

Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals

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INTRODUCTION

For decades, the United States courts of appeals have faced increasing caseloads that now are widely recognized as a threat to the courts' ability to dispense consistent and timely justice.¹ At the same time, the United States Supreme Court has significantly reduced the number of cases it decides.² One consequence of these concurrent trends has been an increase in the number of unresolved "circuit splits"—cases in which two or more courts of appeals have decided the same legal issue differently.

Circuit splits undermine the uniformity, consistency, and predictability of federal law.³ They result in situations where litigants obtain different outcomes under the same federal law merely because of the geographic location where their case is decided. The issue of circuit splits has been so widely regarded as a threat to the fair and consistent distribution of justice that it has been the focus of numerous reform efforts.⁴ For instance, congressional commissions have recommended major overhauls of the structure of the federal courts—such as establishing a new layer of appellate court⁵ or creating an "inter-circuit tribunal"⁶—largely to minimize the number and impact of circuit splits.⁷

These proposals, however, failed to gain traction and now largely have fallen by the wayside.⁸ Perhaps they were too politically difficult to effectuate,

1. See JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS* 1 (2002); Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 *STAN. L. & POL'Y R.* 57, 59 (2016).

2. See discussion *infra* Part I.B.

3. See Evan Bernick, *The Circuit Splits Are Out There—and the Court Should Resolve Them*, 16 *ENGAGE* 2 (2015); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *TEX. L. REV.* 1, 38 (1994) ("Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process."); Henry J. Friendly, *Indiscretion About Discretion*, 31 *EMORY L.J.* 747, 758 (1982) (referring to the uniform application of law as "the most basic principle of jurisprudence"); Joseph F. Weis, Jr., *The Case for Appellate Court Revision*, 93 *MICH. L. REV.* 1266, 1269 (1995) (calling "federal law uniformity" a "fundamental concept").

4. The Hruska Commission, for instance, advocated for the establishment of the National Court of Appeals in part because of the risks circuit splits pose to the uniformity of federal law. See U.S. COMM. ON REVISION OF THE FED. COURT APP. SYS., *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 5–10* (1975) [hereinafter *HRUSKA*].

5. For instance, the National Court of Appeals.

6. An inter-circuit tribunal, as described by Judge Carl McGowan of the D.C. Circuit, is a "temporary court with an experienced judge from each circuit [that would] receive and dispose of . . . referrals as the Supreme Court [would] choose[] to make." See Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 *CALIF. L. REV.* 789, 829 (2020) (referencing Carl McGowan, *The View from an Inferior Court*, 19 *SAN DIEGO L. REV.* 659, 670–71 (1982)).

7. See *id.* at 822–23, 825–27, 828–30 (discussing Congress's failed attempt to enact the inter-circuit tribunal in 1970 and to establish the National Court of Appeals, among other reforms designed to "resolve more circuit splits that breed litigation").

8. The Intercircuit Tribunal and the National Court of Appeals have not, for instance, been established and are no longer under serious consideration by Congress. For years, scholars and judges have continued to propose new methods of addressing circuit splits, but without success. See *id.* at 828–31.

or they suggested changes too substantial and revolutionary. Yet the same caseload trends that gave rise to these proposals continue unabated. The federal appellate courts face the highest caseloads in their history, while the Supreme Court heard fewer cases in the 2018-2019 Term than in almost any other Term in modern times.⁹ This combustible combination renders circuit splits more likely to arise and remain unresolved.

Because of the political and other challenges of judicial reform, real change may need to take a more gradual, evolutionary approach that would enable the courts of appeals themselves, as they are currently structured, to minimize and resolve circuit splits.¹⁰ This Article proposes one such solution that adapts for inter-circuit use procedures that many courts of appeals already have adopted to prevent “intra-circuit splits”—that is, disagreements between or among panels within the same court.¹¹

The D.C. Circuit has implemented one such intra-circuit procedure, referred to as the “*Irons* procedure” after the case in which the court adopted the process.¹² Implemented in the early 1980s, the procedure allows a panel of the court, under certain circumstances, to seek the entire D.C. Circuit’s approval to publish an opinion that overrules existing circuit precedent without convening a formal en banc hearing.¹³ If approved, the panel states in a footnote that the full court agrees with the panel’s decision, thereby overruling precedent on the issue.¹⁴

The *Irons* procedure could serve as a model for a similar inter-circuit procedure to resolve, and even to prevent, inter-circuit splits. Like panels of the D.C. Circuit in an *Irons* case, a panel from one circuit could seek informal approval from a different circuit court with which its forthcoming decision will disagree.¹⁵ That approval would change the precedential effect of the other circuit, thus avoiding a circuit split. If the other circuit declines the invitation to alter its law, the circuit split would be highlighted and clarified, signaling to the Supreme Court that a circuit split may be presented adequately for its consideration.

9. SUPREME COURT CASELOADS, 1880–2015, FED. JUDICIAL CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015/> [<https://perma.cc/7XEM-TME9>]. See *infra* note 39 for further discussion.

10. See Cohen, *supra* note 1, at 221 (concluding, based on an empirical study of courts of appeals, that “courts can best be served by slowly adopting relatively small changes”).

11. See Amy E. Sloan, *The Dog that Didn’t Bark: Stealth Procedures and the Erosion of Stare Decis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 713–17 (2009).

12. See D.C. CIR. CT. OF APPEALS, POLICY STATEMENT ON *EN BANC* ENDORSEMENT OF PANEL DECISIONS (1996) (hereinafter “POLICY STATEMENT”); Sloan, *supra* note 11, at 734–35. See also *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981) (holding that an en banc decision resolving a conflict constituted the law of the circuit).

13. POLICY STATEMENT, *supra* note 12.

14. *Id.*

15. See discussion *infra* Part III.

Such a reform is not without potential controversy. An inter-circuit *Irons* procedure raises serious questions about the courts' jurisdiction and the potential for impermissible advisory opinions.¹⁶ The proposed process also raises practical questions about the impact it would have on the appellate courts' workload, as well as equitable concerns regarding the role of litigants and judicial collegiality.¹⁷ If these hurdles can be overcome, however, the proposed process may provide an efficient means to minimize circuit splits without a major restructuring of the federal judiciary.

Part I of this Article discusses the problems circuit splits pose and how the circuit courts' growing caseloads, combined with the Supreme Court's shrinking docket, are perpetuating the potential for increasing circuit splits. Part II discusses the informal en banc procedures currently in place in the courts of appeals. Part III provides an overview of a proposal to adapt the *Irons* procedure to prevent and resolve inter-circuit splits. Part IV considers some key obstacles to adopting this proposed approach and suggests mechanisms to overcome these challenges.

I.

CIRCUIT SPLITS AND THE PROBLEMS THEY POSE

Numerous scholars, legal organizations, and even some judges have warned of an urgent need to address the increasing caseloads borne by the circuit courts.¹⁸ Some observers have characterized the rising federal caseloads as a "caseload crisis."¹⁹ One aspect of this "crisis" is the concern that larger caseloads will result in more significant and enduring circuit splits.

