granting en banc review may delay a case an additional year.[183] As Judge Goodwin observed, "[i]f the Supreme Court is going to take [the case], let's let them get at it," rather than let the case sit for an additional year.[184] Of course, it is difficult to predict when the Supreme Court will grant certiorari.

Another external-facing objection is that en banc decisions do not always clarify the law.[185] Judge Kaufman described en banc review as frequently producing either a majority opinion that is purposefully vague to create a consensus within the court, or "a litany of diverging opinions, injecting a degree of uncertainty into the law . . . ."[186]

C. Appellate Judges Doth Protest Too Much

Largely out of concerns about prestige, many appellate judges opposed and blocked structural reforms—such as the establishment of a National Court of Appeals and the Intercircuit Tribunal—that could have significantly expanded the judiciary's capacity to address fragmentation. Appellate judges' specific complaints about en banc review emerged following the Reagan Administration's politicization of judicial appointments.[187] Although likely driven in substantial part by concerns about public perceptions of the judiciary, appellate judges emphasized the logistical burdens and collegial strains implicated by en banc review.[188] Even after the Reagan era passed, and later administrations rebalanced the composition of the judiciary, appellate judges' disinclination to resolve circuit splits through en banc review has remained.[189]

179. *Id.* at 34; Ginsburg & Falk, *supra* note 162, at 1021.
180. Ginsburg & Falk, *supra* note 162, at 1021.
181. *Id.*
182. Wasby, *supra* note 143, at 34.
183. *Id.*
184. *Id.*
185. Kaufman, *supra* note 162, at 8.
186. *Id.*
187. *See* Menell & Vacca, *supra* note 3, at 874.
188. *Id.* at 878 n.488.
189. *Id.* at 860–61.

We recognize that circuit courts, like district courts and the Supreme Court, face large caseloads and other challenges.[190] Nonetheless, appellate judges' passive resistance serves the personal interests of judges, not the national interest in clarifying the law. The past four decades have demonstrated the need for greater, not lesser, attention to defragmenting national law. Whereas circuit courts have substantially curtailed oral argument and opinion writing in an effort to manage the rising caseload[191] and implemented procedures for streamlining the resolution of intracircuit splits,[192] they have steadfastly resisted expanding use of en banc review to address the growing fragmentation of intercircuit law. By failing to take up this responsibility, circuit courts have increased the level and complexity of legal uncertainty and hence litigation, thereby further contributing to the rising caseloads as well as forum shopping and other undesirable effects on the rule of law.

Resolving difficult legal puzzles is central to the appellate judge job description, and intracircuit and intercircuit splits are among the most important puzzles to solve. Moreover, such cases can counteract the vicious cycle that drives litigation. The fact that en banc cases can produce tensions among judges is inherent to the appellate judge job. Furthermore, the concern that en banc review could lead to more uncertainty overlooks the signal that such conflicts send to the Supreme Court and Congress regarding confusion in the law. Ignoring such conflicts deprives parties and the public of coherent national law.

1. An Illustration[193]

A controversy over copyright protection for computer software poignantly illustrates the lax attitude with which some appellate judges approach their responsibility to address the fragmentation of national law. In 1977, before software copyright litigation emerged, the Ninth Circuit ruled in *Krofft Television Productions, Inc. v. McDonald's Corp.*[194] that expert testimony was inadmissible to determine whether Mayor McCheese and the merry band of McDonaldland characters infringed copyright protection for Wilhelmina W. Witchiepoo and the other imaginative H.R. Pufnstuf costumed characters.[195] After the emergence of software copyright infringement cases in the 1980s, substantially all software copyright cases have permitted expert witnesses to aid juries in understanding

190. *See id.* at 851–55.

191. *See id.* at 856–59.

192. *See generally* Irons v. Diamonds, 670 F.2d 265 (D.C. Cir. 1981); Steven Bennett & Christine Pembroke, *'Mini' In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 544–57 (1986); Michael S. Kanne, *The "Non-Banc En Banc": Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 611 (2008).

193. Professor Menell served as counsel on the appeal in the illustration that follows.

194. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

195. *Id.* at 1164.

software code.[196] As the Second Circuit recognized in *Computer Associates International, Inc. v. Altai, Inc.*,[197] the ordinary observer standard "may well have served its purpose when the material under scrutiny was limited to art forms readily comprehensible and generally familiar to the average lay person," but as to computer programs, district courts must have "discretion . . . to decide to what extent, if any, expert opinion, regarding the highly technical nature of computer programs, is warranted in a given case."[198]

In a shocking departure from the decisions of every other circuit that had confronted software copyright infringement litigation, the Ninth Circuit reaffirmed and applied the bar on expert testimony originating in *Krofft* to copyright disputes involving highly technical computer software code. The court in *Antonick v. Electronic Arts* held that lay juries must decipher and analyze software code—distinct hexadecimal assembly code languages for different processors[199]—without the assistance of expert witnesses,[200] a rule that the authoring judge characterized at the oral argument as "nutty."[201]

As the basis for upholding and applying the nutty rule to computer software copyright cases, the panel decision provided the following explanation:

> Antonick is not alone in contending that experts should be allowed to help juries assess the holistic similarity of technical works such as computer

196. *See* Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003) (citing Dawson v. Hinshaw Music Inc., 905 F.2d 734, 736 (4th Cir. 1990)) ("Expert testimony will usually be necessary to educate the trier of fact in those elements for which the specialist will look."); Gates Rubber Co. v. Bando Chem. Indus., 9 F.3d 823, 834–35 (10th Cir. 1993) (citation omitted) ("Given the complexity and ever-changing nature of computer technology, we decline to set forth any strict methodology for the abstraction of computer programs. Indeed, in most cases we foresee that the use of experts will provide substantial guidance to the court in applying an abstractions test."); Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992); *Dawson*, 905 F.2d at 734–37 (citing Suzanne R. Jones, Note, Whelan Associates v. Jaslow Dental Laboratory*: Copyright Protection for the Structure and Sequence of Computer Programs*, 21 LOY. L.A. L. REV. 255, 294 (1987)) (expressly diverging from the *Krofft* approach with regard to the admissibility of expert testimony, explaining that the infringement inquiry "should be informed by people who are familiar with the media at issue"); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1222–23 (3d Cir. 1986) (relying on Federal Rule of Evidence 702 to permit expert testimony where it will be useful to a trier of fact).

197. *See generally Altai*, 982 F.2d 693.

198. *See id.* at 713.

199. Assembly code languages are low-level computer programming languages that were more commonly used with primitive computer environments. *See Assembly language*, WIKIPEDIA, https://en.wikipedia.org/wiki/Assembly_language#Language_design (last visited Oct. 26, 2023) [https://perma.cc/B257-7BUZ]. They involve instruction sets based on mnemonics that are defined for particular processors. Hexadecimal provides a convenient way of representing binary information, which is very important for computer systems. Computer systems store information in arrays of on/off switches. Thus, the basic unit of information in computer systems is a binary digit ("0" or "1") or "bit." *See Bit*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bit (last visited Oct. 26, 2023) [https://perma.cc/D4TY-RN7Y]. Hexidecimal features a base of 16 symbols ("0"–"9", "A"–"F") as opposed to the more common decimal ("0"–"9") system. *See Hexidecimal*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hexadecimal (last visited Oct. 26, 2023) [https://perma.cc/ML98-Z7B4]. Hence, hexadecimal symbols provide a human-friendly representation of binary-coded values.

200. *See generally* Antonick v. Elec. Arts, Inc., 841 F.3d 1062 (9th Cir. 2016).

201. *See Robin Antonick v. Elec. Arts, Inc., No. 14–15298*, U.S. CTS. FOR THE NINTH CIR., at 25:00–25:28, https://www.ca9.uscourts.gov/media/video/?20160316/14-15298/ (last visited Oct. 26, 2023) [https://perma.cc/DS4M-BF9W].

> programs. *See Brown Bag*, 960 F.2d at 1478 (Sneed, J., concurring); *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992). But, given our precedents, that argument must be addressed to an en banc court.[202]

Putting aside the ease with which the panel could have distinguished a copyright case involving costumed characters, which are readily observable and perceivable by lay juries, from a case involving a comparison of software code written in different hexadecimal computer languages, the court's apparent invitation to take up this obsolete interpretation in an en banc review seemed promising. But when that petition was tendered,[203] the panel members voted to deny rehearing en banc, and no other member of the Ninth Circuit requested a vote on whether to hear the matter en banc.[204] The court's unwillingness to address the split is all the more surprising given the prominence of the software industry in the Ninth Circuit. Furthermore, the issue was so clearly and persuasively addressed by the other circuit decisions that the en banc review would have been relatively easy to resolve.

2. Toward Streamlining and Improving En Banc Review

Circuit courts can implement changes to make the en banc process more effective and overcome some of the logistical burdens that appellate judges articulated. Large circuit courts can streamline en banc review by reducing the number of judges required for en banc panels. With substantial expansion of appellate judgeships in some circuits, Congress amended the Judicial Code in 1998 to authorize courts of appeals with more than fifteen judges to "perform [their] en banc function by such number of members of [their] en banc courts as may be prescribed by rule of the court of appeals."[205] This reform was specifically aimed to make en banc review more manageable in large circuits.[206] Although the Fifth, Sixth, and Ninth Circuits qualify for mini en-banc panels, only the Ninth Circuit has utilized this procedure.[207]

Similarly, circuit courts could adopt rules similar to the Seventh Circuit's Rule 40(e), which requires a panel to circulate to the active judges to consider en banc review an opinion overruling circuit precedent or creating a conflict between the circuits.[208] If a majority of the active judges do not favor rehearing en banc, then a footnote is added to the panel's published opinion to that effect and becomes the law of the circuit.[209] As one Seventh Circuit judge describes it, this

202. *Antonick*, 841 F.3d at 1067 n.4.

203. *See* Appellant's Petition for Rehearing En Banc, Antonick v. Elec. Arts, Inc. (9th Cir. 2017) (No. 14–15298).

204. *See* Order Denying En Banc Review, Antonick v. Elec. Arts, Inc. (9th Cir. 2017) (No. 14-15298).

205. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

206. *See id.*

207. *See* 9th CIR. R. 35-3 ("The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.").

208. 7th CIR. R. 40(e).

209. *Id.*

rule "allows the court to provide an 'en banc ruling' without the formalities of 'en banc procedure.'"[210]

To further minimize the logistical issues involved with the court sitting en banc, circuit courts can schedule en banc weeks each year.[211] Each circuit is required to hold semi-annual meetings of the judicial council of the circuit.[212] Many circuit court judges will already be in attendance at those meetings, so scheduling en banc hearings in connection with those meetings will alleviate some of the travel and scheduling problems associated with en banc review.[213]

In addition, circuit courts can deploy technology to overcome some of the logistical barriers.[214] From the COVID-19 pandemic experience, courts and litigants have learned that remote work can frequently reduce the costs and logistical challenges of live hearings. Holding online en banc hearings in some cases would eliminate travel time (for the judges and lawyers) and greatly reduce scheduling conflicts.

Moreover, when hearing cases en banc, the entire court does not need to resolve every issue in the case. Instead, the court can decide the specific circuit split issue en banc but then remand the remainder of the case to be decided by the three-judge panel consistent with the en banc decision.[215] This practice should narrow the issues to be decided en banc and free up the nonpanel judges from spending additional resources on the case.

Furthermore, circuit courts can improve the quality of en banc review by inviting amici to participate in the en banc proceedings. The Federal Rules of Appellate Procedure allow amici to file briefs, but require leave of the court or consent of all parties.[216] Some courts, most notably the Court of Appeals for the Federal Circuit, regularly permit amici to file briefs without leave of court.[217] In some cases, the Federal Circuit specifically invites the United States or the USPTO to file an amicus brief.[218] By liberally allowing amici to participate, circuit courts can consider multiple viewpoints and interests and can take advantage of the input of those most knowledgeable about a circuit split.[219]

IV. GVR EN BANC

Absent structural judiciary reform and in view of the Supreme Court's limited capacity to resolve more than sixty-five merits decisions per Term, circuit courts are the most promising institutions for expanding the judiciary's capacity

210. Kanne, *supra* note 192, at 623.
211. *See* Stein, *supra* note 49, at 836.
212. 28 U.S.C. § 332(a).
213. *See* Stein, *supra* note 49, at 836–37.
214. *See* Menell & Vacca, *supra* note 3, at 885.
215. *See* Stein, *supra* note 49, at 837.
216. FED. R. APP. P. 29(a).
217. *See* Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 743 (2011).
218. *See id*.
219. *See id*. at 744.

to resolve or, at a minimum, percolate circuit splits. Unfortunately, their appetite to play that role has waned, not expanded, as fragmentation has increased.

We believe that the Supreme Court can assume a larger managerial role in defragmenting national law through the modification of one of its existing tools. Where the Justices encounter a clear circuit split in the ordinary course of reviewing a certiorari petition that does not rise to the Court's certiorari threshold, it should grant, vacate, and remand (GVR) the matter to the circuit court for en banc review.[220] The Supreme Court would, of course, retain authority to review the en banc decision.

This modified instrument in the Supreme Court's toolbox falls within the Supreme Court's existing power to issue GVR orders, a power that the Court has expanded over the past several decades.[221] The Supreme Court's use of GVR en banc would greatly aid in resolving circuit splits, involve minimal work for the Supreme Court, not require Congressional action, and overcome circuit courts' reluctance to sit en banc.

In this Part, we describe the evolution of GVR, including how the Supreme Court has expanded the grounds for issuing GVR orders. We then examine the legal authority for the Supreme Court to issue GVR en banc orders and conclude that the Court has such authority. We base this conclusion on statutory authority, Supreme Court Rule 10, the Supreme Court's inherent supervisory power, and precedent. Finally, we explain how GVR en banc can be an effective tool for expanding the judiciary's capacity to resolve fragmentation, although structural judiciary reform could further enhance that capacity.

A. The Expansion of GVR

The use of GVR traces back to early twentieth-century cases in which the Supreme Court would, after plenary review of the merits,[222] vacate and remand cases to state supreme courts due to intervening state statutes or state supreme court decisions.[223] This practice was initially based on federalism concerns,[224] but the Supreme Court soon thereafter expanded the qualifying events to include intervening Supreme Court decisions.[225] Thus, GVR expanded from federalism concerns to more general equitable, efficiency, and supervisory considerations, permitting lower courts (state and federal) to reconsider judgments in light of previously unavailable information.[226] Over time, the range of intervening events that served as a basis for GVR expanded to encompass: (1) state court decisions,

220. This proposal is similar to Justice White's proposal to authorize circuit courts to resolve intercircuit splits on a national basis through en banc review, subject to Supreme Court review. *See supra* Subsection II.C.4.

221. Sena Ku, Comment, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 Nw. U. L. REV. 383, 389 (2008) (describing the Supreme Court's expansion of its GVR power).

222. *Id.* at 389.

223. Shaun P. Martin, *We've Only Just Begun: The Impact of Remand Order on American Jurisprudence*, 36 ARIZ. ST. L.J. 551, 553 (2004); Ku, *supra* note 221, at 387.

224. Ku, *supra* note 221, at 387.

225. *Id.* at 387–88.

226. *Id.* at 388–89.

(2) state statutes, (3) Supreme Court decisions, (4) federal statutes, (5) new interpretations by administrative agencies, (6) changed factual circumstances, and (7) confessions of error or new positions taken by the Solicitor General of the United States.[227]

The Supreme Court has enumerated the virtues of GVR.[228] First, it "preserves 'the dignity of the [lower court] by enabling it to consider potentially relevant decisions and arguments that were not previously before it.'"[229] Second, GVR "conserves the scarce resources of [the Supreme] Court that might otherwise be expended on plenary consideration."[230] Third, GVR assists the Supreme Court by giving it the benefit of the lower court's insight.[231] And finally, GVR avoids unequal treatment because of the Supreme Court's inability to grant plenary review in each case raising similar issues.[232]

Over the last few decades, the Supreme Court has expanded the bases for GVR beyond the seven common categories despite opposition from some Justices. In *Lawrence v. Chater*,[233] the Supreme Court rejected Justice Scalia's contention that GVR was limited to the traditional grounds and should only be applied when the intervening event actually has a legal bearing on the lower court's decision.[234] In contrast, the majority required that the intervening event raise only "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration."[235] The majority's lower standard for ultimately affecting the outcome expanded the Court's ability to issue GVR orders.[236]

A decade later, in *Youngblood v. West Virginia*,[237] the Supreme Court further expanded the grounds for GVRs. In *Youngblood*, a criminal defendant moved to set aside his conviction of sexual assault, brandishing a firearm, and indecent exposure on the grounds that the state had suppressed exculpatory evidence in violation of *Brady v. Maryland*, which had been decided more than forty years earlier.[238] The trial court denied the defendant's request for a new trial, finding that the evidence was not exculpatory and failed to discuss *Brady*.[239] The West Virginia Supreme Court of Appeals affirmed the trial court, but did not

227. *Id.* at 389; *see also* SHAPIRO ET AL., *supra* note 62, at 346–47; Lawrence v. Chater, 516 U.S. 163, 166–67 (1996) (per curiam).

228. *Lawrence*, 516 U.S. at 167.

229. Ku, *supra* note 221, at 394 (quoting Stutson v. United States, 516 U.S. 193, 197 (1996)); *see also Lawrence*, 516 U.S. at 167 (GVR "assists the court below by flagging a particular issue that it does not appear to have fully considered.").

230. *Lawrence*, 516 U.S. at 167.

231. *Id.*; Ku, *supra* note 221, at 410.

232. *Lawrence*, 516 U.S. at 167.

233. *Id.* at 163.

234. *Compare id.* at 168–75 *with id.* at 178–92 (Scalia, J., dissenting); *see also* SHAPIRO ET AL., *supra* note 62, at 348.

235. *Lawrence*, 516 U.S. at 167.

236. SHAPIRO ET AL., *supra* note 62, at 348.

237. *See generally* Youngblood v. West Virginia, 547 U.S. 867 (2006).

238. *Id.* at 868–69; Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 714 (2009).

239. *Youngblood*, 547 U.S. at 869.

specifically address the alleged *Brady* violation.[240] Two West Virginia Supreme Court justices dissented and believed that a *Brady* violation had occurred.[241]

The defendant filed a petition for certiorari with the U.S. Supreme Court, and the Court GVR'd the case to the West Virginia Supreme Court of Appeals for reconsideration of the *Brady* issue.[242] The Court explained that the defendant had presented the *Brady* issue to the trial court and the West Virginia Supreme Court, and noted that if the Supreme Court were to reach the merits in the case, "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue."[243]

Justice Scalia, joined by Justice Thomas, dissented.[244] Justice Kennedy filed a separate dissent.[245] All three dissenting Justices pointed to the absence of any intervening change in the law.[246] As Justice Scalia explained, "the Court was vacat[ing] and remand[ing] *in light of nothing*."[247] In such circumstances, he asserted, the Court should just exercise its normal appellate jurisdiction and grant or deny certiorari on the merits.[248] Nonetheless, six Justices approved this broader rationale for GVR and continued the Court on the path of expanding GVR grounds.[249]

GVR en banc (or "GVREB") would be another pragmatic use of the Supreme Court's supervisory authority to promote more efficient and thorough resolution of legal disputes. As in *Youngblood*, there would be no intervening change in the law in GVR en banc cases. After remand, the circuit court's en banc decision would either avoid the need for the Supreme Court to decide the issue or it would provide the Court with a more fully developed analysis for considering and possibly granting further review.

240. *Id.*
241. *Id.*
242. *Id.* at 870.
243. *Id.*
244. *Id.* at 870–75 (Scalia, J., dissenting).
245. *Id.* at 875 (Kennedy, J., dissenting).
246. *Id.* at 871, 875.
247. *Id.* at 872 (Scalia, J., dissenting) (emphasis in original).
248. *Id.* at 874 (Scalia, J., dissenting).
249. Ku, *supra* note 221, at 400.

B. The Meaning of GVR

GVR orders specify the intervening event or issue for reconsideration.[250] Some judges believe GVR requires them to revisit the issue, but that they are free to reach the same result.[251] Others consider GVR as equivalent to a polite reversal.[252] Although the Supreme Court has previously stated that a GVR order is not a final determination on the merits,[253] the Court has been less than clear in its short GVR orders and practice.[254] These same concerns will arise with respect to GVREBs.

The better view of GVR is that it is not the functional equivalent of a summary reversal.[255] The Court has a summary reversal tool and chose not to use it in GVR'd cases. The lower courts should understand GVR as a command to reconsider the case, but that it may come to the same or a different conclusion.[256] To clarify the issue, commentators have suggested that the Court distinguish between cases where the Court is indifferent to the result on remand and cases in which reversal is truly sought.[257] This recommendation should be heeded in both general GVR and GVREB contexts.

C. Authority for GVREB

GVRs not involving intervening events can be conceptualized as serving either a law-shepherding or a justice-ensuring purpose.[258] The law-shepherding GVRs "spring from the Court's desire to act as law-declarer and, much more, to manage the judicial system so as to make its lawmaking function as effective and convenient as possible rather than allowing it to happen accidentally as the cases come."[259] A typical example is the Supreme Court ordering the lower court to decide the case on a different issue than it had done when there is no mandatory sequence and without finding that the initial issue was decided incorrectly.[260] In contrast, the justice-ensuring GVRs "do not involve weighty questions of law

250. *See, e.g.*, Rocket Mortg., LLC v. Alig, 142 S. Ct. 748 (2022) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of TransUnion LLC v. Ramirez, 594 U.S. ––, 141 S. Ct. 2190 (2021)."); Bank Markazi v. Peterson, 140 S. Ct. 813 (2020) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116—— (S. 1790).").

251. Arthur D. Hellman, *"Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 390–91 (1984); Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 515 (2004).

252. Hellman, *supra* note 251, at 391; Chemerinsky & Miltenberg, *supra* note 251.

253. Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964).

254. Hellman, *supra* note 251, at 391–93; Chemerinsky & Miltenberg, *supra* note 251, at 517–18 ("[T]he typical GVR order is short and cryptic, consisting of nothing more than a formulaic three-sentence recitation.").

255. SHAPIRO ET AL., *supra* note 62, at 350.

256. *Id.*

257. Hellman, *supra* note 251, at 399; Chemerinsky & Miltenberg, *supra* note 251, at 526.

258. Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 174–76 (2020).

259. *Id.* at 233.

260. *Id.* at 174.

but rather involve the suspicion that an injustice has occurred—but the Court asks the lower court to take another look rather than sorting out what happened itself."[261]

GVREBs would fall into the law-shepherding category because the Supreme Court would be remanding to the circuit court to prompt it to reconsider its jurisprudence in light of the interpretations of another circuit or the interpretations of multiple other circuits. Such a directive could resolve a circuit split or further percolate the law and potentially lead to eventual resolution at the Supreme Court. Unlike the sequencing example given above, GVREB would not involve the Supreme Court requiring the circuit court to address a different issue; the Supreme Court would remand on the issue that was addressed by the circuit court and directly appealed to the Supreme Court.

Several Justices have been critical of law-shepherding GVRs and have asserted that the Court does not have the power to GVR in these cases.[262] They maintain that the Court's "appellate jurisdiction under Article III of the U.S. Constitution and the governing statutes is constrained by historical understandings of appellate action, which, the skeptics believe, limit the Court's power to vacate and remand without finding error in the judgment under review."[263] In these law-shepherding GVR cases, the skeptics assert that "the Court [should] either deny review altogether or, if it is going to grant review, figure out the merits itself."[264] As illustrated below, the Court has broad authority to order law-shepherding GVRs, including GVREB.

1. Section 2106

The Constitution grants Congress the power to regulate the Supreme Court's appellate jurisdiction and the procedures used.[265] The Court's power to GVR stems from 28 U.S.C. § 2106,[266] which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[267]

In *Lawrence v. Chater*, the Supreme Court recognized that § 2106 gives the Court "a broad power to GVR."[268]

261. *Id.* at 175.
262. *Id.* at 176.
263. *Id.*
264. *Id.*
265. U.S. CONST. art. III, § 2, cl. 2; *see also* Bruhl, *supra* note 258, at 185.
266. Lawrence v. Chater, 516 U.S. 163, 166 (1996) (per curiam); *see also* J. Mitchell Armbruster, Note, *Deciding Not to Decide: The Supreme Court's Expanding Use of the GVR Power Continued in* Thomas v. American Home Products, Inc. *and* Department of the Interior v. South Dakota, 76 N.C. L. REV. 1387, 1399 (1998).
267. 28 U.S.C. § 2106.
268. *Lawrence*, 516 U.S. at 166.

The statutory language confers plenary power to GVR with the only limitation being justice.[269] Certainly, harmonizing the law to avoid the deplorable and pernicious effects of fragmentation falls under the broad umbrella of justice.

As Professor Aaron-Andrew Bruhl explains, § 2106 and its predecessors were intended to unshackle appellate courts (including the Supreme Court) from English common law rules restricting their authority.[270] Congress intended to give the Supreme Court a flexible and broad remedial scheme.[271] The Supreme Court's rejection of Justice Scalia's traditional limitations approach in *Lawrence* and *Youngblood* suggests that GVREB would fit neatly within § 2106.

Despite the broad statutory language, there are limits on the Court's § 2106 powers beyond promoting justice. External limitations in the Constitution or other statutes can restrict the Court's § 2106 powers.[272] For example, the Supreme Court could not increase a jury's determination of damages after a civil trial because this would violate the Seventh Amendment.[273] Similarly, the Supreme Court could not order a new trial if the party seeking it failed to file a motion under Rule 50 with the district court.[274]

Nor does § 46(c) of the Judicial Code[275] constrain the Supreme Court's authority to order en banc review. That provision provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.[276]

As the Supreme Court explained shortly after this provision was enacted, Congress drafted § 46(c) as a grant of power *to the courts of appeals* to order hearings en banc.[277] This language codified the Supreme Court's decision in *Textile Mills*, which recognized that the circuit courts have this power.[278] Vesting the power to convene en banc review with a majority of active judges clarified that *parties* lacked any right to en banc review.[279]

Thus, § 46(c) is simply a grant of power to the courts of appeal and a rejection of any legal rights by litigants. It says nothing about how the Supreme Court's powers under § 2106 are limited because such concerns were not contemplated by Congress. The Court's powers under § 2106 were not affected. The

269. Bruhl, *supra* note 258, at 186.

270. *Id.* at 186–96.

271. *Id.* at 196.

272. *Id.* at 209.

273. *Id.* at 210 (citing Dimick v. Schiedt, 293 U.S. 474, 485–88 (1935)).

274. *Id.* (citing Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 402 n.4 (2006)).

275. *See supra* notes 135–36 and accompanying text.

276. 28 U.S.C. § 46(c).

277. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 250 (1953).

278. *Id.* at 250–51 (citations omitted) ("The statute, enacted in 1948, is but a legislative ratification of *Textile Mills Securities Corp. v. Commissioner*—a decision which went no further than to sustain the power of a Court of Appeals to order a hearing en banc.").

279. *Id.* at 252 (citing an exchange between Senators Danaher, McFarland, and Kilgore on a previous bill that it was the decision of the court of appeals, and not upon motion by the attorneys for the parties, who would assemble the court en banc).

Court recognized as much in *Western Pacific Railroad*, when the Court explained that "[t]he en banc power . . . is . . . a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate."[280]

Similarly, Rule 35 of the Federal Rules of Appellate Procedure—based on § 46(c)—specifies that "[a] majority of the circuit judges who are in regular active service and who are not disqualified may order than an appeal or other proceeding be heard or reheard by the court of appeals en banc."[281] Like § 46(c), Rule 35 is a limitation on parties, a grant of power to the circuit courts, and irrelevant as an external prohibition on the Supreme Court's power under § 2106. As the 1967 Advisory Committee Notes explain, "[t]he rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc."[282] Rule 35 sets time and word length limitations on parties petitioning for en banc review,[283] but a party petitioning for en banc review is not the only method by which en banc review occurs. The circuit courts may sua sponte order that a case be heard en banc.[284] Rule 35 confirms that the circuit courts have this power and limits which judges on the circuit may participate in the en banc determination,[285] but it does not otherwise preclude en banc review.[286]

Thus, under a textualist or purposivist view of § 2106, the Supreme Court has the authority to use GVREB, and there is no prohibition external to § 2106 that otherwise limits the Court's power.

2. Supreme Court Rule 10

Chief Justice Rehnquist argued that because GVR involves a grant of the petition for certiorari, any case that the Supreme Court GVRs must meet the requirements of Supreme Court Rule 10.[287] Rule 10 sets forth the standards by which the Supreme Court determines whether to grant a petition for certiorari.[288] The two most relevant standards for GVREB purposes are: (1) a circuit court entering a decision in conflict with the decision of another circuit on the same important matter;[289] and (2) a circuit court deciding an important question of federal law that has not been, but should be, settled by the Supreme Court.[290]

280. *Id.* at 260.

281. FED. R. APP. P. 35(a).

282. FED. R. APP. P. 35 advisory committee's notes to 1967 adoption.

283. FED. R. APP. P. 35(b)–(c).

284. FED. R. APP. P. 35(a); *see* Vacca, *supra* note 217, at 760–62 (listing twenty-two cases the Federal Circuit sua sponte ordered en banc in the appendix).

285. FED. R. APP. P. 35(a).

286. Although unnecessary, the Judicial Conference could amend Rule 35(a) to add the following language to the beginning of the rule: "Except in those cases in which the Supreme Court has ordered rehearing en banc." Given circuit court judges' role in the Judicial Conference and their ire towards en banc review, this proposal might encounter resistance.

287. Thomas v. Am. Home Prods., Inc., 519 U.S. 913, 916–17 (1996) (Rehnquist, J., dissenting).

288. SUP. CT. R. 10.

289. SUP. CT. R. 10(a).

290. SUP. CT. R. 10(c).

The rule also makes clear that the listed standards "neither control[] nor fully measur[e] the Court's discretion."[291]

As applied to cases where GVREB would be appropriate, Rule 10 would be satisfied. Cases involving intercircuit splits fall squarely within the first standard. One circuit court has disagreed with another circuit on a particular legal issue. Intracircuit splits do not meet this standard. But intracircuit splits (and intercircuit splits) may very well fall within the second standard—a question the Supreme Court should settle.

But whether a GVREB satisfies Rule 10 is irrelevant.[292] A majority of the Supreme Court has rejected the contention that Rule 10 must be satisfied in all GVRs.[293] Even Justice Scalia, who has viewed use of the GVR tool restrictively, rejected the notion that the case must satisfy Rule 10.[294] As he explained, the Court has "never regarded Rule 10, which indicates the general character of reasons for which we will grant plenary consideration, as applicable to our practice of GVR'ing."[295] He further remarked that most of the cases in which the Court used its power to GVR did not meet Rule 10's standards.[296]

Therefore, Rule 10 does not limit the Supreme Court's ability to order GVREB. But even if it did, the intercircuit split cases and perhaps some of the intracircuit split cases would satisfy the standard.

3. Supreme Court Supervisory Power

Another possible basis for the Supreme Court's authority to GVR en banc is the Court's inherent supervisory powers to supervise the lower courts. Inherent supervisory powers, however, are probably the weakest and most questionable form of authority justifying GVREB.

The Constitution vests the Supreme Court with "judicial power,"[297] and from this grant, it is empowered "to decide, in accordance with law, who should prevail in a case or controversy."[298] But the Constitution does not establish the means by which the Court exercises this judicial power.[299] Although Congressional statutes and rules regulate judicial power, the Supreme Court regularly

291. SUP. CT. R. 10.

292. Martin, *supra* note 223, at 563 ("[I]t seems clear that the express standards established by Rule 10 on this issue do not currently apply to potential GVRs."); Ku, *supra* note 221, at 391 ("The Supreme Court has repeatedly gone beyond its normal certiorari jurisdiction to grant certiorari for cases in which it anticipates GVR'ing.").

293. Thomas v. Am. Home Prods., Inc., 519 U.S. 913, 913 (1996).

294. *Id.* at 914–15 (Scalia, J., concurring).

295. *Id.* at 914 (Scalia, J., concurring).

296. *Id.* at 914–15 (Scalia, J., concurring).

297. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

298. Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 37 (2008).

299. *Id.* at 37–38.

applies its inherent powers to take actions not specifically authorized by Congress or the Constitution.[300] The Court's inherent power permits it "to develop procedures to help it dispose of cases on the Supreme Court's own docket."[301]

Inherent powers are critical to the federal judiciary and have been recognized by the Court since at least 1812.[302] But their bounds are nebulous, and they lack clear standards for when the Court can invoke them to take action not specifically permitted by rule or statute.[303] The Court has sometimes declared "that inherent powers are available only when they are indispensable to the discharge of the judicial power, yet it often authorizes their use in less pressing situations."[304]

In 2006, then-Professor, and now Supreme Court Justice, Amy Coney Barrett wrote that although the Court has the power to develop procedures to help it dispose of cases on its docket, "[i]t does not necessarily follow, however, that the Supreme Court has the power to prescribe procedures controlling the way that inferior courts dispose of the cases on their dockets."[305] But she also noted: "To be sure, the Supreme Court's inherent authority over its own procedure might permit it to dictate some inferior court procedures designed to facilitate the Supreme Court's own review of the inferior court record."[306]

Some types of GVREB are exactly what Justice Barrett describes. This is most apparent in the intercircuit split scenario where GVREB will assist in the percolation process. In these scenarios, the Supreme Court is exercising its inherent power to order circuit courts to hear cases en banc so the Supreme Court can later resolve the circuit split itself after benefitting from the en banc court's review.

