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There is No Such Thing as Circuit Law

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Article

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INTRODUCTION

There is no such thing as circuit law.[1] Federal circuit courts of appeals do not create or apply their own bodies of law. Those courts lack the power to create law in the choice-of-law sense, and even if they did, it would be subject to the whims of the Supreme Court. Were it even possible to create circuit law, doing so would be unwise because it would undermine the fundamental purpose of federal law: uniformity.

1. With apologies to Robert Heinlein and Gary Huckabay in particular, and microeconomists and the contributors to rec.sport.baseball and *Baseball Prospectus* in general. *See* ROBERT A. HEINLEIN, THE MOON IS A HARSH MISTRESS 227 (1997) ("If I hadn't believed simple arithmetic that you can't ship stuff downhill forever without shipping replacement back, would have tossed in cards. But . . . tanstaafl. 'There ain't no such thing as a free lunch,' in Bombay or in Luna."); Joe Sheehan, *Prospectus Today: No Such Thing*, BASEBALL PROSPECTUS (Aug. 12, 2003), https://www.baseballprospectus.com/news/article/2197/prospectus-today-no-such-thing [https://perma.cc/UZZ3-LWXH] ("'There's no such thing as a pitching prospect' (TINSTAAPP, for short) is actually a shorthand way of expressing the idea that minor-league pitchers are an unpredictable, unreliable subset of baseball players . . . . Gary Huckabay was the first to use the phrase . . . ."); Gary Huckabay, REC.SPORT.BASEBALL (Nov. 1, 1996), https://groups.google.com/g/rec.sport.baseball/c/njJBCeojmBM/m/HBfuqZB-7s4J [https://perma.cc/PX5D-CYTK] ("Huckabay's trite little saying: 'There's no such thing as a pitching prospect.'").

And yet judges,[2] lawyers,[3] and the media[4] routinely suggest

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2. *See* Hart v. Massanari, 266 F.3d 1155, 1173 (9th Cir. 2001) ("Circuit boundaries are set by statute and can be changed by statute. When that happens, and a new circuit is created, it starts without any circuit law and must make an affirmative decision whether to create its circuit law from scratch or to adopt the law of another circuit—generally the circuit from which it was carved—as its own."); United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689 (1960) ("[En banc courts] are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of *the law of the circuit*.") (emphasis added); Bradley v. United States, 161 F.3d 777, 782 n.4 (4th Cir. 1998) ("We, of course, apply *the law of the Fourth Circuit*, not the Fifth Circuit. However . . . *the law of our circuit* does not conflict with that of the Fifth Circuit in this instance.") (emphasis added); Henry v. Hulett, 930 F.3d 836, 839 (7th Cir. 2019) ("For more than 20 years it has been established in this circuit that the Fourth Amendment does not apply to visual inspections of prisoners. It is best to leave *the law of the circuit* alone, unless and until the Justices suggest that it needs change.") (emphasis added); *In re* Jones, 226 F.3d 328, 330 (4th Cir. 2000) ("This holding overruled the prior *law of this circuit* . . . .") (emphasis added); Oliver v. Arnold, 19 F.4th 843, 858 (5th Cir. 2021) (en banc) (Duncan, J., dissenting from denial of en banc rehearing) ("*In our circuit*, public school teachers can make students pledge allegiance to Mexico but can't make students write down our pledge.") (emphasis added); Gulf Power Co. v. FCC, 226 F.3d 1220, 1223 (11th Cir. 2000) (Carnes, J., concerning the denial of rehearing en banc) (per curiam) ("The result is that *the law of this circuit* is decided not on the basis of the votes of a majority of the seven non-disqualified judges of this Court in active service, but instead by the vote of the senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel.") (emphasis added); United States v. Zolin, 850 F.2d 610, 610 (9th Cir. 1988) (mem.) (Norris, J., concurring in the result) ("I write separately to make it clear that I believe the independent evidence rule has been and should continue to be the *law of the circuit*.") (emphasis added); United States v. Gates, Crim. No. 08-42-P-H, 2008 WL 5382285, at *7 (D. Me. Dec. 19, 2008) ("[W]ith respect to the legality of the North Carolina traffic stop, *the law of the United States Court of Appeals for the Fourth Circuit* controls.") (emphasis added); United States v. Longo, 70 F. Supp. 2d 225, 261 (W.D.N.Y. 1999) ("[I]n determining whether Williams voluntarily consented to the recording of the conversations, the court shall apply *Sixth Circuit law*.") (emphasis added); United States v. Restrepo, 890 F. Supp. 180, 191 (E.D.N.Y. 1995) ("The Memphis officers should have been able to rely on their understanding of *the law in the Sixth Circuit* and could not have been expected to know *the law in circuits other than the one in which they were operating*.") (emphases added); Matthew Renda, *Koh Takes Seat at Last on Ninth Circuit Bench*, COURTHOUSE NEWS SERV. (Dec. 13, 2021), https://www.courthousenews.com/koh-takes-seat-at-last-on-ninth-circuit-bench [https://perma.cc/7K8R-MVHN] (quoting Judge William Alsup as saying that "Judge Lucy Koh will be fair, thoughtful, and careful in the development of *our circuit law*") (emphasis added); J. Harvie Wilkinson, III, *The Drawbacks of Growth in*

circuit law is real. In a 2014 case, a panel of the Federal Circuit

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the Federal Judiciary, 43 EMORY L.J. 1147, 1174–75 (1994) ("The integrity of the appellate function depends upon that concept known as the 'law of the circuit.'").

3. *See* Jennifer L. Sturiale, *A Balanced Consideration of the Federal Circuit's Choice-of-Law Rule*, 2020 UTAH L. REV. 475, 476 (characterizing the Federal Circuit's opinion as being, at first blush, "about what law should apply: the law of the Fifth Circuit or the law of the Sixth Circuit"); Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1427 (2020) ("The phrases 'circuit precedent' and 'law of the circuit' are often used to describe both the rule and the body of case law within a specific circuit (both panel decisions and en banc decisions) that enjoys the benefit of the rule."); Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847, 871 ("The Florida plaintiffs' action was timely under the *law of the Eleventh Circuit*.") (emphasis added); *see also id.* at 879 (noting that in the case two circuits' precedents conflict, "we do have choice of law," albeit one that is contrasted with "the usual choice of law context"); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1175–76 (2012) ("In such instances, federal courts typically address Fourth Amendment claims on the basis of a choice of law construct, adopting a *lex loci* ('law of the place') approach, which applies the *law of the circuit* in which the allegedly unlawful search or seizure occurred.") (emphasis added); Gregory C. Parliman & Jonathan E. Hill, *Third Circuit Law on Summary Judgment in the Area of Employment Discrimination*, 20 SETON HALL L. REV. 786, 802 (1990) (contrasting "the state of summary judgment law in the Third Circuit" with "that of other circuits").

4. *See* Brian Flood, *Judge Calls Fifth Circuit Law on Student Speech "Dumpster Fire,"* BLOOMBERG LAW (Dec. 16, 2021), https://news.bloomberglaw.com/us-law-week/texas-students-forced-pledge-of-allegiance-lawsuit-can-proceed [https://perma.cc/JZ2V-VECL] (noting that a dissenting judge characterized "the circuit's law" in an area as a "dumpster fire"); Bill Girdner, *Oregon Flouts Ninth Circuit Law*, COURTHOUSE NEWS SERV. (June 16, 2021), https://www.courthousenews.com/oregon-flouts-ninth-circuit-law [https://perma.cc/W6J7-AAX5] (arguing that Oregon state courts were wrong to continue a policy when a similar policy employed by a California state court had been enjoined and the Ninth Circuit had affirmed); Bill Girdner, *Idaho Courts Flout First Amendment Law in Ninth Circuit*, COURTHOUSE NEWS SERV. (July 23, 2021), https://www.courthousenews.com/idaho-courts-flout-first-amendment-law-in-ninth-circuit [https://perma.cc/L3SD-HZ8N] ("Courthouse News late Friday filed a First Amendment action against Idaho's court administrator over her refusal to provide access to new court documents when they are received, contrary to *Ninth Circuit law*.") (emphasis added); Sean Sullivan & Mike DeBonis, *With Little Fanfare, Trump and McConnell Reshape the Nation's Circuit Courts*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/powerpost/with-little-fanfare-trump-and-mcconnell-reshape-the-nations-circuit-courts/2018/08/14/10610028-9fcd-11e8-93e3-24d1703d2a7a_story.html [https://perma.cc/9QYU-AQQ7] ("Because the Supreme Court these days is taking so few cases, the law of the circuit is, on many, many issues, the final law for the people who live in that circuit.") (quoting Professor Arthur D. Hellman).

divided sharply over whether to apply "Fifth Circuit law" or "the law of . . . the Sixth Circuit."[5] Judge Henry Friendly claimed that "each circuit" was permitted "to make its own federal law."[6] Before she took the bench, then-Professor Amy Coney Barrett argued that rules of horizontal stare decisis "set most circuit law in relative stone."[7] The Ninth Circuit has even boldly declared that "until the Supreme Court takes some action, the law as we have determined it is the law in this circuit . . . All parties, the government as well as private persons, are bound by the law as we have found it."[8]

Even Congress is in thrall to this myth. In 1975, the Hruska Commission—tasked by Congress with studying improvements to the federal appellate courts—described one of the chief objections to adding more federal appellate judges as the potential sacrifice of "stability and harmony in the law of the circuit."[9] Nor was this a stray remark. The Hruska Commission Report used the phrase "law of the circuit" in twelve separate places.[10]

The problem is that these statements assume, wrongly, that there is such a thing as circuit law. That assumption is incorrect as a matter of institutional power, doctrine, theory, and practice.[11]

Of course, the opinions issued by federal courts of appeals are important legal materials that lawyers and other judges may

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5. *See In re* Barnes & Noble, Inc., 743 F.3d 1381, 1383–84 (Fed. Cir. 2014); *see also id.* at 1384 (Newman, J., dissenting) (arguing against the application of Sixth Circuit law); *accord* Sturiale, *supra* note 3, at 509–14 (considering possible explanations for Judge Newman's dissent and linking them to concerns about the substance of patent law).

6. *See* Henry J. Friendly, *The "Law of the Circuit" and All That: Foreword to the Second Circuit 1970 Term*, 46 ST. JOHN'S L. REV. 406, 412 (1972).

7. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1044 (2003).

8. United States v. Goodheim, 664 F.2d 754, 756 (9th Cir. 1981) (per curiam).

9. Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 205 (1975) [hereinafter Hruska Commission Report].

10. *See id.* at 246, 266–69, 272.

11. A rare exception to the pattern of reliance on this faulty assumption is James Durling, Comment, *The Intercircuit Exclusionary Rule*, 128 YALE L.J. 231, 232–33 (2018) (arguing that circuit courts of appeals are wrong to rely on caselaw from sister circuits when adjudicating suppression motions regarding searches that occurred within the geographic boundaries of the adjudicating circuit).

rely on when answering new questions. And those rulings can have a binding effect not only on the parties but also on lower courts and other panels of the same circuit. In that very limited sense, courts of appeals make law that is "of" their circuit. But this is just to restate rules of precedent, preclusion, law of the case, and a series of vertical and horizontal rules of stare decisis. Let us call this weak form—which this Article does not challenge—"circuit precedent."

The mistake is to make an inferential leap from these limited doctrines of former adjudication to grander pronouncements about "circuit law." Often this mistake manifests in talking about "circuit law" in the same way we talk about state law: as a separate body of substantive rules that must be applied in certain types of disputes. Not all courts make that mistake when talking about circuit precedent. In particular, the Supreme Court has never endorsed this idea.[12] But many circuit courts of appeals do, across many different areas of law. And they do so even though they are charged with interpreting and applying a unitary body of substantive rules: federal law. Call this strong form the myth of circuit law.

The myth of circuit law has distorted the law in significant but unseen ways. This Article, therefore, not only argues that circuit law is illusory, but also documents some of the major ways the mistaken belief to the contrary has undermined federal law. It has led judges to hide their disagreements about substantive law in arcane disputes about which circuit's law should apply. It has dressed up fights about fundamental fairness as skirmishes over choice of law. And it has persuaded courts to refuse to grant relief for violations of civil rights.

To motivate the argument that there is no such thing as circuit law, it's worth tracing the myth of circuit law's origins. Part I takes on this task through a historical and institutional lens. Part II describes the mischief the myth's persistence has created—including in multidistrict litigation, official immunity for government misconduct, patent law, and administrative law—and begins to refute the wisdom of the myth's doctrinal manifestations. Part III advances two arguments for abandoning the

12. Even last Term, Justice Barrett wrote separately to express her doubt about one implication of the myth of circuit law. *See* United States v. Tsarnaev, 142 S. Ct. 1024, 1042 (2022) (Barrett, J., concurring) (expressing skepticism that courts of appeals have "supervisory authority" to craft novel rules of procedure that are uniquely applicable in cases within that circuit).

myth of circuit law across the board: one grounded in conflict-of-laws theory, and the other grounded in the purpose of federal law.

I. THE HISTORY OF FEDERAL JUDICIAL CIRCUITS

The myth of circuit law, like most myths, grew from an acorn of truth. So let us first step through the institutional developments that made the myth of circuit law seductive. That story begins when Congress first created judicial circuits in the Judiciary Act of 1789. And it picks up steam in 1891, when the Evarts Act created the modern federal circuit courts of appeals. Then, during the twentieth century, the courts of appeals grew in personnel and importance as the Supreme Court's docket both shrank and became discretionary. These developments demanded the more widespread use of horizontal stare decisis and en banc sittings. Finally, in the 1980s, Congress created the Eleventh and Federal Circuits, which sparked new and more focused reliance on the concept of circuit law. Together, these developments dramatically increased the importance of "circuit precedent"—the weak form—and invited mistaken reliance on "circuit law," the mythical strong form.

A. THE JUDICIARY ACT OF 1789'S ORIGINAL STRUCTURE OF THE FEDERAL JUDICIARY

The myth's origins trace to the earliest federal courts. The Judiciary Act of 1789 was Congress's first attempt at constituting federal judicial tribunals, and its reach and influence remain considerable today. The 1789 Judiciary Act is critical to *this* story because it gave birth to the idea of regional judicial circuits in the first place. Though their purpose and role have changed significantly in the intervening centuries, circuits remain a key building block of the federal judiciary.

Yet the circuits created in 1789 were very different from their modern successors. The Judiciary Act of 1789 created and staffed three kinds of federal courts: the Supreme Court, District Courts, and "Circuit Courts."[13] But none exercised the same power they do today. The circuit courts created by the Judiciary Act exercised mixed original and appellate jurisdiction, having concurrent jurisdiction with state courts over most original civil actions where the amount in controversy exceeded five hundred

13. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 4, 1 Stat. 73, 74–75 (1789).

dollars and there was diversity of citizenship.[14] They were also staffed in each case by two justices of the Supreme Court and one district judge of the district in which the Circuit Court sat.[15] The district courts were given jurisdiction over federal crimes involving minor punishments and certain alien suits involving international law.[16] Finally, the Supreme Court's appellate jurisdiction was mandatory.[17]

Most importantly, the Judiciary Act created *regional* circuits defined territorially. These regional circuits were defined mainly by reference to the District Courts from which they heard appeals; in the statutory text, the "districts" were to be "divided into three circuits."[18] But these circuits were conceived regionally: there was an eastern (New Hampshire, Massachusetts, Connecticut, and New York), a middle (New Jersey, Pennsylvania, Delaware, Maryland, and Virginia), and a southern (South Carolina and Georgia) circuit.[19]

Despite their enduring historical importance, the first judicial circuits did not give rise to even the idea of circuit precedent for at least three reasons. First, the original circuit courts were staffed by judges appointed to *other* courts (the Supreme Court and the District Courts), meaning that it was much less likely for disagreements to arise among the circuit courts. Second, the original circuit courts had mixed trial and appellate jurisdiction, meaning that their decisions were not as exclusively concerned with the law *alone* as purely appellate courts are. And third, appeal was available to the Supreme Court in nearly every case decided by the circuit courts, reducing how much they could declare law in any kind of final sense. Together, these institutional features reduced the lawmaking role of the early circuit courts.

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14. *Id.* § 11. The Circuit Courts also had jurisdiction over actions in which the United States was a plaintiff and many types of federal crimes. *Id.*

15. *Id.* § 4. The one exception was that no district judge could sit as a member of a Circuit Court hearing an appeal "from his own decision." *Id.*

16. *Id.* § 9. Certain other cases involving the United States and consuls or vice consuls were also within the jurisdiction of the District Courts. *Id.*

17. *Id.* § 13.

18. *Id.* § 4.

19. *Id.* The two other districts—Kentucky and Maine—each had its own appellate process. The District of Kentucky was authorized to act as its own Circuit Court in appropriate matters, whereas appeals from the District of Maine were taken "to the circuit court in the district of Massachusetts." *Id.* § 10.

As a result, the original circuit courts were never understood to create their own law in either the weak or the strong sense.[20] As the Ninth Circuit has recognized, the concept of "[c]ircuit law" was "wholly unknown at the time of the Framing."[21] Even the idea of a systematic rule of stare decisis did not develop until the first half of the nineteenth century; prior decisions were taken as mere evidence of the law rather than as law itself.[22] And the early versions of stare decisis that did arise were rife with exceptions.[23]

And this structure remained in place for a century, though with minor changes at the edges.[24] For example, the Judiciary Act of 1802 permanently increased the number of judicial cir-

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20. It's likely that the idea of judges "making" law is anachronistic as applied to the late eighteenth century.

21. Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001); *see also* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 24 (2000) (noting that the "circuit precedent" rule "has no analogue in the common-law system").

22. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 32–33, 35–36 (1959); Sassman, *supra* note 3, at 1413 ("While there was some sense of the importance of adhering to prior decisions, unreliable reporters and other features of early American judicial practice diminished precedent's role."); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 666 (1999) ("The founding-era doctrine of precedent thus was in an uneasy state of internal conflict. On one hand, the framing generation perceived the importance of stability and certainty in the law, and thus embraced a rule of following past decisions. On the other hand, a declaratory understanding of the common law gave rise to an exception permitting some form of reexamination of the merits of a prior decision.").

23. *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 105 (2000) ("[T]he justification for departing from prior precedent changes quite dramatically depending upon one's view of the prior cases as themselves a source of law.").

24. One major exception was the Judiciary Act of 1801—the so-called "Midnight Judges Act"—which created six federal judicial circuits, created multiple new judgeships for each circuit, and abolished the practice of requiring Supreme Court justices to "ride circuit" as members of the circuit courts. *See* An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801). That statute was repealed less than a year after its passage by Congress, which abolished all the newly created judgeships and the new circuits along with them. *See* An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes, ch. 8, § 1, 2 Stat. 132, 132 (1802); *see also* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1720–21 (2007) (tracing these developments).

cuits to six and described them ordinally rather than geographically, creating the first through sixth circuits.[25] Subsequent nineteenth-century legislation successively expanded that number to seven, nine, and ten.[26] But each of these statutes maintained the staffing arrangements for the circuit courts, including the practice of having Supreme Court justices sit as members of their panels.[27] It wouldn't be until the federal judiciary included independently staffed intermediate courts of appeals that the concept of "circuit law" could take root.

B. THE EVARTS ACT'S CREATION OF THE COURTS OF APPEALS

A growing population demanded change. As the economy and population expanded, driving larger judicial dockets, the burden on Supreme Court justices of traveling to "ride circuit" increased. The justices were increasingly called on to travel farther, for longer, to decide more cases. The practice was unsustainable.

Separately, the experience of the Civil War and Reconstruction caused Congress to expand federal-court jurisdiction to reduce the relative importance of state courts. For example, the Judiciary Act of 1875 gave federal courts general jurisdiction over all claims arising under federal law, making the burden worse.[28]

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

26. *See* Act of Feb. 24, 1807, ch. 16, 2 Stat. 420 (Seventh Circuit); Act of Mar. 3, 1837, ch. 34, 5 Stat. 176 (Eighth and Ninth Circuits); Tenth Circuit Act of 1863, ch. 100, 12 Stat. 794. The Tenth Circuit was abolished by the Judicial Circuits Act of 1866, ch. 210, § 2, 14 Stat. 209, 209 and later recreated by the Tenth Circuit Act of 1929, ch. 363, § 1, 45 Stat. 1346, 1346–47.