A. *The Growth and Persistence of Circuit Splits*

As the courts' caseloads continue to grow, the opportunity for circuit splits grows too. Indeed, there is good reason to believe that the number of circuit splits, including splits in areas of enormous consequence, is also increasing.²⁰

16. See *infra* Part IV.A.

17. See *infra* Part IV.C.

18. See Lavie, *supra* note 1, at 59. See also AM. BAR ASS'N, JUDICIAL VACANCIES (2019). In June 2018, the chief judge of the Eastern District of California and other judges of that court issued a letter "to provide notice of a current crisis and an upcoming exacerbation of that crisis that will have serious and catastrophic consequences if left unaddressed." The judges asked the members of Congress who represent the Eastern District of California to introduce a bill establishing five new judgeships. See Letter from Chief Judge Lawrence J. O'Neill to Members of the Senate and the House of Representatives of California (June 19, 2018), <http://www.caed.uscourts.gov/caednew/assets/File/Judgeship%20Letter%20June%202018.pdf> [<https://perma.cc/H4WF-MNA2>].

19. Lavie, *supra* note 1, at 59 n.7.

20. As Menell and Vacca have noted, scholars have debated this point. See Menell & Vacca, *supra* note 6, at 868–69. For example, after reviewing certiorari petitions filed in the early 1970s, Professor Gerhard Casper and Judge Richard Posner argued that about 1 percent of the petitions the Supreme Court declined to review concerned a circuit split. See GERHARD CASPER & RICHARD A. POSNER, THE WORKLOAD OF THE SUPREME COURT 89 (1976). Similarly, Professors Samuel Estreicher

This outcome is compounded by the Supreme Court's shrinking docket²¹ and amplified by the Court's recent trend of declining to resolve circuit splits.²²

Over at least the last three decades, the circuit courts' caseloads have grown massively. Between 1990 and 2017, new filings in federal circuit courts ballooned from 40,893 to approximately 59,000, an increase of approximately 44 percent.²³ From 2016 to 2017 alone, the circuit courts' new filings increased by about 10 percent.²⁴ In 2018, the number of filings for circuit courts dropped by 16 percent, but still amounted to 49,363 cases, nearly 15,000 more filings than in 1990.²⁵

In 1990, Congress enacted the Judicial Improvements Act, which created sixty-nine new district court judgeships and eleven circuit court judgeships.²⁶ Since 1990, the Judicial Conference of the United States ("Judicial Conference") has repeatedly asked Congress to establish new judgeships.²⁷ For instance, the Judicial Conference recommended the creation of twelve additional permanent circuit court judgeships in 1997.²⁸ It made similar requests in 1999,²⁹ 2003,³⁰

and John Sexton concluded that, in 1982, the Supreme Court denied certiorari in only twelve cases that presented "intolerable" circuit splits. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 779 (1984). Professor Arthur Hellman, on the other hand, has argued that dozens of meaningful circuit splits have persisted. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 705–07 (1995). Ultimately, Menell and Vacca showed that, mathematically, there has very likely been a material increase even in "intolerable" splits since Estreicher and Sexton's study of the 1982 docket. Menell and Vacca, *supra* note 6, at 872–73.

21. See discussion *infra* Part I.B.

22. See *id.*

23. See FEDERAL JUDICIAL CASELOAD STATISTICS (2017), U.S. COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017/> [<https://perma.cc/7PFT-JHD5>]; JUDICIAL FACTS AND FIGURES, U.S. COURTS 6 (2010) https://www.uscourts.gov/sites/default/files/statistics_import_dir/alljudicialfactsandfigures.pdf [<https://perma.cc/WQ87-5BH8>].

24. FEDERAL JUDICIAL CASELOAD STATISTICS, *supra* note 23.

25. *Id.*

26. See Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089.

27. The Judicial Conference is the policy-making body for the federal judiciary. See ABOUT THE JUDICIAL CONFERENCE, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference/> [<https://perma.cc/BS9E-JWC7>].

28. See JUDICIAL CONFERENCE SEEKS NEW JUDGESHIPS TO HANDLE GROWING WORKLOADS AT ALL LEVELS, U.S. COURTS (Mar. 11, 1997), <https://www.uscourts.gov/news/1997/03/11/judicial-conference-seeks-new-judgeships-handle-growing-workloads-all-levels/> [<https://perma.cc/F8LK-ERMC>].

29. See JUDICIAL CONFERENCE SEEKS NEW JUDGESHIPS - ADEQUATE COMPENSATION FOR JUDGES AND OTHERS, U.S. COURTS (Mar. 16, 1999), <https://www.uscourts.gov/news/1999/03/16/judicial-conference-seeks-new-judgeships-adequate-compensation-judges-and-others/> [<https://perma.cc/6TRS-RCZ7>].

30. See JUDICIAL CONFERENCE ASKS CONGRESS TO CREATE 57 NEW JUDGESHIPS, U.S. COURTS (Mar. 18, 2003), <https://www.uscourts.gov/news/2003/03/18/judicial-conference-asks-congress-create-57-new-judgeships/> [<https://perma.cc/9TTC-BNCS>].

2007,³¹ 2016,³² 2017,³³ and 2019.³⁴ Congress has not acceded to any of these requests.

The increasing growth of cases before the federal judiciary over the last thirty years has likely resulted in more circuit splits. As the federal judiciary's caseload grows, the risk of circuit splits rises as more opportunities arise for judges to decide cases differently. At the same time, the Supreme Court has reduced its own caseload, decreasing the number of circuit splits it resolves. In 1990, the last time Congress enacted a judicial reform bill, the Supreme Court granted petitions in 141 cases.³⁵ By 2000, the Supreme Court granted petitions in only ninety-nine cases.³⁶ Since then, it has averaged close to eighty grants per year, but granted as few as sixty-six in 2011.³⁷ Last year, the Supreme Court had seventy-seven cases on its docket, not many more than one-half the number of petitions for which it granted certiorari in 1990.³⁸ In fact, seventy-seven is among the lowest number of cases considered by the Supreme Court in several decades.³⁹

The Supreme Court theoretically could reduce its total caseload while still resolving more circuit splits if it focused on cases that present circuit splits. There are circuit splits in many areas of federal law, so there is no dearth of opportunity.⁴⁰ The Supreme Court, however, has not appeared to have increased the ratio of circuit split cases to the other cases on its docket.⁴¹ To the contrary,

31. See FEDERAL JUDICIARY SAYS NEW JUDGESHIPS NEEDED, U.S. COURTS, (Mar. 13, 2007), <https://www.uscourts.gov/news/2007/03/13/federal-judiciary-says-new-judgeships-needed/> [<https://perma.cc/58KS-6CNQ>].

32. See JUDICIAL CONFERENCE APPROVES PRISONER CASE FILING AND JUDGE ASSISTANCE PILOT PROGRAM, U.S. COURTS (Sept. 13, 2016), <https://www.uscourts.gov/news/2016/09/13/judicial-conference-approves-prisoner-case-filing-and-judge-assistance-pilot/> [<https://perma.cc/7ZA8-ZG33>].

33. See JUDICIAL CONFERENCE ASKS CONGRESS TO CREATE NEW JUDGESHIPS, U.S. COURTS (Mar. 14, 2017), <https://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships/> [<https://perma.cc/M8S2-X9PP>].

34. See JUDICIAL CONFERENCE APPROVES PACKAGE OF WORKPLACE CONDUCT REFORMS, U.S. COURTS (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms/> [<https://perma.cc/Q9DB-JHMN>].

35. FEDERAL JUDICIAL CASELOADS, 1789–2016, FED. JUDICIAL CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015/> [<https://perma.cc/H6N3-4U2N>].

36. *Id.*

37. SUPREME COURT CASELOADS, *supra* note 9. See also 2018–2019 Term, OYEZ, <https://www.oyez.org/cases/2018/> [<https://perma.cc/ND2N-MDXN>] (listing the seventy-seven cases for which the Supreme Court granted a writ of certiorari during the 2018–19 Term).

38. See SUPREME COURT CASELOADS, *supra* note 9.

39. The Court heard seventy-five cases in 2007 and 2014. From 1970–2007, the Court heard more than seventy-seven cases. *Id.*

40. See Hellman, *supra* note 20, at 729.

41. During the 1983 to 1985 Terms, the Supreme Court gave plenary review to 339 cases. Of those, 151 cases presented circuit splits (approximately 44.5 percent of the Court's docket). During the 1993 to 1995 Terms, the Supreme Court gave plenary review to 192 cases. Of those, 132 cases (68.7 percent of the docket) presented a circuit split. The Court heard slightly more cases from 2003–2005, a total of 204, but the number of cases that presented a split declined to 122, or 59.8 percent of the docket. Rather than continuing to increase the ratio of the cases it hears that present circuit splits, as it did in the

the Court appears to have denied review in more and more cases in which circuit splits appear to be present and significant.⁴² Moreover, the Court has left unresolved circuit splits in important and numerous areas of federal law.⁴³ Even if the Court changed course and shifted most of its focus to cases that present circuit splits, it might be unwilling or unable to hear enough cases to meaningfully reduce the number of circuit splits.⁴⁴

The federal circuit courts have received between nearly fifty thousand and sixty thousand new filings each year for most of the twenty-first century, while the Supreme Court has reduced its already small caseload to roughly eighty petitions granted per year.⁴⁵ These two trends create a heightened risk that more circuit splits will endure unresolved.

Unable to rely on the Supreme Court to substantially reduce the number of circuit splits, federal circuit courts may need a different avenue for reform. To this end, some advocates have proposed structural changes to the judiciary, such as creating a new appellate court between the courts of appeals and the Supreme Court.⁴⁶ Others argue for splitting circuits to keep circuits at a number of judges they perceive as more manageable,⁴⁷ while still others point out that increasing the number of circuits would increase the potential for more circuit splits.⁴⁸ Despite concerns over a caseload crisis and requests from some reformers and federal judges themselves, Congress has not passed comprehensive judicial reform legislation or taken any meaningful steps to address the burgeoning caseloads, much less the persistence or growth of circuit splits.⁴⁹ There is little sign that Congress will find the elusive bipartisanship necessary to enact another reform bill that makes major structural changes to the federal judiciary in the near future.⁵⁰

1990s, the Supreme Court reversed course in the mid-2000s. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 982–84 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES* (2006)).

42. See Bernick, *supra* note 3.

43. *Id.*; See *infra* Part II.B for examples.

44. According to Professor Hellman, forty of the circuit splits present during the Supreme Court's 1984–1985 Term were still present nearly one decade later. His study is illustrative of the Supreme Court's limited capacity to resolve circuit splits. See Hellman, *supra* note 20, at 792.

45. See SUPREME COURT CASELOADS, *supra* note 9.

46. HRUSKA, *supra* note 4, at 5.

47. See PAUL D. CARRINGTON, *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* 7 (1968).

48. See, e.g., Mary M. Schroeder, *Jim Browning as a Leader of Judges: A View from a Follower*, 21 ARIZ. ST. L.J. 3, 7 (1989) (quoting Chief Judge Browning to explain that “fragmentation of the circuits” would result in “increased conflict in circuit decisions” and “a growing burden on the Supreme Court”).

49. There has been no shortage of attempts. See Cara Bayles, *In a Timely Manner: Three Decades of Judgeship Bills*, LAW360 (Mar. 19, 2019), <https://www.law360.com/articles/1140612/> [<https://perma.cc/RUB4-29HX>].

50. See AM. BAR ASS'N, *supra* note 18 (noting that partisanship has played a historical role in preventing reform).

B. *The Problems Circuit Splits Pose*

As circuit splits increase, the threats they pose to the administration of justice in a federal system also increase. By threatening the consistency of federal law across circuits, splits create five well-recognized problems.

First, circuit splits create uncertain and disparate applications of federal legal rights. Circuit splits exist in numerous areas of federal law, ranging from constitutional law to debt collection⁵¹ to communications law⁵² and beyond. For instance, the Second, Fourth, and Seventh Circuits have held or assumed for the sake of the case before them that the Second Amendment of the U.S. Constitution permits residents of New York, Maryland, and Illinois to carry handguns outside of the home for the purpose of self-defense.⁵³ Conversely, the Third Circuit has construed the same constitutional provision not to guarantee residents within its jurisdiction the same right.⁵⁴ Thousands of people live in Pennsylvania, but work in New York.⁵⁵ This circuit split raises significant concerns as to whether the “right to bear arms” affords different rights to different citizens based on their geography.⁵⁶

Second, circuit splits cause the same federal law to impose different burdens or limitations on government actors based on those actors’ location. For example, the Fifth Circuit has held that the Commerce Clause of the U.S.

51. Raymond Kim et al., *High Court FDCPA Case Faced Uphill Battle from the Start*, LAW360 (Oct. 21, 2019), <https://www.law360.com/articles/1210720/high-court-fdcpa-case-faced-uphill-battle-from-the-start/> [<https://perma.cc/2ZSC-HGQ6>] (discussing the Supreme Court’s decision to grant certiorari to resolve a split between the Second and Third Circuits on the one hand and the Fourth and Ninth Circuits on the other with respect to the application of the common law discovery rule to the Fair Debt Collection Practices Act).

52. Consumer Financial Services Group, *Ninth Circuit Reaffirms its Broad Definition of ATDS in TCPA; Rules Government Debt Exception Unconstitutional*, BALLARD SPAHR LLP (June 18, 2019), <https://www.ballardspahr.com/alertspublications/legalalerts/2019-06-18-9th-ct-reaffirms-tpca-def-of-atds/> [<https://perma.cc/7B65-Q7UR>] (discussing the circuit split between the Second and Third Circuits on the one hand and the Ninth Circuit on the other with respect to the meaning of “automatic telephone dialing system” under the Telephone Consumer Protection Act).