But GVREBs involving intracircuit splits or intercircuit splits that will be resolved by an en banc decision appear to be the Supreme Court prescribing a procedure for the circuit courts to dispose of cases on their own dockets. This, according to Barrett, is an illegitimate use of the Court's implied power because it conflates local and supervisory rules.[307] Of course, it is impossible for the Supreme Court to know in advance whether the circuit court, sitting en banc, will perpetuate an existing intercircuit split, so even these situations could legitimately fall under Justice Barrett's exception and constitute permissible use of the Court's inherent supervisory power. If the circuit court's en banc review satisfactorily resolves the issue, then that is simply a bonus for the judiciary.

300. *Id.* at 38.

301. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 337 (2006).

302. Anclien, *supra* note 298, at 41 (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

303. *Id.*

304. *Id.*

305. Barrett, *supra* note 301, at 337.

306. *Id.* at 337 n.57.

307. *Id.* at 337.

4. Precedent

Finally, although not perfectly on point, there is precedent for GVREB. In *Civil Aeronautics Board v. American Air Transport, Inc.*, the three-judge panel of the D.C. Circuit was divided on the outcome of the case, which hung on the legal issue of how new regulations from an agency affected property interests obtained under previous regulations.[308] The circuit court judges sought to certify the issue to the Supreme Court.[309]

The Supreme Court issued a per curiam opinion dismissing the certificate.[310] In doing so, the Court stated:

> Perhaps the Court of Appeals may now wish to hear this case en banc to resolve the deadlock indicated in the certificate and give full review to the entire case. This Court does not normally review orders of administrative agencies in the first instance; and the Court does not desire to take any action at this time which might foreclose the possibility of such review in the Court of Appeals.[311]

Although the procedural posture was a bit peculiar and the Supreme Court only suggested, rather than ordered, that the circuit court take the case en banc, the case does provide foundational authority for the Court to order GVREB.[312]

D. An Illustrative Case Study

In Subsection III.C.1, we summarized a case in which a Ninth Circuit panel acknowledged that its interpretation of copyright law clearly diverged from the law of other circuits on whether software experts should be permitted to explain to lay juries the meaning of highly technical source code, but could not be corrected without convening en banc review.[313] Nonetheless, the Ninth Circuit declined to grant the en banc petition. The aggrieved party then petitioned for Supreme Court review, highlighting the very clear circuit split and weight of authority in opposition to the Ninth Circuit's panel decision.[314]

Given the somewhat technical and narrow issue posed by the petition, it is understandable that the Supreme Court might not conclude that this petition ranked among the top sixty-six or so petitions that it would be able to hear during the upcoming Term. Yet the failure to resolve the clear circuit split both deprived the aggrieved party of a fair adjudication of its interests and left a circuit split

308. Civ. Aeronautics Bd. v. Am. Air Transp., Inc., 201 F.2d 189, 193–94 (D.C. Cir. 1952) (per curiam).

309. *Id.* at 194.

310. Civ. Aeronautics Bd. v. Am. Air Transp., Inc., 344 U.S. 4, 4–5 (1952).

311. *Id.*

312. Interestingly, on remand, the D.C. Circuit opted not to hear the case en banc. Instead, two of the judges changed their position to agree with the third, who wanted to remand the case to the district court for further factual development. *See Civ. Aeronautics Bd.*, 201 F.2d at 194.

313. *See supra* notes 199–204 and accompanying text.

314. Antonick v. Elec. Arts, Inc., 583 U.S. 969 (2017). *See also* Petition for Writ of Certiorari, Antonick v. Elec. Arts Inc., 138 S. Ct. 422 (2017) (No. 17–168), 2017 WL 3309744, at *1; Brief of Amici Curiae Intellectual Property Law Professors in Support of Petition for Rehearing En Banc, Antonick v. Elec. Arts Inc., 138 S. Ct. 422 (2017) (No. 17–168), 2017 WL 3977638, at *3.

festering. Had the Supreme Court simply issued GVREB, the Ninth Circuit would have taken on the split and likely resolved it successfully and relatively easily. But without such a supervisory nudge, which would not have required any substantial additional effort by the Justices, the circuit split remains.

E. GVREB: An Effective Collaborative Tool for Defragmenting National Law

As commentators have chronicled, the number of such splits has increased significantly over the past half-century.[315] The Supreme Court's capacity to resolve the rising tide of intercircuit splits has diminished. Yet circuit courts have become less interested in using en banc review to rectify these divisions.[316] The Supreme Court can play a catalyst role in enlisting the circuit courts to confront a significant portion of these aberrations in the fabric of national law.

Under current practices and standards for certiorari, Supreme Court petitioners highlight the presence and extent of circuit splits in their petitions. By adding a GVREB bucket to the Supreme Court's options for resolving certiorari petitions, the Court could substantially increase the number of circuit splits confronted and resolved. This could be done on an experimental basis to see how this expansion of en banc review plays out. But given the lack of leadership from Congress on structural judiciary reform, this may well be the most effective available tool for the foreseeable future.

Given the expanding bases for GVR and the Court's broad power under § 2106, it seems clear that the Court has the power to GVREB. The irrelevance of Rule 10, the ambiguous support based on the Court's inherent supervisory power, and the Court's actions in *Civil Aeronautics Board* strengthen, or at least do not weaken, the Court's ability to adopt a GVREB procedure to help resolve circuit splits.

To be sure, GVREB will not solve the fragmentation problem. But it will provide some much-needed relief. GVREB will immediately resolve intracircuit splits. Once the Supreme Court issues a GVREB order, the circuit court will sit en banc and resolve the issue within the circuit. There may be dissents or concurring opinions, but a decision will be reached.

GVREB may immediately resolve intercircuit splits, but not always. If the circuit the case is remanded to for en banc review is the only outlier and adopts a different interpretation, then the circuit split is resolved. If the outlier circuit court reaffirms its previous interpretation, then fragmentation will persist. And if there are other additional courts involved in the intercircuit split with more than one on each side of the split, then GVREB will not fully resolve it.[317] But

315. *See* Menell & Vacca, *supra* note 3, at 808.

316. *Id.* at 860.

317. To be clear, we do not assert that GVREB will succeed only if the Supreme Court can accurately predict in advance whether the en banc court will resolve the circuit split. This would require the Supreme Court to undertake a substantive review of the merits and make an educated guess as to how each active circuit judge on the court of appeals would vote. This would be counterproductive. By denying certiorari in circuit split cases, the Court permits fragmentation to persist. If GVREB is used, some splits will be resolved by this process, and

even in these circumstances, GVREB aids the percolation process and could assist the Supreme Court in reaching a better decision when the Court eventually addresses the issue.[318] Alternatively, the other circuits in the split may be persuaded by the en banc decision and adjust their approach accordingly.[319]

The use of GVREB will also invigorate appellate courts to better manage their own jurisprudence and pay closer attention to the harmonization of national law. It might well soften circuit judges' resistance to en banc review and even lead the judges to see it as a productive and congenial process.[320] GVREB will motivate circuit courts to streamline their procedures for handling en banc review.

In addition, the availability of GVREB addresses a bias within the Supreme Court's certiorari review process. Commentators have noted law clerks' extreme hesitation to recommend granting certiorari and looking for "every possible reason to deny cert. petitions."[321] With GVREB, the law clerks have a third choice to recommend. When confronted with a petition presenting a circuit split, but perhaps not a deep split, the clerk can recommend GVREB rather than simply denying the petition (as is the current practice) or granting the petition (which exposes the clerk to potential reputational blowback).[322]

Finally, GVREB forthrightly confronts the false assumption that circuit splits will resolve themselves if given more time.[323] As noted above, Professors Beim and Rader's empirical study demonstrates that this does not occur.[324]

GVREB can also be enhanced to more effectively and efficiently identify and resolve circuit splits. By taking advantage of additional resources, the judiciary could systematically map fragmentation to improve law clerks' abilities to screen cases for GVREB or plenary review. The Federal Judicial Center, working under the auspices of the Supreme Court, could collaborate with treatise authors, professors, practitioners, district court judges, and circuit court judges to identify pressing intra- and intercircuit splits.[325] This could greatly enhance the ability of the Supreme Court's bright but relatively inexperienced law clerks tasked with preparing thousands of certiorari memos for the Justices each Term.

this is beneficial to the justice system. Some splits will continue after en banc review, but the result is percolation and a strong signal to the Court that this split will not likely resolve on its own and the Court's plenary review is necessary. Absent GVREB, the Court would have passed on the case and the split would not have been resolved as quickly (or ever). *See supra* Section II.

318. Armbruster, *supra* note 266, at 1411 (citing Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam)).

319. *See, e.g.*, United States v. Jose, 131 F.3d 1325, 1329 (9th Cir. 1997) (en banc) (adopting the interpretation of the Fifth Circuit's en banc decision in *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988)).

320. *See supra* note 172 (reporting positive accounts of en banc review on collegiality).

321. Owens & Simon, *supra* note 59, at 1235–36.

322. GVREB is akin to the waitlist in law school admissions. Rather than outright rejecting or admitting a questionable applicant, the applicant is put on the waitlist to see how the entering class as a whole is shaping up and a decision can be deferred. The applicant might end up accepting an offer at a different institution and withdrawing their application, in which case the waitlisting school avoids a decision.

323. *See supra* Section II.B.

324. Beim & Rader, *supra* note 2, at 456, 468.

325. Menell & Vacca, *supra* note 3, at 884.

V. RESPONSES TO POTENTIAL OBJECTIONS

Despite its promise to reduce fragmentation and the ease with which it can be implemented, implementation of GVREB could encounter various objections. It would impose additional burdens on both the Supreme Court and circuit courts. It could also revive concerns about politicization of the judiciary. Furthermore, other policies, such as establishment of an Intercircuit Tribunal, might well provide a better means of expanding the judiciary's capacity to address fragmentation. As the following discussion explores, we believe that the benefits of experimental use of GVREB provide the most feasible interim approach to addressing the fragmentation of national law.

A. Limited Resources

Half a century ago, Supreme Court Justices and policymakers considered relatively expeditious resolution of circuit splits to be a primary responsibility of the federal judiciary.[326] The Hruska Commission based its work on this foundational principle.[327] Justice Byron White routinely dissented from denials of certiorari petitions that posed circuit splits.[328] Chief Justices Warren Burger and William Rehnquist worked assiduously to bring about structural reforms aimed at enabling the federal judiciary to defragment federal law.[329]

When those reforms failed to survive the legislative gauntlet, Supreme Court Justices increasingly rationalized their diminishing merits docket by saying that the Court is not an "error-correction court,"[330] code for its need for self-preservation through docket triage. In fact, the Court has expanded its use of GVR as a tool for managing its docket. As Professor Aaron-Andrew Bruhl explains, GVRing a case "simply notes the need for reconsideration."[331]

GVREB affords the Court with a cost-effective tool for delegating resolution of, or at a minimum percolating, a particular circuit split. When petitions for

326. *Id.* at 815.

327. *Id.* at 815–19.

328. *See, e.g.*, Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014 (1978) (White, J., dissenting).

329. *See* Menell & Vacca, *supra* note 3, at 818–19, 835.

330. *See* Judicial Conference Second Judicial Circuit of the United States, 178 FED. R. DECISIONS 210, 282 (1997). Justice Ginsburg stated that "[t]he Court is very firmly of the view that it is not an error correction institution." *Id.*; Suzanne Reynolds, *An Interview with Justice Ruth Bader Ginsburg*, 48 JUDGES' J. 6, 10 (2009) ("We are not an error-correction court."); Breyer, *supra* note 46, at 92 ("Rather than correcting errors, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one."); William H. Rehnquist, *Lecture at the Faculty of Law of the University of Guanajuato, Mexico* (Sept. 27, 2001), http://www.supremecourt.gov/publicinfo/speeches/sp_09-27-01.html [https://perma.cc/WX9L-DD9U] ("Rather than serving as an appellate court that simply attempts to correct errors in cases involving no generally important principle of law, the Court instead tries to pick those cases involving unsettled questions of federal constitutional or statutory law of general interest."); *see also* Shapiro, *supra* note 43, at 278–79 (citing addresses by Justices Fred Vinson and William Brennan describing how the Supreme Court is not an error-correction court).

331. Bruhl, *supra* note 238, at 735–36.

certiorari are reviewed by the law clerks, part of the clerks' analysis is determining whether there is a legitimate circuit split and the extent of the split.[332] If there is a deep split and the other hurdles for certiorari are cleared, then the Supreme Court will grant certiorari and decide the case on the merits. If there is a legitimate circuit split, but not a deep split warranting plenary review, then this will be determined as part of the regular certiorari review process. And if the case presents a bogus circuit split, this will also be discovered during the normal certiorari review process, and the petition will be denied. In short, reviewing a case for potential GVREB adds no additional work for the law clerks. The grounds for GVREB have already been determined as part of the existing process. Adding GVREB to the set of options available to certiorari pool memo drafters will likely improve the quality of the analysis.[333] And the Justices are already reviewing the clerks' certiorari memos, so the burden on the Justices' review time is minimal. The circuit court's en banc resolution of the matter might well reduce the Supreme Court's future docket.

GVREB would likely add to the time that the Court would need to devote to its certiorari conferences as the Justices discuss whether and how to use GVREBs. That burden, however, is relatively small, especially in comparison to the gains from resolving an appreciable number of circuit splits. Furthermore, we fully expect the Justices to quickly adapt to the use of this tool. It enhances the Court's ability to manage the clarification of national law.

Use of the GVREB tool would undoubtedly add to circuit courts' burdens by increasing the number of en banc review cases. As noted earlier, there are several ways in which appellate courts can streamline their en banc procedures to accommodate this workload. Moreover, we expect that the use of GVREB would motivate appellate courts to take greater responsibility for addressing circuit splits at the front end—in panel decisions and in consideration of en banc petitions.

Furthermore, as the Freund Study and subsequent reviews recognized, the Supreme Court faces the greatest capacity constraint within the federal judiciary.[334] It is the top of the federal judicial pyramid. Although the circuit courts are also strained, they have greater capacity and need to play a more active and responsible role in harmonizing law.

As the *Antonick* case illustrates,[335] the Ninth Circuit panel could have harmonized its law relating to the role of experts in copyright cases merely by distinguishing between copyright cases involving works that are readily perceived by lay juries and cases with technical subject matter such as computer source code. The other circuits to have confronted the issue did exactly that without the

332. *See* Beim & Rader, *supra* note 2, at 452 (noting that studies show that the Supreme Court is more likely to grant certiorari when true and deep circuit splits exist); *see also* Ruth Bader Ginsburg, *Remarks of Ruth Bader Ginsburg*, 7 N.Y. CITY L. REV. 221, 237 (2004) ("Our law clerks, when they write memos about petitions for certiorari, will tell us the nature of the split. Is it a shallow split? Is it a deep split? A deep split has the best chance of being granted review.").

333. *See supra* notes 56, 321 and accompanying text.

334. *See supra* Subsection II.C.1.

335. *See supra* Subsection III.C.1.

need for en banc review. Alternatively, the Ninth Circuit could have followed the panel's invitation to take the "nutty rule" to en banc review.

Although the Supreme Court's use of GVREB would add to circuit court workload, it is for a very important purpose. Moreover, many circuit courts are operating below their full caseload capacity.[336] The Supreme Court could take appellate caseloads into consideration in experimenting with this tool. Finally, use of GVREB could have the salutary effect of invigorating circuit judges' role in addressing circuit splits.

B. Politicization of the Judiciary

Reinvigoration of en banc review could rekindle concerns about the politicization of the federal judiciary that occurred in the 1980s.[337] In many respects, that ship has sailed.[338] The Reagan Administration's shift away from bi-partisan judicial appointments has become the norm.[339] Every occupant of the White House since President Reagan has made judicial appointments along political lines. While Democrats might well be concerned that President Trump's appointments could use en banc review to change long-established legal rules,[340] Republicans likely have similar concerns about President Biden's appointees.[341]

Although Supreme Court vacancies are relatively rare and can lead to substantial shifts in legal philosophy depending on which political party controls the White House and the Senate at any point in time, the composition of the appellate courts is less vulnerable to being skewed based on the happenstance of Supreme Court vacancies. There is a relatively constant rate of turnover at the appellate court level.

Moreover, the types of cases likely to be GVREB'd will tend to be less politically sensitive. As the number of Supreme Court merits decisions has diminished, the Court has been more focused on high-salience disputes, especially during the past Term. This has decreased the throughput of less prominent circuit split cases. Consequently, the use of GVREB would likely increase the resolution of less politically sensitive circuit splits.

336. *See* Menell & Vacca, *supra* note 3, at 859 (highlighting the tremendous variation in caseloads per circuit court judge across circuit courts).

337. Devins & Larsen, *supra* note 157, at 1379–80, 1410 (describing partisanship in the circuit courts in the 1980s, followed by a period of stability through much of the 2010s, and now a reemergence of partisanship since 2018).

338. *Id.* at 1395–96 (describing increased partisan sorting today).

339. *Id.* at 1391–95 (comparing Reagan-era and pre-Reagan-era judicial appointments).

340. *Id.* at 1380–81.

341. *Id.* at 1381.

C. A Complement to More Ambitious Alternatives to Addressing Fragmentation

As various commissions have recommended over the past half century, structural judiciary reforms offer the most promising and effective solutions to the fragmentation of national law. The Supreme Court is no longer able to shoulder this burden alone.[342] Unfortunately, Congress was not able to pass any of these reforms, and structural judiciary reform is farther from the top of the legislative agenda than it was half a century ago. The fragmentation crisis has been swept under the rug, even as its manifestations—inconsistent interpretations of federal law, forum shopping, and increased litigation—have worsened.

The GVREB tool would substantially increase the Supreme Court's ability to harmonize national law without legislative action. It would draw circuit courts more directly into the process of harmonizing national law. It could also provide a valuable experiment in judiciary reform by highlighting the role that an inter-circuit tribunal might play in expanding the judiciary's capacity to ensure consistent application of the rule of law.[343]

VI. CONCLUSION

Due to the persistent impasse over judiciary reform, national law fragmentation has become endemic to the American justice system. The imperative to harmonize national law that once animated both the Supreme Court and the circuit courts of appeals has waned over the past four decades, leaving citizens, government agencies, nongovernmental organizations, and businesses to operate in an increasingly fragmented legal landscape. Forum shopping has become a key strategy for most areas of litigation. The uncertain character of national law undermines equal treatment and drives up litigation costs.

As our prior research has chronicled,[344] the time for structural judiciary reform is long past due. Even Judge Henry Friendly, who questioned calls for a National Court of Appeals half a century ago, recognized that such a reform might be justified in twenty or twenty-five years.[345] Judge Jon O. Newman recently commented that he would favor "a National Court of Appeals, composed of seven Chief Circuit Judges selected at random" serving "as an ad hoc panel to which the Supreme Court could refer a particular case in order to resolve a circuit split."[346]

We, along with multiple commentators and appellate judges, see expansion of the Supreme Court merits docket as a partial antidote to the fragmentation problem. A targeted approach would involve the Supreme Court inviting certification of circuit splits. Judge Newman has suggested amending Supreme Court

342. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1612–13 (2008).

343. For a detailed diagnosis of the causes of judiciary reform failures and an antidote to solving it, see generally Menell & Vacca, *supra* note 3.

344. *Id.*

345. *See 1976 NCA Hearings*, *supra* note 92, at 251 (1976).

346. *See* correspondence from Judge Jon O. Newman to authors (Oct. 1, 2022) (on file with authors).

Rule 19 to add: "The Court will normally answer [or give serious consideration to answering] a certified question on an issue on which the Courts of Appeals are divided."[347]

Even without fundamental judiciary reform or significant expansion of its merits docket, the Supreme Court can ameliorate the mounting fragmentation challenge by re-envisioning its role as managing circuit court resources. The Court already devotes substantial resources to screening certiorari petitions. As we have shown, it can more efficiently deploy the circuit courts by adding a GVREB bucket to its certiorari process. And circuit courts can reorder their priorities and streamline their own procedures to more effectively aid the Supreme Court in addressing the fragmentation challenge.

The Supreme Court can also utilize the capacities of other institutions, such as the Federal Judicial Center, academic institutions, and treatise writers, to systematically map and track legal fragmentation so as to better focus its efforts and those of the appellate courts on improving the correctness and coherence of national law.

347. *See id*.