27. The Judiciary Act of 1869 added one dedicated circuit court judgeship for each circuit. *See* Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44–45. But Supreme Court Justices and district judges continued to sit on the circuit courts. *See id.*

28. *See* Judiciary Act of 1875, ch. 137, §§ 1–2, 18 Stat. 470, 470–71; Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 951 (2013) (noting that corporations used the 1875 Act to take their cases to federal courts, "leading to an explosion in federal litigation"); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 78 (Transaction Publishers 2007) (1928). The 1875 Judiciary Act's grant of general federal-question jurisdiction was qualified by a $500 amount-in-controversy limitation. *See* Grove, *supra*, at 951 n.95.

In response to mounting pressure from the courts,[29] in 1891 Congress radically reshaped the structure of the federal judiciary by enacting the Evarts Act.[30] The Evarts Act introduced two major changes to federal jurisdiction relevant to the rise of the circuit law myth: it made the Supreme Court's docket partially discretionary for the first time, and it created the modern circuit courts of appeals.[31] Together, these two changes allowed the concept of circuit precedent to take root.

Start with the courts of appeals, which in many ways resembled their modern-day successors. The Act created ten "circuit courts of appeals" that would hear cases in panels of three judges.[32] The judges eligible to sit on these courts of appeals included not only the circuit court judges but also the Supreme Court justice assigned as the relevant circuit justice. However, in the likely case that no Supreme Court justice was available, the circuit judges could constitute a quorum on their own.[33] The statute even specified the cities in which each court of appeals would hear argument; each circuit continues to hear argument in the relevant city today.[34] The Evarts Act also stripped the preexisting "circuit courts" of their appellate jurisdiction and gave it to the newly created courts of appeals.[35] Together, these developments created intermediate federal appellate courts staffed by

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29. Grove, *supra* note 28, at 953–57 (describing political pressure on Congress in the run-up to the Evarts Act).

30. Circuit Courts of Appeals (Evarts) Act, ch. 517, §§ 1–6, 26 Stat. 826, 826–28 (1891).

31. *Id.* §§ 1–2 (creating the courts of appeals); *id.* §§ 5–6 (making Supreme Court appellate jurisdiction discretionary in some cases).

32. *Id.* §§ 2–3.

33. *See id.* § 3.

34. *See id.* (requiring that the First Circuit hear arguments in Boston, the Second Circuit in New York, the Third Circuit in Philadelphia, the Fourth Circuit in Richmond, the Fifth Circuit in New Orleans, the Sixth Circuit in Cincinnati, the Seventh Circuit in Chicago, the Eighth Circuit in St. Louis, and the Ninth Circuit in San Francisco).

35. *Id.* § 4 ("That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established."); *see also id.* § 6 (granting the courts of appeals appellate jurisdiction over district courts and pre-existing circuit courts). The circuit courts retained some residual original jurisdiction. *See id.* §§ 4–5.

dedicated judges and with jurisdiction over appeals from a regionally defined set of trial courts.

At the same time, the Evarts Act gave the Supreme Court a new tool: the power to choose its own cases.[36] To make this change, the Evarts Act explicitly made "the judgments or decrees of the circuit courts of appeals . . . final in all cases" involving diversity of citizenship, patents, federal taxes, crimes, and admiralty, subject only to discretionary review by the Supreme Court.[37] The Evarts Act thus not only created the circuit courts of appeals but also gave them the final say in a wide swath of cases that the Supreme Court is unlikely to hear.

The result was a class of federal appellate judges more numerous than the Supreme Court Justices, divided into regional circuits, whose decisions were subject only to occasional review by the Supreme Court. The Evarts Act's creation of regionally siloed courts of appeals sowed the seeds of both the idea of circuit precedent and the myth of circuit law. That seed would grow as the dockets of the courts of appeals grew proportionately much larger than that of the Supreme Court.

C. THE JUDGES' BILL & THE SUPREME COURT'S DISCRETIONARY DOCKET

The trend of making the Supreme Court's docket discretionary—which began with the Evarts Act and continued with statutes in 1914,[38] 1915,[39] and 1916[40]—ended with the Judiciary Act of 1925.[41] The 1925 Act made Supreme Court review discretionary in nearly all cases,[42] granting the Court unprecedented control over its own docket.

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36. *Id.* §§ 5–6; *see also* Grove, *supra* note 28, at 958 (noting that the Act gave the Supreme Court mandatory appellate jurisdiction over "federal question cases from the lower federal courts and only discretionary review power (through certiorari or certification) over other classes of cases").

37. Evarts Act § 6.

38. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (making Supreme Court review of cases in which a state court upheld a federal right discretionary).

39. Act of Jan. 28, 1915, ch. 22, §§ 2, 4, 38 Stat. 803, 803–04 (making Supreme Court review of bankruptcy and trademark cases discretionary).

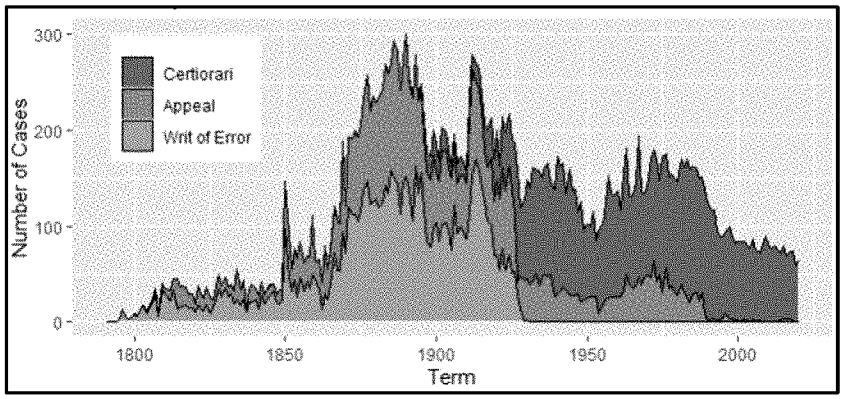
40. Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, 726–27 (making Supreme Court review of certain types of federal claims discretionary).

41. Judiciary Act of 1925, ch. 229, §§ 1–3, 8–9, 43 Stat. 936, 936–41.

42. The Act carried forward mandatory Supreme Court jurisdiction in cases in which: state courts struck down a federal statute, state courts upheld a state

The combined result of the Evarts Act and the 1925 Act on the mix of the Supreme Court's docket was stark. In its 1890 term, the Supreme Court decided 312 cases, zero of which were selected by the Court via the certiorari process. By the 1900 term, thirty-one of the Court's 200 cases were on certiorari. In its 1930 term, after the Judiciary Act of 1925, 103 out of the Court's 168 cases were heard via certiorari. Figure 1 shows this change by plotting the number of cases decided by the Supreme Court each term arising from its three primary types of appellate jurisdiction: appeals, writs of error, and certiorari.[43] Of the three, only certiorari is discretionary.

Figure 1: Supreme Court Jurisdiction Type by Term
Source: Supreme Court Database



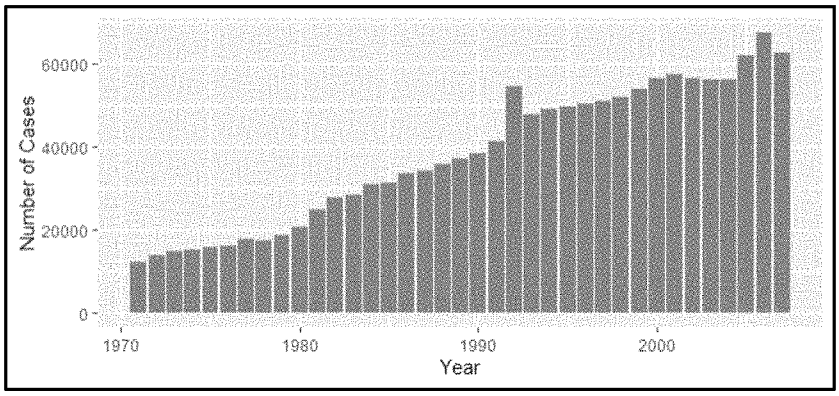
law against a federal constitutional challenge, appeal was available directly to the Supreme Court from a three-judge district court, a court of appeals struck down a state statute, and certain federal criminal cases. *See id.* §§ 1, 8.

43. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *MODERN Databases: 2022 Release 01 ZIP File*, THE SUP. CT. DATABASE, http://supremecourtdatabase.org/_brickFiles/2022_01/SCDB_2022_01_caseCentered_Citation.csv.zip [https://perma.cc/2XND-ELJL]; Spaeth et al., *LEGACY Database: SCDB Legacy 07 ZIP File*, THE SUP. CT. DATABASE, http://supremecourtdatabase.org/_brickFiles/Legacy_07/SCDB_Legacy_07_caseCentered_Citation.csv.zip [https://perma.cc/6HGX-CBRG]. There is a column labeled 'jurisdiction' within both datasets. This column of numeric data relates to the manner in which the Court takes jurisdiction: 1 meaning 'cert,' 2 meaning 'appeal,' and 13 meaning 'writ of error.' *Manner in Which the Court Takes Jurisdiction,* THE SUP. CT. DATABASE, http://supremecourtdatabase.org/documentation.php?var=jurisdiction [https://perma.cc/3JBY-2UCF].

Note especially the precipitous decline in cases heard via writs of error and the dramatic increase in the number of cases heard via certiorari after the Judiciary Act of 1925. Also, note the general decline in the number of cases heard by the Supreme Court during the twentieth century and beyond.[44]

Even as the Supreme Court's docket was shrinking, the courts of appeals' dockets were booming. The Federal Judicial Center keeps tidy data on the dockets of the Courts of Appeals going back to 1971. In that short time, the intermediate appellate courts' dockets have increased by a factor of five, as shown in Figure 2.[45] Other studies confirm that a shrinking percentage of court of appeals decisions are reviewed by the Supreme Court. For example, a blue-ribbon commission chaired by former Supreme Court Justice Byron White found that while 3% of all court of appeals decisions were reviewed by the Supreme Court in 1950, that number fell to 1.1% in 1978, 0.9% in 1984, and 0.3% in 1997.[46]

Figure 2: Court of Appeals Cases by Year
Source: Federal Judicial Center



44. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1276 (2012) (finding that the Court's docket shrank as a result of ideological heterogeneity); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1375–77 (2006) (attributing the decline in the Court's docket to the rise of the "cert. pool").

45. *Caseloads: U.S. Courts of Appeals, 1892–2017*, FED. JUD. CTR., https://www.fjc.gov/history/work-courts/caseloads-us-courts-appeals-1892-2017 [https://perma.cc/2BPW-5PSV].

46. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 12 tbl.2-1 (1998).

The combined result of these two developments is that an increasing percentage of all cases in federal courts terminate at the courts of appeals. The courts of appeals thus have, as a practical matter, many more opportunities to declare the content of the law than the Supreme Court does. That, in turn, multiplies the opportunities for the courts of appeals to disagree, leading to circuit splits.

D. THE RULE OF CIRCUIT PRECEDENT

To manage the courts of appeals' growing dockets, Congress has periodically increased the number of court of appeals judgeships. After the Evarts Act, there were 19 circuit judgeships, and that number increased steadily to 55 in 1930 and 179 in 1990.[47] This growth in the personnel of the courts of appeals also multiplied the opportunities for disagreement.

The courts of appeals devised two main procedures to improve the uniformity of federal law despite this multiplication: en banc sittings and the rule of circuit precedent. Let's start with the en banc procedure, which allows all the active circuit judges of a particular circuit to sit together to decide a case that has already been heard by a panel of three circuit judges. This procedure reduces the degree of intracircuit disagreement because decisions issued by the en banc courts of appeals are treated as binding precedent on all future panels of that circuit. The first court of appeals to sit en banc was the Third Circuit in 1940, when all five active circuit judges heard *Commissioner v. Textile Mills Securities Corp.*[48] The Third Circuit's conclusion that it had the power to sit as an en banc court contradicted a prior decision of the Ninth Circuit, teeing the split up for Supreme Court review.[49]

The Court unanimously affirmed the Third Circuit's use of en banc procedures in *Textile Mills*, reasoning that en banc proceedings were not only authorized by statute but also make "for

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47. *Id.* at 13 tbl.2-2. The number of circuit judgeships has not changed since 1990. *See Chronological History of Authorized Judgeships—Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals [https://perma.cc/H7HK-LB74].

48. 117 F.2d 62, 67–71 (3d Cir. 1940) (en banc).

49. *See* Lang's Est. v. Comm'r, 97 F.2d 867, 869 (9th Cir. 1938) ("Since no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number.").

more effective judicial administration."[50] The main benefit, according to the Court, was that "[c]onflicts within a circuit will be avoided" and "[f]inality of decision in the circuit courts of appeal will be promoted."[51] "Those considerations," the Court explained, "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."[52]

Congress ratified the en banc procedure in 1948.[53] As codified, the process allows a majority of the active judges of a court of appeals to order "a hearing or rehearing before the court in banc," which comprises "all circuit judges in regular active service."[54] The Federal Rules of Appellate Procedure specify more detailed procedures for en banc sittings.[55]

Though the en banc process does indeed decrease the number of conflicts within a circuit, it does so at the risk of sharpening disagreements *among* the circuits. Once an en banc court of appeals has decided a question, it has spoken authoritatively on that issue. Any other en banc court of appeals that disagrees will automatically create a circuit split, threatening to fracture federal law in more obvious ways. Because the circuits are defined regionally, the use of en bancs to solidify precedent contributes to the misconception that en banc courts create "circuit law" in the strong sense. This is especially so in cases of circuit splits, where the "law" of two or more circuits may be compared.

The other development critical to the rise of the idea of circuit law was the rule of circuit precedent, which is sometimes known as "the law of the circuit" doctrine. This rule says that once a panel of a federal court of appeals has decided a particular question, no subsequent panel may reconsider that same question. Put differently, it is a rule of horizontal stare decisis requir-

50. Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 334–35 (1941).
51. *Id.* at 335.
52. *Id.*
53. *See* Judicial Code of 1948, ch. 646, § 46(c), 62 Stat. 869, 871.
54. 28 U.S.C. § 46(c).
55. *See* FED. R. APP. P. 35.

ing that the decisions of panels of a court of appeals bind all later panels of the same court.[56] Every circuit has adopted this rule.[57]

It's easy to see the benefits of the rule of circuit precedent. It promotes judicial economy, increases the uniformity of outcomes of cases litigated in the same circuit, and therefore makes the law to be applied by a court of appeals more predictable in individual cases.[58] Although the rule has its critics,[59] its widespread adoption is a testament to its usefulness.

The rule of circuit precedent is important because, along with the en banc process, it creates a body of decisional precedent that is binding as a matter of stare decisis on both later panels of the same circuit *and* all lower courts whose decisions are appealable to that circuit. It is to this body of decisional precedent that people refer when they talk about the "law of the circuit."[60] As we will see, it makes no sense to think of this body of decisional law as a body of law *distinct* from federal law. But it is important to understand the roots of the misunderstanding before we can understand why it is wrong.

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56. *See* Sassman, *supra* note 3, at 1426 ("The law of the circuit doctrine is, at its heart, a 'strict,' 'binding,' and 'rigid' rule that a panel of a federal court of appeals may not revisit the decision of a prior panel on the same court.").

57. *See* Barrett, *supra* note 7, at 1018 n.20 (collecting cases); *see also* Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 719 & n.29 (2009) (noting that "[e]very circuit follows the law of the circuit rule," and collecting cases); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–95 (2012) ("With the arguable exception of the Seventh Circuit, each circuit court has adopted some version of 'law of the circuit.'"). Several circuits have adopted the rule into their local rules and internal operating procedures. *See* Sloan, *supra*, at 719 & n.30 (collecting authority).

58. These benefits only accrue when the courts of appeals issue published, as opposed to unpublished, decisions. Unpublished decisions are not binding on anyone but the parties they concern. The net benefits of the rule of circuit precedent are thus undermined by the increasing trend in favor of unpublished decisions. *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 549–61 (2020) (collecting data on the increasing frequency of unpublished opinions from courts of appeals).

59. *See, e.g.*, Sassman, *supra* note 3, at 1407 (arguing that the law of the circuit doctrine should be relaxed in cases where there is an active circuit split).

60. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001) ("[W]e believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit.").

E. NEW CIRCUITS, NEW PROBLEMS: THE ELEVENTH AND FEDERAL CIRCUITS

To illustrate how the rule of circuit precedent has been transmogrified into the myth of circuit law, consider what happened when Congress created the Eleventh and Federal Circuits in 1980 and 1982, respectively.[61] In each case, the judges of the newly constituted circuit faced an initial problem: would they be bound by any prior circuit precedent? And if so, which circuit's precedent bound future panels of the new circuit?

In its very first opinion, the Eleventh Circuit made the easy choice to treat Fifth Circuit precedent as binding on it.[62] The Eleventh Circuit was cleaved off from the Fifth Circuit, with the new circuit including the districts of Alabama, Georgia, and Florida.[63] Its judges were formerly judges of the Fifth Circuit. It made perfect sense for the Eleventh Circuit judges to keep treating their (and their former colleagues') prior decisions as binding as a matter of stare decisis. Among the reasons to do so, the Eleventh Circuit cited "stability and predictability," that "[b]ench and bar" were "schooled" in Fifth Circuit precedent, and that citizens had relied on it in planning their affairs.[64] And there was precedent for the Eleventh Circuit's decision: after it was recreated in 1929, two courts in the Tenth Circuit adopted precedents from the Eighth Circuit—from which the new Tenth had been split—as their own.[65]

Although the Eleventh Circuit made a defensible prudential choice in adopting Fifth Circuit precedent as its own, it articulated the choice in a way that is characteristic of the myth of circuit law. The court framed the question before it as a "choice of governing law."[66] The court was forced to make that choice, it

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61 *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

62. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

63. Fifth Circuit Court of Appeals Reorganization Act of 1980 § 2(3). The Fifth Circuit retained jurisdiction over appeals from the districts of Texas, Louisiana, Mississippi, and, for a brief time, the Panama Canal Zone. *Id.* § 2(2).

64. *Bonner*, 661 F.2d at 1210.

65. *Id.* at 1210 (first citing Thompson v. St. Louis-S.F. Ry. Co., 5 F. Supp. 785 (N.D. Okla. 1934); and then citing *In re* Meyers, 1 F. Supp 673 (W.D. Okla. 1932), *rev'd on other grounds sub nom.* Barbee v. Spurrier Lumber Co., 64 F.2d 5 (10th Cir. 1933)).

66. *Id.* at 1209.

reasoned, because Congress "did not address the issue of what body of law would . . . become the body of the law" of the new Eleventh Circuit.[67] The Eleventh Circuit thus transformed a pragmatic decision about which precedents would be binding on it into a choice-of-law problem, even though no change in substantive law had occurred at all. It would have been better for the court to weigh the benefits of judicial economy against the costs of denying litigants a chance to persuade the new circuit to rule differently. Instead, the Eleventh Circuit chose to short-circuit that inquiry by relying on the fictitious concept of circuit law.

The Federal Circuit, created in 1982, faced a different problem. The Federal Circuit was the first court of appeals to be defined by its subject matter rather than regionally. The Federal Circuit's appellate jurisdiction was and is, as a territorial matter, nationwide—but only in cases falling within its subject-matter domain.[68] As a result, appeals from the district courts could go to one of two courts of appeals: the relevant regional circuit (in the ordinary case) or the Federal Circuit (principally in cases involving patents). The question then became whether, when deciding non-patent questions, the Federal Circuit should adhere to the precedent of the relevant regional court of appeals or decide the question anew for itself.

As discussed below, the Federal Circuit characterized the choice just as the Eleventh Circuit had: as a choice of *law*.[69] Although the pragmatic considerations were not nearly as clear as they had been in the Eleventh Circuit's case,[70] the Federal Circuit fell into the same trap of conceiving of the collected precedent of the courts of appeals as a body of law in the choice-of-law sense. Today, the Federal Circuit routinely purports to apply the "law" of the regional circuits, often doing so more often than the regional circuits apply their own precedents.[71]

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67. *Id.*

68. *See infra* Part II.A.

69. *See, e.g.*, Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1572 (Fed. Cir. 1984) ("After considering the jurisdictional question, we must then decide the *choice of law* question.") (emphasis added).

70. *See infra* Part II.A.

