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ARTICLES

Following Lower-Court Precedent

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This Article examines the role of lower-court precedent in the US Supreme Court's decisions. The Supreme Court is rarely the first court to consider a legal question, and therefore the Court has the opportunity to be informed by and perhaps even persuaded by the views of the various lower courts that have previously addressed the issue. This Article considers whether the Court should give weight to lower-court precedent as a matter of normative theory and whether the Court in fact does so as a matter of practice. To answer the normative question, this Article analyzes a variety of potential reasons to give weight to lower-court precedent, including reasons related to stability, constraint, and the wisdom of crowds. To address the descriptive question, this Article examines the current justices' voting behavior and reasoning, over a period of several recent years, in cases in which the Court resolved splits in the lower courts. The Article's conclusions shed light on broader debates over interpretive methodology and the Supreme Court's role as the manager of a large judicial system.

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INTRODUCTION

The US Supreme Court is almost never the first court to consider a question. By the time a question makes its way to the Court, it will often have been debated and decided by numerous lower courts over a period of years, sometimes decades.¹ Nobody would argue that the Supreme Court should be bound, as a formal

¹ See, for example, *Hertz Corp v Friend*, 559 US 77, 89–93 (2010) (describing fifty years of controversy in the lower courts over the meaning of “principal place of business” in 28 USC § 1332 and finally resolving the matter); *Smith v City of Jackson, Mississippi*, 544 US 228, 230, 236–38 (2005) (deciding whether a disparate-impact theory of recovery is available under the Age Discrimination in Employment Act of 1967, a question that lower courts had debated for decades).

matter, by lower-court precedents. Still, if the lower courts have overwhelmingly decided a question in a certain way, should the Supreme Court give their views some genuine weight, even if the Court's own independent judgment leans in the other direction? Or should the Court act as if it were writing on a blank slate, as if it were offering the first word as well as the last? Should the answer depend on the circumstances, and if so, which circumstances matter and why?

The Supreme Court has neither a solid theory nor a steady practice when it comes to using lower-court precedent. In reading the Court's opinions, one sometimes finds statements to the effect that a particular decision accords with, or departs from, the views of most of the lower courts.² These statements, whether found in the majority opinion or in separate concurrences or dissents, are sometimes offered in passing, as if casually observing a coincidence. But in other instances the views of the lower courts are presented as if they play a more important role in the analysis, as if they hold some degree of authority. That is, some opinions suggest that the Supreme Court decided the question in a certain way (or should have decided it in a certain way) *because* most of the lower courts had done so. Many such opinions will be described below, but one recent example is the majority opinion in *United States v Tinklenberg*,³ which concerned the federal Speedy Trial Act of 1974.⁴ The majority found that the statute's key language was facially ambiguous and then listed a series of six contextual considerations that together identified one interpretation as correct.⁵ The second of these considerations, listed before legislative history and workability, was that all but one of the courts of appeals had ruled the same way, a factor that the Court deemed "entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long [] period of time."⁶

² See, for example, *Coleman v Court of Appeals of Maryland*, 132 S Ct 1327, 1332 (2012) ("In agreement with every Court of Appeals to have addressed this question, this Court now holds . . ."); *Cullen v Pinholster*, 131 S Ct 1388, 1417 (2011) (Sotomayor dissenting) (observing that the Court's majority opinion "charts a [] novel course that, so far as I am aware, no court of appeals has adopted"); *Abbott v United States*, 131 S Ct 18, 23 (2010) ("We hold, in accord with the courts below, and in line with the majority of the Courts of Appeals . . .").

³ 131 S Ct 2007 (2011).

⁴ Pub L No 93-619, 88 Stat 2076, codified as amended at 18 USC § 3161 et seq.

⁵ See *Tinklenberg*, 131 S Ct at 2013-16.

⁶ *Id* at 2014.

When an opinion suggests that it is relying on the lower courts as authorities, other opinions in the same case sometimes respond by explicitly rejecting that mode of analysis. That happened in *Tinklenberg*, for example,⁷ as well as in a case decided a few weeks earlier, in which the dissent's heavy reliance on lower courts drew the response that the Court has "no warrant to ignore clear statutory language on the ground that other courts have done so."⁸ In another recent case, the majority's repeated invocations of uniform support from the federal courts of appeals⁹ prompted the dissent to answer that "we do not resolve questions such as the one before us by a show of hands."¹⁰

Another common approach to lower-court precedent is virtually, or sometimes literally, to ignore it. In one recent case, the dissent relied on decades of practice in many district courts and had support from a large majority of the federal courts of appeals that had addressed the question,¹¹ but the Court's majority opinion barely acknowledged that its decision went so clearly against the grain of that lower-court precedent.¹² In other cases, a lengthy history of lower-court engagement with a question will go totally unmentioned, as if it had never happened.¹³

The absence of a settled approach to dealing with the views of the lower courts is odd considering that the issue is so pervasive. Then again, perhaps the lack of a developed theory and consistent practice should come as no surprise, given that some other aspects of the Court's decisionmaking methodology—in particular its approaches to constitutional and statutory

⁷ See *id.* at 2018 (Scalia concurring in part and concurring in the judgment) ("The clarity of the text is doubtless why, as the Court's opinion points out, every Circuit disagrees with the [decision under review]. . . . Clarity of text produces unanimity of Circuits—not, as the Court's opinion would have it, unanimity of Circuits clarifies text.") (citation omitted).

⁸ *Milner v Department of the Navy*, 131 S Ct 1259, 1268 (2011). See also *id.* at 1269 ("We will not flout all usual rules of statutory interpretation to take the side of the bare majority [of lower courts].").

⁹ See *CSX Transportation, Inc v McBride*, 131 S Ct 2630, 2640–41 (2011).

¹⁰ *Id.* at 2650 (Roberts dissenting). See also *Global-Tech Appliances, Inc v SEB SA*, 131 S Ct 2060, 2073 (2011) (Kennedy dissenting) ("[C]ounting courts in a circuit split is not this Court's usual method for deciding important questions of law.").

¹¹ See *Taniguchi v Kan Pacific Saipan, Ltd*, 132 S Ct 1997, 2008–09, 2010–11 (2012) (Ginsburg dissenting).

¹² See *id.* at 2000–01 & n 1, 2005 n 5 (majority) (observing that the circuits were split but citing only two conflicting decisions).

¹³ See Part III.A.2.

interpretation—seem not to enjoy ordinary stare decisis effect.¹⁴ If the Court can be intentionalist on Monday, textualist on Tuesday, and pragmatic on Wednesday, perhaps it is only natural that the Court would honor lower-court consensus one day, openly reject it the next day, and neglect it altogether the rest of the week. Moreover, the more one ponders what the Court should do with lower-court precedent, the more complicated and interesting the question becomes. The potential reasons to defer to lower-court precedent are multiple and diverse, as are the cases that the Supreme Court confronts and the jurisprudential commitments that the justices bring to their work, so a simple resolution may not be feasible.

With the aim of illuminating this intriguing problem, this Article examines the Supreme Court's treatment of lower-court precedent in both its normative and descriptive dimensions. Part I frames the inquiry, and then Part II addresses the central normative issues: Should the Supreme Court ever defer to lower courts on questions of law, and, if so, on what grounds? I present and evaluate half a dozen potential reasons—from stability to judicial constraint to the wisdom of crowds—for the Court to give lower-court decisions some precedential weight. In most cases, the argument for following the lower courts is not very powerful, but in a subset of cases it is.

With the benefit of the theoretical framework developed in Parts I and II, Part III then examines the Court's actual practices both qualitatively and quantitatively. I seek to identify every instance in which the Supreme Court's opinions relied on lower-court precedent during three recent Supreme Court terms, which cover the period from October 2010 through June 2013. For the same period, I also examine how the justices voted when there was a clearly prevailing view in the lower courts. These three terms capture the first three years of the Court as currently constituted—that is, since Justice Elena Kagan replaced Justice John Paul Stevens. There are a number of interesting findings. Notably, while it appears that the Court sides with the majority of the lower courts the majority of the time, it is not at all

¹⁴ See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Georgetown L J 1863, 1872–84 (2008) (discussing whether the Court grants stare decisis effect to statutory interpretation methodologies); Richard H. Fallon Jr, *Constitutional Constraints*, 97 Cal L Rev 975, 1013 (2009) (“[T]he justices have seldom exhibited much interest in attempting to bind either themselves or each other, in advance, to the kind of general interpretive approaches [to constitutional adjudication] that academic theorists champion.”).

uncommon for the Court to reject positions that have enjoyed the support of lopsided majorities of the lower courts. There are also important differences among the current justices, with some justices ignoring or outright shunning lower-court precedent even as other justices appear to accord the lower courts a measure of deference. These differences can be explained through reference to the justices' deeper jurisprudential commitments and can shed light on the methodological divide between the Court's conservatives and liberals.

The Conclusion explores some broader practical and theoretical implications of the analysis. In particular, it addresses the interaction between precedent and foundational theories like textualism, and it considers whether a Supreme Court that is only sporadically attentive to lower-court precedent can avoid destabilizing a judicial system in which other courts use precedent quite differently.

I. FOCUSING THE INQUIRY WITH SOME INITIAL DISTINCTIONS

Precedent is ubiquitous in judicial decisionmaking. Once the inquiry is narrowed to the use of lower-court precedent by the Supreme Court, there still remain a variety of ways in which such precedent might come into play. The following sections introduce some distinctions among uses of lower-court precedent in order to focus the inquiry further.

A. Certiorari Stage and Merits Stage

At the outset, we should distinguish between the certiorari stage, the Court's largely discretionary process for choosing which cases to hear, and the merits stage, at which the Court actually answers the legal questions that it has chosen to consider. In recent years, the Court has given plenary consideration to only about eighty cases per term.¹⁵ Probably the most significant factor in selecting those few cases is the presence or absence of a conflict in the lower courts on an important, recurring question of federal law.¹⁶ This is not to say that a split is always

¹⁵ See *Judicial Business of the United States Courts: 2013 Annual Report of the Director* table A-1 (Administrative Office of the US Courts 2013), online at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/A01Sep13.pdf> (visited Aug 12, 2014).

¹⁶ See US S Ct Rule 10(a)–(b) (listing conflicts in the lower courts as grounds for granting certiorari). See also Amanda Frost, *Overvaluing Uniformity*, 94 Va L Rev 1567, 1630–36 (2008) (reviewing empirical analyses showing that lower-court conflict is still

necessary, especially when the case involves matters of high public importance, but the absence of conflict weighs heavily against a grant of certiorari and will usually (though not always) prevent the Court from intervening.¹⁷ Lower-court views, particularly when they are unanimous, are thus honored routinely at the certiorari stage in the sense that they are left alone.

This Article's central concern, however, is the merits stage, and it is here that acceding to the views of inferior courts raises more interesting issues. Once the Court has decided to invest its time and effort in answering some question, is there any reason that it should care how the majority of the lower courts, or even all of them, have previously answered that question? Once the Court determines to reach the merits, one might suppose that it should simply try to decide the case *correctly*, according to its own view of the matter. It can thus be jarring to read a Supreme Court opinion that seems to aim at a less ambitious goal, such as a recent dissenting opinion that advocated following a long-standing lower-court interpretation that was described (twice) merely as "reasonable," rather than as the best or the correct interpretation.¹⁸ Mere reasonableness does not sound like the standard that a reviewing court ordinarily demands of lower-court determinations of law, which are reviewed *de novo* and thus theoretically without any deference.¹⁹

Of course, "deciding correctly" is a complicated matter. Correctness might not exist in a vacuum; legal questions have histories. The purpose of Part II is to consider the various ways in

the most important factor in granting certiorari); H.W. Perry Jr, *Deciding to Decide: Agenda Setting in the United States Supreme Court* 246, 251 (Harvard 1991) (deeming lower-court conflicts the most important factor in granting certiorari). A mere division of authority is not sufficient; the importance of the question presented matters too, as does whether the issue has had a chance to mature through a bit of percolation. See Perry, *Deciding to Decide* at 230–34, 253–60 (cited in note 16).

¹⁷ See Perry, *Deciding to Decide* at 253–54, 277–79 (cited in note 16).

¹⁸ *Milner v Department of the Navy*, 131 S Ct 1259, 1275, 1278 (2011) (Breyer dissenting) ("[E]ven if the majority's analysis would have persuaded me if written on a blank slate, [the leading lower-court opinion's] analysis was careful and its holding reasonable."). See also *McNally v United States*, 483 US 350, 376 (1987) (Stevens dissenting) ("In these cases I am convinced that those [lower-court] judges correctly understood the intent of the Congress that enacted this statute. *Even if I were not so persuaded*, I could not join a rejection of such a long-standing, consistent interpretation of a federal statute.") (emphasis added).

¹⁹ See 5 Am Jur 2d Appellate Review § 647 (2014). When the legal question is one of state law rather than federal law, the Supreme Court has sometimes deferred to lower federal courts. See *Salve Regina College v Russell*, 499 US 225, 241–42 (1991) (Rehnquist dissenting) (citing examples).

which the lower courts' actions might help to reveal or determine the correct decision for the Supreme Court.

B. Distinguishing among Various Uses of Lower-Court Precedent

This Article addresses the weight that the Supreme Court should accord the lower courts' views as persuasive interpretive inputs when it addresses a question previously addressed by the lower courts. For example, if six circuits have held that skateboards are "vehicles" within the meaning of a statute barring vehicles from federal wildlife refuges, and only one circuit has disagreed, how should that division affect the Supreme Court's resolution of that question? That manner of using precedent should be distinguished from various other roles that lower-court precedent plays in Supreme Court decisions.

We can begin by distinguishing and setting aside those situations in which lower-court precedent is relevant because the particular doctrines at issue themselves direct the Supreme Court to consider the state of the preexisting law. Some examples will clarify. Consider the doctrine of qualified immunity, which applies when government officials are sued for violating constitutional rights. In such a case, it is not necessarily determinative that the official violated the law, for qualified immunity shields the official from liability unless the illegality was clear at the time of the alleged violation.²⁰ The inquiry into the clarity of the preexisting law often calls for an examination of not only Supreme Court precedent, but also that of the lower courts, for the latter may well have been the precedent that most directly addressed the particular circumstances that confronted the official.²¹ A related example comes from the habeas context, in which the Supreme Court might examine the prevailing law of the lower courts to determine whether one of its recent decisions constitutes a "new rule" that does not apply retroactively to upset

²⁰ See *Pearson v Callahan*, 555 US 223, 231–32, 243–44 (2009).

²¹ See, for example, *Wilson v Layne*, 526 US 603, 617 (1999) (noting the absence of "a consensus of [lower-court] cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful"). Likewise, the state of precedent, including lower-court precedent, can be directly relevant to determining whether a good faith exception to the exclusionary rule applies. See, for example, *Davis v United States*, 131 S Ct 2419, 2428–29 (2011) (holding that exclusion was improper when the search complied with then-binding circuit law).

old criminal convictions.²² Similarly, the views of lower courts are relevant in assessing whether a litigant's arguments were so frivolous that the imposition of attorneys' fees or sanctions is warranted.²³

Still another use of lower-court decisions, also not at issue here, occurs when lower-court case law on unrelated questions, or even from separate fields of law, is cited as evidence of a term's ordinary meaning. That is, if the Supreme Court wants to know whether the phrase "filed any complaint" in the Fair Labor Standards Act of 1938²⁴ can include complaints made orally, the Court might consider, among other things, whether judicial opinions from various fields of law ever refer to oral submissions as "filings."²⁵ In such cases, lower courts are being treated like dictionaries in the same way that the Court sometimes uses newspapers and other writings in order to discern the ordinary meaning of a word or phrase.²⁶ Lower-court decisions used in this way are being given a sort of linguistic authority, but the lower-court decisions themselves do not address the question before the Court and so are not really being invoked as authorities on that question. Similarly irrelevant here are instances in which the Supreme Court looks to lower-court decisions predating some enactment in an effort to understand the legal background against which Congress legislated.²⁷ In such an instance, the lower courts' decisions are derivatively useful to the extent that they can shed light on likely congressional intent or reveal

²² *Chaidez v United States*, 133 S Ct 1103, 1111 (2013) (determining that a Supreme Court decision was a "new rule" in part because the decision overturned the law of the vast majority of jurisdictions). But see *id* at 1120 (Sotomayor dissenting) (disputing the relevance of the lower-court cases).

²³ See, for example, *Pierce v Underwood*, 487 US 552, 555–56, 569 (1988) (discussing lower-court decisions in determining whether the government's litigation position was "substantially justified" for purposes of a fee-shifting statute).

²⁴ 29 USC § 201 et seq.

²⁵ *Kasten v Saint-Gobain Performance Plastics Corp*, 131 S Ct 1325, 1329, 1332 (2011). See also *Moskal v United States*, 498 US 103, 121–25 (1990) (Scalia dissenting) (relying on lower-court decisions, among other things, to establish the legal meaning of the term "falsely made").

²⁶ See, for example, *Muscarello v United States*, 524 US 125, 126–30 (1998) (citing, among other things, dictionaries, the Bible, *Robinson Crusoe*, *Moby-Dick*, and computer databases of newspaper articles to determine the meaning of the word "carry").

²⁷ See, for example, *Kappos v Hyatt*, 132 S Ct 1690, 1697–1700 (2012); *Setser v United States*, 132 S Ct 1463, 1468 (2012); *Skilling v United States*, 130 S Ct 2896, 2930–31 (2010). The Court's opinions interpreting 42 USC § 1983 frequently canvass the state of the common law when the statute was enacted, which involves considering scads of nineteenth-century state-court decisions. See, for example, *Filarsky v Delia*, 132 S Ct 1657, 1662–65 (2012).

the existing fabric of the law into which the new statute has to be woven, but they do not and could not directly address the question before the Court.

Finally, the usage of lower-court precedent at issue in this Article is distinct from the phenomenon of the Supreme Court borrowing language from the lower courts for use in its own opinions. Research shows that the Court sometimes copies material (with or without attribution) from lower-court decisions, especially the particular decision under review.²⁸ Even when that kind of borrowing occurs in the Court's legal analysis (as opposed to its recitation of the facts of the case before it), the borrowing can happen whether or not the borrowed-from decision represents the majority of the lower courts (and, moreover, the Court can copy language in order to criticize the copied-from decision).²⁹ Therefore, that kind of borrowing does not really bear on the questions explored here, which involve whether the Court does and should adopt particular legal positions because most of the lower courts have done so.

To be clear, the point of setting aside these uses of lower-court decisions is not to declare them unimportant. The lower courts generate much of the law of our land, and their work therefore finds its way into the Supreme Court's opinions for countless reasons. The topic explored here is the Supreme Court's use of lower-court precedent as a persuasive authority when the Court addresses a question that lower courts have previously decided. Now that the inquiry has been focused, this Article considers the variety of reasons why lower-court decisions on a question of law might carry weight with the Supreme Court.

II. ASSESSING POTENTIAL REASONS TO DEFER TO LOWER COURTS

The Supreme Court has not articulated a theoretical account of whether the lower courts' views matter, when they matter, or why they matter. Some scholars have addressed certain aspects of these issues, typically focusing on some particular rationale for deference to lower courts. Probably the most notable treatment is Professors William Eskridge and Philip Frickey's study of the

²⁸ See Pamela C. Corley, Paul M. Collins Jr, and Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 *J Polit* 31, 37–38, 42 (2011).

²⁹ See *id.* at 33–34, 42.

Supreme Court's 1993 Term.³⁰ Emphasizing the value of stability in the law, the authors criticize the Court for too casually upsetting settled law, including law represented by long-standing lines of lower-court precedent.³¹ Stability is indeed an important value, but stability is just one of several potential reasons for giving weight to the views of the lower courts. In fact, there are at least six distinct justifications. Some of them have more intuitive appeal than others, and some of them find more support in the Court's opinions than others. Some of the rationales may require near unanimity in the lower courts, though others may have some force even in the case of narrower majorities.

The six rationales can be loosely grouped into two broad categories: those that view lower-court decisions as possessing some informational content and those that seek to promote some other institutional value. The first group contains the following three rationales:

- *Epistemic value.* The Supreme Court should pay attention to the lower courts because the fact that they have ruled a certain way tends to show that their favored position is actually correct. That is, the views of the lower courts can have epistemic, or truth-revealing, value.
- *Modest pragmatism.* When the lower courts generate a certain state of the law, the Supreme Court can then observe the consequences. If those consequences appear tolerable, then a risk-averse high court might be reluctant to try out an untested rule with unknown effects.
- *Acquiescence.* If the lower courts have clearly settled on a particular view of the law and Congress has not repudiated that view, Congress can be said to have implicitly ratified that view.

Honoring lower-court precedent can also advance at least the following three institutional values:

- *Stability.* There is value in the law being settled and stable. That is true whether the law comes from positive enactments, Supreme Court decisions, or a consistent line of lower-court authority.
- *Compliance.* The Supreme Court might have an easier time getting the lower courts to obey its decisions if it

³⁰ See generally William N. Eskridge Jr and Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv L Rev 26 (1994).

³¹ See *id* at 76–81.

rules in accord with what most lower courts are already doing.

- *Constraint.* Following the lower courts and ratifying their majority view provides an objectively constraining methodology for the Supreme Court to follow while still ensuring that there is nationally uniform and authoritative law.

The following sections explore each rationale and consider whether, when, and why it has force. After that, Part II.G combines the various partial insights to reach some more general conclusions.

A. Epistemic Value

Chief Justice John Roberts recently wrote, in a dissenting opinion that rejected the majority's appeal to the authority of lower-court consensus, that the Supreme Court "do[es] not resolve questions . . . by a show of hands."³² In one sense he is wrong, for the Court itself operates by majority rule when the justices disagree: five trumps four.³³ But in another sense he is correct. A court is supposed to be a "forum of principle,"³⁴ a domain in which majoritarian might does not make right.

Nonetheless, one can construct a fairly simple argument to the effect that the Supreme Court, when engaged in its own search for the correct answer to the question before it, should give weight to the views of other decisionmakers. Individual wisdom is limited, so heeding the judgment of other actors—at least if they are reasonably smart, well-informed, and quite numerous—might guide the Court toward the correct answer. This borrowed wisdom could come from any number of sources, including foreign courts, expert administrative agencies, legal historians, or popular opinion. Which of those sources are worth heeding depends, of course, on the nature of the question and one's theory of judicial decisionmaking. But one especially promising source of guidance is the lower courts, for they, unlike some other sources, broadly resemble the Supreme Court in terms of the questions that they confront and the norms that govern their decisionmaking. The fact that a large majority of

³² *CSX Transportation, Inc v McBride*, 131 S Ct 2630, 2650 (2011) (Roberts dissenting).

³³ For a valuable meditation on the role of majority rule in multimember courts, see generally Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 *Yale L J* 1692 (2014).

³⁴ Ronald Dworkin, *A Matter of Principle* 69–71 (Harvard 1985).

judges have converged on a particular answer to some legal question provides some reason to believe that their answer is indeed correct.³⁵

More formally, one can support this commonsense intuition by invoking the Condorcet Jury Theorem.³⁶ When the members of a group are all better than random at selecting the correct answer to a question, the likelihood that a majority vote of the group will select the correct answer approaches certainty as the size of the group increases.³⁷ Thus, the aggregate decisionmaking ability of a modestly competent large group can outperform the judgment of the most expert individuals. The Jury Theorem or similar logic has been used as support for the judicial doctrine of *stare decisis* and, more generally, as support for recognizing the wisdom of tradition.³⁸ The same logic could be invoked in the case of lower-court precedent. If one assumes that lower-court judges are better than random in their decisions, then the result embraced by the majority of a large group of them is probably right, and it would be wise for the Supreme Court to give weight to that majority view, even if the justices are individually more competent than their “inferiors.” To give a stylized example, if

³⁵ My discussion of the epistemic argument for following lower-court precedent largely adheres to that argument's internal logic. The epistemic argument confronts some significant difficulties even on its own terms. Those skeptical of the possibility of legal claims being correct will of course have their own more fundamental doubts. This is not the place to review the debate over whether legal propositions can be true, but for helpful points of entry into that debate, see Dennis Patterson, *Law and Truth* 3–21 (Oxford 1996). See also generally Lawrence B. Solum, *Indeterminacy*, in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* 488 (Blackwell 1999).

³⁶ See Marie Jean Antoine Nicolas Caritat, marquis de Condorcet, *Condorcet: Selected Writings* 48–49 (Bobbs-Merrill 1976) (Keith Michael Baker, ed). See also Duncan Black, *The Theory of Committees and Elections* 163 (Kluwer 1987).

³⁷ The simplest version of the Jury Theorem involves a choice between two options and requires that the members of the group be more than 50 percent likely to choose the correct option. The Theorem can be generalized to plurality voting among more than two options, though the results are not as powerful. See David M. Estlund, *Democratic Authority: A Philosophical Framework* 226–30 (Princeton 2008); Christian List and Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 *J Polit Phil* 277, 283–88 (2001). There is no need to dwell on these sorts of complications, for the Jury Theorem suffers from more important limitations even in the simplest case (as this Section will explain).

³⁸ See, for example, Cass R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* 51–52 (Princeton 2009) (linking Condorcet to a Burkean form of judicial minimalism). See also John O. McGinnis and Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 *Nw U L Rev* 803, 845 (2009) (“That a majority of Justices previously interpreted the original meaning of the Constitution in one way provides evidence for that interpretation.”). For a criticism of epistemic/Condorcetian defenses of precedent, see Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 *Colum L Rev* 1482, 1485–1517 (2007).

lower-court judges are each right 60 percent of the time, and if 10 out of 15 of them answer some question a particular way, we can be almost 90 percent sure that the majority is right.³⁹

Nonetheless, there are several difficulties with the Condorcet-inspired argument for deference to lower courts. One obvious limitation is that the argument becomes more forceful as the size of the majority increases—and so, even on its own terms, the argument is weak in narrow splits. That by itself significantly limits the domain in which the argument could operate. In order to present the Condorcetian argument in its best light, let us confine ourselves to the subset of Supreme Court cases that feature a more lopsided split. Even in those circumstances, the argument must confront at least the following three difficulties.

1. Independent decisions.

For one thing, the Jury Theorem derives its power from aggregating the views of many independent individuals.⁴⁰ As a matter of established practice, however, lower courts are supposed to give weight to the views of other lower courts. Uniformity is, for the lower courts, a goal in its own right.⁴¹ The mere fact that one circuit has answered a question in a particular way provides a reason for other circuits to follow suit, a reason that becomes stronger as more courts join the trend.⁴² Thus, a lopsided majority in the lower courts might not represent a consensus of experts but could simply demonstrate a powerful

³⁹ For the formula that gives this result, see Black, *The Theory of Committees and Elections* at 164 (cited in note 36). It is not entirely clear how one should measure the size of the “jury” that resolves an appeal. In the text above I count each judge separately, but that is by no means the only approach. See note 43 (noting the possibility that judges on a panel defer to each other).

⁴⁰ It is not the case that the Jury Theorem is wholly inapplicable when the decisionmakers are not independent (in the relevant, technical sense), but the lack of independence reduces the effective size of the jury, diminishing the force of any consensus. See Bernard Grofman and Scott L. Feld, *Rousseau’s General Will: A Condorcetian Perspective*, 82 *Am Polit Sci Rev* 567, 571 (1988). See also generally David M. Estlund, *Opinion Leaders, Independence, and Condorcet’s Jury Theorem*, 36 *Theory & Decision* 131 (1994) (discussing the meaning of “independence” in the Jury Theorem).

⁴¹ See *Colby v J.C. Penney Co*, 811 F2d 1119, 1123 (7th Cir 1987):

Bearing in mind the interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits, we give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can.

⁴² See David E. Klein, *Making Law in the United States Courts of Appeals* 88–91 (Cambridge 2004) (noting the varied reasons that appellate judges report for whether and why they consider the judgments of sister circuits).

bandwagon effect.⁴³ (In fact, one good argument against a firm rule of intercircuit stare decisis is precisely that it gives too much weight to the first-mover court, which could err and then drag the others along.⁴⁴) To the extent that the lower courts defer to one another, that diminishes the argument that the Supreme Court should in turn defer to their accumulated wisdom, which is in fact not so accumulated after all.

2. Relative competence.

The Jury Theorem reminds us of the power of sheer numbers: a large crowd of people of middling ability can outperform an expert few. Nonetheless, the competence of individual decisionmakers still matters. If Supreme Court justices are significantly more likely to reach correct results than lower-court judges, then a bare majority on the Supreme Court could more reliably reach the right result than could a sizable majority of lower-court judges.

There are several reasons to believe that the Supreme Court is, in the main, better positioned to reach correct decisions.⁴⁵ To be sure, different theories of judging may disagree about which features of an environment best promote sound decisionmaking. Nonetheless, the Supreme Court operates in a resource-rich environment that most theories would deem helpful. Internally, the justices have large and highly competent staffs of law clerks and librarians.⁴⁶ Perhaps more importantly, the Court's relatively small docket provides the luxury of time.⁴⁷ Turning to external

⁴³ See generally Andrew F. Daughety and Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 Am L & Econ Rev 158 (1999). Making matters worse, individual judges on an appellate panel might defer to one another, such that the unanimous decision of a federal court of appeals does not actually represent three separate votes. See generally Lee Epstein, William M. Landes, and Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J Legal Analysis 101 (2011) (modeling the phenomenon of dissent aversion).

⁴⁴ See Richard A. Posner, *The Federal Courts: Challenge and Reform* 380–81 (Harvard 1999).

⁴⁵ The next few paragraphs draw on material in two prior articles. See Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 Notre Dame L Rev 727, 740–41 (2013); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 Cornell L Rev 433, 470–73 (2012).

⁴⁶ See Posner, *The Federal Courts* at 140–42 (cited in note 44); Bruhl, 89 Notre Dame L Rev at 740 (cited in note 45).

⁴⁷ Occasionally, the Court or individual justices have to act on an emergency matter with little time for reflection. In such circumstances, the Supreme Court's ruminative advantage is reduced. See Mike Dorf, *How to Think about Likelihood of Success on the Merits: Further Reflections on the Little Sisters and the Utah SSM Cases*, Dorf on Law

resources, Supreme Court advocacy is increasingly the preserve of highly competent specialists.⁴⁸ These lawyers, whether in private firms, public-interest organizations, or the Solicitor General's office, bring a high degree of effort and skill to each case and leave few stones unturned. To the extent that any important aspects of the case are neglected by the parties, amicus briefs fill the gap. Almost every Supreme Court case attracts them, often many of them.⁴⁹ Aside from conventional legal arguments, these briefs can offer useful information on policy context, interest group alignments, preferences of other political actors, and relevant facts not contained in the formal record.⁵⁰ Even when the United States or one of its agencies is not a party to the case, the government usually files high-quality amicus curiae briefs that provide a wealth of useful information.⁵¹

The above list of contextual features omits the characteristics of the justices themselves.⁵² Supreme Court justices come from a national talent pool, hold the most elite credentials, and

(Jan 6, 2014), online at <http://www.dorfonlaw.org/2014/01/how-to-think-about-likelihood-of.html> (visited Aug 12, 2014) (suggesting that it might be reasonable for a justice to use lower-court views as a proxy for likelihood of success on the merits when under time pressure, but that no such deference is appropriate when there is time for deliberation).

⁴⁸ See Richard J. Lazarus, *Advocacy Matters before and within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Georgetown L J 1487, 1497–1502 (2008).

⁴⁹ See Paul M. Collins Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* 47 (Oxford 2008); Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U Pa L Rev 743, 751–56 (2000).

⁵⁰ See Lee Epstein and Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in Cornell W. Clayton and Howard Gillman, eds, *Supreme Court Decision-Making: New Institutional Approaches* 215, 225–28 (Chicago 1999) (explaining that amicus briefs often provide information about the preferences of the other governmental branches and the public); Stephen Breyer, *The Interdependence of Science and Law*, 280 Science 537, 538 (1998) (stating that amicus briefs can educate the Court on technical matters and improve decisionmaking); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L J 1, 35–37 (2011) (discussing the use of amicus briefs, especially in the Supreme Court, as sources of extrarecord facts). For a recent, skeptical take on the value of the factual information provided by some amicus briefs, see generally Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va L Rev (forthcoming 2014), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409071 (visited Aug 12, 2014).

⁵¹ In recent years, the solicitor general has filed amicus briefs in about 75 percent of the Supreme Court's nonconstitutional civil cases in which the government was not already a party. See Margaret Meriwether Cordray and Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 BC L Rev 1323, 1359 & n 79 (2010).

⁵² Another factor not included in the list of the Court's institutional advantages is the possibility that the larger number of justices (always an en banc court of nine) provides for better deliberation. The modern Court seems not to engage in much collegial debate. See William H. Rehnquist, *The Supreme Court* 254–55 (Knopf 2001).

are closely scrutinized for the acceptability of their political views. All of this differs somewhat for judges on lower federal courts and on state courts (though, for the latter, the selection processes differ substantially from state to state, making it hard to generalize). Whether these personal characteristics make Supreme Court justices more competent decisionmakers is contestable. It probably makes them better in some ways (for example, understanding the preferences of national political elites and possessing academic knowledge of constitutional law) and worse in others (for example, empathizing with the experiences of ordinary people). Regardless, any differences in the personal ability of judges on different courts are probably swamped by much more significant disparities in institutional context.

The decisionmaking environment is, on the whole, less favorable the lower one goes down the judicial pyramid. As one moves down, the caseloads generally grow while the resources shrink. The federal courts of appeals adjudicated over thirty-five thousand cases on the merits in 2013.⁵³ Although it would be too simplistic to contrast that huge figure with the eighty or so cases that the Supreme Court decided on the merits in each of the last several years—for one thing, the justices (or their clerks) have to wade through thousands of petitions for certiorari to find those eighty cases⁵⁴—the staggering contrast is nonetheless broadly instructive. Further, the quality of the advocacy is generally lower and more uneven in the lower courts.⁵⁵ Amicus briefs, which are ubiquitous in the Supreme Court, are less common in federal courts of appeals and state high courts, thus depriving those courts of potentially useful information and perspectives.⁵⁶

⁵³ 2013 *Judicial Business of the United States Courts: 2013 Annual Report of the Director* table S-3 (Administrative Office of the US Courts 2013), online at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S03Sep13.pdf> (visited Aug 12, 2014).

⁵⁴ See 2013 *Annual Report* at table A-1 (cited in note 15).

⁵⁵ See Posner, *The Federal Courts* at 142 (cited in note 44) (noting that the Supreme Court has the advantage of “better briefs and better-prepared oral arguments”); Justice Stephen G. Breyer, 13 *Scribes J Legal Writing* 145, 160 (2010) (assessing briefing in the Supreme Court as being “pretty uniformly good” and stating that “[y]ou’ll get very good briefs in the circuits on a lesser number of occasions”).

⁵⁶ See Wendy L. Martinek, *Amici Curiae in the U.S. Courts of Appeals*, 34 *Am Polit Res* 803, 806–09 (2006) (discussing amicus activity in courts of appeals versus the Supreme Court); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 *Rev Litig* 669, 686–87 (2008) (discussing amicus activity in lower federal courts). See also generally Scott A. Comparato, *Amici Curiae and Strategic Behavior in State Supreme Courts* (Praeger 2003) (discussing amicus participation and its effects in state courts).

Lower-court decisions are more likely to be eccentric or politically extreme, given that the decisionmaking units consist of smaller numbers of judges.⁵⁷

It should be said, in defense of the lower courts, that they do have certain advantages over the Supreme Court. For one thing, lower-court judges have more experience with some issues than the appellate generalists on the Supreme Court. One would expect that federal bankruptcy judges are more knowledgeable about bankruptcy law and policy, for example, and that the average federal or state trial judge probably understands the consequences of various procedural and evidentiary rules better than the justices, most of whom have little or no trial experience.⁵⁸

The justices' opinions occasionally contain hints of deference to lower-court expertise. In a securities case a few years ago, the Court applied a test that departed from a long line of lower-court interpretations.⁵⁹ Justice Stevens wrote separately to explain that he would have followed that line of cases, a line that had begun decades ago in the Second Circuit with opinions by Judge Henry Friendly.⁶⁰ Stevens cited not just the age and number of lower-court precedents, but also relied on Friendly's reputation as "[o]ne of our greatest jurists."⁶¹ Stevens seemed to suggest that the Second Circuit, and Friendly in particular, knew more about how to shape securities law than the formally "supreme" justices.⁶² (As this example shows, the reputations of particular judges and courts matter, not just how many lower courts are involved.) One also finds occasional references to the

⁵⁷ See Michael Abramowicz, *En Banc Revisited*, 100 Colum L Rev 1600, 1608, 1630–33 (2000) (explaining that smaller groups of judges are likely to be less representative of the whole judiciary than larger groups).

⁵⁸ See Kevin M. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L Rev 821, 850–52 (2010) (noting the justices' apparent confusion on basic matters of trial procedure); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex L Rev 1, 58 (1994) (noting that "district courts might be better situated to determine whether particular evidentiary exclusionary rules deter police misconduct, given their greater exposure to testimony by and about police officers"). On the current Court, only Justice Sonia Sotomayor has experience as a trial judge. White House Office of the Press Secretary, Press Release, *Judge Sonia Sotomayor* (May 26, 2009), online at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor (visited Aug 12, 2009).

⁵⁹ See *Morrison v National Australia Bank Ltd*, 130 S Ct 2869, 2878–81 (2010) (Scalia).

⁶⁰ *Id.* at 2889 (Stevens concurring in the judgment).

⁶¹ *Id.* at 2889–90 (Stevens concurring in the judgment).

⁶² See *id.* at 2889 (Stevens concurring in the judgment) (calling the majority opinion "misplaced" in light of the history of Second Circuit jurisprudence on the topic).

expertise of trial judges as a class on matters of litigation procedure.⁶³ Invocations of the lower courts' wisdom sometimes occur in dissents rather than majority opinions, but Eric Hansford found tentative support for the proposition that circuits with greater experience in certain subject areas are affirmed more often in those areas than non-expert circuits, though he deemed the effect more likely attributable to the experienced circuits being able to make better decisions than to the Supreme Court granting those circuits any particular deference.⁶⁴

For justices who regard legislative intent as an important source of guidance, the lower courts might also hold an advantage, at least in theory, because the lower courts sometimes decide their cases at around the time of the original enactment, with the Supreme Court following later. In another securities case, the Supreme Court also overturned a long line of lower-court precedent, but Justice Stevens would have followed those cases because, among other things, the lower-court judges were "closer to the times and climate of the [enacting] Congress."⁶⁵ Of course, any advantage derived from being an early decisionmaker has to be balanced against the inherent advantages of coming later. As a particular question is litigated and decided repeatedly, later courts can study the reasoning of those that came before, dig more deeply into the relevant material, and perhaps discern the consequences of the prior decisions.

The last few paragraphs have suggested that lower courts, even individually, might possess certain advantages over the Supreme Court. The Supreme Court should hesitate, for example,

⁶³ See, for example, *Caplin & Drysdale, Chartered v United States*, 491 US 617, 635 (1989) (Blackmun dissenting) (stating that the Court "should heed the warnings of our District Court judges, whose day-to-day exposure to the criminal-trial process enables them to understand, perhaps far better than we, the devastating consequences of [the Court's approach]"). Another area in which lower-court judges likely enjoy an advantage over the Supreme Court is familiarity with state law. See Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S Cal L Rev 975, 1022–26 (2004). However, questions of state law would rarely be the topic of a split of authority warranting the Supreme Court's intervention.

⁶⁴ See Eric Hansford, Note, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 Stan L Rev 1145, 1146, 1155–56, 1167 (2011).

⁶⁵ *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*, 511 US 164, 192–93 (1994) (Stevens dissenting). Similarly, constitutional originalists might give extra weight to the views and practices of early government officials, many of whom were involved in the framing and ratification of the Constitution. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv L Rev 26, 81 (2000) (suggesting that a judge might think that "[i]f John Marshall and his brethren thought X, perhaps X is right after all, despite initial appearances to the contrary").

before upsetting a lower-court consensus on a matter of trial procedure about which the Court's knowledge is remote and academic. Nonetheless, in the run of cases, the Supreme Court operates in circumstances that make it more capable than the lower courts taken individually. The point of the Jury Theorem, of course, is to consider the lower courts as a numerous group, but if the Court's competence advantage is large, it would take quite a sizable lower-court majority for their collective view to carry serious epistemic weight.

3. Different questions.

A less obvious but perhaps more fundamental problem with the Condorcet-inspired argument for deferring to lower-court views is that, in some cases, the Supreme Court is not even answering the same question that the lower courts addressed. This is so for a few reasons. For one, the question in any case is not just the proper interpretation of some statute or constitutional provision on a blank slate, but rather the proper interpretation *given the constraints of precedent*. Those constraints differ markedly as one moves up the judicial hierarchy. The Supreme Court's holdings are absolutely binding on the lower courts but only somewhat binding on the Court itself.⁶⁶ A lower court might face a question that finds an easy answer in existing Supreme Court precedent, but in the Supreme Court the question could be whether that precedent should be overruled, a question that the lower courts could not entertain. Consider in that regard the Court's recent decision in *Alleyne v United States*,⁶⁷ which evaluated whether the Sixth Amendment permits judges, rather than juries, to find facts that increase a defendant's minimum sentence.⁶⁸ A prior Supreme Court case, *Harris v United States*,⁶⁹ had permitted the practice.⁷⁰ The lower court in *Alleyne*, like other lower courts in countless decisions before it, had relied on *Harris* and curtly rejected the defendant's constitutional challenge.⁷¹ Yet

⁶⁶ See *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 484 (1989) (explaining that "the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions").

⁶⁷ 133 S Ct 2151 (2013).

⁶⁸ *Id* at 2155.

⁶⁹ 536 US 545 (2002).

⁷⁰ *Id* at 568.

⁷¹ See *United States v Alleyne*, 457 Fed Appx 348, 350 (4th Cir 2011) (stating that "Supreme Court precedent forecloses" the defendant's argument). See also, for example, *United States v Brown*, 653 F3d 656, 659–60 (8th Cir 2011) (refusing to depart from the

the Supreme Court overruled *Harris* in *Alleynes*.⁷² The lower court was reversed even though it had decided “correctly.” The Supreme Court was just asking a different question.

A related problem concerns Supreme Court dicta. Lower courts are strongly influenced by the Supreme Court’s dicta,⁷³ but the Supreme Court itself treats dicta more casually. For a revealing example, consider whether the Age Discrimination in Employment Act of 1967⁷⁴ (ADEA) recognizes a disparate-impact theory of liability. Lower courts that addressed the question in the statute’s early years overwhelmingly held that it did recognize such a theory.⁷⁵ Then, in 1993, the Supreme Court’s *Hazen Paper Co v Biggins*⁷⁶ opinion stated that “[d]isparate treatment”—not disparate impact—“captures the essence of what Congress sought to prohibit in the ADEA.”⁷⁷ This statement would be considered dicta under any of the traditional definitions; indeed, the statement openly announced itself as such.⁷⁸ And yet, after *Hazen Paper*, most circuits that addressed the question as a matter of first impression held that the ADEA did not recognize a disparate-impact theory—and some courts that had previously accepted the theory reversed course.⁷⁹ The Supreme Court finally answered the question in 2005 and held, contrary to the newly emerging countertrend triggered by its own dicta,

rule in *Harris* since “only the Supreme Court may overrule its controlling decisions”), cert denied, 132 S Ct 1649 (2012).

⁷² *Alleynes*, 133 S Ct at 2163.

⁷³ See, for example, *Town Sound and Custom Tops, Inc v Chrysler Motors Corp*, 959 F2d 468, 495 n 41 (3d Cir 1992) (“Generally, [] we consider and respect Supreme Court dicta as well as holdings because the Supreme Court hears relatively few cases and frequently uses dicta to give guidance to the lower courts.”). See also David Klein and Neal Devins, *Dicta, Schmicta: Theory versus Practice in Lower Court Decision Making*, 54 Wm & Mary L Rev 2021, 2025–26, 2032–42 (2013) (providing empirical evidence that the holding/dictum distinction rarely affects lower-court decisionmaking); Frederick Schauer, *Opinions as Rules*, 53 U Chi L Rev 682, 683–84 (1986) (“In interpretive arenas below the Supreme Court, one good quote [from the Supreme Court] is worth a hundred clever analyses of the holding.”).

⁷⁴ 29 USC § 621 et seq.

⁷⁵ See *Smith v City of Jackson, Mississippi*, 544 US 228, 236–37 (2005) (collecting cases illustrating the history of the statute’s interpretation in lower courts).

⁷⁶ 507 US 604 (1993).

⁷⁷ *Id* at 610 (emphasis added).

⁷⁸ See *id* (“[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.”) (citation omitted).

⁷⁹ See *Smith*, 544 US at 236–37. See also *Smith v City of Jackson, Mississippi*, 351 F3d 183, 195 n 14 (5th Cir 2003) (citing *Hazen Paper* for support while recognizing that it was not binding), *affd* 544 US 228 (2005); *Mullin v Raytheon Co*, 164 F3d 696, 700–01 (1st Cir 1999) (noting that “[t]he tectonic plates shifted” after *Hazen Paper* and that courts started to reject the disparate-impact theory).

that there was indeed a disparate-impact theory after all!⁸⁰ The seemingly portentous remark in *Hazen Paper* was dismissed as irrelevant commentary.⁸¹ There are plenty of similar examples in which lower courts followed dicta and then had the rug pulled out from under them later.⁸² More broadly, if lower courts are using dicta to try to *predict* what the Supreme Court will do rather than trying to independently engage with the authoritative legal materials,⁸³ then a consensus of the lower courts is not very edifying to the Supreme Court.

Questions may also look different at different points in the judicial hierarchy because the Supreme Court's grant of certiorari can—in a sort of legal version of Heisenberg's uncertainty principle—itsself shift the legal background so that the right answer to the question actually changes after the Supreme Court decides to hear the case. For instance, a grant of certiorari occasionally induces the federal government to announce a new administrative interpretation of a statute. Such interpretations, even when presented in formats such as an amicus brief by the solicitor general, receive a degree of weight.⁸⁴ The question for the Supreme Court then becomes how best to interpret the statute given the semiauthoritative gloss supplied by the executive

⁸⁰ See *Smith*, 544 US at 240. The theory that the Court adopted was a rather narrow one as compared to the version of disparate impact that is available under Title VII. See *id.*

⁸¹ See *id.* at 237–38.

⁸² See generally, for example, *Buckhannon Board & Care Home, Inc v West Virginia Department of Health and Human Resources*, 532 US 598 (2001). Justice Antonin Scalia referred to the dissent's call to honor the lower-court consensus on the question presented as “particularly peculiar in the present case, since that [lower-court] majority has been nurtured and preserved by our own misleading dicta.” *Id.* at 621 (Scalia concurring).

⁸³ The usual view is that the lower courts are supposed to decide matters independently, but some features of the legal system openly embrace prediction, which probably occurs covertly even more frequently. See Caminker, 73 *Tex L Rev* at 8–22 (cited in note 58).

⁸⁴ See, for example, *Talk America, Inc v Michigan Bell Telephone Co*, 131 S Ct 2254, 2257 n 1, 2260–61, 2263–64 (2011) (deferring to the FCC's view, as put forth in the government's amicus brief, and reversing the judgment). See also William N. Eskridge Jr and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *Georgetown L J* 1083, 1112, 1143 (2008) (noting instances of deference to agency inputs and observing that the “Court often requests that the Solicitor General submit an amicus brief”); Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 *Ariz St L J* 1183, 1212–14 (2013) (describing the influence that amicus briefs filed by the solicitor general enjoy, and questioning the optimal level of deference); Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 *Nw U L Rev* 997, 1034–47 (2007) (explaining that the Court has increasingly invited agency views, and arguing that courts should be required to give due consideration to agency amicus briefs).

authorities who administer the statute. In such a case, the decisions of the lower courts are not very relevant, because they originated within an interpretive universe that has now expanded. Accordingly, the Supreme Court and the lower courts could both be right even if they reach opposite conclusions.

More fundamentally, it could be that the lower courts and the Supreme Court—while all engaged in nominally the same judicial activity—are actually engaged in quite different enterprises with different aims. For example, it might make sense for the Supreme Court to regard itself as participating in a dialogue with Congress and the executive branch, such that the Court's role is not to answer questions correctly and finally in the first instance, but rather to spur other institutions of government into action so that the system as a whole comes to a proper resolution of the matter.⁸⁵ For lower courts, whose decisions are less salient, such dynamics are more remote.⁸⁶ As another possibility, the Court's rulings may need to take on a different, more managerial cast given its hierarchical position.⁸⁷ More radically, one might view the Court's role, in certain kinds of cases, as that of a tribunal of philosopher-kings who should decide the great questions before them on (possibly evolving) moral and prudential grounds,⁸⁸ quite unlike the lower courts, whose dominant role is just to apply the rules laid down, umpire-like, to the discrete disputes before them.

* * *

Considering all of these limitations, how powerful is the epistemic argument? The fact that lower courts give weight to other

⁸⁵ See Bruhl, 97 Cornell L Rev at 459–62 (cited in note 45) (discussing democracy-forcing and preference-eliciting approaches to judicial interpretation); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S Cal L Rev 205, 210–13 (2013) (discussing interpretive doctrines premised on dialogue between the courts and Congress). Dialogic approaches are easiest to appreciate in statutory matters, but such approaches can also apply in the constitutional sphere. See, for example, Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 25–36 (Harvard 1999) (arguing that judicial minimalism in constitutional decisionmaking can trigger beneficial democratic deliberation).

⁸⁶ See text accompanying notes 102–04.

⁸⁷ See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 Cornell L Rev 1, 4, 59 (2009) (arguing that the Supreme Court should issue broad, clarifying rulings to provide guidance to the lower courts).

⁸⁸ See, for example, Richard A. Posner, *Foreword: A Political Court*, 119 Harv L Rev 31, 81–84 (2005) (describing the notion—which Judge Richard Posner associates with Professor Alexander Bickel, among others—that the Supreme Court serves as the nation's “moral vanguard”).

lower courts' views means that even a large consensus might not represent as much wisdom as it seems. Moreover, the Supreme Court operates in a more favorable environment in which to "find" the law, further counteracting the lower courts' numerical advantage. And in some cases, the lower courts and the Supreme Court are not even addressing the same question. Taken together, all of this significantly restricts the range of cases over which the epistemic argument could operate, though it does not render the argument totally impotent.

The uncertainties and contingencies involved in determining when to credit the epistemic argument create a further complication—namely, that the Supreme Court might not be able to reliably determine when the preconditions for the epistemic argument are satisfied.⁸⁹ At a certain point, it makes more sense just to make an independent decision rather than to struggle over whether and how much to defer.

B. Modest Pragmatism

A second reason for the Supreme Court to attend to lower-court precedent derives from a pragmatic concern about the consequences of different possible interpretations of the law. When a certain view of the law has been established within a jurisdiction for some time, one can see how things have played out. The lower courts, on this account, would act as laboratories conducting a decentralized experiment. The Supreme Court could observe the results and then, when the time comes, create national law in a more practically informed way. The possibility of this sort of experimentation and learning would provide one justification for the Court's practice of letting lower-court conflicts percolate for a while before stepping in to resolve them.⁹⁰

⁸⁹ For a similar point in the context of judicial application of the Jury Theorem to public opinion, see Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 *Stan L Rev* 213, 225 (2007).

⁹⁰ See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 *Harv L Rev* 4, 65 (1998) (noting "the possibility that the passage of time during which there is a circuit split creates a record of the consequences of different legal regimes"). See also Tom S. Clark and Jonathan P. Kstellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 *J Polit* 150, 153 (2013) (providing a quantitative approach to the question of when the Supreme Court is likely to step in to resolve a circuit split); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 *Am U L Rev* 457, 481–89 (2012) (describing various systemic benefits of allowing issues to percolate in the lower courts).

The pragmatic argument comes in a few forms, some more convincing than others. An ambitious version would have the Supreme Court assess the results of the decentralized experiment and then choose the best interpretation as national law. Yet one wonders whether the Court could reliably discern which of several competing interpretations is generating better consequences. Additionally, the fact that the lower courts are divided and the law uncertain might dampen the extent to which consequences manifest themselves.⁹¹

More modest forms of the pragmatic argument are more plausible. For instance, suppose that most lower courts have embraced a particular position for years, such that their rule has been applied many times in many distinct factual contexts. If no terrible consequences seem evident, one could conclude that the prevailing view is at least workable, even if one could not confidently declare it better than any alternative. An untested view would be riskier precisely because one could not be confident that it would not cause serious problems.

An illustration of this form of modest pragmatism comes from *Tinklenberg*, the Speedy Trial Act case discussed earlier.⁹² The Sixth Circuit had departed from the long-standing, widely embraced view of the statute's meaning.⁹³ Justice Stephen Breyer's opinion for the Court listed a number of questions about how courts could administer the Sixth Circuit's novel rule.⁹⁴ While allowing that courts could eventually find ways to overcome the "administrative difficulties" that the Sixth Circuit's approach would generate, Breyer preferred the amply tested path that other lower courts had already trod: "[A]ny such future strategies for administering the Sixth Circuit's rule cannot provide a present justification for turning the federal judicial system away from the *far less obstacle-strewn path that the system has long traveled*."⁹⁵ This type of reasoning might be attractive to consequentialist judges who are risk averse or who doubt their own ability to accurately predict consequences. It is a satisficing strategy (that is, it accepts "good enough," rather than optimal,

⁹¹ See *Kirtsaeng v John Wiley & Sons, Inc*, 133 S Ct 1351, 1366 (2013) (noting that the expected bad consequences of the competing interpretation adopted by some lower courts had not appeared because the law had not been settled for long).

⁹² See text accompanying notes 3–7.

⁹³ See *Tinklenberg*, 131 S Ct at 2014.

⁹⁴ See *id* at 2014–15.

⁹⁵ *Id* at 2015 (emphasis added).

results)⁹⁶ and also a form of status quo bias. One could also give the argument an evolutionary or Burkean spin: if a certain view has persisted over time in some or all jurisdictions, then it probably represents some degree of good sense and practical adaptation.⁹⁷

The kinds of consequences revealed by lower-court decisions need not be limited to matters of judicial administrability such as those involved in *Tinklenberg*. More broadly, the consequences could include the public's reactions to lower-court decisions on contentious social matters such as same-sex marriage. In this way, lower courts could act as a sort of "backlash" warning system.

It bears noting that the logic of modest pragmatism is flexible enough that it could be invoked even in support of a minority view, as long as the minority represents enough of a critical mass and enough time has passed that one could detect any terrible consequences that would result from the view. The absence of such consequences could then neutralize arguments that the view at issue would lead to bad results if the Supreme Court adopted it. In fact, the Supreme Court's invocation of modest pragmatism is by no means limited to situations in which it follows the majority of the lower courts.⁹⁸

C. Acquiescence

Another type of argument also relies on the fact that lower-court decisions can convey or generate useful information for the Supreme Court. In particular, there can sometimes be meaning in silence. If Congress does not respond to an authoritative pronouncement about the meaning of a federal statute, one might be inclined to take that silence as expressing a degree of congressional approval or at least acquiescence.⁹⁹ The clearest cases involve prior interpretations issued by the Supreme Court or a

⁹⁶ See Herbert A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations* 118–20 (Free Press 4th ed 1997) (distinguishing between maximizing and satisficing behavior).

⁹⁷ Even Bentham, who otherwise mocks the notion of deferring to prior generations (which necessarily lack our experience), explains that past practices are useful guides for consequentialists. See Jeremy Bentham, *Bentham's Handbook of Political Fallacies* 43–45, 49–51 (Johns Hopkins 1952) (Harold A. Larrabee, ed).

⁹⁸ See Part III.B.2.

⁹⁹ See generally William N. Eskridge Jr, *Interpreting Legislative Inaction*, 87 Mich L Rev 67 (1988). The acquiescence argument differs from the situation in which the Supreme Court uses lower-court decisions (along with other sources) to reconstruct the legal background against which Congress legislated. See Part I.B. The acquiescence argument concerns events that take place *after* enactment rather than before.

federal administrative agency.¹⁰⁰ Yet, in principle, the same argument applies to lower-court interpretations, at least when they are numerous and reasonably long-standing such that they represent, practically speaking, the law of the land.

Arguments based on congressional acquiescence are a bit risky even under the best of circumstances. Inaction might reflect agreement on the part of successive Congresses, but it could just as easily reflect the press of more important matters, conflicting preferences about how to amend the statute, the absence of a majority large and powerful enough to overcome legislative inertia, and so forth.¹⁰¹ When the relevant precedents come from the lower courts rather than from the Supreme Court, the problems multiply. Congress is less familiar with the decisional outputs of the courts of appeals, which is hardly surprising given that the lower courts decide many times more cases and those decisions are, almost necessarily, less definitive.¹⁰² Even when Congress does become aware, that same lack of (relative) importance and finality makes it less likely that a failure to respond reflects genuine endorsement.¹⁰³ This is not to deny that Congress does become aware of, and sometimes respond to,

¹⁰⁰ See, for example, *Bob Jones University v United States*, 461 US 574, 599–602 (1983) (“Failure of Congress to modify the IRS rulings . . . make[s] out an unusually strong case of legislative . . . ratification by implication.”); *Flood v Kuhn*, 407 US 258, 279–83 (1972) (noting several Supreme Court cases granting an antitrust exemption to professional baseball and concluding from Congress’s silence that it “had no intention” to overrule the Court).

¹⁰¹ See Eskridge, 87 Mich L Rev at 98–108 (cited in note 99). The hurdles to amending the Constitution, as opposed to a statute, are generally even greater, such that imputing congressional acquiescence in an interpretation is less justified in the former context than in the latter.

¹⁰² See Robert A. Katzmann, *Courts and Congress* 73–74 (Brookings 1997) (finding that congressional staffers are generally unaware of statutory interpretation decisions in lower courts unless an interest group had lobbied them for relief); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L J 331, 337 n 12, 415–16 (1991) (concluding that Congress is unaware of most lower-court decisions and overrides them at a much lower rate than Supreme Court decisions); Stefanie A. Lindquist and David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 *Judicature* 61, 68 (2001) (finding that Congress responds to a small percentage of circuit court decisions). Congress does not have to read through all of the decisions, of course; it can rely on interest groups to bring the few important decisions to its attention. See, for example, Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 *Am J Polit Sci* 165, 165–67 (1984) (developing the police-patrol and fire-alarm models of congressional oversight of the federal bureaucracy). But interest groups, just like Congress, should devote relatively less effort to monitoring and demanding corrective action of the lower courts than the Supreme Court.

¹⁰³ See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 Mich L Rev 1, 82–86 (1994).

lower-court precedents.¹⁰⁴ The soundness of an inference of acquiescence is always a matter of degree. But lower-court interpretations that can realistically claim a congressional blessing—through some combination of salience, near uniformity, and duration—should be rare among the sample of cases that make their way onto the Supreme Court's docket.¹⁰⁵ Thus, although a complete accounting awaits Part II.G, it does not appear that acquiescence arguments centered on lower-court interpretations should play a major role in Supreme Court decisionmaking.

To be sure, it may be that one should understand acquiescence and other inaction-based arguments not as making factual claims about *actual* congressional approval, but instead as making a normatively inflected claim about the proper allocation of institutional functions in a democracy. That is, if a certain interpretation of the law has taken hold (through the work of whatever interpreting entity), the interpretation becomes engrafted into the statute itself, such that the Supreme Court should treat that interpretation as final unless Congress, which has constitutional primacy in statutory matters, displaces it.¹⁰⁶ Buttressing that democratic argument, one could add that the interpretation should be allowed to stand since continuity and stability are institutional virtues, in large part because settled interpretations engender private and public reliance.¹⁰⁷ This is therefore an appropriate time to consider stability-based arguments more directly and to evaluate their force.

¹⁰⁴ See Lindquist and Yalof, 85 *Judicature* at 63–68 (cited in note 102) (documenting instances in which Congress responded to lower-court decisions).

¹⁰⁵ For much the same reasons that congressional acquiescence usually provides little reason for the Supreme Court to honor lower-court precedent, it has been argued that lower courts should give their own statutory precedents less *stare decisis* effect. See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *Geo Wash L Rev* 317, 327–51 (2005).

¹⁰⁶ See *Shearson/American Express Inc v McMahon*, 482 US 220, 268 (1987) (Stevens concurring in part and dissenting in part) (“[A]fter a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself.”); Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 *Mich L Rev* 177, 208–15 (1989) (arguing that, once a statute has been interpreted by a reviewing court, further revisions are “basically legislative” because they are not strictly necessary to fill gaps in the text).

¹⁰⁷ See Eskridge, 87 *Mich L Rev* at 110–11 (cited in note 99).

D. Stability

Even if lower-court precedent did not convey any useful information to the Supreme Court, the very fact of its existence might generate institutional reasons to honor it. One such potential reason is stability. Stability is a primary rule-of-law value¹⁰⁸ and it forms a large part of the justification for following precedent.¹⁰⁹ Stability is valuable for a number of reasons. It promotes the equal treatment of similar litigants over time and, perhaps most importantly, protects the interests of those who have ordered their affairs in reliance on a certain state of the law. Reliance is thus regarded as a critical consideration when a court is deciding whether to overturn one of its own precedents instead of following the norm of *stare decisis*.¹¹⁰

Although the most powerfully reliance-inducing federal precedents come from the Supreme Court itself, a proper concern for the value of stability would require one to attend to any settled law, regardless of its source.¹¹¹ In their theory of law as equilibrium, Professors Eskridge and Frickey include lower-court consensus as one of the various sources that, especially when combined with agency support and congressional acquiescence, can constitute a stable equilibrium worthy of the name “law.”¹¹² Eskridge and Frickey accordingly criticize the Supreme Court for too lightly upsetting some interpretations that had long prevailed in the lower courts.¹¹³ More recently, Professor Hillel Levin has similarly explained that a reliance-focused approach to precedent should put some lower-court precedents on

¹⁰⁸ See Lon L. Fuller, *The Morality of Law* 79–81 (Yale rev ed 1969) (describing constancy through time as an aspect of law’s internal morality); Federalist 62 (Madison), in *The Federalist* 415, 420–22 (Wesleyan 1961) (Jacob E. Cooke, ed) (arguing that frequent changes in the law produce instability, make the law difficult to follow, and defeat the point of self-governance).

¹⁰⁹ See Frederick Schauer, *Precedent*, 39 *Stan L Rev* 571, 597–98, 601–02 (1987) (describing the benefits of following precedent, including predictability and stability).

¹¹⁰ See, for example, *Alleyne*, 133 S Ct at 2164 (Sotomayor concurring); *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 855–56 (1992). See also generally Randy J. Kozel, *Precedent and Reliance*, 62 *Emory L J* 1459 (2013) (discussing the role of reliance in the doctrine of *stare decisis*).

¹¹¹ See, for example, Anita S. Krishnakumar, *Long-standing Agency Interpretations*, 83 *Fordham L Rev* *36–38 (forthcoming 2015), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224066 (visited Aug 12, 2014) (arguing that courts should afford extra deference to particularly long-standing agency interpretations, in part for reasons of reliance and stability).

¹¹² See Eskridge and Frickey, 108 *Harv L Rev* at 76–81 (cited in note 31).

¹¹³ See *id* at 80–81.

or near the same level as Supreme Court precedents for stare decisis purposes.¹¹⁴

Without denying that stability can provide a reason for the Supreme Court to consider the views of lower courts, the stability argument has its limits. To begin with, the potential for disruption and unfairness is worst when all or virtually all of the lower courts have been doing things the same way for a long time. Yet legal questions that have generated a long-standing consensus in the lower courts are, given the Court's certiorari priorities, unlikely to be reviewed. The clearest cases for adhering to lower-court precedent are thus uncommon at the merits stage.

How does the stability rationale fare in the more common scenario of division among the lower courts? If the lower courts are closely divided, stability probably would not have much of a role to play once the Court has decided to grant certiorari, as there will be some disruption either way. However, if the lower courts are divided in a lopsided fashion, then stability could carry some weight. True, the mere existence of a division of authority and the lack of a Supreme Court decision probably somewhat reduce the extent to which people would regard the law as firmly settled and rely on it.¹¹⁵ Nonetheless, strictly from the stability perspective, going with the majority view seems less disruptive in that fewer affected persons would have to change their conduct, learn new law, or have their expectations upset. A further wrinkle, however, is that the circuits differ in terms of population. The Ninth Circuit contains about 20 percent of the country's population. A "minority" view held by the Ninth Circuit governs more of the country's population than a "majority" view held by less populous circuits like the First, Eighth, and Tenth Circuits, which contain fewer people combined than the Ninth Circuit alone.¹¹⁶ Yet, strangely, it does not appear that the

¹¹⁴ See Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 Ga L Rev 1035, 1074–78 (2013); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U Ill L Rev 1103, 1141–42.

¹¹⁵ It is actually quite hard to know how circuit conflicts affect the regulated public's understanding of what the governing law is and how to order their affairs. For an attempt to gauge this through surveys and interviews of lawyers, see Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 S Ct Rev 247, 266–99. Further complicating matters, the extent of reliance may depend on the Supreme Court's practices: if it disregards even long-standing and nearly unanimous lower-court precedent, people should not rely on such precedents very much, which then further justifies the Court's disregard of them.

¹¹⁶ See US Census Bureau, *State and County Quick Facts*, online at <http://quickfacts.census.gov/qfd/index.html> (visited Aug 12, 2014). If one wanted to be

Supreme Court shows special solicitude to the views of the Ninth Circuit. Perhaps the Court is wrong in this respect.

Another complication with stability arguments is that the value of preserving some stable, settled view depends on the question at issue. True, any change in the law involves some transition costs, such as the burden of learning the new law, updating legal materials, and so forth.¹¹⁷ But some kinds of changes are much more disruptive than others. A decision upsetting common and entrenched business practices—such as a decision extending the antitrust laws to previously unregulated conduct,¹¹⁸ or a decision changing the tax treatment of capital investments—could seriously interfere with citizens' primary conduct and destroy the value of certain assets and expectations, especially given that judicial decisions are typically applied retroactively.

Other categories of legal questions are unlikely to involve serious reliance problems, even when the lower courts have been consistent. The Court's *stare decisis* jurisprudence proceeds on the premise that evidentiary and procedural rulings, unlike those bearing on property and contract rights, are unlikely to involve serious reliance costs.¹¹⁹ In the main, that seems right, and so there will usually not be serious reliance-related reasons to honor the views of lower courts in such matters.¹²⁰ Even apart from that, the damage to reliance interests might depend on the direction of the legal change; particularly worrisome are scenarios involving decisions that expand the scope of liability.

Taking all of these considerations together, stability will rarely provide a strong reason for the Supreme Court to attend

even more precise, one could consider not total population, but instead the size of the affected subset of the population. For example, upsetting the Tenth Circuit's position on a question of federal Indian law could be more disruptive than upsetting the law of a more populous circuit that contains fewer tribes.

¹¹⁷ See generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L Rev 789 (2002) (cataloguing various types of legal transition costs).

¹¹⁸ See, for example, *Toolson v New York Yankees, