# The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?

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Congress has made few major changes in the structure of the federal court system subsequent to its passage of the Judiciary Act of 1789.[1] Since the Evarts Act of 1891,[2] when the circuit-riding duties of Supreme Court Justices were finally eliminated and the circuit courts of appeals established,[3] the administration of justice at the federal level has rested fairly comfortably on a three-tier basis. The district courts try cases, the courts of appeals provide obligatory appellate review, and the Supreme Court supervises both, largely on discretionary review, as the court of last resort.[4] Although some minor alterations and revisions in jurisdiction, procedure, and federal-state judicial relations have occasionally been necessary over the last century,[5] the basic structure of the federal court system has remained essentially unchanged since 1891.

The federal judiciary today faces many serious problems, to which I have previously given some thought,[6] as it struggles to manage a steadily increasing caseload. In attempting to solve these difficulties,

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

2. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

3. The circuit courts of appeals are now called the United States courts of appeals.

4. *See generally* P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-63, 439-41, 1539-45 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1928).

5. *See, e.g.*, The Tucker Act of 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C. (1976)); The Magistrate Act of 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified at 28 U.S.C. § 636(b) (1976)); The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified in scattered sections of 18 & 28 U.S.C. (Supp. IV 1980)); The Anti-Injunction Act of 1948, ch. 646, § 2283, 62 Stat. 869, 968 (codified at 28 U.S.C. § 2283 (1976)).

6. Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225 (1982) [hereinafter cited as Wallace, *Working Paper*]; Wallace, *American Inns of Court: A Way to Improve Advocacy*, 68 A.B.A. J. 282 (1982); Wallace, *Judicial Administration in a System of Independents: A Tribe With Only Chiefs*, 1978 B.Y.U. L. REV. 39; Wallace, *Our Judicial System Needs Help: A Few Inside Thoughts*, 12 U.S.F.L. REV. 3 (1977); Wallace, *Wanted: Advocates Who Can Argue in Writing*, 67 KY. L.J. 375 (1979).

we must not only consider the problems currently facing the courts but must also place them in the context of the challenges of the future.[7]

Some of the proposed "cures" for these current problems, however, may in the long run prove worse than the "disease." Almost ten years ago the so-called Freund Committee suggested the creation of a "national court of appeals"[8] as a fourth-tier court situated between the courts of appeals and the Supreme Court. This proposal, the most controversial in recent memory, sparked several years of intense, often emotional, debate and provoked several sitting Justices of the Supreme Court to take public positions, both pro and con.[9] A national court of appeals never materialized largely because the proposed court's primary function—to screen the vast majority of certiorari petitions and appeals from the circuit and state courts to the Supreme Court—received pointed criticism.[10]

In addition to this screening function, however, there was another justification for the fourth-tier proposal—the need to ensure uniformity of federal law. Indeed, the Hruska Commission recommended the creation of a national court of appeals that would hear cases referred to it by the Supreme Court, primarily because of the need to "assure consistency and uniformity by resolving conflicts between circuits."[11] According to the commission and other proponents of a national court of appeals, the federal judiciary is in urgent need of a fourth-tier because the Supreme Court's crushing burden and institutional, as well as human, limitations mean that it can no longer discharge its essential

7. *See* Wallace, *Working Paper*, *supra* note 6, at 225-28.

8. *See* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

9. *See generally* Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721 (1973); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Goldberg, *There Shall Be "One Supreme Court,"* 3 HASTINGS CONST. L.Q. 339 (1976); Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975); Rehnquist, *Whither the Courts*, 60 A.B.A. J. 787 (1974); Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709 (1975); Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A. J. 677 (1974) [hereinafter cited as Warren, *Let's Not Weaken*]; Warren, *A Response to Recent Proposals to Dilute the Jurisdicition of the Supreme Court*, 20 LOY. L. REV. 221 (1974) [hereinafter cited as Warren, *Response to Recent Proposals*].

10. *See, e.g.*, Black, *supra* note 9, at 888-94; Brennan, *supra* note 9, *passim*; Burger & Warren, *supra* note 9, at 728; Warren, *Let's Not Weaken*, *supra* note 9, at 678; Warren, *Response to Recent Proposals*, *supra* note 9, at 226.

11. U.S. COMMISSION ON REVISION OF THE FED. COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 5 (1975), *reprinted in* 67 F.R.D. 195, 208 (1975) [hereinafter cited as HRUSKA COMMISSION REPORT].

obligation of ensuring uniformity in federal law. Given the statistics on the Supreme Court's workload and the decreasing proportion of cases it is able to accept for plenary review,[12] the need for uniformity may on first impression appear to justify the immediate implementation of some type of fourth-tier court. However, those drawn to the very superficial appeal behind this statistical justification for a new national appeals court may be overlooking the historical, analytical, and practical limits of the proposal.

Although the Freund Committee's proposal was never adopted, signs of an impending effort at massive restructuring of the federal judicial system have begun to reappear. In 1978, the Omnibus Judgeship Act[13] added 152 new federal judges, ten in the Ninth Circuit alone. In 1981, with much fanfare, the former Fifth Circuit was split into two.[14] Last year we witnessed the enactment of the Federal Courts Improvement Act of 1982,[15] a measure that created the new Court of Appeals for the Federal Circuit through a merger of the now extinct Court of Claims and the Court of Customs and Patent Appeals. In addition, Congress recently created the article I bankruptcy courts.[16]

The perceived inability of the federal judiciary to perform its functions within its traditional structure ostensibly prompted each of these changes. As the Senate Judiciary Committee wrote in its report on the 1982 Federal Courts Improvement Act: "The difficulty here is structural. . . . [T]he remedy lies in some reorganization at the intermediate appellate level."[17] Each of these changes, however, also signals a small but significant shift in the approach to the administration of justice at the federal level. While refinements in the structure of the federal courts in the first century and three-quarters after the 1789 Judiciary Act were sometimes great, they were largely incremental. Since the 1891 Evarts Act, the system's architects have remained firmly wedded to the three-tier model that has served the nation admirably.

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12. The number of cases filed for Supreme Court review rose from 1,200 in 1951 to 3,600 in 1971 and to over 4,000 at the time of the Hruska Commission Report. *Id.* at 5-6, 67 F.R.D. at 209. Last year, in its 1981 Term, the Supreme Court docketed over 5,000 cases. 51 U.S.L.W. 3020 (U.S. July 27, 1982).

For an extensive analysis of the increase in the Court's workload, see W. Burger, Annual Report on the State of the Judiciary 1-4 (Feb. 6, 1983) (remarks at ABA midyear meeting), *reprinted in* 69 A.B.A. J. 442, 442-43 (1983).

13. Pub. L. No. 95-486, 92 Stat. 1629 (1978) (codified at 28 U.S.C. § 133 (Supp. IV 1980)).

14. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (Supp. IV 1980)).

15. Pub. L. No. 97-164, 96 Stat. 25 (to be codified in scattered sections of 28 U.S.C. and in scattered sections of other titles).

16. *See* 28 U.S.C. §§ 151-160, 771-775, 1471-1482 (Supp. IV 1980).

17. SENATE COMM. ON THE JUDICIARY, FEDERAL COURTS IMPROVEMENT ACT OF 1982, S. REP. NO. 275, 97th Cong., 2d Sess. 3 [hereinafter cited as SENATE REPORT], *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 13.

The recent changes, on the other hand, do not embody this same incremental, tradition-conscious approach. Rather, they raise the potential for an invigorated effort at the balkanization of the courts of appeals and for another public push for a fourth-tier court of appeals.

The purpose of this Article is to impress upon Congress, the courts, the legal profession, and the consumers of federal justice, the public, that frightening statistical projections alone do not justify radical changes in the structure of our federal judiciary. The independence and stability of our federal courts makes them among the best, if not the best, of any nation in the world. While the independence of federal judges is guaranteed by the Constitution,[18] maintaining the system's structural stability depends on our informed understanding of how the federal judiciary functions, the problems it faces as it approaches the third century of its existence, and the alterations that these problems compel.

Informed understanding is the key. The statistics heralding the Supreme Court's inability to hear enough cases to resolve conflicts among the circuits and ensure uniformity of federal law mask the fact that few have considered the degree to which providing uniformity is part of the constitutional role of the Supreme Court. Even fewer have considered whether all intercircuit conflicts are necessarily evils that must be eradicated, or whether some are beneficial and useful, or at least tolerable. More worrisome are the emotional and political undertones involved in debates over a fourth-tier court. Concerned individuals tend to become polarized; neutrals often are driven to extremes, producing opposing camps committed to the irreconcilable goals of either drastic overhaul or unwavering commitment to the status quo. Surely these are not the only possible alternatives.

Piercing the layers of hyperbole surrounding the debate over the future of the federal court system may prove neither an easy nor enviable task. As Professor Rosenberg has observed, "Crisis talk is not new in judicial administration circles."[19] I am convinced, however, that considerably more critical analysis is required before dramatic modifications like a fourth-tier national court of appeals can be justified.

This Article will focus on one question in the debate over a national court of appeals: whether such a drastic change is needed to ensure uniformity of federal law. Part I will argue that diversity in federal law is not only sometimes acceptable, but that historically, it has been condoned by Congress. Furthermore, given our history of making only incremental changes in the structure of the judiciary,

18. *See* U.S. CONST. art. III, § 1, cl. 2.

19. Rosenberg, *supra* note 9, at 711.

more research is needed on the nature of intercircuit conflict to justify the destruction of the traditional three-tier structure. Part II will propose some solutions that may be acceptable alternatives to the creation of a fourth-tier national court of appeals.

## I
## THE IMPORTANCE OF UNIFORMITY IN FEDERAL LAW

Americans live under one Constitution and one large, exceedingly complex set of federal statutes and regulations that together comprise the supreme law of the land. To what extent is it the role of the courts, and in particular the Supreme Court, to ensure that this "supreme" law is also "uniform" law? To answer this elusive question, it is necessary to examine how and why the Supreme Court assumed the task of policing decisions on federal law for uniformity; to study institutional considerations that affect uniformity; and finally to analyze the nature of uniformity in federal law.

### *A. The History of Uniformity*

Historically, Congress' regulation of the Supreme Court's jurisdiction in relation to the state courts demonstrates a congressional perception that the Supreme Court's main role is to ensure the supremacy rather than the uniformity of federal law. Section 25 of the 1789 Judiciary Act established the basic confines of Supreme Court review of state court decisions.[20] The Supreme Court was granted review by appeal as of right (then by writ of error) in cases in which a state court held invalid a statute or treaty of the United States, or upheld a state statute (or other exercise of state authority) against the claim that it was "repugnant to the constitution, treaties, or laws of the United States."[21] Not until 1914 did Congress grant the Court the power to review, by certiorari, state court judgments upholding federal statutes or invalidating state statutes on federal grounds.[22]

The Judges Bill of 1925[23] replaced most obligatory review of state and circuit court decisions with discretionary review by certiorari. This bill, which was drafted by a committee of Supreme Court Justices chaired by Justice Van Devanter,[24] embodies the same philosophical distinction first suggested by section 25 of the 1789 Judiciary Act. The Supreme Court retained mandatory appellate jurisdiction over cases in

20. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86.

21. *Id.*

22. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

23. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. *See generally* F. FRANKFURTER & J. LANDIS, *supra* note 4, at 255-98.

24. HART & WECHSLER, *supra* note 4, at 41.

which a state court strikes down a federal statute or treaty, or where a state court upholds a state statute against federal constitutional or statutory attack. All other review of state decisions was to be by certiorari. This distinction still exists today.[25]

This historical evolution teaches us that Congress has long considered *supremacy* to be the most important value served by Supreme Court review. Decisions invalidating acts of Congress on constitutional grounds or upholding state statutes against federal attack squarely raise issues of supremacy—the first involving the supremacy of the federal constitution over enactments of the federal legislature, and the second involving the supremacy of federal over state law. It took Congress more than a century to grant the Supreme Court the power to hear state cases raising uniformity issues, as when a state court strikes down an act of its own legislature on federal grounds. Such cases do not implicate supremacy values because the state court has obeyed the supremacy clause; rather, they implicate uniformity values because the state court may have gone further than federal law, as construed by the nation's highest court. Yet precisely because the issue is one of uniformity and not supremacy, the right to review state decisions was not granted as part of the "transcendent achievement of the First Judiciary Act,"[26] and when finally granted, was made conditional on the Supreme Court's exercise of its discretion—certiorari. In short, supremacy issues have traditionally justified the Supreme Court's appellate jurisdiction, while uniformity issues have justified only certiorari jurisidiction.[27]

That Congress, in shaping the Supreme Court's jurisdiction, has consistently valued supremacy over uniformity does not, however, imply that practical caseload burdens faced by the Supreme Court have played no part in the development of the high court's jurisidiction. The Evarts Act itself, for example, created the courts of appeals in their present form at least in part because the burden on the Supreme Court of obligatory direct appellate review was perceived as intolerable.[28] Indeed, the development of Supreme Court review reveals an "overriding policy, historically encouraged by Congress, of minimizing the [Court's] mandatory docket . . . in the interests of sound judicial administration."[29] This process of minimization continues, reflected most

25. 28 U.S.C. § 1257 (1976).

26. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 4.

27. The late Judge Leventhal observed that the "premise of certiorari" is "to preserve uniformity amoug the intermediate appellate courts on matters of national law." Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881, 888 (1975).

28. *See* HART & WECHSLER, *supra* note 4, at 39-40.

29. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974) (footnote omitted). *See* F. FRANKFURTER & J. LANDIS, *supra* note 4, at 119.

clearly in the increasing restrictions placed on the three-judge district courts and the complementary direct appeal to the Supreme Court.[30] However, minimization of the Court's mandatory docket has thus far been permitted only in those cases in which the Court's guidance is not viewed as a necessity—in cases involving uniformity. In cases involving supremacy, on the other hand, there has been no minimization.

Although this point need not be overemphasized, these jurisdictional niceties remain important in the law. Lawyers, judges, and academics interested in the future of the judiciary should recognize that uniformity has historically been accorded only a secondary importance as an aspect of our federal jurisprudence. Moreover, those who insist that the distinction is of no practical import should remember that under *Hicks v. Miranda*,[31] when the Supreme Court exercises "discretion" to dismiss a case on its mandatory appeal docket for want of a substantial federal question, that dismissal as a legal matter is a decision on the merits binding on the lower courts throughout the country. On the other hand, denials of certiorari are not decisions on the merits and have no precedential value.[32]

Because supremacy has been the Court's primary function, supremacy issues remain the subject of obligatory review on the merits. But the current issue, which one should consider from a historical view, is whether uniformity of federal law should become a primary concern of the Supreme Court. I suggest that uniformity should remain a secondary concern because, as will be seen, conflicts are not intrinsically intolerable,[33] and where intolerable, can be remedied by solutions less onerous than a massive restructuring of the federal system.[34]

### *B. Institutional Considerations Affecting Uniformity*

#### *1. Plenary review*

Moving from the jurisprudential to the practical, it is useful to examine the basic institutional and quantitative assumptions underlying the concept of a national court of appeals. The first institutional consideration that must be examined is the assumption that plenary review by the Supreme Court is necessary to produce uniform federal law in every instance. Full plenary review itself is not necessarily the only

30. HART & WECHSLER, *supra* note 4, at 247-48 (Supp. 1981).

31. 422 U.S. 332, 343-44 (1975).

32. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 489-97 (1953) (Frankfurter, J., concurring); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19 (1950) (Frankfurter, J., respecting denial of certiorari). *See generally* Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979).

33. *See infra* notes 72-79 and accompanying text.

34. *See infra* notes 95-110 and accompanying text.

means of providing uniformity. Consideration could be given to whether other modes of Supreme Court review—specifically short per curiam opinions and summary orders[35]—may justifiably be expanded in order to meet the needs of uniformity.

It is clear that plenary review by the Supreme Court has become less available. Accordingly, the basic quantitative assumption made by the proponents of a national court of appeals is that the Supreme Court is overworked, faces a growing number of requests for review of state and federal cases, and has reached its limit in terms of the number of cases it can accept for plenary review.[36] Thus, while "in the future the Court cannot be expected to provide much more guidance in legal issues than it now does . . . the number and complexity of unsettled controversies in the law continues to grow."[37] The position, in sum, is that while the Supreme Court's caseload is increasing, its ability to make pronouncements on important issues of federal law is decreasing, because the number of cases in which the Court can grant plenary review and issue full opinions remains the same.[38]

The major increase in the Court's docket in recent years cannot be gainsaid.[39] However, the relative decline of plenary review does not mean that the Court has exhausted its capacity to promote additional uniformity in federal law. Even assuming that the Court has nearly reached its capacity for the number of cases it can accept for plenary review, it does not necessarily follow that the Court's ability to resolve conflicts among the circuits and promote uniformity is at an end.

Indeed, plenary review is not always the best way to settle conflicts. Opinions of the Supreme Court can be works of art and jurisprudential wisdom that stand immutable for ages,[40] but at times they can also be examples of difficult compromises forged in the heat of controversy and judicial debate.[41] Not infrequently, these latter decisions are

35. *See infra* notes 48-53 and accompanying text.

36. This may be, but only those directly involved can give the best answer. Based upon recent statistics, however, one may wonder whether the Court has yet to reach its limit. The 1981 Term, for example, witnessed a significant increase in the number of cases argued on the merits in which the Court issued full, authored opinions. 51 U.S.L.W. 3020 (U.S. July 27, 1982). This occurred without the consistent services of some of the Justices due to temporary illnesses. Furthermore, the 1981 Term saw a sharp increase in the number of cases that the Court granted discretionary review. *Id.* *See* W. Burger, *supra* note 12, at 1-4 *reprinted in* 69 A.B.A. J. at 442-43.

37. SENATE REPORT, *supra* note 17, at 3, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 13.

38. *See* HRUSKA COMMISSION REPORT, *supra* note 11, at 209-36.

39. *See supra* note 12.

40. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *Ex parte* Young, 209 U.S. 123 (1908); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

41. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (steel seizure case); New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers case).

overruled years later, either because the Court boldly asserts its initial error,[42] changes its conclusion upon considered reflection,[43] or chooses to follow a path originally rejected.[44]

If the Court is to resolve intercircuit conflict effectively by choosing among conflicting rules applied by the various courts of appeals, it must speak with a voice of ringing clarity. But the Court is not always able to provide a conflict-ending opinion. A decision of the Supreme Court may not provide uniformity if, in order to gather a majority of the Justices around a common result, it avoids resolving the conflict among lower courts. Moreover, internal inconsistencies and divisions among the Justices may serve more to lay the seeds for new conflicts than to resolve brewing ones.[45]

Indeed, the Court has found it increasingly difficult in recent years to deliver harmonious opinions that represent the views of a majority of the Justices. From 1955 through 1981, the Supreme Court produced almost three times as many plurality decisions as were issued in the entire previous history of the Court.[46] Because the precedential value of plurality opinions has itself been a source of debate,[47] plenary review cannot aid the search for uniformity when it produces no uniform rationale subscribed to by a majority of the Court. This difficulty reflects the increased complexities of legal problems arising from a highly advanced nation rather than any shortcoming of the modern Court. Nonetheless, the increasing prevalence of plurality opinions, particularly in cases presenting difficult issues that have tormented and divided the lower courts, stands as an institutional constraint to increased uniformity.

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42. *See, e.g.*, *Erie*, 304 U.S. at 79, *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); Brown v. Board of Educ., 347 U.S. 483, 495 (1954), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896); Gideon v. Wainwright, 372 U.S. 335, 345 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942).

43. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

44. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 701 (1978), *overruling* Monroe v. Pape, 365 U.S. 167 (1961).

45. An example of this phenomenon in relation to the state courts are the Supreme Court's death penalty decisions where the inconsistencies and divisions among the Justices may have increased uncertainty over the constitutionality of state death penalty statutes. *See* Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

46. Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1127 n.1, 1147 (1981). Between 1801 and 1955 the Court produced only 45 plurality opinions, but between 1955 and 1981 the Court produced 130 plurality opinions. *Id. See also* Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60; Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. CHI. L. REV. 99, 99 n.4 (1956).

47. *See, e.g.*, Note, *The Precedential Status of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980); *see also* sources cited *supra* note 46.

*2. Summary Dispositions*

The second institutional consideration to be examined is the use of summary dispositions. If one accepts the proposition, explored in Part II,[48] that some lower court conflicts are less significant and hence more tolerable than others, it follows that some conflicts are not worthy of extensive Supreme Court analysis. Summary dispositions should be adequate to resolve such conflicts.

Even where the conflict is significant, summary dispositions may be appropriate. When the Court desires to pronounce a uniform rule but more than one approach is arguably correct, the Court's function is to serve as the final forum in which competing rules may be offered up for application. While every decision should be "right," in some cases it may be more important that an issue be finally decided than that it be decided "correctly." Particularly where the issue is minor or technical, as are many questions of procedure and jurisdiction, a definitive answer is often more important than a scholarly and definitive explanation. In such cases, summary disposition might be an appropriate vehicle for the efficient resolution of the conflict. Without appreciable further strain on its capacity for plenary review, the Court might be able to make major strides toward promoting uniformity by increasing its output of brief per curiam opinions. Not only would this significantly diminish the asserted need for a fourth-tier court of appeals, but it would also offer immeasurable advantages in terms of clarity. Whether that approach has merit needs further consideration.

Summary dispositions, particularly summary reversals, have elicited spirited disagreement within the present Court.[49] A major criticism has been levied at the Court's practice of issuing summary dispositions without any explanation.[50] Disposition by brief per curiam opinions, without full briefing or argument on the merits, could avoid that criticism, or perhaps a different briefing practice could be considered. The problem, of course, is selecting the cases that qualify for this type of treatment.[51]

I do not rule out, however, the use, where appropriate, of the pure summary disposition that is no more than a brief order. It can be used sometimes as an important tool in the Court's efforts to promote uni-

48. *See infra* notes 72-79 and accompanying text.

49. *See* W. Brennan, Remarks to the Third Circuit Judicial Conference 6 (Sept. 9, 1982) (on file with the *California Law Review*); T. Marshall, Remarks to the Second Circuit Judicial Conference 5-10 (Sept. 9, 1982) (on file with the *California Law Review*). Both Justices protested against the Court's use of summary dispositions.

50. *See, e.g.*, Rosenberg, *Notes From the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court* (pt. 1), 19 HOUS. L. REV. 607, 609, 631-39 (1982).

51. A discussion of the possible criteria that could be relevant for the selection of such cases is beyond the scope of this Article.

formity. Although the Court seems more willing recently to reverse or vacate summarily and remand circuit court cases, it has done so largely for reconsideration in light of one of its own decisions. As a means of promoting uniformity without the necessity of plenary review, this sort of disposition is of great importance. If the courts of appeals carefully study the Court's opinion on which the remand is based, as I believe they should, they may well uncover a trend in the developing legal doctrine that can be used to aid conflict resolution and thus enhance uniformity.

Both the brief per curiam opinion and the summary order, therefore, are swift, accurate tools already in the federal judiciary's arsenal that might be used more frequently to promote uniformity without appreciably straining the Supreme Court's human and institutional capacity. As such, they represent an approach to resolution of conflicts that is not nearly as drastic as the creation of a new, fourth-tier court of appeals. While the traditional aspects of plenary review—briefing and oral argument—are perceived by many as vital to the proper functioning of the Supreme Court,[52] many lower courts, including the Ninth Circuit, have begun to move away from the presumption that every case merits full argument and full briefing.[53] Guided by local rule, these incremental innovations have worked well. Although the experience may not be transferable, careful study should determine whether such incremental changes may be sufficient to produce the desired result at the Supreme Court level. On the other hand, summary dispositions by the Court should be limited to cases in which they are appropriate. To discern which cases could fit this description and to explore further the conflict problem, it is necessary to examine the nature of "uniformity" in federal law.

### *C. The Nature of Uniformity*

Ideally the federal Constitution and the federal laws should be applied consistently and uniformly by all the lower courts, state and federal, throughout the nation. There is, in reality, but one due process clause, and theoretically the question of what "process" is constitutionally "due" should not vary in cases presenting the same facts, either within one circuit or between two or more circuits. Has the present structure of the federal judiciary failed to meet that theoretical ideal? Is it necesssary from a practical point of view for our system to meet this ideal in every case? If it has fallen short of the theoretical ideal in a

52. *See* W. Brennan, *supra* note 49, at 6; T. Marshall, *supra* note 49, at 5-6.

53. *See, e.g.*, Internal Operating Procedures for the United States Court of Appeals for the Ninth Circuit 15-17 (on file with the *California Law Review*); *see also* Neisser, *Riding Herd on the Backlog: The Ninth Circuit's Approach*, 56 CAL. ST. B.J. 96, 101-02 (1981).

specific case or generally, how serious is the shortfall? These questions must be examined in order to put the cold statistics on the federal court's burgeoning caseload in proper perspective.

As observed above, the recent dramatic increase in the workload of the federal courts—at all levels—cannot be gainsaid.[54] But to what extent do these numbers indicate that the present structure of the federal judiciary is incapable of providing enough uniformity? Before answering that question, a preliminary word about the Supreme Court's institutional role is in order.

### *1. The Supreme Court's Institutional Role*

In a hypothetical legal system, there might exist one judicial body capable—both in terms of jurisdiction and physical resources—of issuing determinative, final pronouncements on all issues of federal law. We do not, of course, live in such a system. Moreover, it is not clear that such a system would be ideal.[55]

In our constitutional system the degree of respect accorded to the Supreme Court's decisions is a measure of the Supreme Court's institutional effectiveness. This respect, in turn, stems not only from the wisdom with which the Court generally acts, but also from the fact that the Court's role requires it to avoid deciding all the myriad issues that it is asked to, and could, review. Rather than issuing a detailed interpretation of the Constitution or the United States Code, the Court chooses with care overarching issues the resolution of which will affect the development of an important area of law. Thus, its opinions are typically laid out in broad strokes, designed to teach, inform, and guide the lower courts as they apply these principles in the uncharted factual waters of the future. This role is a unique one—a role that can be performed only by "one Supreme Court."[56] There can, in this function, be but one drummer. A secondary national court attempting to augment this role could well provide an offbeat cadence, distracting to the national direction and hindering the efforts of lower courts to keep in step. The Supreme Court sets the beat by providing the general constitutional and statutory principles of federal law. In announcing, reaffirming, and, on occasion, changing these principles, the Court increases its prestige and legitimacy by demonstrating that its traditional institutional role is to set the basic federal judicial agenda rather

54. HRUSKA COMMISSION REPORT, *supra* note 11, at 10-13, *reprinted in* 67 F.R.D. at 214-17. *See also* Wallace, *Working Paper*, *supra* note 6, at 227-28 (outlining projected increases in federal courts' caseloads); *supra* note 12.

55. For a discussion of the possible benefits of intercircuit conflict, see *infra* notes 72-79 and accompanying text.

56. *See* Goldberg, *supra* note 9, at 343.

than to preside as final arbiter over every federal judicial dispute.[57]

This is, in my judgment, as it should be. A Supreme Court decision is designed to bind the entire nation for centuries. It is in the sometimes wide interstices between the high court's general pronouncements that all other courts in the nation function on issues of federal law. Must there be a new court, a fourth-tier court, to provide determinative rules in these gaps which the Supreme Court has so rightly avoided filling? Only, I suggest, if the rest of the system is filling the gaps in an intolerable manner.

### 2. *The Statistical Illusion and the Supreme Court's Dual Role*

Numbers alone cannot, and do not, answer whether the present system is deficient. That the lower federal courts hear more cases and issue more opinions today than ten or twenty years ago does not prove that the system is failing. Indeed, it may suggest that the system is working, and that more litigants are becoming cognizant of their legal rights and remedies, and confident of the ability and determination of the federal judiciary to enforce them impartially. Moreover, it is not necessarily a weakness in the system that the courts of appeals function as the courts of last resort in ninety-nine percent of the cases filed, or that the number of plenary Supreme Court pronouncements of national law continues to decline as a percentage of all federal cases.[58]

The key to the analysis is recognizing the difference between the Supreme Court's role in resolving conflicts and its role in correcting misinterpretations of federal law. The two are separate. When the Court takes a case involving an issue upon which the circuits are in conflict, and upon which the Court has not yet spoken, the Court must take two steps. First, it resolves a conflict among the circuits. Second, it decides the issue. The former step involves its conflict-resolving function; the latter step its error-correction function. A problem can occur if critics of our present structure blend the two together.

Without separating the two steps, an effective analysis cannot be made. In regard to the second step, no commentator has argued that the modern Court lacks the capacity to correct any important error on a question of federal law. Thus, as long as the Supreme Court retains the authority and ability to correct federal decisions, it could properly dele-

57. Stevens, *supra* note 9, at 180:

> [I]t would be unfortunate if the function of the Supreme Court of the United States should become one of primarily—or even largely—correcting errors committed by other courts. It is far better to allow the state supreme courts and federal courts of appeals to have the final say on almost all litigation than to embark on the hopeless task of attempting to correct every judicial error that can be found.

58. *See* HRUSKA COMMISSION REPORT, *supra* note 11, at 12-13, *reprinted in* 67 F.R.D at 216-17.

gate the resolution of conflicts to some other body. In sum, then, the only concrete issue raised by the statistics concerns the Court's capacity to resolve intercircuit conflicts.[59] These statistics, however, indicate only that the Court is working overtime; they do not indicate that the Court is failing to provide enough uniformity in federal law. When the numbers begin to demonstrate that unresolved conflicts are increasing, it is time to consider reforms. Why?

Until such a conflict arises, one of three situations exists: no federal court has confronted the issue; only one circuit has ruled on the question; or more than one circuit has passed judgment, but each has arrived at the same conclusion. In each of these situations, there *is* uniform national law. If the uniform law is intolerably wrong, the Supreme Court must exercise the corrective function of its authority. But it is not until a conflict among the circuits arises that the alleged inability of the Supreme Court to police federal decisions for uniformity becomes an issue.

### *3. The Hruska Commission*

With this background, let me be more specific. In 1975, the Hruska Commission identified "four major consequences of the failure of the federal judicial system to provide adequate capacity for the declaration of national law."[60] These were: (1) unresolved intercircuit conflict, (2) delay, (3) a burden on the Supreme Court to hear cases "not worthy of its resources," and (4) uncertainty caused by potential conflicts. I consider only the first consequence, unresolved intercircuit conflict, to be of significance.

Taking initially the last-asserted consequence, uncertainty caused by potential conflicts, the Hruska Commission stated that "the lack of capacity for definitive declaration of the national law frequently results in uncertainty even though a conflict never develops."[61] I suggest that it is crucial to address this consequence in light of the observation made in the previous Subsection, that until a conflict among the circuits develops, there is no need to add more capacity for the declaration of "national" law. Surely there exists potential for conflict among the circuits in any area of law. If this potential encourages the relitigation of a question before another court,[62] then the "failure" may be beneficial.

59. There may be other reasons to provide more appellate capacity, such as a desire to provide all federal judges more time for thought and reflection, *see, e.g.*, Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959), but this Article deals only with the perceived need to permit more pronouncements of uniform law.

60. *See* HRUSKA COMMISSION REPORT, *supra* note 11, at 13-14, *reprinted in* 67 F.R.D. at 217-19.

61. *Id.* at 14, 67 F.R.D. at 219.

62. *Id.*

The second court of appeals to face the issue can critically scrutinize the first decision to decide whether to follow it. In this sense, our circuit courts have always acted much like common law courts in separate jurisdictions. If the potential for conflict encourages excessive forum shopping,[63] minor revisions in venue rules could be considered to redress the system's failure without the need for more radical changes. If potential conflicts cause unfairness to some parties by encouraging harassing relitigation of previously decided issues,[64] broader use of the doctrine of collateral estoppel might be sufficient to eliminate unnecessary unfairness.

The second consequence claimed by the Hruska Commission is delay in arriving at a "definitive decision on a national basis."[65] First, as stated in the previous Subsection, such delay is of no import until a conflict among the circuits develops. Until then, the question either has not arisen or has been decided in a uniform fashion. Delay prior to an actual conflict can only be condemned because it is the necessary appurtenance of potential conflict, which in itself does not indicate a failure justifying an overhaul of our judicial system.[66] In some instances, moreover, I suspect that even delay *after* the development of a conflict may have its own jurisprudential and practical advantage. The delay may provide a minority circuit with an opportunity to reexamine, and perhaps change, its decision as the weight of authority among the circuits becomes more clear. This has happened at least once in my own experience.[67] Finally, delay itself is an accepted consequence of our case-by-case system of lawmaking by adjudication. For delay to justify radical changes in our judicial structure, it is first necessary to identify precise areas of law where the cost of the delay—measured in practical

63. *See id.* at 13, 67 F.R.D. at 218.

64. *See id.* at 14, 67 F.R.D. at 219.

65. *Id.* at 13, 67 F.R.D. at 218.

66. As I discuss later, *see infra* notes 73-76 and accompanying text, intercircuit conflicts add to the quality of federal justice by providing differing perspectives on the law to the Supreme Court, which therefore can make clearer and better reasoned judgments. On the other hand, this process is undeniably slower than immediate resolution of the conflict by a national court of appeals. Whether intercircuit conflicts are unacceptable therefore depends on the relationship between the improvement in the quality of the rule finally resulting and the cost of the slow approach to that uniform rule in specific, identified areas of law. The Hruska Commission seems to have recognized this as a "caveat." HRUSKA COMMISSION REPORT, *supra* note 11, at 14-15, *reprinted in* 67 F.R.D. at 219. However, because the Commission, with only a few exceptions, did not identify specific areas of the law in which delay is prolonged and unacceptable, its conclusions are overbroad. Delay itself is not to be condemned if it is beneficial; in order for delay to stand as a failure of the federal judicial system, it must be because the cost of prolonged uncertainty is greater than "the gain from maturation of thought from letting the matter simmer for awhile." *Id.* at 15, 67 F.R.D. at 219 (quoting former Solicitor General Erwin N. Griswold).

67. *Compare* Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), *with* Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

terms—outweighs our commitment to that system of justice itself. This has not been done.

The third asserted consequence of the Supreme Court's heavy caseload, a perceived burden on the Supreme Court to hear cases not worthy of the high Court's time, is a failure of our three-tier model only if one assumes that all cases justify plenary Supreme Court review. As explained above,[68] summary mechanisms already exist for resolving some circuit conflicts short of full argument and opinion. The summary process, moreover, provides a means by which the Supreme Court can decide an issue of federal law even before a conflict arises, if the issue is one for which uncertainty or delay would be costly.[69] Even if this alleged third consequence is persuasive, there are, as discussed later,[70] less onerous solutions available than a new fourth tier in the federal structure.

In sum, neither the statistics heralding the rising caseload of the federal courts nor three of the four "consequences" they engender, as identified by the Hruska Commission, are sufficient to make a strong case for a national court of appeals. The only perceived consequence that provides any possible support for a new, fourth-tier court is that of unresolved intercircuit conflict. Determining whether this consequence justifies the creation of a national court of appeals, however, requires further inquiry into the nature of intercircuit conflicts, their advantages and disadvantages, and, most importantly, into whether lesser revisions in our federal structure, consistent with our traditional approach, can overcome unacceptable conflicts and allow for the optimal amount of uniformity in federal law.

## II
## INTERCIRCUIT CONFLICTS AND THEIR RESOLUTION

If the purpose of a fourth-tier court of appeals is to add more capacity for resolving conflicts among the circuits, then it is crucial to understand whether unresolved intercircuit conflict actually represents a failure of our present federal system. Many assume that any intercircuit conflict is intolerable. For me, this is an unacceptable generalization. I believe that more research and analysis is necessary on such questions as (1) whether intercircuit conflicts are intrinsically bad; (2) whether conflicts in some areas of law are less acceptable than others;

68. *See supra* notes 48-53 and accompanying text.

69. Of course, more research must be conducted to identify those cases amenable to summary disposition.

70. *See infra* notes 80-110 and accompanying text.

and (3) how many unacceptable conflicts actually exist.[71] Only then can the discussion turn to the more concrete question of whether, and if so how, to restructure the federal system in order to resolve conflicts and promote uniformity in federal law.

### *A. What Conflicts are Unacceptable?*

If all intercircuit conflicts are evils that should be avoided at all cost, then there can be no objective reason to oppose a national court of appeals modeled along the lines proposed by the Hruska Commission—one that would resolve intercircuit conflicts in cases by "reference" from the Supreme Court or by "transfer" from the present courts of appeals. But it is not clear that there is anything intrinsically unacceptable about conflicts. Indeed, if conflicts were by their very nature unacceptable, the traditional rule denying precedential status to out-of-circuit decisions probably would not have enjoyed its long history.[72] Conflicts among the circuits appear to embody a subtle mixture of both good and bad aspects.

Although at first blush the idea of a "good" conflict may seem strange, conflicts may in some ways be beneficial. On a theoretical level, there should be some allowance for the respectful disagreement on legal issues which is characteristic of the law itself. On a more practical level, as pointed out above,[73] the Supreme Court generally gives guidance with broad principles, allowing lower courts to flesh them out through case-by-case application. The Court is then able to make more refined generalizations in subsequent cases with the valuable assistance of the practical experience and ideas of other judges. When circuits differ, they provide the reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts act as the "laboratories" of new or refined legal principles (much as the state courts may do in our federal system),[74] providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments. As Professor Black has written, "Many [intercircuit conflicts] can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules, particularly where the question of law is a

71. I suggested further study of such questions in Wallace, *Working Paper*, *supra* note 6, at 229-30.

72. *See, e.g.*, Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981); Pan American World Airways, Inc. v. CAB, 517 F.2d 734, 741 (2d Cir. 1975); 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.402[1], at 66 (2d ed. 1982).

73. *See supra* text accompanying notes 56-57.

74. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 431-32 (1979).

close one, to which confident answer will in any case be impossible."[75] Moreover, the very diversity of our vast country, with its many regional differences and local needs, logically supports a flexible system that can benefit, when appropriate, from federal law which takes account of these regional variations (e.g., in fields such as water rights).[76]

The drawbacks of intercircuit conflicts, on the other hand, are much easier to identify, and could include such factors as: delaying the definitive resolution of questions of national importance; encouraging tactical ploys designed to avoid the unfavorable approach of one circuit or take advantage of the favorable approach of another circuit; and permitting unnecessary uncertainty over which interpretation of a federal law will be applied by a circuit that has not yet ruled on a question.

Without considering the benefits attributable to some regional variation in federal law [77] and the financial cost of establishing a new conflict-resolving structure, the intrinsic value of intercircuit conflicts thus reflects some combination of two broad factors: the potential for improving the quality of federal justice by encouraging more reasoned and principled decisions on issues of federal law, and the potential for delay and uncertainty caused by the slowness with which our federal system arrives at a definitive resolution of these issues. If this could be quantified, I suspect that it would result in an equation something like this: $V = Q - (D + U)$. The value of intercircuit conflict (V) equals the improvement in quality of the resulting rule (Q) less the sum of the cost of the delay in producing a definitive answer (D) and the cost of the resultant uncertainty (U).

Of course, these considerations can never be quantified. But this abstract equation does illustrate a crucial point. The mere fact that our present three-tier system produces intercircuit conflicts that are not immediately resolved by the Supreme Court does not mean that the system is a failure. As Justice Stevens stated, "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."[78] Therefore, intercircuit conflicts are unacceptable only in those areas of the law in which speed is of the essence, where the cost of slow or uncertain justice outweighs the advantages of quality justice; in other words, where patience is not desirable. In terms of the equation, $(D + U)$ is greater than Q, and thus V, the value of the conflict, is negative.

Where V is positive, however, intercircuit conflicts may be benefi-

75. Black, *supra* note 9, at 898.

76. *See* Stevens, *supra* note 9, at 183 ("[T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . .").

77. *See supra* note 76 and accompanying text.

78. Stevens, *supra* note 9, at 183.

cial, or at least tolerable. It is in identifying this distinction that research has been woefully inadequate. Scholarship may demonstrate that the vast majority of questions of federal civil law fall in this category. Technical procedural and evidentiary rulings provide ready examples. The same may be true even in more substantive areas. Our system is not necessarily failing simply because there is a different rule in the Ninth and First Circuits. Most litigants easily adapt to the law within their particular circuit. Because most litigants live and work within the confines of only one circuit, the law applicable to them is the law of one circuit. Whether that circuit has adopted a majority or minority rule does not influence that litigant's primary activities nor the conduct of any resulting litigation. Thus, for the vast majority of litigants in this country, there is a "uniform" federal law in spite of the many issues on which the circuits may disagree. Although it would be beneficial theoretically if each law were applied identically throughout the United States, the cost of achieving that goal outweighs its benefits. In terms of the equation, the costs of delay and uncertainty (D + U) are insignificant while the potential for improving the quality of the law (Q) through patient resolution of the conflict is significant; therefore the value of the conflict (V) is positive.

It is thus apparent that intercircuit conflicts have their primary negative impact on multicircuit actors. The delay in arriving at a definitive rule of national application makes a practical difference to these parties. Aside from the United States Government, which can control its exposure through congressional legislation, most such multicircuit actors today are corporations. This suggests that intercircuit conflicts on questions dealing uniquely with corporations may be unacceptable. On the other hand, these parties ordinarily possess the resources to secure expert counsel on unresolved legal issues and to structure their operations in order to comply with the varying rules of different circuits. Thus, while the value of intercircuit conflicts on some corporate issues (for example, securities and antitrust law) may, on balance, be negative, it is questionable whether such conflicts are so unacceptable as to justify a new, national court of appeals.

My basic point is very simple. If intercircuit conflicts are to be considered an unacceptable feature of our three-tier model, more analysis is required. First, those areas of law in which unresolved intercircuit conflict produces unacceptable delay or uncertainty must first be identified. Second, the extent of intercircuit conflicts in these identified areas of law must be measured. As Justice Stevens has remarked, the number of unresolved conflicts is probably exaggerated.[79] If the

79. *Id.* at 182-83. Judge Friendly has indicated that the number of cases in the Second Circuit raising intercircuit conflict issues is perhaps "two score, out of nearly a thousand cases

number of unacceptable conflicts is too high, then, and only then, will the third question be ripe for resolution: How can the federal system be restructured or modified in order to prevent and resolve unacceptable intercircuit conflicts?

### *B. Resolving Unacceptable Conflicts*

Once the analytical and quantitative questions posed above have been answered, thought can justifiably turn to what I now (prematurely) address—the various ways of resolving unacceptable intercircuit conflicts. At least three alternatives exist: a national court of appeals, national specialty courts, or modifications of the present three-tier system. Given both the historically secondary status of uniformity as a justification for Supreme Court review[80] and the lack of adequate study of the nature and extent of intercircuit conflict,[81] I believe that the proponents of the first alternative, a national court of appeals, have not proved their case; therefore, renewed calls for such a court would be premature at best. The following two Subsections consider the remaining two alternatives.

#### *1. National Specialty Courts*

There has been and continues to be great pressure exerted on Congress to create national specialty courts.[82] Notwithstanding its impressive name, the newly created Court of Appeals for the Federal Circuit[83] is one such example. This court will decide cases heard by two former specialty courts, the Court of Claims and the Court of Customs and Patent Appeals. Rather than receiving geographic jurisdiction, the court is vested with national jurisdiction over a limited subject matter.[84] Added to the jurisdiction of the prior separate specialty courts is jurisdiction to hear all patent infringement appeals and appeals from non-Tucker Act contract cases decided in district court, which until

disposed of after hearing or submission." Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 411 (1972). A recent survey of Ninth Circuit cases decided in 1981 found ten cases in which the Ninth Circuit explicitly created or continued a conflict among the circuits. Undoubtedly there were other cases in which the court was either unaware of the conflict or chose not to acknowledge it. *See* Memorandum from Ninth Circuit Staff to Chief Judge Browning (Nov. 1, 1982) (on file with the *California Law Review*).

80. *See supra* notes 20-34 and accompanying text.

81. *See supra* notes 72-79 and accompanying text.

82. *See, e.g.*, Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975). *But cf.* HRUSKA COMMISSION REPORT, *supra* note 11, at 28-30, *reprinted in* 67 F.R.D. at 234-36 (commission considered various proposals for specialty courts but expressly rejected specialty courts as a solution for court caseload problems).

83. *See supra* note 15 and accompanying text.

84. SENATE REPORT, *supra* note 17, at 3, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 13.

now have been heard by the courts of appeals.[85]

Patent law, however, is one exceptional area of law in which it can be argued persuasively that intercircuit conflict has created an intolerable problem—excessive forum shopping. Most patent cases involve multicircuit actors and therefore enhance the potential for forum shopping when there is an intercircuit conflict. It has also been argued that due to the adverse effect which the lack of uniform patent law may have on the certain application of that law, and therefore on product development and introduction in this country, patent law may well be an area in which conflicts among the circuits cannot be tolerated.[86] Debating this issue now would be futile;[87] however, the idea of this national specialty court is not properly transferable to all areas of law in which intercircuit conflict is considered unacceptable.

Specialty courts, as the American Bar Association recognized in its opposition to the 1982 Act,[88] embody their own clear disadvantages. First, specialty courts set what may prove to be an unfortunate precedent, in that any success of the Court of Appeals for the Federal Circuit will spur efforts to create specialty courts in other areas in which the need for a court may not yet have been demonstrated. Second, the establishment of specialty courts is clearly inconsistent with the long tradition of diversity and generalism on our federal bench. Third, it is not clear that precise jurisdictional definitions can ensure that the specialist judge will hear only the specialized subject matter. Charges of patent infringement not infrequently result in an antitrust counterclaims. As the Court of Appeals for the Federal Circuit may well have appellate jurisdiction for such a case,[89] a judge trained in a special area of the law will decide issues outside of his specialty—indeed, issues often of substantial legal complexity.

Finally, and perhaps most significantly, the creation of a specialty court with nationwide federal appellate jurisdiction could deflect attention away from alternative solutions that are more appropriate for

85. *Id.* at 7, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 17.

86. *See id.* at 5-6, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 15-16; *infra* note 90.

87. Earlier I suggested that excessive forum shopping, if redressed by revisions in venue rules, does not justify the creation of a new court. *See supra* note 63 and acompanying text. The same argument could apply to patent courts, but because they already exist, the argument would here be futile.

88. *See, e.g., U.S. Court of Appeals for the Federal Circuit: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 97th Cong., 1st Sess. 421-23 (1981) (testimony of Benjamin Zelenko and George Whitney who, on behalf of the ABA, opposed the creation of the new patent specialty courts).

89. *See* SENATE REPORT, *supra* note 17, at 18-20, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 28-30; *id.* at 37-38, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS app. B, at 46-47 (letter from William Weller, Legislative Affairs Officer of the Administrative Office of the U.S. Courts, to Senator Robert Dole (Oct. 19, 1981)).

other areas of federal law. With the institutional and administrative support for a permanent national court in place, there would be a tendency to solve other perceived unacceptable intercircuit conflicts merely by expanding the jurisdiction of the Court of Appeals for the Federal Circuit, rather than by the more painstaking process of isolating and drafting a less drastic solution. Building gradually, the final step would be a simple name change to the national court of appeals.

Patent law, because of its focus on technological issues *and* the extreme need for uniformity in decisionmaking, is, at best, a special case.[90] However, the creation of specialty courts in other areas must be supported by reasons at least as compelling as those which justified the creation of the Federal Circuit. Specialty courts must be considered exceptional, suitable only for areas of the law in which unacceptable conflict, together with other significant and decisive factors,[91] produces an intolerable burden on both the federal judiciary and the parties subject to conflicting rules. The necessary presumption against the creation of other such courts cannot be overcome simply upon a showing that a specialty court is a quick-fix solution to intercircuit conflicts. Rather, it must be shown by these factors that a specialty court is *required*. At this time, I agree with Senator Leahy, who has said that he is "aware of no likely candidate for an additional specialty court."[92]

### 2. *Modifications to the Present Three-Tier System*

There are other means of resolving unacceptable intercircuit conflict short of either a national court of appeals or a proliferation of national specialty courts. There exist solutions that are consistent with the incremental approach to improvements in the federal judiciary[93] and with the traditional congressional inclination to value supremacy over uniformity.[94] They could be considered even with the present lack of significant research on the nature and extent of conflicts among the circuits. Each of these proposals, moreover, could be achieved with only minor revisions of the statutes and rules governing appellate jurisdiction in the federal courts. I have alluded to such solutions in an

90. Congress determined that "there is a special need for national uniformity" in patent cases, *id.* at 4, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 14, because "widespread forum-shopping is particularly acute," *id.* at 5, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 15 (footnote omitted), and the lack of uniform standards makes business planning less predictable and thus adversely affects technological innovation, *id.* at 6, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 16.

91. A discussion of such factors is beyond the scope of this Article.

92. SENATE REPORT, *supra* note 17, at 39, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS at 48 (additional views of Senator Leahy).

93. *See supra* text accompanying notes 17 & 53.

94. *See supra* notes 20-34 and accompanying text.

earlier paper,[95] and now suggest that they should be given serious consideration.[96]

*a. Ad Hoc Delegation to an En Banc Circuit Court*

The first proposal is a procedure which in some ways resembles the concept of "reference" jurisdiction proposed by the Hruska Commission, but which does not create a permanent new court. Under this proposal, the Supreme Court could certify intercircuit conflict issues to the en banc circuit courts, on a random or rotating basis, thereby temporarily delegating determinative conflict resolution authority if the Court is too busy or feels the issue unworthy of its resources. For example, suppose that the Supreme Court has identified a certain legal issue on which the circuits are in conflict, and that the Court would like to, but for whatever reason cannot, accept the issue for resolution. In this situation, the Supreme Court could designate one circuit court to convene en banc and assign it to a case raising the issue. The resulting decision would be binding on all circuits unless reversed by the Supreme Court, which would have the usual discretion to grant or deny certiorari to the case.

The virtue of this proposal is that the solution fits the asserted need. If the problem is the need for a uniform national rule, one rule would result and there would then be no intercircuit conflict. If, in the Supreme Court's view, the en banc circuit court has arrived at a wrong conclusion that must be overruled, the Court can exercise its corrective function by reviewing the case just as it would any other incorrect decision. Importantly, however, the conflict would be gone. This is an application of the analytical principle, discussed earlier,[97] that the conflict-resolution function needs to be separated from the error-correction function.

It is not clear whether the Supreme Court would have the authority to institute such a procedure by rule. The Court is vested with the power to prescribe rules for the conduct of its own business[98] and to promulgate rules governing "the practice and procedure of the . . . courts of appeals . . . in civil actions . . . and appeals therein."[99] If it

95. *See Working Paper*, *supra* note 6, at 229-31.

96. Subsequent to the lecture on which this Article was based, the Chief Justice recommended changes that fall short of the creation of a permanent national court of appeals. *See* W. Burger, *supra* note 12, at 11-12, *reprinted in* 69 A.B.A. J. at 447. The Chief Justice's proposal is not inconsistent with the proposals offered herein. It remains to be seen to what extent any specific proposed legislation may be consistent with the modifications suggested in this Article. *See, e.g.*, S. 645, 98th Cong., 1st Sess. tit. VI, 129 CONG. REC. S1947, S1955-56 (daily ed. Mar. 1, 1983) (proposed Court Improvements Act of 1983).

97. *See supra* text accompanying notes 58-59.

98. 28 U.S.C. § 2071 (1976).

99. *Id.* § 2072.

could not be accomplished by rule, Congress, of course, could establish such an en banc certification procedure with an amendment of Title 28 of the United States Code.

*b. National En Banc Court*

My second proposal would definitely require congressional action. It involves a procedure to establish, on a case-by-case basis, a national en banc court.[100] Like the certification procedure just discussed, the national en banc court would function to resolve intercircuit conflicts on an ad hoc basis. The court would be convened in one of two ways: either by a vote of a majority of the Justices of the Supreme Court, or by majority vote of the twelve circuit courts. The court would have no permanent members, however.

Once the procedure is triggered, an en banc court would be formed. An en banc court comprised of all United States courts of appeals judges would obviously be absurd. My proposal is more analogous to the "limited en banc" procedure now used in the Ninth Circuit.[101] Although the Ninth Circuit has twenty-three active members, a panel of eleven is authorized by rule to act for the court en banc. Members of the limited en banc court are chosen by lot, with spaces reserved for judges who have not sat on the en banc court for a certain designated period.[102] Similarly, once the convening of the court has been triggered for a given case, the national en banc court could be comprised of one judge from each circuit court, chosen by lot, by the chief judge of the circuit, or by any other method adopted by the circuit itself. The resulting twelve judges would sit for the purpose of deciding only the case submitted; each case heard by the national en banc court would be before a different panel.[103] With this complement of twelve judges, the national en banc court would be authorized to decide the particular case involving an unacceptable intercircuit conflict. Its decision would be national precedent, binding on all circuit and district courts, subject only to reversal by the Supreme Court in that or a later case.

100. I first considered this general idea in Wallace, *Working Paper*, *supra* note 6, at 229, and in J.C. Wallace, Remarks at the Annual Judicial Conference, Second Judicial Circuit of the United States (May 8-9, 1981), *reprinted in* 93 F.R.D. 675, 767-68 (1982).

101. *See* Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633; 9TH CIR. R. 25.

102. 9TH CIR. R. 25.

103. On this point, my proposal is considerably different from the proposal to establish a "National Division" of the Court of Appeals to resolve conflicts among the circuits. *See* Special Comm. on Coordination of Judicial Improvements, ABA, Resolution Concerning Creation by Congress of a National Division of the United States Court of Appeals (Rep. No. 111a Jan. 1974); Hufstedler, *Courtship and Other Legal Arts*, 60 A.B.A. J. 545, 548 (1974); *House Favors National Division for Federal Courts of Appeals*, 60 A.B.A. J. 453, 453 (1974).

The national en banc court would be empowered only to resolve actual intercircuit conflicts. As discussed above,[104] potential conflicts are not problematic. Action is necessary only when an actual conflict among the circuits develops. Thus, no request for convening the national en banc court could be accepted, nor would the Supreme Court be authorized to direct national en banc review, until one circuit court was faced with an appeal raising an issue on which two or more other circuits are in conflict. At that point, the circuit hearing the case would have two options: decide the case on its own authority, and thus follow one of the two inconsistent rules, or call for a vote with respect to convening the national en banc court.

A circuit faced with an actual conflict would thus have the discretion to determine initially whether the issue involved was sufficiently important to merit consideration by the national en banc court. This, together with the burden of establishing a new en banc court for each case taken, would discourage excessive use of the procedure, as well as give each circuit the freedom to harmonize the law, criticize one or more of the rules adopted by other circuits, or distinguish its own case. Thus, only intercircuit conflicts of significance would be chosen. In short, the national en banc court would not take authority away from the courts of appeals, and would not automatically require any panel in any circuit to delegate the case to the national en banc court. Yet, if the circuit hearing the case called for a vote and the majority of the courts of appeals agreed that the time had come to hammer out a uniform rule, a national en banc court, drawn from every circuit, could do the hammering.

Under this proposal, the Supreme Court would also be authorized to direct the convening of the national en banc court to decide a case, whether or not the case had previously been considered for intercircuit en banc treatment. The Supreme Court could vacate the judgment of a court of appeals, and then direct the convening of and remand to the national en banc court. The en banc court would be obliged to decide the case even if a majority of the circuits had previously voted against such en banc review. Thus, the Supreme Court would retain final authority over the issue without being forced to grant certiorari to resolve it. If the high court disagreed with the national en banc decision, it could then accept the case for review through normal channels and reverse. But importantly, as with my first proposal, the Court would not be bothered with a conflict. Review would be based solely on whether an error was made that requires correction.

This proposal differs from my first proposal in that it loses some

104. *See supra* text accompanying notes 61-64.

simplicity. The en banc circuit court under my first proposal is already in place and merely will hear an additional case en banc. The second proposal is more complicated but gives circuit courts the ability to call for the resolution of the intercircuit conflict and adds the national flavor of taking a representative from each circuit.

There are undoubtedly many aspects of the national en banc court proposal that remain to be explored. As with my first proposal, however, the advantages are many. First and foremost, a national en banc procedure provides exactly what proponents of a national, fourth tier court of appeals insist is needed: added capacity for swift, determinative rulings on cases involving intercircuit conflict. Second, it resolves conflicts in a manner that preserves the status of the Supreme Court as court of last resort and the traditional right of intercircuit disagreement. The procedure would not demean the authority of either the Supreme Court or the courts of appeals. Third, it provides an easily implemented procedure that might, in the long run, prove sufficient to prevent and resolve unacceptable intercircuit conflict. Fourth, because it would be an ad hoc device, not requiring permanent quarters, staff, or significant administrative expense, the court would be both inexpensive in price and modest in aspiration. Each judge serving on a particular national en banc court case would not be excused from his or her normal circuit assignments. There would be no possibility that the court's jurisdiction would be expanded prematurely, as an easy means of providing additional appellate capacity, simply because the institutional trappings of a court were already in place. Fifth, it could immediately relieve the Supreme Court of a large part of its burden. In a recent Term, the Court explicitly recognized a conflict among the circuits in the issue to be decided in twenty-six of the 149 cases in which it granted plenary review.[105] Referring these cases to a national en banc

105. In its 1979 Term, the Supreme Court explicitly recognized an intercircuit conflict in the following 26 cases, all of which generated full written opinions: United States v. Salvucci, 448 U.S. 83, 86 n.2 (1980); Moliasco Corp. v. Silver, 447 U.S. 807, 814 (1980); NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980); Bifulco v. United States, 447 U.S. 381, 386 (1980); Coffy v. Republic Steel Corp., 447 U.S. 191, 194 (1980); Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 104 (1980); Standefer v. United States, 447 U.S. 10, 14 (1980); Walker v. Armco Steel, 446 U.S. 740, 744 (1980); Aaron v. SEC, 446 U.S. 680, 686 (1980); Gomez v. Toledo, 446 U.S. 635, 638 (1980); General Tel. Co. v. EEOC, 446 U.S. 318, 320 (1980); Curtiss-Wright v. General Elec. Co., 446 U.S. 1, 7 (1980); Owen v. City of Independence, 445 U.S. 622, 635 n.15 (1980); Payton v. New York, 445 U.S. 573, 575-76 (1980); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 390 (1980); United States v. Gillock, 445 U.S. 360, 361 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 331 (1980); United States v. Apfelbaum, 445 U.S. 115, 119 (1980); Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 77 (1980); Lewis v. United States, 445 U.S. 55, 58 (1980); Whirlpool Corp. v. Marshall, 445 U.S. 1, 8 (1980); United States v. Euge, 444 U.S. 707, 708 n.1 (1980); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 559 (1980); Rush v. Savchuk, 444 U.S. 320, 326-27 (1980) (state/state and state/federal conflicts); Carbon Fuel Co. v. UMWA, 444 U.S. 212, 215 (1979); Perrin v. United States, 444 U.S. 37, 38 (1979). *See also* Crown

court would have decreased the cases reviewed that Term by almost twenty percent. Finally, the proposal for a national en banc court is consistent with the incremental approach[106] to revisions in the structure of the federal judiciary.

Until the proposal for a national en banc court is tested, only estimates can be made of how often it would have to convene. The need for resolution of intercircuit conflicts may be extensive and may make traditional full-blown en banc consideration in every such case impractical. That possible eventuality, however, would not defeat the proposal; it would only call for modification. Keeping in mind that the purpose of this en banc procedure is not to correct errors but to resolve conflicts, the en banc court need not expend its resources to forge a new rule acceptable to a majority of the en banc court. Instead, the en banc court could meet and choose between or among the alternative rules provided by the conflicting circuits. By accepting what the majority believe to be the preferable rule and adopting that opinion, the en banc court would resolve the conflict with a minimum of effort. The nature of the issue would determine the necessity of briefing or oral argument. No opinion would be written—just a summary order adopting one of the opinions. Under this alternative, the burden on the en banc court would be significantly diminished—allowing a menu of five or more cases at one sitting.[107]

Until it is proven that the extent of unacceptable, unresolved intercircuit conflicts presents a clear and present danger to the proper

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Simpson Pulp Co. v. Costle, 445 U.S. 193, 197 n.9 (per curiam) (apparent conflict mentioned only in incidental footnote). In its 1979 Term, the Court delivered full opinions in 149 cases. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 289 (1980).

There were undoubtedly other cases involving conflicts that the Court was unable to hear because of its crowded docket. Justice White, for example, pointed to 25 cases from the September conference for the 1978 Term that should have been taken for consideration but were not because of the Court's crowded docket. Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1017-22 (1978) (White, J., dissenting from denial of certiorari). Seven of the cases involved intercircuit conflicts and two involved conflicts between different state courts. *Id.* at 1017-19.

The Chief Justice has estimated that a court which would hear intercircuit conflict cases could take as many as 35 to 50 cases a year from the Court's calendar. *See* W. Burger, *supra* note 12, at 11, *reprinted in* 69 A.B.A. J. at 447. Justice O'Connor has recently stated that "[d]uring [her] first Term at the Supreme Court, about 23.7% of [the Court's] decided cases involved interpretation of statutes on which the lower courts had reached conflicting decisions." S. O'Connor, Comments on Supreme Court's Case Load, Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents 8 (Feb. 6, 1983) (on file with the *California Law Review*).

106. *See supra* text accompanying notes 17 & 53.

107. A similar procedure is used at times by the California Supreme Court. When there is a conflict between intermediate courts, the supreme court has authority to choose between the results and withdraw publication of the opinion considered less desirable. *See* CAL. CT. R. 29a. Such decertification, or a hearing, to resolve a conflict is permitted only when it "appears *necessary* to secure uniformity of decision." *Id.* (emphasis added).

functioning of the three-tier model, the national en banc court is as great an improvement as can justifiably be made.

*c. Reduction in the Number of Circuits*

A third and more long-range proposal for solving the problem of intercircuit conflicts would be to reduce the number of circuits.[108] I realize that such a proposal would conflict with the trend in the federal judiciary of adding circuits. The former Fifth Circuit was recently divided into the new Fifth and the Eleventh Circuits.[109] No doubt each will, in the not too distant future, be candidates for redivision. Proposals have also been made to divide the Ninth Circuit into two or three circuits. If allowed to continue, balkanization of the circuits will become unmanageable. Somewhere along the line, it must be asked whether smaller circuit courts are absolutely required to reduce unacceptable *intracircuit* conflict, and whether that reduction, on balance, outweighs any resulting increase in *intercircuit* conflict.

The Ninth Circuit, now the nation's largest, has adopted several procedures which provide for decentralized administration, and which permit it to minimize and resolve intracircuit conflicts.[110] While it is too early for a final evaluation, our experience thus far has been remarkably successful. Based upon what I have seen to date, the Ninth Circuit should remain intact to determine empirically whether intracircuit conflicts can be handled acceptably despite the large size of the circuit court. If the experiment is successful, the possibility of combining circuits could be studied.

These administrative improvements could minimize and resolve intracircuit conflict, while the assignment of conflicts to a circuit en banc court or creation of a national en banc procedure could minimize and resolve any remaining intercircuit conflicts. Because larger circuits would present less opportunity for unresolved intercircuit conflicts, and because those that do arise could be handled easily by either of the en banc procedures suggested, the Supreme Court would be relieved almost entirely of pressure to grant plenary review on intercircuit conflict cases. Basically, the Supreme Court could return to its primary function of preserving supremacy and get out of the conflict business.

I admit that this proposal sounds radical. But it seems radical only

108. *See Working Paper*, *supra* note 6, at 229.

109. *See supra* note 14 and accompanying text.

110. *See, e.g.*, General Orders for the United States Court of Appeals for the Ninth Circuit § 4.1 (on file with the *California Law Review*); Internal Operating Procedures, *supra* note 53, at 23. *See generally* Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937, 958-60 (1980) (discussing the "issue classification" procedure employed by the Ninth Circuit's Central Staff). The Ninth Circuit has been divided into three administrative units. 9th Cir. R. 23.

because it suggests consolidating the courts of appeals and changing their boundaries. Structurally and jurisprudentially, it is considerably less radical than the proposed fourth tier national court of appeals. The three-tier model which has served us well for a century or more would remain. Indeed, it could continue to serve us for the foreseeable future.

## CONCLUSION

Change should not be rejected merely because it is different. But neither should change be implemented without determining if a need exists and whether the proposed solution adequately meets the need. The nature and extent of unresolved intercircuit conflict is a question that deserves more study. The argument that the Supreme Court cannot resolve all intercircuit conflicts on plenary review is not sufficient grounds for creating a fourth tier court of appeals. Less drastic measures—such as the increased use of summary dispositions by the Supreme Court or the creation of a national en banc procedure—should first be considered. Unlike the addition of a new layer of intermediate federal appellate review, these reforms are consistent with the jurisprudential and structural tradition of our federal judicial system. Unless and until it is demonstrated that the three-tier model is clearly deficient, the administration of federal justice is best served by continued adherence to an incremental approach in structural reform. Before we decide to commission a new federal judicial structure, we should first determine that the present one has outlived its usefulness. The burden of proof on that question has not yet been met.