71. *See* Dennis Crouch, *Wag the Dog: The Federal Circuit's Advancement of Fifth Circuit Law*, PATENTLY-O (Oct. 6, 2021), https://patentlyo.com/patent/2021/10/federal-circuits-advancement.html [https://perma.cc/5EZ9-MRHE]

The collective experiences of the Eleventh and Federal Circuits show how powerful the idea of circuit precedent has become. They also show how this myth grew out of a combination of factors, including the rule of circuit precedent, en banc procedures, the relative decrease in the proportion of court of appeals cases reviewed by the Supreme Court, and the growth in the number of circuit judges in each circuit. Each of these developments is real, but the mistake was confusing them for something more: circuit law.

II. CIRCUIT LAW IS A MIRAGE WITH MANY GUISES

At this point, the reader may fairly raise the old bugaboo of jurisdictional scholarship: *so what?* Why does it matter, the objection goes, what courts call what they're doing? Whether they're choosing different bodies of "law" or different collections of judicial "precedent," the result is the same. This realist critique can be met with a realist response: the labels matter because they have spawned significant downstream consequences across many areas of law.

This section illustrates the variety of those consequences, which touch on multidistrict litigations (MDLs), patents, administrative law, criminal law, and official immunity. By tracing developments in each of these areas to the myth of circuit law, this section begins the work of debunking the myth while also showing its wide-reaching effects.

A. ENCLAVES OF CIRCUIT EXPERTISE: THE FEDERAL CIRCUIT AS POINT AND COUNTERPOINT

The first example of the myth of circuit law's mischief arises from nowhere in particular. That is because the Federal Circuit's appellate jurisdiction is defined in no way regionally. Instead, the Federal Circuit has exclusive jurisdiction over all federal appeals involving certain claims. This jurisdictional fact has two consequences. First, the mere existence of the Federal Circuit suggests that the myth of circuit law is mistaken. Second, and somewhat surprisingly given the foregoing, the Federal Circuit

("[T]he Federal Circuit has substantially advanced the doctrine [concerning inconvenient venue under 28 U.S.C. § 1404(a)] over the past 4 years, even though during that time the Fifth Circuit has not decided any Section 1404 cases. By the time the Fifth Circuit hears another mandamus petition, I expect that the court may be a bit shocked to see where their doctrine has gone.").

has reinforced the myth of circuit law more than any other court of appeals. This part unpacks both consequences.

1. The Federal Circuit Itself Proves the Point

One of the most important ways in which Congress has contributed to the development of the myth of circuit law is its unbroken reliance on state borders to delimit judicial circuits. It is much more natural to think of a court as developing its own law if that court is the apex court of appeals within a well-defined political unit. By drawing circuits' boundaries along state borders, Congress made it seem like the circuits were in charge of defining the federal rules of primary conduct within their borders. The Second Circuit, in this story, is roughly analogous to the Supreme Court of Vermont, New York, and Connecticut; the Eleventh Circuit, the Supreme Court of Alabama, Georgia, and Florida; and so on. And though there are several independent

problems with this view that render it false,[72] it still is a powerful idea.[73]

Yet in creating the Federal Circuit, Congress fully decoupled federal appellate jurisdiction from geographic borders. Once the Federal Circuit was constituted, the decisions of every district

72. I will name only two, one obvious and one less so. The obvious reason this is wrong is that courts of appeals decisions are nearly always appealable to the U.S. Supreme Court via a petition for certiorari, such that courts of appeals' decisions cannot finally determine answers to questions that arise under federal law. The subtler reason has to do with venue. Whether an appeal is heard by one regional court of appeals or another is not technically determined by where the underlying conduct, transaction, or occurrence took place. Instead, it is determined by the plaintiff's choice of forum, as limited by statutes governing venue and transfer. *See, e.g.*, 28 U.S.C. §§ 1391, 1404. Under the general civil venue statute, a plaintiff may bring a claim in any district "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). Although this venue choice is qualified by other doctrines, most notably personal jurisdiction, not even the combination of venue and personal jurisdiction can guarantee that an action will be heard in the same circuit where the underlying wrong occurred. *See, e.g.*, Durling, *supra* note 11, at 234–37 (canvassing caselaw addressing the applicable precedent when a court adjudicates the legality of a search that occurred outside its geographic ambit); *see also* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1175–77 (2012) (explaining how circuit splits in fourth amendment cases can cause one circuit's position to spill over into out-of-circuit cases). That is so not least because parties can consent to venue and personal jurisdiction in any court they choose. FED. R. CIV. P. 12(g), (h); 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3829 (4th ed. 2022) (specifying that defendants can waive venue defects); *accord* Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653, 655 (1923) (noting that the predecessor venue statute "merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election"); Nat'l Equip. Rental v. Szukhent, 375 U.S. 311 (1964) (enforcing a pre-suit contractual agreement to appoint an agent for purposes of service of process and holding that such a provision effectively waives any objection grounded in personal jurisdiction); *cf.* Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49 (2013) (holding that forum-selection clauses should be given controlling weight in choosing the most convenient venue in all but the most exceptional cases). Similarly, venue provisions governing petitions for review of final administrative action reveal a similar defect in conceiving of courts of appeals' law-making power in territorial terms. *See, e.g.*, Consolidation Order, *In re:* Occupation Safety and Health Administration, Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, Issued on Nov. 4, 2021, Case MCP No. 165 (J.P.M.L. Nov. 16, 2021) (awarding exclusive appellate jurisdiction over petitions filed in twelve courts of appeals to the Sixth Circuit after drawing lots pursuant to 28 U.S.C. § 2112(a)(3)).

73. *See, e.g.*, United States v. Goodheim, 664 F.2d 754, 756 (9th Cir. 1981) (per curiam).

court judge in the country were appealable to one of *two* courts of appeals: the relevant regional circuit court in most cases, but the Federal Circuit in cases falling within that court's statutory jurisdiction.[74] For that reason, the mere creation of the Federal Circuit underscores a problem with the concept of circuit law. If courts of appeals' jurisdiction cannot be described in purely geographic terms, even roughly, then it makes less sense to speak of them as developing the law of any place.[75]

2. The Federal Circuit's Practices Challenge the Point

Even though the Federal Circuit's own jurisdiction suggests that it makes no sense to speak of federal courts of appeals as having geographic or territorial lawmaking power, the Federal Circuit's internal practices have given rise to one of the most persistent and widespread uses of the concept of circuit law. When the Federal Circuit hears appeals involving patent-related questions (or other questions exclusively within the Federal Circuit's subject-matter jurisdiction), it sometimes faces supplemental non-patent issues. In that scenario, the Federal Circuit reviews non-patent matters "under the law of the particular regional circuit court where appeals from the district court would normally lie."[76] Because this rule—which has been applied consistently for nearly four decades—purports to rely on the existence of a cognizable body of "law" of the "regional circuits," it poses a challenge to the thesis advanced here.

The Federal Circuit began this practice shortly after it was created. This "choice of law" question stemmed from the Federal Circuit's jurisdiction over matters pendent to patent disputes, as

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74. 28 U.S.C. § 1295.

75. In this regard, the creation of the Federal Circuit reflects a larger trend during the twentieth century away from territorial theories of jurisdiction toward more flexible approaches. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (explaining that the territorial theory of jurisdiction that predicated Pennoyer v. Neff, 95 U.S. 714, 733 (1878), was obsolete).

76. Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1575 (Fed. Cir. 1984) (per curiam); *see also* Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 909 (Fed. Cir. 1984) (expanding the rule of *Panduit Corp.* to include non-procedural, non-patent matters); Atari, Inc. v. JS & A Grp., 747 F.2d 1422, 1440 (Fed. Cir. 1984) (reaffirming that approach); Sturiale, *supra* note 3, at 476 ("The Federal Circuit . . . applies an unusual choice-of-law rule. Pursuant to the rule, the court considers not which of two or more *states'* or *nations'* laws it should apply . . . [but r]ather, the court considers which *court of appeals'* law to apply—its own law or the law of the regional circuit court in which the case originated.").

an early case illustrates.[77] *Litton Systems, Inc. v. Whirlpool Corp.* was filed in the U.S. District Court for the District of Minnesota, from which appeals most commonly go to the Eighth Circuit.[78] But because *Litton Systems* involved patent-infringement claims, Whirlpool's only appeal was to the newly created Federal Circuit.[79] Importantly, *Litton Systems* also involved a trademark claim under the Lanham Act over which the Federal Circuit's jurisdiction is concurrent with the other Courts of Appeals.[80] At the time, there was an active circuit split between the Eighth and Federal Circuits about the appropriate standard of appellate review for the likelihood-of-confusion element of a Lanham Act trademark claim.[81] The Federal Circuit described this circuit split as though it presented a choice-of-law problem: "which rule [to] follow in a Lanham Act case where the district court was located in a circuit having a precedent differing from one we later established."[82] But because the parties had not raised the issue and the court was satisfied that the district court's order was reversible under either standard of review, the court did not at that time "go out of [its] way to resolve the issue."[83]

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77. One earlier case had encountered the issue but not conceived of it as a conflict of laws problem. American Hoist & Derrick Co. v. Sowa & Sons, 725 F.2d 1350, 1367 (Fed. Cir. 1984) (looking to the "Ninth Circuit view" in deciding whether market definition is an element of a Sherman Act claim).

78. 728 F.2d 1423 (Fed. Cir. 1984).

79. 28 U.S.C. § 1295(a)(1) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—(1) of an appeal from a final decision of a district court . . . in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents . . . ."); *see also* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 1295, 96 Stat. 25, 37 (granting the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over patent appeals).

80. 728 F.2d at 1426; *see also* 15 U.S.C. § 1125(a) (creating a civil cause of action for patent and trademark infringement). The case also involved certain state law claims not relevant here. *Litton Sys.*, 728 F.2d at 1426.

81. *Litton Sys.*, 728 F.2d at 1445 ("The Eighth Circuit, in which this case was tried, has held, that '[l]ikelihood of confusion is a finding of fact [in which case the appeals court] must uphold the trial court's finding of likelihood of confusion unless it is clearly erroneous.' Our circuit, which has jurisdiction over this appeal, has held, however, that 'the issue of likelihood of confusion is the ultimate conclusion of law to be decided by the court, and that the clearly erroneous rule is not applicable.'") (citations omitted).

82. *Id.*

83. *Id.*

This "choice of law" question recurred at least four more times that same year, giving the Federal Circuit ample opportunity to expound its answer.[84] *Panduit Corp.* provides the clearest conclusion, posing the question as "[w]hich law to apply in this case?"[85] The choice-of-law question, the *Panduit* court recognized, derives from the Federal Circuit's "unique jurisdictional grant," which "places practitioners and district courts in a unique posture: they are accountable to two different courts of appeals."[86] Requiring district courts to serve two appellate masters, the court recognized, "raises questions relating to *stare decisis* and certainty in the law."[87] But, the court determined, this tension was part of Congress's design for a court of appeals whose appellate jurisdiction was defined by subject matter rather than by geography.[88]

Though the *Panduit* court saw the choice-of-law question as baked into the Federal Circuit's enabling legislation, it threatened to consume a great deal of judicial and litigant resources if not properly managed. In particular, a scheme of "bifurcated decision-making," the court reasoned, would go against "the goal of the federal judicial system to minimize confusion and conflicts."[89] And even though the *Panduit* court thought the problem was endemic to the Federal Circuit's structure, the court also

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84. *In re* Int'l Med. Prosthetics Rsch. Assocs., Inc., 739 F.2d 618, 620 (Fed. Cir. 1984) ("[A]ppl[ying] the same guidance previously made available by the circuit . . . having authority over the district court under 28 U.S.C. § 1294" to avoid the problem of district courts answering questions "one way when the appeal on the merits will go to the regional circuit in which the district court is located and in a different way when the appeal will come to this circuit"); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1572–73 (Fed. Cir. 1984); Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 909 (Fed. Cir. 1984); Atari, Inc. v. JS & A Grp., 747 F.2d 1422, 1440 (Fed. Cir. 1984); *see also* Verdegaal Bros. v. Union Oil Co., 750 F.2d 947, 950 (Fed. Cir. 1984) (applying Ninth Circuit precedent to patent infringement case); Litton Sys., Inc. v. Sunstrand Corp., 750 F.2d 952, 955 (Fed. Cir. 1984) (same); Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc., 750 F.2d 1552, 1559 (Fed. Cir. 1984) (applying the rule that "a majority of the regional circuits that have considered the question also have applied"); Rhone-Poulenc Specialties Chimiques v. SCM Corp., 769 F.2d 1569, 1572 (Fed. Cir. 1985) (finding that the Federal Circuit Court of Appeals will apply the law of the district where the patent infringement plaintiff files the complaint).

85. 744 F.2d at 1571.

86. *Id.* at 1573.

87. *Id.*

88. *Id.*

89. *Id.*

hypothesized that the problem "was possibly unforeseen by Congress."[90] Nor was statutory text any aid to resolving the apparent conflict, the court said, leaving only legislative history to cast light on the question.[91] That history, the court determined, evinced Congressional intent—and a correlative Federal Circuit mandate—"to bring about uniformity in the area of patent law."[92]

The *Panduit* court then took an inferential leap from Congress's intent to increase uniformity in patent law to Congress's "abhorrence of conflicts and confusion in the judicial system."[93] That assertion, made without authority, grounded the court's invocation of a "general policy of minimizing confusion and conflicts in the federal judicial system."[94] That paved the way for the court's final logical leap.

The trouble with a bifurcated system of appeals, the court said, is the burden it puts on district courts and litigants to apply "two different sets of law for an identical issue due to different routes of appeal."[95] The Federal Circuit thus reasoned in three steps: (1) The courts of appeal find/develop/make their own "sets of law"; (2) unless the Federal Circuit applies the "law" of the relevant geographic circuit, lawyers and judges will face difficulty predicting what rule will be applied on appeal; (3) this kind of uncertainty "should be minimized" so long as it can be done without sacrificing "the goal of patent law uniformity."[96] The *Panduit* court, therefore, held that "the Federal Circuit shall review procedural matters, that are not unique to patent issues, under the law of the particular regional circuit court where appeals from the district court would normally lie."[97]

The Federal Circuit later extended *Panduit*'s holding to all non-patent matters, not just procedural ones. For example, in *Bandag, Inc. v. Al Bolser's Tire Stores*,[98] the Federal Circuit declared that it would "decide *nonpatent* matters in the light of the

90. *Id.*

91. *See id.* ("Since our enabling statute fails to enunciate any guidance for this question, an analysis of the legislative history must be made.").

92. *Id.* at 1574 ("This court, thus, has a mandate to achieve uniformity in patent matters.").

93. *Id.*

94. *Id.* (also offered without authority).

95. *Id.*

96. *Id.*

97. *Id.* at 1574–75.

98. 750 F.2d 903 (Fed. Cir. 1984).

problems faced by the district court . . . including the law there applicable."[99] This decision, the court noted, was necessary "to avoid exacerbating the problem of intercircuit conflicts in non-patent areas."[100] Similarly, in *Atari, Inc. v. JS & A Grp.*,[101] the Federal Circuit acknowledged that its approach to intercircuit conflicts of law was "unique, but no more unique than is th[e Federal Circuit itself] and the congressional pioneering that created it."[102] Grounding its decision "more on systemic practicality than on judicial humility," the court recognized that "the path to the established law of the involved circuit . . . may not be easily discernible and clearly marked."[103] Yet so long as advocates were prepared to brief and argue all non-patent matters in the Federal Circuit "sitting as though it were a panel of" a regional circuit, that difficulty could be met.[104]

A key problem with the Federal Circuit's logic in each of these cases is that there is no support for the initial premise that there is any such thing as circuit law in the strong sense.[105] That premise was not only necessary to the Federal Circuit's decision to follow precedent issued by the regional circuits in nonpatent matters, but also the very source of the seeming tension that prompted the court to consider the question in the first place. To see why, imagine how the Federal Circuit's logic would go if we negated the premise and insisted, as this paper argues, that there is no such thing as circuit law in the strong sense.

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99. *Id.* at 909 (emphasis added).

100. *Id.*

101. 747 F.2d 1422 (Fed. Cir. 1984) (en banc).

102. *Id.* at 1440. Two of the judges on the en banc court concurred in the result only and specifically disagreed with the majority's decision to reach the larger choice-of-law question. *Id.* at 1441 (Friedman, J., concurring) ("I see no reason to discuss in the order denying the motion the numerous and far-ranging issues the court addresses. It is time enough to consider those other issues in future cases in which they are directly presented and must be decided."); *id.* (Davis, J., concurring) ("There is . . . no need to go further and trench far into the general question of the substantive law we should apply in non-patent areas in District Court appeals.").

103. *Id.* at 1440.

104. *Id.*

105. Another problem is that the legislative history on which the Federal Circuit relied is ambiguous at best, and to the contrary at worst. *See generally* Sturiale, *supra* note 3, at 480–82 (collecting and summarizing this legislative history, and concluding that Congress's main goal was to improve the uniformity of patent law).

First, we would have to inquire whether district courts were therefore bound to obey two masters. In some ways, this step in the logical chain is still true—but only in a way that restates the Federal Circuit's statutory jurisdiction. Suppose instead we take the claim to be that district courts will face a choice between following one set of precedent—binding on them sometimes—and following another—binding on them the rest of the time—with the punishment for choosing incorrectly being reversal. Once again, the claim is superficially true but rests on an unstated premise likely to be false: that district judges will be hard-pressed if not altogether unable to discern in advance which court will have appellate jurisdiction in a particular case. But despite some edge cases, disputes about which circuit has appellate jurisdiction over a direct appeal are rare.[106]

Nor is the possibility that a district court's adherence to precedent might still result in reversal a phenomenon unique to the Federal Circuit. The weight of *all* circuit precedent in statutory matters is subject to the qualification that it may be overruled by the Supreme Court or abrogated by Congress. Even within a particular circuit, the court sitting en banc is empowered to overrule otherwise binding circuit precedent. In sum, following binding precedent is no guarantee that a district court will avoid reversal.

What about vertical stare decisis, which requires district judges to apply binding precedent from the circuit in which they sit?[107] That rule cannot support the Federal Circuit's argument, for the simple reason that it assumes the thing to be decided: how to apply the rules of vertical stare decisis when appeals from a particular court may be taken to one of two intermediate appellate courts. Even as an analogy, this argument doesn't hold up. If anything, the typical rule that district courts must apply the precedent of the circuit that will review their judgments on appeal would seem to support the exact opposite of the Federal Circuit's conclusion.

The problem is yet more widespread: *any* time a district court can discern a gap between (a) the rule it correctly predicts an appellate court will apply and (b) otherwise-binding precedent, a district judge is in a jam. If she anticipates the appellate

106. *But see* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) (resolving such a dispute).

107. *See* Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981) ("District courts are bound by the law of their own circuit.").

court's overruling, she may be rebuked for disobedience even as she is affirmed.[108] If the district judge instead follows precedent that is then overruled, she will be reversed despite her fidelity to precedent.[109] In short, reversal can be no punishment because it occurs even when a district judge discharges her duties to a tee.

The Federal Circuit's logic also perversely reinforces the evil it seeks to root out: disuniformity. By recognizing each circuit's precedent as its own distinct body of law, the Federal Circuit's approach welcomes persistent differences in federal law from one circuit to the next.[110] But this is by no means a consensus view: many authorities recognize circuit splits as necessary percolation on the way to eventual Supreme Court review,[111] or perhaps as transient errors soon to be worked pure in the lower

108. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (affirming the Fifth Circuit while at the same time denying that the lower court "should have taken the step of renouncing" otherwise-binding precedent); *see also* Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 843–45 (2018) (collecting cases).

109. *See* Agostini v. Felton, 521 U.S. 203, 237–38 (1997) ("Adherence to [precedent] by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued validity.").

110. Indeed, things are even worse than that when it comes to trademarks. The Federal Circuit has jurisdiction over trademark disputes in two different ways: first, it can hear such disputes when they are ancillary to a patent dispute; second, it can hear such disputes on direct petition for review from the Trademark Trial and Appeal Board (TTAB). *See* 28 U.S.C. § 1295(a)(4)(B). In the former case, the Federal Circuit applies out-of-circuit precedent to adjudicate the trademark question. *See, e.g.*, Imagineering, Inc. v. Van Klassens, Inc., 53 F.3d 1260, 1264 (Fed. Cir. 1995) (applying the Second Circuit's test for likelihood of confusion in case on appeal from the U.S. District Court for the Southern District of New York). But in the latter case, the Federal Circuit develops its own body of substantive trademark law, which can conflict with the out-of-circuit authority it would apply in other cases. *See, e.g.*, *In re* Elster, 26 F.4th 1328, 1332 (Fed. Cir. 2022) (applying Federal Circuit precedent on direct appeal from TTAB). Thus, the rule of substantive federal law applied by the Federal Circuit can depend entirely on the procedural history of the dispute.