53. See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (Maryland); *Kachalsky v. Cty. Of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (New York); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (Illinois). See also *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) (citing *Kachalsky*, 701 F.3d 81).

54. *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), cert. denied 134 S. Ct. 2134 (2014).

55. Mitchell L. Moss & Carson Qing, *The Emergence of the “Super-Commuter,”* N.Y.U. WAGNER SCH. OF PUB. SERV. (Feb. 2012), https://wagner.nyu.edu/files/rudincenter/supercommuter_report.pdf/ [<https://perma.cc/G4GF-VPWK>].

56. Under the United States’ federalist system, citizens are well acquainted with being subject to different laws based on geography, as each state has its own laws. The concern at the federal level is that the same law issued by the same sovereign applies differently to different citizens based exclusively on geography. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 824 (1992) (“Our constitutional language and culture hold the U.S. Constitution to be the repository of the fundamental values of the national community, a community to which every citizen belongs.”); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1171–75 (2012) (discussing the problems raised by non-uniform application of the Fourth Amendment).

Constitution permits the city of New Orleans to require private city tour guides to pass a history lesson and obtain a license from the state before they offer their services to the public.⁵⁷ The D.C. Circuit has held that the same constitutional provision does not empower the District of Columbia City Council to enact such a rule.⁵⁸ Similarly, with respect to the Second Amendment, the First, Second, Fourth, and Seventh Circuits⁵⁹ require state legislatures to proffer evidence to support weapons regulations, whereas the Third Circuit does not require evidence.⁶⁰ Thus, the Illinois legislature must overcome a more stringent burden than the Pennsylvania or New Jersey legislatures to enact the exact same firearm regulation.

Third, circuit splits often endure well beyond the cases immediately at issue. Ultimately, the appellate courts “bear the chief responsibility for law-making in the federal system” because the Supreme Court chooses to review an “extremely narrow” band of cases.⁶¹ Without resolution from the Supreme Court, many circuit splits remain in place indefinitely. Because courts of appeals have reduced their own use of en banc procedures, even that mechanism to avoid circuit splits has been weakened.⁶²

Fourth, circuit splits raise questions of fundamental fairness because they impair the bedrock American principle that federal law should be uniform.⁶³ Circuit splits threaten “our sense of national identity as a people literally constituted by the Constitution [which] is linked indissolubly with ideals of common constitutional rights . . . [because] national ideals require national enforcement as an affirmation of our shared nationhood.”⁶⁴ This principle has been a cornerstone of American federalism since the earliest days of the Union. John Jay, for instance, wrote in *The Federalist Papers* that “we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection[s].”⁶⁵

Fifth, because circuit splits raise questions of fundamental fairness, they may undermine the federal judiciary’s legitimacy. Some scholars have argued that the public loses trust in the courts when the same law applied to different people yields different outcomes.⁶⁶ One consequence of the fragmentation of federal law from circuit splits is forum shopping, which has been criticized as

57. Bernick, *supra* note 3 (citing *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014)).

58. *Id.* (citing *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014)).

59. *Id.* (citing *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); and *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011)).

60. *See Drake v. Filko*, 724 F.3d 438 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014).

61. Lavie, *supra* note 1, at 58 (citing others).

62. *See Menell & Vacca, supra* note 6, at 859–61.

63. *See Gardner, supra* note 56.

64. *See* RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 130 (2001). *See also Gardner, supra* note 56.

65. THE FEDERALIST NO. 2, at 38–39 (John Jay).

66. Logan, *supra* note 56.

unfair.⁶⁷ Any threat to the widespread perception that the federal courts are fair and consistent arbiters of federal law is a threat to the courts' legitimacy and influence.⁶⁸

Because of these five problems, the bulk of scholarship concludes that circuit splits are, on the whole, a defect of the federal judiciary.⁶⁹ This proposition is not, however, universally accepted.⁷⁰ Some academics and judges have argued that circuit splits are a positive feature of the federal judiciary precisely because they allow for variation across geographical polities.⁷¹ By accounting for geographical variety, circuit splits arguably promote democracy by allowing different regions to be governed in a manner reflective of the local political community.⁷² These advocates also argue that the current system allows the circuits to act as laboratories for the development of federal law.⁷³

Even were some level of variation among court decisions desirable, there would still be a benefit to giving the circuit courts a vehicle to resolve circuit splits without Supreme Court intervention. A reform that allows circuit courts to resolve certain splits through an inter-circuit process could reduce the disadvantages created by circuit splits while preserving the advantages that some judges and scholars have noted.

67. See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889 (2001) (arguing that forum choice plays a critical role in the outcome of patent litigation, resulting in a problematic lack of uniformity within federal patent law).

68. See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (6th ed. 2016) (discussing the connection between the public perception of the Supreme Court and its legitimacy and influence).

69. See Bernick, *supra* note 3; Caminker, *supra* note 3; Friendly, *supra* note 3; Weis, *supra* note 3 and accompanying text.

70. Many scholars and judges do not believe that lack of uniformity within federal law is necessarily bad, and some believe it is a positive feature of the federal judiciary. See Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 356 (2006); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1574 (2008) (noting that various "judicial practices are at odds with uniformity," specifically including "the lack of inter-circuit stare decisis"); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill*, 71 CALIF. L. REV. 913 (1983).

71. See, e.g., J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L. J. ONLINE 67 (2009), <https://www.yalelawjournal.org/forum/if-it-aint-broke/> [<https://perma.cc/VGT9-KR7Q>].

72. When Congress restructured the circuit courts with the Evarts Act of 1891 (26 Stat. 826 (1891)), it intentionally established distinct circuit courts on the basis of geography. By doing so, it created a system where judges in different circuits could interpret the same law differently, leading to different applications of law in different geopolitical communities. Congress could have created a single federal circuit court with multiple geographically based divisions to ensure both uniformity and administrative efficiency. Or it could have mandated that each circuit court follow the precedents of the other circuit courts, absent Supreme Court review. Instead, Congress established a judiciary attuned to local concerns by enabling circuit splits.

73. As Judge Wilkinson has argued, many circuit splits "contribute fruitfully to the dialogic quality of federal law" and "[t]he benefits derived from regarding the states as experimental laboratories do not wholly disappear when the subject becomes one of federal law" because "[a]rriving at sound judgments often takes time, and a rush to uniformity will not invariably provide it." Indeed, the Supreme Court often appears to wait to hear a case until there has been a circuit split in order to allow the legal issues to develop, as prescribed in Rule 10 of the Supreme Court Rules. Wilkinson, *supra* note 71, at 69–70.

II.

INFORMAL EN BANC PROCEDURES AS A MODEL FOR JUDICIAL REFORM

There are a variety of reforms that could reduce the number of circuit splits. Many of the reforms proposed to date have involved fundamental changes to the structure of the federal judiciary. For example, the proposed National Court of Appeals would be an entirely new level in the judiciary, which would hear cases referred to it by the Supreme Court to “assure consistency and uniformity by resolving conflicts between circuits.”⁷⁴

It is not surprising that proposals to fundamentally change the structure of the federal judiciary have been unsuccessful. As we have noted elsewhere, empirical research into the federal courts shows that “slow evolution is preferable to a risky revolution, which could have dire and unforeseen consequences.”⁷⁵ One evolutionary method to enable the circuit courts themselves to resolve circuit splits would be to adapt the informal en banc procedures that numerous circuit courts already use internally to prevent intra-circuit splits.