111. *See, e.g.*, Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 508 (2013) ("[T]he experience of the Federal Circuit suggests that in the absence of percolation, much can go awry. On several issues, the court has swung back and forth between extremes.").

courts.[112] By contrast, the Federal Circuit's approach implies not only that the Supreme Court and the en banc courts of appeals cannot resolve circuit splits, but also that the proper interpretation of federal law is a subjective enterprise incapable of reaching consistent answers.[113] In the name of uniformity, the Federal Circuit has adopted a rule that is deeply pessimistic about the possibility of uniformity.

B. THE *VAN DUSEN* RULE

If the Federal Circuit relies so heavily on the myth of circuit law, how can it be a myth? This section begins answering that question by illustrating ways in which federal courts have rejected the myth in other contexts. Start with a puzzle that arises when cases are transferred from one federal court to another. This happens not only when a single case is transferred to a more convenient venue but also when many cases are consolidated in a multidistrict litigation.

The puzzle springs from two institutional facts about federal courts. First, as noted, the proportion of cases decided by the courts of appeals rather than the Supreme Court has been steadily on the rise, meaning the courts of appeals are the de facto court of last resort in an increasing majority of disputes.[114] As a result, there are more opportunities for circuit splits, even as the Supreme Court is increasingly unable to resolve those splits.[115]

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112. *See, e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 812 (1984) ("In our view, the Court should act as the manager of the federal judicial system, overseeing the work of the federal and state courts, and intervening only when necessary to resolve fundamental interbranch or federal-state clashes or to render a final resolution of a question that has ripened for decision after percolation in the lower courts."). Of course, some scholars think the whole idea of percolation is a smokescreen. *See, e.g.*, Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 690 (1990) ("[P]ercolation is not a purposeful project. It is just a way of postponing decision . . . ."); *see also* Dreyfuss, *supra* note 111, at 508 (collecting similar critiques).

113. Of course, it might be true that the shared project of interpreting federal law is fundamentally indeterminate, but that truth would pose an even deeper problem for the Federal Circuit's logic, because it would call into question the coherence of any system of precedent.

114. *See supra* Parts I.B–C (discussing how the Evarts Act and subsequent statutes, including the Judiciary Act of 1925, helped build a system where courts of appeals give most of the final verdicts).

115. *See supra* Part I.C (suggesting that the Evarts Act and Judiciary Act of 1925 have allowed for more circuit splits).

Second, federal procedural rules have increasingly accommodated transfers of cases among judicial districts and circuits.[116] Once transferred, these cases present a problem.[117] Whose interpretation of federal law should govern: the transferee court's or the transferor court's?[118] Perhaps you can already see how the myth of circuit law will come into play here.

As the law has developed, the answer depends on whether the claims arise under state or federal law. If the claims arise under state law, the law the transferor court would apply continues to apply.[119] But if the claims are federal, the transferee court's law applies in most cases.[120] Understanding why the law operates differently depending on the nature of the claim at issue reveals why circuit law is not a meaningful body of law in the way that state law is.

1. When Claims Arise Under State Law

Take the easy case first: what body of substantive law applies when a case involving state-law claims is transferred from one federal court to another? The Supreme Court first addressed this question in *Van Dusen v. Barrack*, a mass-tort case.[121] The

116. *See* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 677 (1984) (determining that because of certain Judicial Code sections and statuory provisions, "[c]ases do not always remain in the forum initially selected by the plaintiff; in the federal system transfers to another court occur with frequency").

117. The question has divided even the most learned authorities. *Compare* Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 415–16 (1955) [hereinafter Currie, *Change of Venue*] (arguing that federal courts should develop a systematic approach to these choice-of-law questions), *with* Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 348 (1960) [hereinafter Currie, *Change of Venue: Retraction*] (disagreeing and instead arguing that no systematic solution was possible "while diversity jurisdiction exists").

118. *See* Marcus, *supra* note 116, at 678 ("The interaction between these two trends—toward more frequent conflicts and more numerous transfers—raises a choice-of-law question: When a federal claim is transferred, should the transferee court apply the interpretation of the circuit in which the case was filed or of the circuit to which it was transferred?").

119. *See infra* Part II.B.1.

120. *See infra* Part II.B.2.

121. 376 U.S. 612 (1964). The case involved a plane crash on a flight from Boston to Philadelphia. *Id.* at 613. Individual suits were brought in federal courts in Massachusetts and Pennsylvania. *Id.* at 612. At defendants' request, the wrongful-death suits originally filed in the Eastern District of Pennsylvania were transferred to the District of Massachusetts. *Id.* at 614.

claims in that case were originally filed in federal court in Pennsylvania and later transferred to federal court in Massachusetts under the federal transfer statute.[122]

The key question when the case got to the Supreme Court was which law should apply: that of Massachusetts or Pennsylvania? The question was critical because Massachusetts law assessed damages for wrongful death in a narrow, statutorily defined band determined by the defendant's culpability, while Pennsylvania law applied traditional and unlimited principles of compensatory damages.[123] Massachusetts law therefore favored the defendants, while Pennsylvania law likely favored the plaintiffs.[124]

The Court held that the law applicable before transfer should remain so afterward.[125] The evil to be avoided, the Court reasoned, was allowing defendants to use the transfer statute as a mechanism to shop for more favorable substantive law.[126] The venue transfer statute, the Court said, sought to achieve one goal: to relieve the burden on the defendant of an inconvenient *forum*.[127] By contrast, § 1404(a) was *not* designed to effect a change in the applicable substantive law.[128] All the forum-trans-

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122. *See* 28 U.S.C. § 1404(a). *Van Dusen* arose before Congress created the multidistrict litigation device. *See* 28 U.S.C. § 1407.

123. *See Van Dusen*, 376 U.S. at 627 (summarizing each state's relevant law).

124. *See id.* at 630 ("[T]he potential prejudice to the plaintiffs is so substantial as to require review of the assumption that a change of state law would be a permissible result of transfer under § 1404(a).").

125. *See id.* at 639 ("We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.").

126. *See id.* at 635 ("This legislative background supports the view that § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court.").

127. *See id.* at 634 ("Congress, in passing § 1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one.").

128. *See id.* at 635–36 (determining that the "legislative history" of the statute "certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue'" and that such a reading would "frustrate the remedial purposes" of the statute).

fer statute did, according to the *Van Dusen* Court, was "authorize a change of courtrooms."[129]

Read broadly, *Van Dusen* might have applied to all transferred cases. If § 1404(a) simply authorizes a change in courtrooms, it arguably should not matter whether the claims at issue arise under state or federal law. On this theory, the transferee court should imagine itself sitting in the transferor jurisdiction, with all the consequences for substantive law that would attend that fiction.

Yet the *Van Dusen* rule's logic was unique to state law. Applying the law of the state in which the transferor court sat was necessary, the Court reasoned, to achieve the twin aims of *Erie R. Co. v. Tompkins*: discouraging forum shopping and avoiding the inequitable administration of the laws.[130] Though *Erie*'s application is notoriously thorny,[131] its domain is clear: *Erie* applies

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129. *See id.* at 636–37 ("[B]oth the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.").

130. *See id.* at 638 (first citing *Erie*, 304 U.S. 64 (1938); and then citing Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)) (providing support for its holding); *see also* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (announcing *Erie*'s twin aims). Although *Hanna* was decided a year after *Van Dusen*, both reflect the same approach to the problem of state law in federal courts—namely, achieving similar outcomes whether a case is filed in state court or in a federal court sitting in that same state.

As Judge Kaufman and Brainerd Currie noted, however, the logic of *Erie* might arguably support either outcome in a case like *Van Dusen*. If the goal is to ensure that federal courts sitting in diversity always apply the substantive law of the state in which they sit, *Erie* favors applying the transferee state's own law. By contrast, if the goal is achieving the same outcomes regardless of whether a plaintiff chooses to file in state or federal court within a given state, *Erie* weighs in favor of applying the transferor state's law even after transfer. *See* Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 601 (1951); Currie, *Change of Venue, supra* note 117, at 413. Thus, the *Van Dusen* Court's choice reflects a view of *Erie* that is aligned with *Hanna*'s exaltation of forum shopping as *Erie*'s Janus-faced foe.

131. *Erie*'s vagueness prompted a vagary from Professor Currie. *See* Currie, *Change of Venue: Retraction*, *supra* note 117, at 341 (admitting that in his 1955 article of the same general name, "[t]he conclusion reached was wrong—not just plain wrong, but fundamentally and impossibly wrong"); *see also id.* at 348 ("I am no longer disposed to give a confident answer to that question. The problem now appears to be insoluble, in any completely satisfactory way, while diversity jurisdiction exists.").

only to cases in which the basis for federal jurisdiction is diversity of citizenship.[132] As a result, *Van Dusen,* by its terms, applies only to transferred cases involving state-law claims.[133]

Van Dusen's limits make sense. Massachusetts and Pennsylvania are separate sovereigns, with separate bodies of substantive law. There is a real choice of law at stake when a court weighs which body of law to apply. Due respect for the independent sovereignty of state governments demands that federal courts not facilitate end-runs around their substantive laws. But what happens if the claims arise under federal law, and no such considerations apply?

2. When Claims Arise Under Federal Law

Though *Van Dusen*'s holding was limited to state-law claims, its logic suggests a potentially broader sweep. If § 1404(a) should be interpreted so that transferring a case does not effect a change in substantive law, the same reasoning would seem to apply with equal force to federal claims when there is a split between the transferor and transferee circuits over the meaning of federal law.[134]

Even asking whether to apply *Van Dusen* to federal claims would therefore seem to imply the existence of two distinct bodies of circuit law: one in the transferee court, the other in the

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132. *Erie*, 304 U.S. at 69, 71 (laying out that the "question for decision" pertains to case precedent applied to "federal courts exercising jurisdiction on the ground of diversity of citizenship").

133. *See* Ferens v. John Deere Co., 494 U.S. 516, 523 (1990) (explaining the logic and extent of the holding in *Van Dusen*); Marcus, *supra* note 116, at 692 ("*Van Dusen* was expressly limited to differences in state law . . . ."); Friendly, *supra* note 6, at 412 ("I take [*Van Dusen*] to be limited to choices of *state* law.") (emphasis in original). *But see* Eckstein v. Balcor Film Invs., 8 F.3d 1121, 1127 (7th Cir. 1993) (holding that *Van Dusen* and *Ferens* apply "whenever different federal courts properly use different rules," including when federal law incorporates state law by reference). For a more detailed discussion of *Eckstein*, see *infra* Part II.B.2.

Van Dusen's scope is yet more limited still, as it does not apply when the original forum was improper, lacked personal jurisdiction over the defendants, or was not the forum selected by a valid forum-selection clause. *See* 15 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3846 nn.31–31.50 (4th ed. 2022) (collecting cases); *see also* Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49 (2013) (holding *Van Dusen* inapplicable to cases transferred pursuant to a valid forum-selection clause).

134. And, by extension, cases consolidated for pretrial purposes as part of a multidistrict litigation pursuant to 28 U.S.C. § 1407.

transferor court. This is exactly how many commentators have framed the issue.[135] In other words, if the myth of circuit law was correct, it would be best to apply the *Van Dusen* rule to transferred federal claims. And yet courts do not do so, suggesting that the myth is just that.

Consider *In re Korean Air Lines Disaster of September 1, 1983*,[136] in which then-Judge Ruth Bader Ginsburg wrote the leading opinion on whether the *Van Dusen* rule applies to transferred federal claims. Like *Van Dusen* itself and many good mass-tort hypotheticals, *In re Korean Air Lines* involved a high-speed crash.[137] But unlike *Van Dusen*, which involved questions of state law, *In re Korean Air Lines* involved federal law. In particular, the question was how to interpret the Warsaw Agreement,[138] as amended by the Montreal Convention,[139] which limited damages claims by aircraft passengers to $75,000, but also required airlines to give written notice in at least ten-point font.[140] Various federal courts had disagreed over whether written notice in smaller text resulted in forfeiture of the $75,000-

135. *See* Marcus, *supra* note 116, at 686 (speculating that "the concept of law of the circuit" was inevitable given the structure of the Courts of Appeals created by the Evarts Act); Friendly, *supra* note 6 (noting that "the Supreme Court's inability to hear more than a relatively few cases each term, its desire sometimes to let the dust settle before moving in, and other factors permit each circuit to make" the "law of the circuit," meaning each circuit's "own federal law in limited areas at least for a short time and occasionally . . . for a long one"); Paul D. Carrington, *Crowded Dockets and The Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 580 (1969) ("The 'law of the circuit' has emerged as a response to the Supreme Court's incapacity to resolve intracircuit conflicts.").

136. 829 F.2d 1171 (D.C. Cir. 1987).

137. *Id.* at 1172 (stating the case arises out of the destruction of a commercial plane heading to Seoul, South Korea by "Soviet military aircraft"); *see also, e.g.*, Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 281 (1957) (introducing a hypothetical in which fifty passengers injured in a train crash successively sue the railroad, and asking whether a judgment adverse to the railroad in the first action should preclude the railroad in subsequent actions).

138. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C. § 1502.

139. Order Approving Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 Fed. Reg. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

140. *In re Korean Air Lines*, 829 F.2d at 1172 (identifying the reasons for controversy in the case).

per-passenger damages limit.[141] Most importantly, the district court below disagreed with the Second Circuit on the question of waiver.[142]

The key procedural fact was that *In re Korean Air Lines* was a multidistrict litigation, and that some cases before the federal court in D.C. had been transferred there for pretrial purposes from district courts within the Second Circuit.[143] That meant that, at least in theory, some cases subject to the D.C. district court's pretrial rulings would end up back in the Second Circuit for trial purposes and, presumably, any appeals from a final judgment after trial.[144] Because the cases had been transferred from the Second Circuit for pretrial purposes only, the district court was in a bind. Should it apply precedent from the Second Circuit in deciding the waiver issue, or should it instead make an independent determination about the meaning of federal law?[145]

In re Korean Air Lines therefore, neatly presented a clear question: whether the *Van Dusen* rule applies to transferred *federal* claims or whether, instead, it applies only to transferred state law claims.[146] That the question had not been addressed directly by courts[147] or Congress led Judge Ginsburg to note the

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141. *Compare In re* Air Crash Disaster at Warsaw on March 14, 1980, 705 F. 2d 85 (2d Cir. 1983) (deeming the limit waived), *with In re* Korean Air Lines Disaster of September 1, 1983, 664 F. Supp. 1463 (D.D.C. 1983) (applying the limit notwithstanding inappropriately small typeface).

142. *In re Korean Air Lines*, 664 F. Supp. at 1474–77.

143. *See* 829 F.2d at 1173 (categorizing the "cases consolidated in this appeal"); 664 F. Supp. at 1488 (D.D.C. 1987) ("Pursuant to multidistrict litigation statute, actions were transferred to the District of Columbia District Court for limited purposes.").

144. *See generally* 28 U.S.C. § 1407(a) (authorizing consolidation of cases filed in different districts only for *pretrial* purposes); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998) (holding that district courts lack statutory authority to retain for trial cases transferred as part of an MDL).

145. *See In re Korean Air Lines,* 829 F.2d at 1174 ("The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims.").

146. *Id.*

147. *But see* Stirling v. Chem. Bank, 382 F. Supp. 1146, 1149–51 (S.D.N.Y. 1974) (applying transferor court precedent to federal securities fraud claims consolidated in an MDL); *In re* Four Seasons Sec. L. Litig., 370 F. Supp. 219, 236 (W.D. Okla. 1974) (similar to *Stirling*); *In re* Plumbing Fixtures Litig., 342 F. Supp. 756, 758 (J.P.M.L. 1972) (stating "[i]t is clear that the substantive law

need for "attention from Higher Authority."[148] Lacking such divine guidance, the D.C. Circuit turned to the next best thing: the "thoughtful commentary" of Professors Marcus and Steinman.[149]

Both Professor Marcus and Professor Steinman had argued that, because of important differences between state and federal law, the *Van Dusen* rule should not apply in the context of transferred federal claims.[150] Professor Steinman's argument was grounded in the doctrine of law of the case. She concluded that law-of-the-case doctrine is procedural in the *Erie* sense, meaning that federal courts determine it for themselves rather than deferring to state law.[151] By extension, then, she argued that a federal MDL court should apply its own understanding of the law-of-the-case doctrine.[152] That was particularly true, in Professor Steinman's view, because, unlike many transfer motions under 28 U.S.C. § 1404, MDL consolidation does not typically involve "an effort to judge shop for more favorable rulings."[153]

Taking a different tack, Professor Marcus argued that *Van Dusen* was driven largely by two concerns: the *Erie* doctrine's

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of the transferor forum will apply after transfer" to claims arising under the federal Clayton Act). Most of the other cases to consider the question predated *Van Dusen*. *See* Marcus, *supra* note 116, at 692 & n.98 (first citing H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962); then citing Ackert v. Bryan, 299 F.2d 65, 69–70 (2d Cir. 1962); and then citing Clayton v. Warlick, 232 F.2d 699, 706 (4th Cir. 1956)) (collecting cases and generally concluding "that differences in interpretation of federal law were irrelevant to the decision whether to transfer, and that the transferee court should decide the issues of federal law without regard to the views of the transferor circuit").

148. *In re Korean Air Lines*, 829 F.2d at 1174.

149. *See id.* (first citing Marcus, *supra* note 116, at 721; and then citing Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662–706 (1987)).

150. *See* Marcus, *supra* note 116, at 721 ("[T]he transferee court must be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit."); Steinman, *supra* note 149, at 632 n.116 ("This Article agrees with Professor Marcus, however, that the *Erie* policy of eliminating the inequitable administration of the laws that results when some litigants can gain admission to federal court on the basis of diversity while others are confined to state court by the accident of their residence does not apply to the choice of law questions presented by the transfer of federal question cases between federal courts.").

151. Steinman, *supra* note 149, at 635.

152. *Id.* at 667 ("A court in multidistrict litigation, however, should have discretion to use its own, or another single, doctrine when necessary to effectuate fair, efficient, and uniform handling of the cases.").

153. *Id.* at 668.

aim of avoiding forum shopping and the general privilege a plaintiff enjoys to select her own forum.[154] Marcus further argued that neither concern is triggered by a transferred federal claim. The fact of transfer was enough to override the concern for the plaintiff's choice of forum, and the claims' federal nature was enough to defeat any need to consult the oracle of *Erie*.[155] Thus, Professor Marcus argued, because neither of the principles that animated *Van Dusen* applied to transferred federal claims, it made no sense to extend the rule to that context.[156] So far, so good.

While advancing their arguments, though, Professors Marcus and Steinman adopted the rhetoric—if not the substance—of the myth of circuit law. For example, Marcus described the development of "the concept of the law of the circuit" as "inevitable" given the Evarts Act.[157] Similarly, he described the question that would eventually be presented in *In re Korean Air Lines* as a "choice-of-law problem."[158] Professor Steinman likewise summarized a thorny MDL problem as turning on "whether the remand court would regard Sixth Circuit law as governing."[159]

Despite that rhetoric, the substance of these academic arguments reinforces the argument advanced here: there can be no such thing as circuit law. For example, Marcus developed the "principle of competence"—rooted in the Evarts Act—under which each court of appeals is both competent and obliged to decide questions of federal law.[160] That presumption of competence,

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154. Marcus, *supra* note 116, at 679; *see also supra* note 130 and accompanying text.

155. Marcus, *supra* note 116, at 679 ("*Erie* is simply irrelevant where federal claims are involved, and its policies have no bearing on the choice between interpretations of federal law. The venue privilege is similarly inapposite once plaintiff's choice of forum has been vetoed by a transfer.").

156. *Id.* ("*Van Dusen* therefore should not govern [transferred federal claim] cases.").

157. *Id.* at 686.

158. *Id.* at 693.

159. Steinman, *supra* note 149, at 704; *see also id.* at 642 n.154 (discussing "Fifth Circuit law").

160. Marcus, *supra* note 116, at 702–09 (defining the "principle of competence"); *see also, e.g.*, Clayton v. Warlick, 232 F.2d 699, 706 (4th Cir. 1956) ("We are not impressed by the argument that such transfer should be denied because of an alleged conflict of decision between this Circuit and the Seventh on an important question of law involved in the case. If there be such conflict, this presents a matter for consideration by the Supreme Court on application for

in Marcus's telling, does not apply to a federal court deciding questions of state law.[161] Finally, as noted, Professor Marcus explained well why the logic of *Van Dusen* itself did not compel one circuit to apply the "law" of a sister circuit.[162] Professor Steinman's argument that these questions should be guided in the first instance by the niceties of the law-of-the-case doctrine rather than abstract concerns about the "law" of any circuit reinforces the point.[163]

The D.C. Circuit in *In re Korean Air Lines* added its own reasoning to buttress these scholarly arguments. One of the supposed motivations for applying the *Van Dusen* rule to transferred federal claims, the court noted, is to promote the uniformity of federal law.[164] But applying *Van Dusen* in the context of federal claims would undermine, rather than reinforce, the uniformity of federal law, as the court recognized.[165] Instead, "[t]here would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere"—even within the same MDL.[166] The court also recognized that the persistence of different interpretations of federal law was inimical to the purpose of federal law in ways that differences in state law are not inconsistent with the purpose of state law.[167] "[B]ecause there is

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certiorari, not for consideration by a district judge on application for transfer under 28 U.S.C. § 1404(a).").

161. *See* Marcus, *supra* note 116, at 702 ("For federal courts, the most significant choice-of-law difference between issues of state law and issues of federal law is that they lack competence to decide the former and are presumptively competent to decide the latter.").

162. *See supra* notes 150, 154–56 and accompanying text.

163. *See, e.g.*, Steinman, *supra* note 149, at 705 ("If the court is faced with challenges of rulings from a large number of transferor or discovery courts, it can, in the exercise of sound discretion, choose to use one of their doctrines or its own doctrine, if the inefficiencies and inequities of acting otherwise so indicate.").

164. *See* In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987) (discussing the goal of uniformity).

165. *Id.* at 1175 ("Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity.").

166. *Id.*

167. *See id.* (stating that, unlike with federal law, "[o]ur system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task").

ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory."[168] Anything else would put district judges managing MDLs in the "logically inconsistent" position of "apply[ing] simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law."[169]

Applying this logic, the D.C. Circuit in *In re Korean Air Lines* held that the *Van Dusen* rule did not apply to transferred federal claims.[170] In other words, the court held that a court ruling on a transferred federal claim need not follow precedent from the transferor circuit court of appeals. Instead, the transferee court could and indeed should undertake its own interpretation of federal law, one informed but not strictly bound by decisions from other circuits.[171] For those reasons, the court held that the district court was not wrong to disagree with the Second Circuit's interpretation of the Montreal Convention, even in cases transferred from—and due to be transferred back to—the Second Circuit.[172]

Judge Douglas Ginsburg—the other Judge Ginsburg then on the D.C. Circuit—concurred separately in *In re Korean Air Lines* to "add some reflections on the 'choice of law' problem."[173] His use of scare quotes reveals that he, like his colleagues, avoided falling prey to the myth of circuit law. Rather than worry about imaginary notions like "the law of the circuit," Ginsburg wrote, courts deciding transferred federal claims should instead be guided by the doctrines supposed to balance judicial economy against accuracy of adjudication: "*res judicata*, collateral estoppel, and law of the case" chief among them.[174] None of those doctrines, he noted, would have compelled the MDL court to apply

168. *Id.*

169. *Id.* at 1175–76.

170. *See id.* at 1176 (finding "that the law of a transferor forum on a federal question" deserves "close consideration, but does not have stare decisis effect in a transferee forum situation in another circuit").

171. *Id.* ("The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis.").

172. *Id.* (acknowledging and agreeing with the language of the district court opinion).

173. *Id.* at 1176 (D.H. Ginsburg, J., concurring). Judge Williams, the third member of the panel, joined the concurrence.

174. *Id.* at 1177.

precedent from the Second Circuit in deciding cases transferred from that circuit.[175] Judge Ginsburg argued instead that federal courts operate under a "norm of independent judgment"—reminiscent of Professor Marcus's "principle of competence"[176]—which requires them to determine for themselves, unless bound by vertical stare decisis, the meaning of federal law.[177]

In the wake of *In re Korean Air Lines*, most courts and commentators are persuaded that *Van Dusen* does not apply to transferred federal claims. For example, perhaps showing that there were no hard feelings, the Second Circuit followed *In re Korean Air Lines* to reject an argument that federal claims transferred from the Southern District of Florida should be guided by Eleventh Circuit precedent rather than the Second Circuit's.[178] Similarly, the Wright & Miller treatise notes that "[t]here are good reasons for concluding that *Van Dusen* should not apply to federal question cases transferred for MDL proceedings."[179] This basic consensus is not without problems,[180] but it is most consistent with the purposes of federal law.

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175. *Id.* ("The New York plaintiffs do not, and cannot, however, rely upon any of these doctrines to support application of *Polish Airlines* to their transferred cases.").

176. *See generally supra* note 160 and accompanying text (referencing the "principle of competence").

177. *In re Korean Air Lines*, 829 F.2d at 1177–78 (D.H. Ginsburg, J., concurring) (outlining why, in this particular case, "imposing upon a federal court the duty to accept as binding another circuit's interpretation of federal law would constitute a novel departure from the norm of independent judgment").

178. *See* Menowitz v. Brown, 991 F.2d 36, 39 (2d Cir. 1993) (per curiam) (discussing the appropriate statute of limitations for federal securities claims transferred from the Eleventh Circuit given a circuit split between that court and the Second Circuit on that issue).

179. 15 WRIGHT & MILLER, *supra* note 133, § 3867; *see also id.* n.32 (collecting dozens of cases rejecting *Van Dusen* in the context of transferred federal claims).

180. The most challenging situation is when two different circuits get stuck in an infinite loop of transfers back and forth between themselves because they disagree about how to interpret statutes defining their respective jurisdictions and refuse to apply each other's precedent. In the case of such a gastonette, the only hope is Supreme Court intervention. *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 803–04 (1988) (resolving a dispute between the Seventh and Federal Circuits over which had subject-matter jurisdiction over hybrid antitrust and patent claims after both courts explicitly declined jurisdiction in reaction to the other's dismissal); *accord Gastonette*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A dilatory 'dance' in which each of the two responsible

The main exception to this general rejection of the strong form of "circuit law" is when the federal law at issue is explicitly made "geographically non-uniform,"[181] such as when federal law explicitly borrows state law. For example, Congress specified that the statute of limitations for certain federal securities claims equals "the limitation period provided by the laws applicable in the jurisdiction"—i.e., state law.[182] In this narrow circumstance where Congress deliberately chose to render federal law non-uniform, preferring instead to achieve parity between state and federal law, some courts have concluded that *Van Dusen* should apply.[183] The leading opinion articulating this exception, written by Judge Easterbrook, was careful to avoid relying on the myth, if not the rhetoric,[184] of circuit law.[185] The Seventh Circuit in that case asked:

> Are different circuits like different states for the purposes of *Van Dusen* and *Ferens*? Usually not. A single federal law implies a national interpretation. Although courts of appeals cannot achieve this on their own, the norm is that each court of appeals considers the question independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation.[186]

The only reason to depart from the logic of *In re Korean Air Lines*, then, is if Congress itself has compelled it by making the

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parties waits until the other party acts—so that the delay seems interminable; esp., a standoff occurring when two courts simultaneously hear related claims arising from the same bases and delay acting while each court waits for the other to act first."); Jon O. Newman, *Birth of a Word*, 13 GREEN BAG 2D 169 (telling the story of the coining of "gastonette").

181. 15 WRIGHT & MILLER, *supra* note 133, § 3867; *see also id.* § 3846 (identical).

182. *See* 15 U.S.C. § 78aa-1(a) ("The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.").

183. *See* Eckstein v. Balcor Film Invs., 8 F.3d 1121, 1124 (7th Cir. 1993); Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1046 (9th Cir. 2012); *In re* Ford Motor Co., 591 F.3d 406, 413 (5th Cir. 2009); Trull v. Dayco Prod., LLC, 178 F. App'x 247, 249 (4th Cir. 2006); Olcott v. Delaware Flood Co., 76 F.3d 1538, 1546–1547 (10th Cir. 1996).

184. *See Eckstein*, 8 F.3d at 1124 (describing Seventh Circuit precedent as "the law in the Seventh Circuit on June 19, 1991.").

185. *See id.*

186. *Id.* at 1126 (citation omitted) (first citing *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171 (D.C. Cir. 1987); then citing *id.* at 1178 (D.H. Ginsburg, J., concurring); and then citing Marcus, *supra* note 116, at 702).

law geographically non-uniform.[187] There is thus a separation-of-powers dimension to the issue: because courts ascribe uniformity to congressional enactments in the name of legislative intent, that uniformity can be defeated only by congressional intent to the contrary.

The law today is, therefore, that district and circuit courts adjudicating transferred federal claims should treat them just like any other case before them: by applying binding in-circuit precedent, considering persuasive non-binding authority, and making their best determination of the meaning of federal law. *Van Dusen* and *In re Korean Air Lines* together establish two axioms necessary to prove that there is no such thing as circuit law. First, federal law is not like state law: by design, the former is uniform, and the latter is varied. Second, each federal court is presumed competent—and indeed has an affirmative obligation—to determine the meaning of federal law for itself, at least when not bound by principles of stare decisis. No such presumption, let alone obligation, applies when a federal court decides matters of state law.

C. QUALIFIED IMMUNITY, RETROACTIVITY, AND "CLEARLY ESTABLISHED" LAW

Another hidey-hole for the myth of circuit law is the idea of "clearly established law." When sued under 42 U.S.C. § 1983 or *Bivens*[188] for violating federal rights, government officials are immune from liability unless the rights they violated were clearly established. But to determine which laws are clearly established, judges must determine which courts establish law "clearly." Everyone agrees that the Supreme Court can clearly establish law, and that district courts generally cannot, but the hard questions come when we look to the circuit courts. One popular view treats the decisions of the court of appeals in whose circuit the alleged violation of federal rights occurred as uniquely or particularly capable of clearly establishing law in this way. Yet in adopting this view, courts sometimes fall victim to the

187. *See* McMasters v. United States, 260 F.3d 814, 819 (7th Cir. 2001) ("Only where the law of the United States is specifically intended to be geographically non-uniform should the transferee court [entertaining federal claims] apply the circuit precedent of the transferor court.") (citing, among other authorities, *Eckstein*, 8 F.3d at 1126).

188. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

myth of circuit law, with grave consequences for the coherence of federal law, as Part II.C.1 argues.

We can see why the notion of circuit law is nonsensical even in the context of qualified immunity by comparing that doctrine to cases considering whether a criminal defendant may be punished criminally for behavior undertaken relying on precedent from his regional circuit court of appeals that was later reversed by the Supreme Court. In that scenario courts generally reject the idea that regional circuit precedent uniquely or automatically insulates from subsequent criminal liability conduct it considers non-criminal. They do so for a simple reason: courts of appeals do not have final authority to declare what the law is within their jurisdiction. Instead, that authority always remains with the Supreme Court, as Part II.C.2 suggests.

1. Qualified Immunity

The law of qualified immunity illustrates how the myth of circuit law is at once both seductive and illusory. Although many federal courts give special place in their qualified immunity analysis to precedent from their regional circuit court of appeals, there is little justification for such a categorical rule. That rule has legitimate roots traceable to one of qualified immunity's motivations: clear notice. The idea is that it is unfair and unwise to impose civil liability on government officials who cannot be expected to know in advance the right they are violating.[189] But when infected by the myth of circuit law, courts of appeals end up losing sight of the lodestar of clear notice and instead privilege their own decisions over more fundamental considerations.

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189. *See* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2103 (2018) ("[D]ifficult questions arise when binding precedent is clear but the [government official] defendant nonetheless is under contradictory commands."); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 619 (2021) ("[The Court's] decisions articulate an expectation that qualified immunity actually causes government officials to assess, before acting, whether prior court decisions clearly establish that their conduct would violate the Constitution."). Professor Schwartz has collected evidence casting doubt on the empirical premise in the Court's logic: that government officials have any idea what even federal appellate courts say the contours of constitutional rights are. *See generally id.* at 605 (finding "unequivocal proof that officers are not notified of the facts and holdings of cases that clearly establish the law for qualified immunity purposes"); *infra* note 210 and accompanying text (discussing Professor Schwartz's empirical findings).

The Supreme Court crystallized the modern formulation of qualified immunity doctrine in *Harlow v. Fitzgerald*, which immunized White House officials from civil liability so long as their conduct did not violate clearly established law.[190] Doctrinally, qualified immunity requires that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[191] The key concept here is fair notice. It is only fair to hold a government official liable, *Harlow*'s reasoning goes, if that official should have reasonably understood the law to prohibit his conduct. And such an understanding, the logic continues, is possible only if that law was *clearly established.*[192]

Because the concept of "clearly established law" bears so much weight in the definition of qualified immunity, it has been heavily litigated. Unfortunately, the Supreme Court has offered little guidance about which judicial decisions suffice to render a legal rule "clearly established" for purposes of qualified immunity. For example, in *Harlow*, the Court specifically avoided saying whether law could be "clearly established" by opinions of the courts of appeals or district courts.[193] This original ambiguity persists today.

Later Supreme Court cases elaborated on the "clearly established" prong without clarifying which courts' decisions sufficed for that purpose. So, in *Anderson v. Creighton*, the Court held that, when assessing whether a right was clearly established, courts should not cast the right at an inappropriately high level of generality.[194] Instead, the Court held, "[t]he contours of the right must be sufficiently clear that a reasonable official would

190. 457 U.S. 800 (1982). The doctrine was first announced in Pierson v. Ray, 386 U.S. 547, 557 (1967) ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

191. *Harlow*, 457 U.S. at 818.

192. *Id.* at 818–19.

193. *See id.* at 818 n.32 ("[W]e need not define here the circumstances under which the state of the law should be evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.") (internal quotation marks omitted).

194. 483 U.S 635 (1987).

understand that what he is doing violates that right."[195] The requirement that the right be defined at a narrow level of generality does not mean, the Supreme Court has insisted, that a plaintiff must cite prior cases with identical or even "materially similar" facts.[196] Yet many commentators have accused the Court of requiring that kind of factual similarity.[197]

Apart from the level-of-generality question in qualified immunity, there remains considerable uncertainty about *which* courts have power to "clearly establish" statutory or constitutional rights. Subject to the qualifications discussed above, Supreme Court precedent is up to the task. But what about precedent from the circuit courts of appeals? And does it matter if the circuit precedent is local or instead from one of the sister circuits?

Here too, the Supreme Court has resisted laying down clear rules.[198] But this much seems clear: out-of-circuit authority can be relevant to determining whether a right was "clearly established," but it is a difficult showing for a plaintiff to make. First,

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195. *Id.* at 640.

196. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts.").

197. *See, e.g.*, Schwartz, *supra* note 189, at 613 ("Current Supreme Court doctrine suggests that an officer violates clearly established law only if there is a prior court of appeals or Supreme Court decision holding virtually identical facts to be unconstitutional."); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–54 (2013) (describing recent developments); Daniel K. Siegel, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in* Bellotte v. Edwards, 90 N.C. L. REV. 1241, 1251–52 (2012) (describing two inconsistent lines of doctrine from the Supreme Court); Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante) ("Section 1983 meets Catch-22. . . . No precedent = no clearly established law = no liability. An Escherian Stairwell."). For a case in which the Supreme Court appeared to demand precedent with identical facts before deeming a right clearly established, see Brosseau v. Haugen, 543 U.S. 194, 200 (2004) (looking only at "cases relevant to the situation [the defendant] confronted") (internal quotation marks omitted); compare Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").

198. *See* John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1309 (2012) (observing that the Supreme Court failed to "enumerate the sources of law that may establish" a right either in *Harlow* or "in the intervening thirty years").

the Court has held that plaintiffs may rely on persuasive authority other than circuit precedent in arguing that a right is clearly established.[199] Yet in practice, such a showing can be practically impossible. For example, the Court has held that a lone out-of-circuit case does not suffice to establish law clearly when it represents neither "controlling authority in [plaintiffs'] jurisdiction at the time" nor "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[200] Similarly, the Court has elsewhere demanded a "*robust*" consensus of persuasive authority to clearly establish law.[201] But out-of-circuit precedent has been treated as relevant when relied on by *defendants*: where officers relied on three out-of-circuit cases and two state supreme court cases to justify the reasonableness of their actions, the Court declared that the right was not "clearly established."[202]

Unguided by the Supreme Court, the courts of appeals have been left to develop their own tests to determine which judicial opinions "count" to determine whether a right was clearly established. The circuits' varied approaches resist easy categorization, but all are informed by qualified immunity's supposed lodestar: fair notice. It is this consideration of fair notice that has led many circuits to exalt "circuit law" over precedent from other courts. Yet in each case, the circuit courts' reasons for relying on circuit precedent to determine the content of "clearly established law" provide no support for the idea that such precedent forms a coherent and distinct body of law in the traditional sense.

The Second Circuit's approach embodies prizing circuit precedent over other authority in determining whether a right was clearly established. That court has explained that "a right is

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199. *See Hope*, 536 U.S. at 741–42 (relying on regulations from the Alabama Department of Corrections and a Department of Justice report, in addition to Eleventh Circuit precedent, to deem a right "clearly established").

200. Wilson v. Layne, 526 U.S. 603, 617 (1999). The Court also noted that the out-of-circuit case had been decided only five weeks before the events at bar. *See id.* at 616.

201. *Al-Kidd*, 563 U.S. at 742 (requiring that without a case on point there should be existing precedent placing the question beyond debate); *see also* Plumhoff v. Rickard, 572 U.S. 765, 767 (2014) (same).

202. *See* Pearson v. Callahan, 555 U.S. 223, 244 (2009); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 376–77 (2009) (relying on judicial disagreement to conclude that qualified immunity attached); *see also Wilson*, 526 U.S. at 618 (noting that a circuit split had developed after the conduct at issue and concluding on the basis of that disagreement that it would be "unfair to subject police to money damages for picking the losing side of the controversy.").

clearly established" only if, among other requirements, "the Supreme Court *or the Second Circuit* has recognized the right," such that "a reasonable defendant would have understood . . . that his conduct was unlawful."[203] In this way, the Second Circuit derives the requirement that the right be recognized by the Supreme Court or itself from the general principle that qualified immunity is shaped by what a reasonable officer would have understood the law to be. "The question is not what a lawyer would learn or intuit from researching case law," the Second Circuit has explained, but "what a reasonable person in the defendant's position should know about the constitutionality of the conduct."[204]

Applying this rule to decide whether a right was clearly established after it had been recognized by decisions from the Third and Ninth Circuits, as well as a district court in the Southern District of New York, the Second Circuit held that such out-of-circuit and lower-court precedent could not establish a right clearly. "When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."[205] The Second Circuit's approach, therefore, reflects the most restrictive version of what it takes for a right to be "clearly established"—by exclusive reference to in-circuit precedent.[206]

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203. Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003) (cleaned up) (emphasis added); *see also* Reuland v. Hynes, 460 F.3d 409, 420 (2d Cir. 2006) (employing an "objectively reasonable" standard).

204. *Recore*, 317 F.3d at 197 (quoting McCullough v. Wyandanch Union Free Sch., 187 F.3d 272, 278 (2d Cir. 1999)).

205. Pabon v. Wright, 459 F.3d 241, 255 (2d Cir. 2006); *see also Reuland*, 460 F.3d at 420 (stating that a right may be deemed clearly established only if "the Supreme Court or the Second Circuit has recognized the right" (quoting *Recore*, 317 F.3d at 197)). *But see* Scott v. Fischer, 616 F.3d 100, 105 (2d Cir. 2010) ("Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue, even if those decisions come from courts in other circuits.") (citations omitted).

206. *See Pabon*, 459 F.3d at 255. *But see Scott*, 616 F.3d at 105 ("Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this *or other courts* 'clearly foreshadow a particular ruling on the issue,' *even if those decisions come from courts in other circuits*." (quoting Varrone v. Bilotti, 123 F.3d 75, 79 (2d Cir. 1997))) (emphasis added).

Other circuits take different approaches, but they all prize their own precedent above that of their sister circuits. For example, the Fourth Circuit casts a slightly wider net, but generally declines to "look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose."[207] The Eleventh Circuit is similarly stingy.[208] In sum, though most courts of appeals will consider out-of-circuit authority in determining whether a right is clearly established, they will only do so if other sources run out.[209]

The problem with this practice is that it is only loosely tied to the ultimate object of the qualified immunity inquiry: whether the law was clear enough that it is reasonable to expect government officials to comply with it. Perhaps it is true that law-enforcement officials read all the slip opinions of the Supreme Court, their local court of appeals, and maybe the state supreme court. But empirical evidence suggests otherwise.[210] And, in any

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207. Doe *ex rel.* Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 176 (4th Cir. 2010) (citations omitted). *But see* Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) (noting that courts may look to determine whether there is a consensus among out-of-circuit authority, but only if there are "no . . . decisions from courts of controlling authority").

208. Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2001) ("Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation.").

209. Williams, *supra* note 198, at 1311 & n.93 ("They vary in their assessment of how much consensus must have been reached outside the circuit.") (collecting cases); *see also* Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003) ("The court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a consensus of persuasive authority elsewhere."); Peroza-Benitez v. Smith, 994 F.3d 157, 165 (3d Cir. 2021) (noting that the court will "look[] to factually analogous Supreme Court precent, as well as binding opinions from our own [c]ourt," before turning to other circuits); Morgan v. Swanson, 659 F.3d 359, 371–72 (5th Cir. 2011) (requiring a "robust consensus of persuasive authority" in the absence of controlling authority) (citations omitted); Cullinan v. Abramson, 128 F.3d 301, 311 (6th Cir. 1997) ("Ordinarily, at least, in determining whether a right is 'clearly established,' this court will not look beyond Supreme Court and Sixth Circuit precedent."). The Eighth and the Ninth Circuit have adopted the most expansive views of which authority counts, although they too put more weight on "binding" precedent. *See, e.g.*, Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985); Tlamka v. Serrell, 244 F.3d 628 (8th Cir. 2001).

210. *See* Schwartz, *supra* note 189, at 629–64 (finding empirically that California police departments train officers on leading Supreme Court cases but

event, what law-enforcement officers know about the content of existing law depends on what qualified immunity doctrine expects of them. There is, therefore, no reason not to charge officers with knowledge of rights established clearly, even if clarified by out-of-circuit precedent.

Informed by these broader critiques of qualified immunity's reliance on the concept of clearly established law, we can see how poorly "circuit law" does as a proxy for the body of substantive law that law-enforcement officers in fact know or are expected to know.[211]

2. Retroactive Application of New and More Expansive Interpretations of Criminal Laws

A similar unfounded reliance on the concept of circuit law has created confusion about whether new interpretations of federal criminal laws can be applied retroactively. Courts have grappled unsatisfyingly with whether a person may rely on clear precedent from the relevant regional court of appeals holding that a person's conduct is not unlawful and therefore continue the conduct at issue. Although there are good reasons grounded in due process and related constitutional principles not to give

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rarely on Ninth Circuit or even Supreme Court authorities applying general principles to a wider variety of factual circumstances).

211. This problem is not confined to qualified immunity. Similar exaltation of "circuit law" has distorted judicial interpretations of federal habeas statutes. *See, e.g.*, Marlowe v. Warden, FCI Hazelton, 6 F.4th 562, 569 (4th Cir. 2021) (requiring, as a prerequisite to a federal prisoner filing a habeas petition under 28 U.S.C. § 2241, that "at the time of conviction, settled *law of this circuit* or the Supreme Court established the legality of the conviction") (emphasis added). Some of the courts of appeals' more adventurous attempts to elevate circuit precedent to the status of "clearly established law" for purposes of other federal habeas statutes have been explicitly rebuked by the Supreme Court. *See, e.g.*, Marshall v. Rodgers, 133 S. Ct. 1446, 1450 (2013) (per curiam) ("Although an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct.") (citations omitted). Admittedly, there is a key difference between habeas petitions under § 2241 as limited by § 2255 and those under § 2254(d)(1), which explicitly limits the scope of "clearly established Federal law" to determinations "by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

retroactive effect to new interpretations of federal criminal statutes, none of them rely on or are aided by an insistence that there is any such thing as circuit law.

This question is linked to the requirement that a right be "clearly established" before it can ground officer liability. As the Supreme Court has noted:

> The fact that [qualified immunity] has a civil and [retroactivity] a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.[212]

And just as some lower federal courts have extrapolated from qualified immunity's requirement of fair notice to an undue reliance on the concept of circuit law, so too have they with retroactivity doctrine.

The retroactivity question is illustrated well by *United States v. Rodgers*,[213] which involved an interpretation of the False Statements Accountability Act.[214] Larry Rodgers called the Kansas City, Missouri, offices of the FBI and the Secret Service; he told the former that his wife had been kidnapped and the latter that she was involved in a plot to assassinate the president.[215] In fact, however, Rodgers was seeking to enlist the help of federal officers in locating his estranged wife, who had fled their marital home.[216] At the time, there was binding precedent from the Eighth Circuit holding that false statements made to federal law-enforcement agencies did not violate the statute.[217] But there was also an active circuit split on this very question, with at least two other circuits holding that false statements made to federal law-enforcement agencies were proscribed by the statute.[218]

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212. United States v. Lanier, 520 U.S. 259, 270–71 (1997).

213. 466 U.S. 475 (1984).

214. 18 U.S.C. § 1001(a)(2) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be [guilty of a federal crime.]").

215. 466 U.S. at 476.

216. *Id.* at 477.

217. *See* Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967).

218. *See* United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967); United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974) (en banc).

The case presented two possible views about fair notice. In one view, the relevant law at the time of Rodgers's conduct was the "circuit law" of the Eighth Circuit, which precluded Rodgers's criminal prosecution. In the other view, the only "law" in question was the criminal statute itself, and because the Eighth Circuit's interpretations of that statute were subject to reversal by the Supreme Court, there would be no retroactivity problem if the Supreme Court, addressing the question for the first time, endorsed the expansive interpretation of the statute.

Rodgers, of course, chose the first view, arguing that it would violate due process principles for the Supreme Court, in a single case, both to overrule the Eighth Circuit precedent that found Rodgers conduct lawful and to apply the new interpretation of the statute to punish him criminally.[219] The Supreme Court rejected Rodgers's argument in a single sentence:

> [A]ny argument by respondent against retroactive application to him of our present decision, even if he could establish reliance upon the earlier [Eighth Circuit precedent], would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.[220]

The Court thus held that Rodgers could not rely on the Eighth Circuit's interpretation of the statute, even though it was binding on the federal court in which he was prosecuted.

The Court's reasoning in *Rodgers* implicitly rejected the myth of circuit law. The only consideration in these kinds of retroactivity cases is whether, given all relevant legal materials, it was reasonably foreseeable that a person's conduct would be found criminal.[221] Of course, circuit precedent is relevant to that inquiry. But it is not totemic. The weight of circuit precedent consists of its stare decisis effect. Whether to overrule circuit precedent turns on a balancing of the interests implicated by that feature of common law adjudication. As a result, it is no problem for federal law not to permit individuals to rely on cir-

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219. *Rodgers*, 466 U.S. at 484.

220. *Id.*

221. *See, e.g.*, Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991) (arguing that the use of the term "retroactivity" is confusing in this context, and instead seeking to reframe the inquiry into one of predictability).

cuit precedent as if it created a safe harbor from criminal liability.[222] As one commentator put it, "no one has any right to rely on a federal circuit court of appeals decision in ordering his affairs."[223] Though we might bemoan that state of affairs, we should do so in ways that engage with the doctrine that compels it (stare decisis) rather than illusory notions that provide cover for it (circuit law).

Rodgers thus upended some circuits' attempts to create "circuit law" that individuals could rely on in planning their behavior.[224] Consider the travails of James Albertini, an anti-nuclear activist in Hawaii during the 1970s. Albertini visited military bases often to distribute leaflets arguing for an end to the nuclear arms race. After several of these visits, Albertini was served with a letter from military authorities barring him from entering the premises of individual bases.[225] One of the facilities from which the military had barred Albertini was Hickam Air Force Base.[226] Violating a bar letter is a federal crime.[227] So when an officer spotted Albertini leafletting at Hickam A.F.B. during an open house, he was escorted off the base and prosecuted criminally.[228]

The Ninth Circuit vacated Albertini's conviction on substantive First Amendment grounds.[229] The Ninth Circuit reasoned

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222. See Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 691; Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 457, 470–72 (2001).

223. Schaefer, *supra* note 222, at 691.

224. *Id.* at 690–91 ("Until recently, one of the assumed benefits of the doctrine of the law of the circuit was [an] element of reliability. That supposed advantage was nullified by the 1984 decision of the Supreme Court of the United States in *United States v. Rodgers*, which apparently destroyed any illusion that the decision of a court of appeals established the law that could be relied on within that circuit.").

225. United States v. Albertini, 830 F.2d 985, 986 (9th Cir. 1987) (en banc).

226. *See id.*

227. 18 U.S.C. § 1382 ("Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—[s]hall be fined under this title or imprisoned not more than six months, or both.").

228. *Albertini*, 830 F.2d at 986.

229. United States v. Albertini, 710 F.2d 1410, 1417 (9th Cir. 1983), *rev'd*, 472 U.S. 675 (1985).

that the military had transformed Hickam into a temporary public forum during the open house and therefore not even Albertini could be barred from the premises on that day, so long as he was peaceful.[230] Because the statute of conviction was unconstitutional as applied to his case, Albertini's conviction was set aside.

Shortly after his victory at the Ninth Circuit, and before the government's time to petition for a writ of certiorari had elapsed, Albertini's lawyer wrote to the naval commander at Pearl Harbor and informed him that Albertini planned to visit the base to exercise what the Ninth Circuit had said were his First Amendment rights.[231] The Navy again barred Albertini from entering the base.[232] Albertini later attempted to enter the base on at least three separate occasions; each time, he was arrested and charged with federal crimes.[233]

Albertini moved unsuccessfully to dismiss the charges against him because his conduct was protected by the First Amendment, consistent with the Ninth Circuit's holding in *Albertini I*.[234] The government opposed the motion and instead asked the district court to put the proceedings on hold pending the outcome of its petition for a writ of certiorari in *Albertini I*. The district court agreed with the government and continued Albertini's trial indefinitely.[235]

After granting certiorari,[236] the Supreme Court reversed the Ninth Circuit's judgment in *Albertini I*.[237] The Court held that military bases are not public forums, and that even assuming they could be public forums, Albertini's bar letter gave the government good reason to exclude him in any event.[238] Albertini's original conviction was therefore affirmed on remand.[239]

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230. *Id.*

231. *Albertini*, 830 F.2d at 986.

232. *Id.*

233. *Id.*

234. *Id.* at 987. ("The Court reasoned that the exclusion of bar letter recipients from military open houses does not infringe the first amendment because such an exclusion promotes an important governmental interest.").

235. *Id.*

236. United States v. Albertini, 469 U.S. 1071 (1984).

237. United States v. Albertini, 472 U.S. 675 (1985).

238. *Id.* at 684–90.

239. *See* United States v. Albertini, 783 F.2d 1484, 1488 (9th Cir. 1986).

Meanwhile, the district court put Albertini's trial for unlawfully entering the base at Pearl Harbor back on the calendar.[240] A jury convicted Albertini of twice illegally entering the naval base without permission.[241] He was given probation, community service, and a suspended 12-month prison sentence.[242]

The Ninth Circuit reversed Albertini's new convictions. That court framed the question as a "narrow" one: "whether a person whose conduct has been tried in court and vindicated on appeal can rely upon the court's decision in repeating the same conduct after receiving the appellate judgment."[243] This question, the Ninth Circuit said, implicated a tension between the rule against ex post facto laws and the Supreme Court's power to correct inferior courts' errors of law.[244] In holding that due process principles demanded that Albertini be allowed to rely on the Ninth Circuit's prior judgment, the Ninth Circuit reasoned that its own pronouncements rendered the possibility of Albertini's later conviction unforeseeable.[245] As the court put it, due process means "that a person who holds the latest controlling court opinion declaring his activities constitutionally protected should be able to depend on that ruling to protect like activities from criminal conviction until that opinion is reversed, or at least until the Supreme Court has granted certiorari."[246]

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240. *Albertini*, 830 F.2d at 987 ("Six months later, in December 1985, the government recalendared Albertini's trial for the three 1984 offenses.").

241. *Id.*

242. *Id.* at 987–88.

243. *Id.* at 988 ("[W]hether a person whose conduct has been tried in court and vindicated on appeal can rely upon the court's decision in repeating the same conduct after receiving the appellate judgment, when the government has either filed a petition for certiorari or still has time to file such a petition, and the Supreme Court has not acted to grant or deny the petition.").

244. *Id.* Strictly speaking, the constitution's prohibition on ex post facto laws did not apply, as it constrains only legislatures. But the Supreme Court had previously held that due process principles impose similar limits on the judiciary's power to enlarge a criminal statute's sweep through interpretation and apply the more expansive interpretation retroactively. *See* Marks v. United States, 430 U.S. 188, 192 (1977) (holding that the right of fair notice that certain conduct is a crime, embodied in the Due Process Clause, cannot be infringed by judicial action); Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

245. *Albertini*, 830 F.2d at 989.

246. *Id.* at 989.

The Ninth Circuit's holding was narrow but bound up with the notion of circuit law. It decided only that someone like Albertini, who had a Ninth Circuit opinion not only declaring his contemplated future conduct to be legal, but also doing so *as to him personally*, could rely on that opinion. And yet it is not obvious why, just because the relevant circuit precedent concerned Albertini personally, he should be immune from prosecution.[247] There would be no reason to relieve Albertini of the criminal consequences of his actions unless Ninth Circuit precedent—regardless of its subject—was substantive law in that overruling it worked a retroactive change in the law applicable to everyone, not just Albertini. And there is a tension between *Rodgers*, which held that circuit precedent alone cannot render criminal prosecution unforeseeable, and the Ninth Circuit's statement in *Albertini* that a person may depend on circuit precedent in continuing behavior previously declared lawful.

The Ninth Circuit eventually resolved this tension in *United States v. Qualls*,[248] a case with a mercifully simpler procedural history than *Albertini*. Danny Qualls was indicted for knowingly possessing firearms despite his previous felony convictions, in violation of the federal felon-in-possession statute.[249] At the time of the indictment, Ninth Circuit precedent established that Qualls was lawfully permitted to possess only some of the firearms giving rise to his charges.[250] So when the district court instructed the jury in a way that treated Qualls's possession of all the firearms equally, he appealed his conviction claiming legal error.[251] The Ninth Circuit reversed Qualls's conviction,[252]

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247. *See* Morrison, *supra* note 222, at 475 ("[T]here is no principled significance in the greater immediacy of the reliance in *Albertini*. Due process either protects an individual's reliance on a prior decision, or it does not. The identity of the defendant in the case on which one seeks to rely cannot be the determining factor.").

248. 172 F.3d 1136 (9th Cir. 1999) (en banc).

249. *Id.* at 1138; 18 U.S.C. § 922(g)(1).

250. *See Qualls*, 172 F.3d at 1138 ("At this time, California law allowed Qualls to possess any of the four rifles, but did not allow him to possess either of the two revolvers or the pistol. Our interpretation of the federal felon-in-possession statute allowed Qualls to possess any weapon that he was allowed to possess under state law."); *see also* United States v. Dahms, 938 F.2d 131, 134–35 (9th Cir. 1991) (holding that a defendant who was charged with violating the felon-in-possession statute for carrying a shotgun could not be convicted because Michigan law only prohibited possession of handguns, not shotguns).

251. *Qualls*, 172 F.3d at 1138.

252. United States v. Qualls, 108 F.3d 1019, 1024 (9th Cir. 1997).

and the en banc court affirmed,[253] holding that the jury instruction had been in error.

When the Supreme Court later held that the Ninth Circuit had been wrong about the correct interpretation of the felon-in-possession statute in the first place,[254] it asked the Ninth Circuit to reconsider its decisions in *Qualls*.[255] The Ninth Circuit, again sitting en banc, "recognized" the Supreme Court's interpretation of the statute as binding and held that it should apply retroactively in Qualls's case.[256] In a footnote, the majority overruled *Albertini*, noting that it conflicted with *Rodgers*, which held that out-of-circuit authority could render conduct declared lawful by the local regional circuit nevertheless foreseeably criminal.[257]

Rodgers and *Qualls* are not popular. The *Qualls* dissent called *Rodgers* "unfair," "unfortunate," and "a departure from a time-honored principle."[258] Trevor Morrison accused *Rodgers* of "undermin[ing]" "principles of fair warning"[259] and declared its consequences—*Qualls* among them—"bizarre" and "beyond defending."[260] Former Illinois Supreme Court Justice Walter Schaefer said that *Rodgers* "add[ed] an element of urgency to the

253. United States v. Qualls, 140 F.3d 824, 825 (9th Cir. 1998) (en banc).

254. Caron v. United States, 524 U.S. 308 (1998) ("Even if a State permitted an offender to have the guns he possessed, federal law uses the State's determination that the offender is more dangerous than law-abiding citizens to impose its own broader stricture.").

255. United States v. Qualls, 525 U.S. 957 (1998) (granting petition for writ of certiorari, vacating judgment below, and remanding for reconsideration in light of *Caron*).

256. *Qualls*, 172 F.3d at 1138–39 ("When we apply retroactively the *Caron* rule to Qualls, we find that the district court's jury instruction was not erroneous.").

257. *Id.* at 1139 n.1 ("To the extent that our decision in *United States v. Albertini* conflicts with *Rodgers*, we overrule *Albertini*. In *Albertini*, we stated that an individual could rely on 'the latest controlling court opinion . . . until that opinion is reversed, or at least until the Supreme Court has granted certiorari.' In *Rodgers*, however, the Supreme Court stated that 'the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and against the position of the respondent reasonably foreseeable.' Thus, under *Rodgers*, reversal or the grant of certiorari are immaterial to the due process inquiry; instead, the existence of a circuit split is the focus of that inquiry." (first quoting United States v. Albertini, 830 F.2d 985, 989 (9th Cir. 1987); and then quoting United States v. Rodgers, 466 U.S. 475, 484 (1984))).

258. 172 F.3d at 1139 (Hawkins, J., concurring in part and dissenting in part).

259. Morrison, *supra* note 222, at 521.

260. *Id.* at 496.

solution of the problem of conflicting court of appeals decisions."[261] And Will Baude has noted the inconsistency between *Rodgers* and the Court's approach to circuit splits in the context of qualified immunity.[262]

Yet the *Rodgers* rule has been reaffirmed by the Supreme Court,[263] and it remains good law.[264] Perhaps the myth of circuit law helps explain why. Circuit precedent carries great weight in several ways, but it does not constitute its own body of law; at best, instead, circuit law merely contributes to the mosaic of judicial opinions working out the meaning of federal law. Surveying that reality reveals that at least one of *Rodgers*'s claimed defects is on firmer ground than it seems.[265]

D. AGENCY NONACQUIESCENCE

The mistaken belief that there is any such thing as circuit law also helps dispel a seeming bit of government lawlessness: agency nonacquiescence. An agency engages in nonacquiescence when it chooses not to follow precedent from the circuit courts of appeals when conducting its internal proceedings.[266] Judges have accused agencies engaged in nonacquiescence as "neglect[ing]" "a basic tenet in our federal system of administrative practice and review": the idea that administrative agencies are "'inferior' tribunal[s], whose decisions . . . are subject to review

261. Schaefer, *supra* note 222, at 691.

262. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 74–77 (2018) ("[O]ne rarely sees a similar empathy for regular criminal defendants, and indeed the Court's decisions do not bear it out.").

263. *See* Moskal v. United States, 498 U.S. 103, 114 n.6 (1990) ("Moskal's contention that he was 'entitled to rely' on one Court of Appeals decision holding that washed titles were not 'falsely made' is wholly unpersuasive." (citing United States v. Rodgers, 466 U.S. 475, 484 (1984))).

264. *See* Baude, *supra* note 262, at 75 & n.172 (collecting seven recent cases in which the Supreme Court has applied the *Rodgers* rule against criminal defendants).

265. It may still be that *Rodgers* is a bad rule. The leeway that the common law gave, and the rule of lenity gives, to criminal defendants accused of violating ambiguous criminal laws alone suggests an independent reason to think *Rodgers* is out of step with larger principles of fair notice.

266. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989) ("The selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals—a practice commonly termed agency nonacquiescence—is not new in American law.").

and consequent approval or disapproval by" the court of appeals.[267] Other judges have echoed the concern that nonacquiescence verges on lawlessness.[268]

The phenomenon of agency nonacquiescence illustrates well the tension between uniform federal law and discrete enclaves of different bodies of circuit law. Let us first distinguish between two types of nonacquiescence: inter- and intra-circuit. With some administrative agencies, the relevant channeling statute[269] directs appellate review of the agency's action to a specific court of appeals in a predictable way. The former Immigration and Naturalization Service is like this, as are the Internal Revenue Service and the National Labor Relations Board. Simplifying only slightly, appeal from adverse rulings issued by those agencies is to the regional court of appeals in which the immigration judge sits or where the employer or the taxpayer resides.[270] That jurisdictional fact enables these agencies to engage in *intercircuit* agency nonacquiescence. In other words, the agency can abide by

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267. Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529, 532 (7th Cir. 1953).

268. *See* Borton, Inc. v. Occupational Safety & Health Rev. Comm'n, 734 F.2d 508, 510 (10th Cir. 1984) (holding that circuit court precedent bound both the court and the Occupational Safety and Health Review Commission); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382–83 (D.C. Cir. 1983) (holding that the NLRB must halt its "*willful* defiance" of circuit precedent) (emphasis in original); ITT World Commc'ns v. FCC, 635 F.2d 32, 43 (2d Cir. 1980) (holding that the FCC could not ignore binding circuit precedent); Ithaca Coll. v. NLRB, 623 F.2d 224, 227–29 (2d Cir. 1980) (reprimanding the NLRB for its "consistent practice of refusing to follow the law of this circuit"); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969–70 (3d Cir. 1979) (rejecting NLRB's argument that they could disregard binding circuit cases that they did not "acquiesce" to); Goodman's Furniture Co. v. U.S. Postal Serv., 561 F.2d 462, 465 (3d Cir. 1977) (Weis, J., concurring) (critiquing the practice of litigants ignoring circuit precedent by bringing the same legal question with different factual patterns to multiple circuit courts); May Dep't Stores v. Williamson, 549 F.2d 1147, 1149–50 (8th Cir. 1977) (Lay, J., concurring) (arguing that litigants should be estopped from bringing a claim in the Eighth Circuit because the Seventh Circuit had already ruled on the same issue); *see also* Estreicher & Revesz, *supra* note 266, at 681 n.7 (collecting cases).

269. *See* Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419 (2022), (tracing the increasing rigidity with which these channeling statutes are interpreted); *see also Sourcebook of Federal Judicial Review Statutes*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/research-projects/sourcebook-federal-judicial-review-statutes [https://perma.cc/TJC2-VA2H] (cataloguing these statutes).

270. *See* Estreicher & Revesz, *supra* note 266, at 713 n.175; *see also* Rosendo-Ramirez v. I.N.S., 32 F.3d 1085, 1093 (7th Cir. 1994) ("Immigration Judges apply the law of the circuit in which they sit.") (citation omitted).

an adverse ruling "in" one circuit while flouting it in another. By contrast, intracircuit nonacquiescence occurs when an agency declines to apply precedent from the court of appeals that will ultimately exercise judicial review over its actions.[271]

For those in thrall to the myth of circuit law, intercircuit and intracircuit nonacquiescence represent minor and major insubordination, respectively. Courts and commentators view intercircuit nonacquiescence as the less problematic form.[272] Yet it illustrates well the sway of the myth of circuit law. Though many agencies treat the rulings of the local regional court of appeals as binding, there are really only two reasons to do so, one that relies on the concept of circuit law and the other which is purely pragmatic. The pragmatic reason is harmless and easy to grasp: if the agency doesn't want to lose an appeal, it should toe the lines created by the appellate court's precedent. The alternative reason, the one that is internal rather than external to the law, relies on the myth of circuit law. If regional courts of appeals find, make, or apply their own bodies of substantive law within their borders, then agencies—like all persons—are bound by that law, unless and until it is modified by Congress or the Supreme Court. But that view is inconsistent with the Supreme Court's approach to conflicts between agency and circuit court interpretations of the same statute, illustrating once again that circuit law is mere myth.[273]

Meanwhile, courts see intracircuit nonacquiescence as much more problematic, but they do so only because they rely too much on the concept of circuit law. As Estreicher and Revesz put it

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271. *See, e.g.*, *Borton*, 734 F.2d at 510 ("The majority opinion of the Commission flatly rejected our view as expressed in [circuit precedent] . . . . This the Commission cannot do. [Circuit precedent] binds the Commission for cases reviewed in this circuit just as it binds this panel of judges. If the Commission wishes to change the rule, it must do so through rulemaking procedures, in which event those subject to the rule will have notice and an opportunity to comment. The Commission may not overrule a decision of this Court by an internal adjudicatory decision.").

272. *See* Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Acquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 643–44 (1991) ("Intercircuit nonacquiescence invokes no judicial hostility, in part because it mirrors the way courts themselves treat precedent from other circuits.").

273. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (upholding agency interpretation of its organic statute under Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), even though that interpretation conflicted with existing circuit precedent).

well, "From the perspective of the reviewing court, [agency] nonacquiescence appears to embody a claim that the agency is entirely free to disregard *binding law in the circuit*."[274] But that claim begs the question of whether precedent from the relevant court of appeals is "binding" on the agency's internal adjudication and rulemaking.

There are plenty of reasons to question whether that is so.[275] For example, the Supreme Court has held that the doctrine of offensive non-mutual issue preclusion—which bars a party from refuting an issue adjudicated against it in a prior case, even without complete mutuality of parties[276]—can never apply to the United States.[277] So circuit precedent cannot be binding in a preclusion sense. For that reason, even if an agency is likely to lose appeals before a circuit that has already ruled against it, the relative rarity of such appeals can make it attractive for the agency to "play for the rule" by engaging in nonacquiescence to win reversal down the road.[278] That is especially true where the courts of appeals have divided on an issue, increasing the odds of Supreme Court review.

Without the myth of circuit law, the pure fact of agency nonacquiescence looks different, and it becomes possible to assess

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274. Estreicher & Revesz, *supra* note 266, at 682 (emphasis added) (discussing the Social Security Administration).

275. *See* White, *supra* note 272, at 641 (arguing for wholesale rejection of the "law of the circuit" doctrine when confronted with agency nonacquiescence); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 831 n.2 (1990) (arguing that although "the decisions of a regional court of appeals" have legal effect, they "cannot compel an administrative agency exercising delegated congressional authority and responsible for the administration of a statute of national application to alter its internal decision-making processes in a manner contrary to agency policy before the legal system has come to rest in support of a nationally uniform rule").

276. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (holding that defendants in a securities fraud case could not re-litigate factual issues already determined in a separate suit).

277. *See* United States v. Mendoza, 464 U.S. 154, 162 (1984) ("We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case.").

278. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limit of Legal Change*, 9 LAW & SOC'Y REV. 95, 99–100 (1974) (arguing that repeat players in litigation enjoy a systematic advantage over "one-shotters" because they can "play for rules" in addition to "play[ing] the odds").

the tradeoffs of allowing such behavior.[279] That kind of nuanced analysis of agency nonacquiescence has shown that the practice can be defended in at least some circumstances.[280] Careful doctrinal analysis has established in a similarly persuasive fashion that nonacquiescence is not proscribed by traditional doctrines like stare decisis, due process, or the separation of powers, along with issue preclusion as described above.[281] And in many cases, upon weighing these considerations, agencies decide to acquiesce.[282] Thus the myth of circuit law reveals itself once again to be simply the partial overlap of several complex doctrines of former adjudication.[283]

III. THE IMPOSSIBILITY AND UNDESIRABILITY OF CIRCUIT LAW

The last part showed that the myth of circuit law has distorted many unrelated areas of federal law and sketched domain-specific arguments against relying on the concept of circuit

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279. *See, e.g.*, White, *supra* note 272, at 641 (noting the costs of barring agency nonacquiescence include forum shopping and a decrease in the uniformity of federal law).

280. *See* Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 528 (1986) ("The question whether nonacquiescence is legitimate or desirable can be resolved at a theoretical level only by reference to a prior choice between conflicting values. The decisionmaker must choose between conflicting values. The decisionmaker must choose between the perspective of the agency and that of the courts, between rule of law values and bureaucratic values. That value conflict pervades administrative law. Because the conflict has not been resolved in other contexts, it is unlikely to be resolved generally or permanently in the context of nonacquiescence."); *accord* Estreicher & Revesz, *supra* note 266, at 682 n.14 ("Rather than an open-ended choice between conflicting values, the proper treatment of nonacquiescence flows, we believe, from an understanding of the respective functions of agencies and courts in our administrative lawmaking system.").

281. *See* Maranville, *supra* note 280, at 499 ("None of these four doctrines provides a satisfactory response to nonacquiescence, however, because each doctrine applies only to a limited aspect of the nonacquiescence problem, and each doctrine can provide a resolution to the problem only after the decisionmaker chooses between judicial and agency perspectives on the problem.").

282. *See* White, *supra* note 272, at 644 & nn. 23–27 (collecting examples); *see also* Ins. Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957) ("It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.").

283. *See* White, *supra* note 272, at 642 (explaining that intracircuit agency nonacquiescence regards circuit precedent merely as law of the case).

law. This part takes the viewpoint of a higher level of generality and advances two theoretical arguments. First, the concept of circuit law is impossible to reconcile with prevailing views of the relationship between law and sovereign legal systems. In other words, in its stronger forms, the notion of circuit law is nonsensical. Second, and more functionally, this part argues that reliance on the concept of circuit law conflicts with the fundamental purposes of federal law.

A. DIFFERENT LAW IMPLIES A DIFFERENT LEGAL SYSTEM

This part draws upon leading theorists of philosophy of law and conflict of laws to argue that the notion of circuit law conflicts with our modern legal system. First, it points up agreement among unlikely jurisprudential bedfellows—Austin, Hart, and Dworkin—to emphasize how each thinker is committed to the idea that a body of law must be identified by reference to a discrete sovereign, legal system, or political community, rendering circuit law impossible under present conditions. Second, this part turns to bitter battles about conflict-of-laws theory to make a similar insight.

1. Rare Jurisprudential Convergence: Austin, Hart & Dworkin

To qualify as law, a set of rules must be linked to an identifiable sovereign, legal system, or political community.[284] Without this identity between law and politics, law reduces to norms and conventions.[285] This core insight helps illustrate why circuit

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284. *See* H.L.A. HART, THE CONCEPT OF LAW 49 (1961) ("[I]n every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms . . . [a] simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one."); JEREMY BENTHAM, OF LAWS IN GENERAL 1 (H.L.A. Hart ed., 1970) ("A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state . . . .") (emphasis in original).

285. *See* HART, *supra* note 284, at 49 ("Where [sovereignty] is present, we may speak of the society, together with its sovereign, as a single independent state, and we may speak of *its* law: where it is not present, we can apply none of these expressions, for the relation of sovereign and subject forms, according to this theory, part of their very meaning.") (emphasis in original); J. L. AUSTIN, LECTURES ON JURISPRUDENCE, OR, THE PHILOSOPHY OF POSITIVE LAW 121 (Robert Campbell ed., 1875) ("[E]very positive law is set by a given sovereign to a person or persons in a state of subjection to its author."); *see also id.* at 122 ("A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person

law is not real. Because federal intermediate appellate courts are each part of the same sovereign legal system, they cannot develop their own bodies of law.

The link between sovereignty and substantive law is essential even for legal philosophers who, like H.L.A. Hart, put less weight on the concept of sovereignty. A major point of departure between the earliest legal positivists like Austin and Bentham and their twentieth-century successors like Hart was the insight that the concept of law could not be built up from the idea of threats from a sovereign alone. While Austin maintained that positive law sprung from the commands of a sovereign habitually followed,[286] Hart argued that positive law was identifiable by reference to a socially determined rule of recognition.[287] Or, as Scott Shapiro paraphrased Jeremy Waldron, Austin "insisted that the sovereign makes all the rules," while "Hart argued instead that *the rules make the sovereign*."[288]

Yet Hart's now-dominant account of law depended on a discrete legal community that collectively determined authoritative legal rules. Put differently, Hart's key move was to complicate and make more plausible the concept of sovereignty as applied to modern legal systems. Indeed, we might simply say that Hart sought to replace the word "sovereignty" with the phrase "legal system," while retaining the essential feature that law runs out at the borders.[289] Hart's dependence on the notion of sovereignty is similarly evident in his treatment of international law, which he claimed lacked a unifying rule of recognition.[290] The relevant difference between Hart and Austin, then, is that they have different conceptions of sovereignty, *not* that Hart thought law

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or body which is its immediate chief, live in a state of subjection to one and the same sovereign.").

286. AUSTIN, *supra* note 285, at 120.

287. HART, *supra* note 284, at 92.

288. Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 235 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (emphasis in original).

289. *See* Shapiro, *supra* note 288, at 246 (noting that for Hart, "the content of a legal system is established by that system's rule of recognition"). *But cf. id.* at 247 (noting the difficulty of incorporating choice of foreign law into Hart's account).

290. HART, *supra* note 284, at 209; *see also id.* at 217 (arguing that sovereignty is a function of relationships of legal control, not the other way around); *id.* at 218 ("The question for . . . international law . . . is: what is the maximum area of autonomy which the rules allow to states?").

without sovereignty was possible.[291] Instead, Hart used his theory to illustrate why modern state legal systems are both supreme within their own domains and also independent of other legal systems.[292]

This common reliance on the notion of sovereignty extends to those who have sought to apply Hart's views to the specific case of the United States. Hart's theory requires that every legal system have a single rule of recognition, against which the validity of all legal claims can be tested.[293] Identifying the rule of recognition that legal actors in the United States take as authoritative is surprisingly difficult. Two difficulties that arise during that task are of particular relevance here: what is the relationship between the U.S. Constitution and the rule of recognition, and how much does the rule of recognition incorporate or refer to state law or state institutions.[294] Yet the extant attempts have one key feature: they include as part of the rule of recognition reference to only two types of sovereign law: federal law and state law.[295] None argue that federal judicial circuits have any

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291. *See, e.g.*, *id.* at 73 ("[T]he initial, simple conception of the sovereign has undergone a certain sophistication, if not a radical transformation.").

292. *See* Shapiro, *supra* note 288, at 243 ("Hart also showed that the secondary rules can be used to explain two properties shared by modern state legal systems: supremacy within a system's borders and independence from other systems."); *accord* HART, *supra* note 284, at 69 (noting that the independence of a legal system depends not on the existence of a "supreme legislator" who "is legally unrestricted or . . . obeys no other person habitually," but rather "that the rules which qualify the legislator [to issue valid laws] do not confer superior authority on those who have also authority over other territory").

293. *See* HART, *supra* note 284, at 97–107 (assuming a single rule of recognition).

294. *See, e.g.*, Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 631–32, 645–47 (1987) (addressing these two questions); *see also* Stephen V. Carey, Comment, *What Is the Rule of Recognition in the United States?*, 157 U. PA. L. REV. 1161, 1192–96 (including answers to these questions in a proposed statement of the rule of recognition).

295. *Cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 318 (1992) ("The territorial allocation of authority is too deeply embedded in our law to require justification. If territorial states are a bad idea, our laws must be amended to change the definitions and conceptions of states.").

role to play in determining, by themselves, what the rule of recognition or the supreme criterion of law is.[296]

We can make a similar claim about Ronald Dworkin, Hart's chief critic. Though Dworkin was no positivist, his theory of law was similarly committed to the idea that the limits of a legal system were determined by reference to identifiable political communities. For instance, Dworkin's ideal judge, Hercules, must decide hard cases not by reference to his own personal moral beliefs, but by reference to *community* morality.[297] As Dworkin's examples illustrate, the relevant "community" in the United States is the nation, rather than universal morality, and not individual judicial circuits. Of course, Hercules is limited by principles of vertical and horizontal stare decisis, but that is so because they are part of the substantive law of the United States, not because Hercules is applying substantive "circuit law."[298] Combining these ideas, then, we can say that Hercules includes consideration of precedent, including circuit precedent, in his legal reasoning because respect for precedent is part of the relevant community morality.[299]

Of course, Austin, Hart, and Dworkin do not exhaust the range of jurisprudential views about the nature of law. But as their views represent leading styles that often are in opposition, their convergence on the idea that a distinctive substantive law requires a distinctive sovereign, legal system, or community. And in each case, judicial circuits do not qualify.

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296. *See* Greenawalt, *supra* note 294, at 659–60 (including reference to the U.S. Supreme Court and state supreme courts, but not federal intermediate appellate courts); *see also* Carey, *supra* note 294, at 1192–94 (referencing only the U.S. Supreme Court and state supreme courts); *cf.* Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 288, at 95, 100–08 (making reference exclusively to the U.S. Supreme Court).

297. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 126–28 (1978) ("Hercules' theory of adjudication at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large.").

298. *See id.* at 117 (explaining how law-as-integrity includes concepts of vertical and horizontal ordering).

299. *Id.* at 115 ("Hercules must suppose that it is understood in his community, though perhaps not explicitly recognized, that judicial decisions must be taken to be justified by arguments of principle rather than arguments of policy.").

To illustrate the point, consider the paradigm cases of independent sovereigns: foreign nations and U.S. states. It is possible to speak of the law of France or Kenya, just as it is to speak of the law of Oklahoma or South Carolina. It is not similarly possible to speak of the law of Western Europe nor of East Africa, just as it is impossible to speak sensibly about the law of the Oklahoma panhandle nor of the Sea Islands, because none of those regions constitutes a separate sovereign.[300]

Because substantive law is linked with sovereignty in this way, we can use the limits of a sovereign's power to determine that body of law's scope.[301] More specifically, to identify two sets of legal rules as distinct bodies of substantive law, it is necessary and sufficient to identify distinct sovereigns. As a result, individual bodies of "circuit law" cannot be substantive bodies of law in the choice-of-law sense since each circuit is constituted by and exercises the power of the same sovereign: the United States.

2. Rare Theoretical Convergence: Formalists & Realists

Just as opposing legal philosophers have all relied on the link between a distinct legal system and a substantive body of law, so too have the leading theorists of conflict of laws. Horizontal and vertical choice of law both depend, as a theoretical matter, on the idea that different law requires a different legal system.

Horizontal Choice of Law. This bedrock principle of private international law is inscribed in our federal system along two axes: horizontal and vertical choice of law.[302] Horizontal choice of law is the question of which body of substantive law should govern a transborder dispute, and typically the choice is between the law of the state where the suit was first brought (forum law) or the law of the state where the events took place (law of the

300. *See* Rensberger, *supra* note 3, at 851 ("While [the choice between precedent from two different circuits] is not a choice of law problem in the traditional sense of choosing the law of a particular sovereign over the law of another distinct sovereign, it does require courts to choose between legal rules that reflect different *versions* of federal law."); *see also* Sturiale, *supra* note 3, at 476 (presenting the choice between "two or more *states'* or *nations'* laws" as the traditional choice-of-law problem).

301. *See* Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. L. REV. 1, 4 (1984) ("[A] single sovereign's laws should be applied equally to all . . . .").

302. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 23 U. PA. J. CONST. L. 2127, 2156 (2021) (delineating horizontal from vertical choice of law in the federal courts).

place).[303] But horizontal choice of law implicates a prior question: What are the candidates for substantive bodies of law among which choice of law rules must select?

Though this question was answered by each of the American Law Institute's first two Restatements of Conflict of Laws—which together memorialized bitter debates between legal formalists and realists—it is a rare point of agreement between those opposites.[304] To summarize reductively, the First Restatement in 1934 reflected the formalist, "vested rights" approach most associated with Joseph Beale, its principal drafter.[305] The First Restatement sought to ground choice of law rules in a view of sovereign power that was purely territorial.[306] Typically, the First Restatement approach leads to applying the law of the place where the events took place.[307] Naturally, then, the First Restatement linked substantive law to the boundaries of a particular state or nation, not any other political unit.[308]

One problem with the First Restatement approach is that it is not always possible to say exactly *where* a legal wrong took place, particularly as interstate activity became more common.[309] So as the world modernized and became more interconnected throughout the twentieth century, strict territoriality grew untenable.[310] Yet the First Restatement's formalism prevented the vested rights approach from adapting to changed circumstances.

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303. *See id.* at 2133–35 (describing horizontal choice of law as it relates to the *Erie* doctrine).

304. *Compare* RESTATEMENT (FIRST) OF CONFLICT OF L. (AM. L. INST. 1934) (exhibiting the tension between formalism and realism in producing a cohesive document), *with* RESTATEMENT (SECOND) OF CONFLICT OF L. (AM. L. INST. 1971) (exhibiting similar tensions and compromises as the previous Conflict of Laws Restatement).

305. *See* RESTATEMENT (FIRST) OF CONFLICT OF L. introduction note (AM. L. INST. 1934) (describing the primary role of Joseph Beale in drafting this restatement).

306. *See id.* §§ 1–2 (describing the jurisdiction, subject matter, and meaning of conflict of laws).

307. *E.g.*, *id.* (illustrating such a situation).

308. *Id.* § 3 ("As used in the Restatement of this Subject, law is the body of principles, standards and rules which the courts of a particular state apply in the decision of controversies brought before them.").

309. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (rejecting a territorial view of personal jurisdiction in favor of a more functional, flexible standard).

310. *See, e.g.*, *id.*

Unyielding formalist doctrine, blind to changing circumstances, is favorable terrain for legal realists, so it's no surprise that they were the first to draw blood from Beale and the First Restatement. Led by Walter Wheeler Cook, the legal realists argued that the study of conflicts of law should be a purely descriptive enterprise: "[W]e shall . . . focus our attention upon what courts have *done*, rather than upon the description they have given of the reasons for their action."[311] Any general rules that might stem from this descriptive project, he wrote, could "purport to be nothing more than an attempt to describe in as simple a way as possible the concrete judicial phenomena observed, and their 'validity' will be measured by their effectiveness in accomplishing that purpose."[312] To Cook, judges were like weird bugs, and legal realists were entomologists with magnifying glasses.[313]

Cook and the legal realists razed the vested-rights approach and the First Restatement to its foundations.[314] Brainerd Currie, about whom more in a moment, wrote that Cook had "discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another."[315] But because Cook's project was solely descriptive, it could never provide any advice about what conflict of laws rules *should* be.[316]

Brainerd Currie, no less an opponent of the vested-rights approach than Cook but also no legal realist, began the task of rebuilding conflict of laws. His work offered an alternative to both Beale's vested-rights approach and Cook's scientistic descriptive accounts. Currie's "governmental interest analysis" reoriented the focus away from territoriality and urged attention

311. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 460 (1924) (emphasis in original).

312. *Id.* at 460.

313. Indeed, Cook's early academic training was in the sciences, including reading for a doctorate in physics in Berlin. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 37 & 397 n.38 (1973). Similarly, Cook's realist fellow traveler, Roscoe Pound, had done early academic work involving "an elaborate taxonomy of Nebraskan plants." *Id.* at 23 & 393 n.55.

314. *See* Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 504–05 (2014).

315. BRAINERD CURRIE, *On the Displacement of the Law of the Forum*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 3, 6 (1963).

316. Roosevelt, *supra* note 314, at 505 (claiming that the realists had no theory to replace conflict of laws rules).

to the reasons a state adopted a particular law.[317] Most often, this approach led to applying the law of the forum state, but it sought to reduce the choice of law question to a question of interpretation.[318] Because of its focus on the interest of the forum state in applying its own substantive policies, the Second Restatement too linked substantive law to the extent of the sovereign's power.[319]

In short, the two Restatements reflected opposite legal theories at least as much as they reflected opposite views about conflict of laws. Yet despite their opposition, the Restatements agree on the key threshold question: what constitutes a body of substantive law for purposes of horizontal choice of law? The First Restatement's answer was that a body of "law" is a set of rules "which the courts *of a particular state* apply" when deciding cases.[320] The Second Restatement's version is a near carbon copy: a body of "law" is a set of rules "which the courts *of that*

317. *See* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1302 (1989) ("To resolve a choice of law question, the court should determine the policies expressed in the relevant laws, and then analyze how these policies are configured.").

318. *See, e.g.*, Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 266–68 (1958) (finding compromise among differing conflict of laws approaches).

319. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 1 (AM. L. INST. 1971) ("The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.").

320. RESTATEMENT (FIRST) OF CONFLICT OF L. § 3 (AM. L. INST. 1934) (emphasis added); *see also id.* § 1 ("No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states."); *id.* § 2 ("As used in the Restatement of this Subject, the word state denotes a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit.").

state apply" when deciding cases.[321] Even the draft Third Restatement toes a similar line.[322] A reporter's comment to the second subsection of the most recently published draft announces confidently that "[t]he world is composed of states having separate and differing systems of law."[323] The reason the three Restatements agree so deeply on this as they do on few other matters is because the link between sovereignty and a particular body of law is baked into the very notion of choice of law, which is embedded in our constitutional structure.[324]

Vertical Choice of Law. Unlike horizontal choice of law, which governs the selection of the substantive laws among two or more assumedly equal sovereigns, vertical choice of law asks whether to apply national or subnational—federal or state—law.[325] In that sense vertical choice of law is a problem unique to

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321. RESTATEMENT (SECOND) OF CONFLICT OF L. § 4 (AM. L. INST. 1971) ("As used in the Restatement of this Subject, the 'local law' *of a state* is the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts *of that state* apply in the decision of controversies brought before them.") (emphasis added); *see also id.* § 1 ("The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution."); *id.* § 3 ("As used in the Restatement of this Subject, the word 'state' denotes a territorial unit with *a distinct general body of law*.") (emphasis added); *id.* § 3 cmt. e ("As used in the Restatement of this Subject, the word 'state' is a generic term which covers any territorial unit with a distinct body of law, including a State of the United States.").

322. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 1.01 (AM. L. INST., Tentative Draft No. 1, 2020) ("As used in this Restatement, the word 'state' means a territorial unit with a distinct legal system and body of general law."); *see also id.* § 1.01 illus. f ("Territorial subdivisions of a state that lack distinct legal systems and bodies of general law, and hence are not themselves states, may be authorized to make laws that govern only within their boundaries. Certain state laws may apply only to particular locations or classes of persons. *Such personally or geographically limited laws are part of the law of the state for the purposes of this Restatement.*") (emphasis added).

323. *Id.* § 1.02 cmt. a ("The world is composed of states having separate and differing systems of law. While states are territorially bounded, human activity is not, and neither, necessarily, is state law.").

324. *See, e.g.*, U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

325. *See* Michael S. Green, *Vertical Power*, 48 U.C. DAVIS L. REV. 73, 75–77 (2014).

federal systems.[326] And our federalism has settled upon vertical choice of law rules so intricate they take on a baroque or even rococo style.[327]

Like its orthogonal counterpart, vertical choice of law in the United States also reflects an understanding that only sovereigns have law.[328] And because our system of vertical choice of law has a constitutional dimension, it is an important touchstone in understanding whether there is any such thing as circuit law.[329]

Consider *Erie Railroad Co. v. Tompkins*, the fountainhead of modern American vertical choice of law.[330] As it is taught in first-year civil procedure, *Erie* and its progeny tell federal courts which body of substantive law to apply when adjudicating non-federal claims.[331] *Erie* itself stands for the somewhat more limited proposition that a federal court, sitting in diversity, must apply state substantive law—including the decisional law of the state's courts.[332] Because Justice Brandeis's opinion in *Erie* cast the question in a constitutional light, however, the Erie doctrine has implications for the argument here.[333]

We remember *Erie* for its confident and pithy declaration: "There is no federal general common law."[334] Yet it is often overlooked that Justice Brandeis's famous elegy for the "brooding omnipresence" of general law was offered in support, not of *Erie*'s statutory holding—that the Rules Enabling Act required federal courts sitting in diversity to obey state judges' interpretations of

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326. *See id.*

327. *See, e.g.*, *id.* (presenting the issue of state civil procedure in federal courts).

328. *See id.*

329. *See id.* (recognizing the constitutional problems inherent in our vertical choice of law federal system).

330. 304 U.S. 64 (1938).

331. *See generally id.* In John Hart Ely's formulation, there are two Eries: *Erie* and Erie, the case and the larger idea. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 700 (1974) ("'Erie' is really about several things, or at least so this Article will argue.").

332. *Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

333. *See id.* at 78 ("And no clause in the Constitution purports to confer such a power [to declare substantive rules of common law applicable to the states] upon the federal courts.").

334. *Id.*

state law—but in support of its constitutional holding.[335] Though commentators have bemoaned the obscurity of *Erie*'s constitutional logic, its structure is straightforward.[336]

That constitutional holding, essential to modern American judicial federalism, can take the following syllogistic form:

1) Congressional lawmaking is limited to the powers enumerated in the Constitution[337];
2) The Constitution's scheme for the separation of powers contemplates that Congress has the lawmaking power, including the power to define the jurisdiction of federal courts;
3) As a result of 1 and 2, the federal judiciary has no lawmaking power beyond what the Constitution gives to Congress and Congress gives to the judiciary;
4) The doctrine of *Swift v. Tyson*—the case *Erie* overruled—authorized federal courts to develop substantive law outside the federal government's constitutionally enumerated lawmaking powers, in violation of principle 3 above; ergo
5) The doctrine of *Swift v. Tyson* is unconstitutional. QED.

In other words, *Erie* recognized that judges are constrained to apply and interpret law validly created by an authority constitutionally vested with lawmaking power. With state law, that means federal judges are bound by state constitutions, statutes, regulations, and judicial decisions. With federal law, it means

335. *Id.* at 77–78.

336. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3 & n.161 (7th ed. 2016) ("The constitutional basis for the *Erie* decision has confounded scholars.").

337. *See Erie*, 304 U.S. at 78–80. Of course, in 1938, the *Erie* Court stood at the crest of a sea change in the scope of Congress's lawmaking powers under Article I. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47–49 (1937) (declaring constitutional the Wagner Act and abolishing fine-grained distinctions between economic activity under the Commerce Clause); *accord* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (representing the shift from the *Lochner* Court to the New Deal consensus). But regardless of how extensive that power came to be, the principle that the judiciary could not create substantive law in areas where Congress could not either remained. *See Erie*, 304 U.S. at 78; CHEMERINSKY, *supra* note 336, § 6.1 (accepting this as a lasting standard).

that federal judges must rest their grounds of decision on the federal constitution, statutes, treaties, and regulations.[338]

Justice Brandeis thus grounded *Erie* as a constitutional matter in the principle this section seeks to establish: that substantive law must be identified by reference to a legitimate sovereign.[339] To prove his point, Justice Brandeis channeled the ghost of Justice Holmes: "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[340] For federal courts to create, interpret, find, or apply substantive law, they must trace it to a valid act of lawmaking.[341] Because our federal constitutional order—unlike every state's constitutional order—does not give judges the power to create new substantive law independently from a putative act of interpretation, federal judges are constitutionally prohibited from creating their own bodies of substantive law.[342] Instead, they are bound to interpret and apply either state law or federal law traceable to valid legislation or the Constitution.

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338. Even after *Erie*, there remain limited enclaves of federal common law. *See* CHEMERINSKY, *supra* note 336, § 6.1 (summarizing these enclaves, which include "the rights and duties of the federal government, international law, conflicts among the states, and admiralty."); *cf.* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1010 (1985) ("There was no coherent concept in the early nineteenth century of 'federal common law' as we now make use of that expression.").

339. *See Erie*, 304 U.S. at 78.

340. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting), *superseded by statute*, Act of July 25, 1988, Pub. L. No. 85-554, 72 Stat. 415 (codified as amended at 28 U.S.C. §§ 1331–1332), *as recognized in* Hertz Corp. v. Friend, 559 U.S. 77 (2010)). It is no accident that Justice Brandeis quoted liberally from Justice Holmes's solo dissent in *Black & White Taxicab*: that earlier case had laid bare the incentives litigants had to engage in vertical forum shopping under the rule of Swift v. Tyson, 41 U.S. 1 (1842). *See Erie*, 304 U.S. at 73 (noting that "[c]riticism of the doctrine [of *Swift*] became widespread after the decision of *Black & White Taxicab Co.*").

341. *See Erie*, 304 U.S. at 78.

342. This is not to deny that judges have great power to shape the law, including by creating federal common law. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986) (arguing that the judicial power to craft federal common law is wider than commonly believed). But that federal common law was assumed, even by Professor Field, to be national and uniform in its character. *See id.* at 962 ("[F]ederal rules will be made when there is a need for national uniformity . . . or when national interests require."); *id.* at 953 ("A dominant consideration [in choosing between state and federal common law] is whether there is a need for a uniform national rule.").

The *Erie* principle also implies that federal intermediate appellate courts cannot make their own bodies of substantive law any more than *any* federal court can make substantive law after *Erie*.[343] Of course, the line between interpretation and lawmaking is fuzzy, and cases when judges seem to craft new substantive law out of whole cloth with barely a reverent nod in the direction of text are innumerable even after *Erie*. Yet *Erie* and its progeny reflect a shared principle—even if it is not universally followed—that disagreement about the meaning of federal law is disagreement about interpretation, not about policy alone.

B. FEDERAL LAW ABHORS DISUNIFORMITY

Even if it made sense to talk of circuit law in the strong sense, it would be undesirable to do so because it would undermine a key purpose of federal law: uniformity. Just as the federal executive and legislative branches were meant to create unitary actors capable of addressing nationwide problems, so too was federal law and the federal judiciary designed to create national uniformity.[344] This is evident from Article III's various bases of federal subject-matter jurisdiction, as well as Article I, Section 8's grant of Congress's enumerated powers—each of which at least arguably addresses an area where national uniformity is particularly important.[345]

We can see the desire for uniformity in the very existence of a Supreme Court, whose most important function is to ensure the uniformity of federal law.[346] The alternative—leaving to

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343. *See Erie*, 304 U.S. at 78.

344. *See* U.S. CONST. art. I, § 8; *id.* art. III (endowing broad powers in national governmental actors).

345. *See id.* art. III; *id.* art. I, § 8.

346. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1578 (1833) (attributing to the need for uniformity the choice to give ultimate appellate jurisdiction to the Supreme Court rather than to Congress); *see also id.* § 1591 ("The constitution itself would or might speak a different language according to the tribunal, which was called upon to interpret it; and thus interminable disputes embarrass the administration of justice throughout the whole country."); *id.* § 1636 ("The same reasoning applies with equal force to 'cases arising under the laws of the United States.' In fact, the necessity of uniformity in the interpretation of these laws would of itself settle every doubt, that could be raised on the subject." (quoting U.S. CONST. art. III, § 1)). Justice Story drew on William Paley's writings for these assertions. *Accord* WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 355–56 (Liberty Fund 2002) (1785) ("This constitution is necessary for two purposes:

state supreme courts the task of determining the authoritative meaning of federal law—"is a hydra in government, from which nothing but contradiction and confusion can proceed."[347] For these reasons, Justice Story exalted uniformity as the chief aim of federal law.[348] Without "necessity," he wrote, the "public mischiefs" that would follow "would be truly deplorable."[349] Chief Justice Marshall similarly noted "the necessity of uniformity."[350]

Because the myth of circuit law entails treating long-term disagreements among the circuits as to the meaning of federal law as unproblematic, the myth conflicts with the purposes of federal law.[351] There is no reason for federal law to accommodate a concept that questions the importance of its primary job.[352]

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to preserve an [sic] uniformity in the decisions of inferior courts, and to maintain to each the proper limits of its jurisdiction. . . . A common appellant jurisdiction, prevents or puts an end to this confusion.").

347. THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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

349. *Id.* at 347–48; *see also* STORY, *supra* note 346, § 1569 ("The idea of uniformity of decision by thirteen independent and co-ordinate tribunals (and the number is now advanced to twenty-four) is absolutely visionary, if not absurd. The consequence would necessarily be, that neither the constitution, nor the laws, neither the rights and powers of the Union, nor those of the states, would be the same in any two states. And there would be perpetual fluctuations and changes, growing out of the diversity of judgment, as well as of local institutions, interests, and habits of thought." (citing *Martin*, 14 U.S. (1 Wheat.) at 345–49)).

350. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416 (1821).

351. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38–41 (1994) (discussing "'uniformity' values"); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17, 40 (1981) (counting as a downside of proposals to selectively strip Supreme Court jurisdiction the possibility that, "[w]ith the courts of fifty states ruling independently on the constitutionality of challenged federal programs, the frequent result would be chaos of a magnitude that we have thus far been unable to produce in our legal system").

352. The agreement that federal law is supposed to be uniform is not itself uniform. *Compare* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 114–24 (2009) (characterizing uniformity among the federal courts as a myth), *with* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569–72 (2008) (recognizing this lack of uniformity and disagreeing with the problem that it poses). But Seinfeld's argument is that there are limits on the ability of lower

And uniformity is linked to the animating purpose of federal law. Judge Friendly called uniformity "the most basic principle of jurisprudence."[353] The weight of commentary supports the existence of a fundamental link between federal law and the need for uniformity.[354] Federal law's connection to uniformity is bound up with the institution of the Supreme Court and its systemic role.[355] Indeed, the uniformity value in federal law runs so deep that to violate it challenges fundamental fairness.[356]

And yet the myth of circuit law fundamentally undermines the uniformity of federal law. As Judge Friendly put it fifty years ago, the concept of circuit law leads the courts of appeals to "become increasingly ingrown or, if one prefers a less pejorative term, self-contained."[357] Matters have not improved in the in-

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federal courts to achieve uniformity in *absolute terms*, not whether it is desirable for federal law to aim at uniformity on the margin. See Seinfeld, *supra*, at 114–15. And Frost's critique is leveled most squarely at the idea that circuit splits are inherently bad. *See* Frost, *supra*, at 1630–39. That critique therefore concerns how long circuit splits linger at least as much as it does the fact of intercircuit disagreement. *See id.* Indeed, one of Professor Frost's predictions is that, if the Supreme Court were to stop focusing on resolving circuit splits, outlier circuits would have less power, not more. *See id.* at 1638. In any event, as Professor Frost notes, her argument is both counter-intuitive and unique in the literature. *See id.* at 1570, 1639.

Similarly, Justice Stevens noted that the Court's slavish pursuit of absolute uniformity in federal law is an "ungovernable engine." Michigan v. Long, 463 U.S. 1032, 1070 (1983) (Stevens, J., dissenting). But Justice Stevens was referring to the Court's attempts to impose uniformity in the application of federal law by *state* courts, even when the state courts may have been relying as much on state law as on federal law. *See id.* at 1065–66.

353. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

354. *See* Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 541 (2010) (collecting authority). *But see id.* at 540–41 & nn.23–29 (collecting contrarian views).

355. *See* Eugene Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951, 952 (1973); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and National Law*, 82 HARV. L. REV. 542, 543, 551–52 (1969).

356. *See, e.g.*, O'Connor, *supra* note 301, at 4 ("[A] single sovereign's laws should be applied equally to all . . . ."); *cf.* Stephen E. Sachs, *Originalism as Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 861 (2015) ("We might talk about a particular search-and-seizure ruling as 'the law of the Fourth Circuit,' but we don't actually think that the Fourth Amendment requires different things in Maryland than it does in Delaware.").

357. Friendly, *supra* note 6, at 413.

terim, despite plausible proposals designed to address the problem.[358] And because it is so inimical to federal law's core purpose, the myth of circuit law has had mainly ill effects on the development of federal law. In sum, the concept of circuit law is not just incoherent, it's also a bad idea.

CONCLUSION

Let us conclude by unmasking the villain of the story: the myth of circuit law. That notion is simply an illusion created by the complex interplay of doctrines like stare decisis, preclusion, and law of the case, combined with the historical development of regional judicial circuits.[359] As the First Circuit has made explicit, "law of the circuit doctrine . . . is a 'subset of stare decisis.'"[360] It is also "one of the sturdiest 'building blocks on which the federal judicial system rests.'"[361] Yet we can accommodate all the understandable instincts that give rise to the myth of circuit law without taking on the baggage of this fiction. All we must do is look past the illusion to the underlying messy reality.

This is not simply about using the right terms. Close attention exposes the real tradeoffs that courts must make all the time, even as they are shrouded behind talk of "circuit law." These are deep choices with real consequences. Should courts favor judicial economy or accuracy? Should they prize fair notice or accountability? By removing the smokescreen of a legal fiction, courts can ensure they're transparently asking the right question: what is the best understanding of federal law?

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358. *See, e.g.*, Sassman, *supra* note 3, at 1451–54 (proposing that the circuits relax the law of circuit doctrine in conflict cases); Hruska Commission Report, *supra* note 9 (proposing a National Court of Appeals).

359. These doctrines do not always sit easily alongside one another. *See, e.g.*, Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565 (2017) (exploring some due-process-related tensions between the doctrines of preclusion and stare decisis).

360. United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018) (quoting San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010)).

361. *Id.* (quoting *San Juan Cable*, 612 F.3d at 33).