Informal en banc review is a “procedure by which one federal circuit court panel circulates an opinion to the full court for acquiescence in an action as a substitute for formal en banc review.”⁷⁶ If a panel wishes to issue a ruling that contravenes prior authority and the full court (or in some cases a majority of the full court) agrees, then the panel will issue its opinion with a notation indicating the full court’s agreement with the ruling.⁷⁷

This process provides a more efficient alternative to a formal en banc hearing to obtain full-court agreement to modify a potentially erroneous or outdated circuit precedent. Most, but not all, of the circuit courts have established informal en banc review. The Fourth, Fifth, Sixth, and Eighth Circuits have used such a procedure, though not frequently.⁷⁸ The Ninth, Eleventh, and Federal Circuits, on the other hand, do not appear to have authorized such a procedure.⁷⁹ The Third Circuit’s local rules appear to prohibit informal en banc proceedings.⁸⁰ Informal en banc procedures have been most widely used by the Second and Seventh Circuits, and, to a lesser extent, the First, Tenth, and D.C. Circuits.⁸¹

74. HRUSKA, *supra* note 4, at 5.

75. Cohen, *supra* note 1, at 221.

76. Sloan, *supra* note 11, at 725.

77. *Id.* at 726.

78. *See id.* at 726–27.

79. *Id.* at 726.

80. *See id.* at 719 n.30 (“It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court *en banc* consideration is required to do so.” (citing 3D CIR., INTERNAL OPERATING P. 9.1)).

81. *See id.* at 727.

Not all of the circuits use identical procedures, nor are all circuits' procedures laid out in formal circuit rules. The differences between the Seventh Circuit's procedures and those of the D.C. Circuit are illustrative.

A. *The Seventh Circuit's Procedure*

The Seventh Circuit first referred to its informal en banc review procedures in the 1969 case *United States v. Brown*.⁸² In the early 1970s, panels initiated the informal en banc process by circulating their opinions to active judges. In 1976, the Seventh Circuit formalized the procedure by issuing Local Rule 16(e), which states that:

A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (*e.g.*, *overruling Doe v. Roe*).⁸³

Under the Seventh Circuit's procedure, the proposed opinion may become circuit law if the court does not vote to hear the case en banc. The Seventh Circuit has used its informal en banc process in hundreds of cases.⁸⁴

B. *The D.C. Circuit's Irons Procedure*

The D.C. Circuit implemented its informal en banc review procedure in 1977 and formalized it in 1981.⁸⁵ The D.C. Circuit's process is known as the "*Irons procedure*" after the case in which it was introduced. Unlike the Seventh Circuit's procedure, it requires active judges to affirmatively vote to adopt the panel's proposed change to circuit law.⁸⁶

82. *Id.* at 732 (citing *United States v. Brown*, 411 F.2d 930, 934 n.5 (7th Cir. 1969)).

83. *Id.* (citing PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 127 (1981)). Local Rule 16(e) was renumbered to 40(e) in 1996.

84. From 1969 to 2007 alone, the Seventh Circuit used its informal en banc process 272 times. *See id.* at 739.

85. *Id.* at 734.

86. According to Sloan, the D.C. Circuit first implemented an informal en banc procedure in 1977 in *United States v. Sheppard*, 569 F.2d 114 (D.C. Cir. 1977), but the procedure was not formalized until the court's ruling in *Irons*, 670 F.2d 265 (D.C. Cir. 1981). Sloan, *supra* note 11, at 734.

In *Irons v. Diamond*, a panel of the D.C. Circuit resolved a conflict between two of its prior decisions, overruling one by adopting the other.⁸⁷ The case concerned a request pursuant to the Freedom of Information Act for documentation relating to approved patent applications. Rather than resolve the intra-circuit split via formal en banc review, the panel included a footnote, known as an “*Irons* footnote,” stating that “[t]he foregoing part of the division’s decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit.”⁸⁸

In 1996, the D.C. Circuit adopted a formal policy to govern the use of the *Irons* procedure.⁸⁹ According to the “Policy Statement on *En Banc* Endorsement of Panel Decisions” (the “Policy Statement”), the *Irons* procedure is appropriate when “[a]ction by the court *en banc* may be called for, but the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full *en banc* hearing.”⁹⁰ The Policy Statement lists four examples of proper use of the *Irons* procedure:

1. To resolve an apparent conflict in the prior decisions of panels of the court;
2. To reject dictum that warrants express rejection to avoid confusion;
3. To overrule an old or obsolete decision that has been rendered obsolete by subsequent legislation or other developments; or
4. To overrule a more recent precedent a panel is convinced is clearly an incorrect statement of current law because of an intervening Supreme Court decision or the combined weight of authority from other circuits.⁹¹

To use an *Irons* procedure, the case must satisfy three conditions:

1. Additional briefing or argument over the question to be presented for informal en banc review would not provide additional benefit;
2. Deciding the question is necessary to decide the case; and
3. The parties had a fair opportunity to address the question in their briefings, or the panel has asked for supplemental briefing and such briefing has provided fair opportunity to address the question.⁹²

If the case meets these three conditions and falls into one of the four aforementioned categories or a similar category, the panel must circulate its

87. 670 F.2d at 267–68.

88. *Id.* at 268 n.11.

89. This document did not become public until 2008. Sloan, *supra* note 11, at 735.

90. POLICY STATEMENT, *supra* note 12.

91. *See id.*

92. *See id.*

opinion to the full court. It also must circulate a memorandum explaining the factual and legal background of the case and the panel's justification for en banc action.⁹³ If, and only if, a majority of all members of the D.C. Circuit endorse the panel's decision and none of the members disapprove of it, the panel may publish an *Irons* footnote overturning a prior precedent.⁹⁴

Circuit courts often use informal en banc procedures to resolve intra-circuit splits or to overrule prior precedent.⁹⁵ Where a majority of the court's active circuit judges agree with one another and disagree with a prior panel decision that has created an inter-circuit split, the court can use the *Irons* procedure to overrule that panel decision.⁹⁶ Accordingly, the *Irons* process already is a vehicle by which the D.C. Circuit sometimes resolves inter-circuit splits.⁹⁷

III.

AN INTER-CIRCUIT *IRON*S PROCEDURE: A MECHANISM TO RESOLVE CIRCUIT SPLITS

The intra-circuit informal en banc procedures widely adopted among the circuit courts, and the D.C. Circuit's *Irons* procedure in particular, could be adapted across circuits to resolve or avoid circuit splits.

A. *The Proposal: Creating an Inter-Circuit Irons Procedure*

We propose an inter-circuit *Irons* procedure. Under our proposal, if a panel of one circuit intends to issue a decision that would create a split with the precedent of another circuit, the first circuit would be authorized to certify the question to the second circuit to align the circuits' precedents. Like a D.C. Circuit panel seeking permission for an *Irons* footnote, the referring circuit would provide the recipient circuit with a draft opinion and the case materials, such as briefs, the record, and argument transcripts, together with a memorandum explaining the issue presented. The referring panel would ask the recipient court to consider whether its precedent should stand with respect to the case presented.

Rules similar to those adopted in the D.C. Circuit's Policy Statement would apply to guide both the potential referring panel and recipient court in determining whether an inter-circuit process is necessary. Because circuit splits sometimes implicate more than two circuits, the process might need to include

93. *Id.*

94. *Id.*

95. The Seventh Circuit used it for this purpose over one hundred times. Sloan, *supra* note 11, at 727, 736.

96. POLICY STATEMENT, *supra* note 12.

97. See, e.g., Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA, 891 F.3d 1041, 1052 n.* (D.C. Cir. 2018); United States v. Southerland, 466 F.3d 1083, 1084 n.1 (D.C. Cir. 2006); United States v. Dorcelly, 454 F.3d 366, 373 n.4 (D.C. Cir. 2006); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 160 n.1 (D.C. Cir. 2005); and Entravision Holdings v. FCC, 202 F.3d 311, 313 n.** (D.C. Cir. 2000). See Sloan, *supra* note 11, at 741, 790–91, for discussion of these cases as examples of the D.C. Circuit using the *Irons* procedure to overrule precedent undermined by other circuit courts' rulings.

multiple recipient courts, in which case the process could be done all at once or *seriatim*.

Once the case had been transferred to the recipient court, the active judges of the recipient court would vote on the issue presented and report the outcome of the vote to the referring panel. The recipient court would also transfer the case back to the referring panel. If the recipient court agreed that its precedent should not apply or should be changed under the facts of the specific case presented, the referring panel would so note in an *Irons*-style footnote, and the decision would constitute precedent for both the referring court and the recipient court.

If the recipient court were to stand on its prior precedent, it would report that decision to the referring court. The referring panel would report that result in a footnote, explaining the circuit split and noting the recipient court's report and justification for its conclusion. The identification and recognition of the circuit split would enable the parties to identify the circuit split more precisely to the Supreme Court, and it might encourage the Supreme Court to accept the case for further review on that basis.

There are a variety of ways to structure an inter-circuit *Irons* procedure. For instance, the statute or rules that authorize the new process could require a recipient court to accept the case and to respond with a report within a given time period. Ultimately, each circuit could decide the parameters of its procedure for responding to a referring court's request. Alternatively, one procedure could be implemented across all of the circuits.

Regardless, one important aspect of the new process is that the recipient court would need to act affirmatively to accept the certification of the question. In this way, the broad outline of the process would take its inspiration from the D.C. Circuit's *Irons* process, which allows a panel to alter a prior circuit precedent only if the judges of the full court affirmatively vote in favor of doing so. It would not permit the referring court to resolve another circuit's precedent simply because the recipient court did not act upon the request. In this respect, the inter-circuit process would follow the D.C. Circuit's *Irons* procedure rather than the Seventh Circuit's process.

B. The Benefits of an Inter-Circuit Irons Procedure

The key benefit of the inter-circuit *Irons* procedure would be its ability to enable the circuit courts to address circuit splits efficiently and without the need for Supreme Court review. Circulating an opinion to one or even multiple circuit courts would be relatively inexpensive. The practice would not require the recipient court to draft an opinion, although the court would have the option of explaining its reasoning in its report to the referring panel. Rather, each judge on the recipient court would simply need to vote on whether to agree with the referring panel's opinion. The inter-circuit *Irons* procedure, therefore, would allow circuit courts to resolve existing circuit splits or prevent new circuit splits from forming, and to do so quickly.

The recipient circuit courts would benefit from the inter-circuit *Irons* process because it would provide them with an efficient mechanism to correct prior panel decisions. This benefit would be particularly attractive where the circuit believes its prior panel decision was decided erroneously, is no longer prudent in light of intervening actions, or is incorrect in light of the other circuits' better reasoning. A circuit court cannot wish away erroneous or outdated panel decisions; it must wait for the issue to present itself anew through a case. The inter-circuit *Irons* procedure, on the other hand, would provide circuit courts with many more opportunities to correct panel decisions, an interest all circuits likely share. The D.C. Circuit and several other circuits already use an intra-circuit procedure for these reasons.⁹⁸

Even when the Supreme Court accepts a case to resolve a circuit split, the process is long and costly both to the judiciary and to the litigants. Petitioners have at least ninety days to file a petition for certiorari,⁹⁹ followed by months of briefing and oral argument. Because of its informality, an inter-circuit *Irons* procedure could be far quicker than Supreme Court review, even when multiple circuit courts are involved, and it would not require the parties to undertake additional briefing or other costly efforts.

The inter-circuit *Irons* procedure would also enable the resolution of numerous circuit splits that would otherwise never gain the attention of the Supreme Court. Even if the Supreme Court greatly expanded its caseload, it would still very likely leave numerous circuit splits unresolved. The inter-circuit *Irons* procedure would be an important supplemental mechanism to resolve circuit splits in light of the declining Supreme Court docket. Any panel of any court of appeals could initiate the inter-circuit *Irons* procedure, and the circuit courts receiving the request could review it and decide whether to agree.

Another important benefit of the inter-circuit *Irons* procedure would be to avoid circuit splits before they are created. A panel could use the inter-circuit *Irons* procedure to prevent a circuit split before it even arose, whereas the Supreme Court generally can resolve a circuit split only after it arises. Preventing circuit splits would create more consistent results from the start, causing more litigants' cases to be more equitably resolved. This benefit would be particularly important in the criminal due process context because criminal statutes can be retroactively applied after a circuit split has been resolved. As one legal scholar has explained,

[The Supreme Court] announced a rule [in *United States v. Rodgers*]

98. "[To overrule] an old or obsolete decision [that] has plainly been rendered obsolete by subsequent legislation or other developments" or "[to overrule] a more recent precedent which, due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, a panel is convinced is clearly an incorrect statement of current law." See POLICY STATEMENT, *supra* note 12.

99. Supreme Court Procedure, SCOTUS BLOG, <https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> [https://perma.cc/5BX9-975J].

that whenever the circuits are split as to whether certain conduct is covered by a criminal statute, a decision resolving the split in the government's favor can retroactively authorize the prosecution of individuals who engaged in that conduct even in circuits where the conduct had been held lawful.¹⁰⁰

Thus, preventing a circuit split regarding criminal statutes could create more equitable outcomes than resolving a split after it arises.

Even in cases where the recipient court stands on its precedent, resulting in a split, the inter-circuit *Irons* procedure would clearly identify a circuit split in the referring panel's opinion. In such cases, the referring panel generally would include a footnote in its opinion describing the result of the referral. Such a footnote would unambiguously declare the existence of a circuit split. In this way, the circuit courts could signal the need for intervention to the Supreme Court. This process would also enable multiple circuit courts to consider a question before the Supreme Court decides the issue. Multiple circuit courts could engage in a dialogue over the question prior to Supreme Court review, thereby enriching the Supreme Court's understanding of the various angles to the question before considering it.

The inter-circuit *Irons* procedure also has an advantage over many other proposals to address circuit splits, such as the introduction of a new federal court level, because it would function within the existing structure of the federal judiciary. It is not likely that there is any more political appetite to reconstitute the federal judiciary now than there was when prior efforts failed. A more gradual, more evolutionary change, such as this proposal, has a more realistic chance of acceptance.

IV.

OVERCOMING OBSTACLES TO THE ADOPTION OF AN INTER-CIRCUIT *IRON*S PROCEDURE

The inter-circuit *Irons* procedure would provide substantial potential benefits, but it also faces a number of challenges. Although some of these challenges could present significant hurdles to its adoption, solutions exist that would enable the courts to adopt the proposed procedure.

A. *Resolving Concerns Regarding Advisory Opinions*

Perhaps the most significant legal hurdle to implementing the inter-circuit *Irons* procedure is the concern that the recipient court would lack the power to consider its prior precedent in the context of a certification and referral rather than in an independent case. The U.S. Constitution limits "[t]he judicial

100. Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 457 (2001).

Power . . . to Controversies”¹⁰¹ The “Case and Controversies Clause” has long been interpreted to bar federal courts from providing an advisory opinion.¹⁰² Pursuant to this clause, the Supreme Court has held that federal courts may not “act in friendly or feigned proceedings.”¹⁰³ There is a concern that a recipient court responding to an *Irons* referral would be issuing an advisory opinion.

The recipient court’s decision may not constitute an advisory opinion, however, because the recipient court would render a decision in an actual case over which it would have jurisdiction. The case before the recipient court would be a live controversy because actual parties would be disputing issues, and the case would be within the recipient court’s jurisdiction because it would have been referred to the recipient court by the referring court. The referred case would not be a matter before another court over which the recipient court is advising.

At a minimum, the recipient court’s decision and report would be akin to dicta, which some legal scholars have characterized as a court rendering permissible advice “beyond its jurisdiction in the case.”¹⁰⁴ Dicta are not the holding of a case, but they are often influential and help shape the nature of the court’s holding. Similarly, the recipient court’s decision and report could alter the referring court’s ultimate decision, such that the recipient court would decisively affect the final decision in the case. Any concern that an inter-circuit *Irons* report would constitute an improper advisory opinion could also be addressed through procedural changes initiated by the circuit courts or by Congress. One such reform could be a “law of the circuits.” The circuit courts currently follow a “law of the circuit,” which states that the decision of the panel hearing a case on first impression sets the precedent on the issue for the circuit.¹⁰⁵ Just as they have adopted the law of the circuit, the circuit courts could adopt a “law of the circuits,” meaning that each circuit court of appeals would recognize the decision of a panel hearing a matter of first impression as precedent, regardless of which circuit the panel is a part.

In other words, the first panel to hear a case, regardless of the circuit in which the panel’s judges sit, would set precedent for all the circuits. A subsequent panel that believes the precedent is wrong could use the inter-circuit *Irons* procedure to persuade the circuit from which the panel decision was made to reverse the decision. If the recipient court disagrees with the referring panel’s decision, the referring panel would be bound to the recipient court’s existing

101. U.S. CONST. art. III, § 2.

102. Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 771 (1998).

103. *Id.* at 783.

104. *Id.* at 781–91 (recognizing that dicta are permissible even though “[i]f a court includes dicta in an opinion deciding an actual controversy, it is going beyond its jurisdiction in the case and rendering advice on the law”).

105. Sloan, *supra* note 11, at 718–19 (explaining the law of the circuit and noting that every circuit has adopted the rule).

precedent. This process is analogous to certification by a circuit court to a state's supreme court to address an issue of state law.

Even then, each circuit could be the ultimate arbiter of its own circuit's law, absent binding Supreme Court authority. Were the referring court to disagree with the law of the circuits established by another circuit's decision, the referring court still could consider the case en banc to overrule the precedent within its circuit. If the two circuits disagree en banc, a true circuit split would be created for the Supreme Court to resolve.

The Supreme Court would be far more likely to grant review under these circumstances, as the circuit split would be clear and, given the difficulty of creating it, meaningful. Because circuit splits would become increasingly rare, the Supreme Court might be willing and able to address a greater percentage of them.

Coupling the inter-circuit *Irons* procedure with a law of the circuits would comport with the Constitution and provide for uniform interpretation across the circuits, while establishing a means to overrule incorrect precedent. It also would avoid the need for congressional action because the circuits could adopt these practices on their own accord.¹⁰⁶ The process may not address existing circuit splits, but it would be a useful tool moving forward.

Alternatively, Congress could enact other measures to ensure that the inter-circuit *Irons* process does not create impermissible advisory opinions. One option would be for Congress to enact a statute authorizing circuit courts to exercise joint and concurrent jurisdiction over a case referred through the inter-circuit *Irons* procedure. Under this framework, the inter-circuit referral and report would be part of a single court process. If there were a disagreement between the two courts that jointly sit over the case, a single panel comprised of judges from both the referring and recipient courts would be empowered to make the final determination. Accordingly, the case would be an actual case or controversy before both circuits. Or Congress could enact a law redefining the separate circuits as divisions of a single national appellate court only in the context of inter-circuit review. Either method might ensure that recipient courts' decisions are not advisory opinions.

We recognize, as the literature on judicial reform indicates,¹⁰⁷ that increased complexity undermines the likelihood of a proposal's success. Complexity may discourage judges from adopting the process by creating administrative burdens and procedural hurdles. Moreover, involving Congress may also reduce the likelihood the proposal is adopted, given Congress's track record on judicial reform and the partisanship attending judicial appointments.

106. *Id.* at 719 (explaining that “[e]very circuit follows the law of the circuit rule. Statements of the rule in judicial opinions are echoed in several courts’ local rules and internal operating procedures.”).

107. *See generally* Menell & Vacca, *supra* note 6 (providing a comprehensive history of judiciary reform in the United States, including unsuccessful attempts of structural reform).

B. Addressing Potential Increases in Court Workloads

Another potential disadvantage of the inter-circuit *Irons* procedure is that it might increase circuit courts' workloads. As discussed in Part II, circuit courts' workloads have been generally increasing for the last few decades. The inter-circuit *Irons* procedure could exacerbate this problem by adding new time-sensitive cases to each of the circuit courts' dockets. Depending on how it is implemented, the inter-circuit *Irons* procedure could have this effect by requiring more than one circuit court to consider questions pertinent to legal issues presented in a particular case.

However, were it successful in reducing the number of circuit splits, the marginal increase in workload for *Irons*-presented cases would be outweighed by the greater decrease in caseload over the long run. As the Advisory Committee Notes to Federal Rules of Appellate Procedure recognize, "[t]he existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict."¹⁰⁸ Like en banc procedures, the inter-circuit *Irons* procedure "will not necessarily prevent intercircuit conflicts" but will "provide[] a safeguard against unnecessary intercircuit conflicts."¹⁰⁹ By doing so, the procedure will reduce the courts' caseloads.

The burden on the appellate courts would also be a function of how many cases each court referred or accepted for *Irons* review. If the courts perceived the benefits of *Irons* review to be high, they would likely use it despite a marginal increase in workload. If not, then courts would be likely to use the process sparingly, and the process would only create more work in the worthiest cases.¹¹⁰

C. Avoiding Negative Impact on Inter-Circuit Collegiality

A third potential criticism of the inter-circuit *Irons* procedure is that it would adversely affect collegiality among the judges who sit on different circuit courts. A recipient court might not appreciate the suggestion that its precedents are incorrect or the requirement to review a new case in addition to its existing docket. This annoyance could be compounded if the recipient court's judges are required to respond to an *Irons* referral within a relatively quick timeframe.

It is not clear that this concern would be borne out. On the contrary, widespread use of the inter-circuit *Irons* procedure might actually improve, rather than sour, collegiality across the circuits. When judges create circuit splits today, they do so by issuing an opinion that either explicitly or implicitly contradicts other courts' prior rulings. There generally is little or no interaction

108. FED. R. APP. P. 35, Advisory Committee's note to 1998 amendment.

109. *Id.*

110. Some literature argues that circuit courts give more deference to district courts when their dockets grow. See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011). One possible consequence of adding cases to circuit courts' dockets via the *Irons* procedure may be greater deference in a few cases to district courts.

among the courts when one circuit refuses to follow another circuit's precedent. As a result, there is no opportunity for discussion or even advance notice that a decision will be deemed wrong by one's peers.

The inter-circuit *Irons* procedure, in contrast, would provide advance notice of a sister court's potential contrary decision and the opportunity to respond. Moreover, an *Irons* determination would only overrule the recipient court's precedent if the decision is unanimous, or if the continuing split results in Supreme Court review. Any judge adamant that the circuit split is proper may vote to preserve that split.

Moreover, the concern that the recipient court might be offended by a challenge to its precedent assumes that the judges currently sitting on the recipient court are the same judges who decided the precedent the referring court hopes will change. This assumption may be too broad. At least some of the precedents considered through the inter-circuit *Irons* procedure would predate the currently sitting judges of the recipient court. In such cases, the recipient court judges would have no personal stake in the decision under reconsideration. As courts recognize in their own en banc rules, many circuit splits result from old, and possibly outdated, precedents, such that a receiving court itself may believe its precedents are in need of reform.¹¹¹ Indeed, Judge Harry T. Edwards of the D.C. Circuit was part of a panel that used the *Irons* procedure to reverse a precedential opinion of which he was the author.¹¹² Ultimately, the success of the inter-circuit *Irons* procedure would depend in part on the confidence the circuit court judges have in the process.

D. Ensuring Equitable Treatment of Litigants in Implementing Inter-Circuit Consideration

A significant criticism of the D.C. Circuit's *Irons* procedure has been that it is inequitable to the litigating parties because it does not provide them with the opportunity to brief or argue the issue to the informal en banc panel.¹¹³ This same

111. Notably, the Policy Statement allows the D.C. Circuit to use the *Irons* procedure to overrule its own precedents that are no longer viable in light of intervening changes by the Supreme Court or are inconsistent with the weight of the sister circuits' subsequent decisions. POLICY STATEMENT, *supra* note 12.

112. See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 891 F.3d 1041 n.* (D.C. Cir. 2018) ("Because our holding today might be viewed as inconsistent with some of the discussion in *NEDACAP I*, this opinion has been circulated to and approved by all of the active members of the court, and thus constitutes the law of the circuit. See *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981)."); Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Irons Footnote*, NOTICE & COMMENT (June 8, 2018) <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-irons-footnote/> [<https://perma.cc/4N3A-FH5K>] (explaining that "Judge Edwards asked the Court to trim back his own prior analysis").

113. Sloan, *supra* note 11, at 758–59. Judge Karen Henderson of the D.C. Circuit has criticized the *Irons* procedure for, among other things, allowing "non-panel members to" overrule "unambiguous circuit precedent . . . without benefit of briefing or argument." *In re Sealed Case No. 97-3112*, 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (Henderson, J., concurring).

criticism could be directed at the inter-circuit *Irons* procedure because it would not permit the litigants to submit additional briefs to the referring panel or the recipient court, nor could the litigants engage in additional oral arguments.¹¹⁴

To address this criticism, circuit courts could implement the same types of safeguards that have been implemented by the D.C. Circuit to safeguard litigants' interests in the *Irons* procedure. The *Irons* procedure contains structural safeguards to ensure that litigants have ample opportunity to make their views heard. A panel cannot publish an *Irons* footnote unless (1) the parties have had a fair opportunity to address the question in their briefings, or the panel has asked for supplemental briefing and such briefing has provided fair opportunity to address the question, and (2) additional briefing or argument over the question to be presented for informal en banc review would not provide additional benefit.¹¹⁵ In such cases, the litigants have participated and their continued participation would be unnecessary, so there is no detriment to the administration of justice. Litigants can still request formal en banc review or petition for certiorari by the Supreme Court. If either en banc review or certiorari is granted, the litigants will be entitled to participate in the subsequent proceedings. The D.C. Circuit's practice therefore recognizes the need for the parties to participate and allows them to do so.¹¹⁶

CONCLUSION

Circuit splits can undermine a legal principle that many believe is fundamental: courts should apply federal laws uniformly. The growth and persistence of circuit splits present a critical issue that merits reform because circuit splits create a fragmented federal legal system that apportions rights and restrictions according to geography. This problem is compounded by the Supreme Court's recent reticence to resolve various circuit splits. New ideas and substantive conversations about reform are necessary to solve this perpetual problem. To that end, this Article proposes to adapt the procedures of informal en banc proceedings that many courts of appeals have already adopted. Although there are potentially significant hurdles to adopting such an inter-circuit *Irons* procedure, the benefits of doing so would be substantial.

114. A related consequence of widespread use of the inter-circuit *Irons* procedure would be the need for future litigants to check the *Irons* footnotes included in the opinions of the circuit courts not hearing their case. Reading these footnotes would ensure that litigants have a comprehensive understanding of the views of the court before which their case appears. While this consequence would impose an added burden on litigants, it is not categorically different from their current burden to understand the full scope of precedent within the circuit and to identify cases from other courts that have presented the same issues as the case under consideration.

115. POLICY STATEMENT, *supra* note 12.

116. A related criticism may be the increased delay the procedure may cause litigants to bear. This concern may be addressed by placing constraints on the time a recipient court has to respond. Regardless, the benefits of resolving circuit splits may outweigh the marginal delay in the likely modest number of cases subject to the inter-circuit *Irons* procedure.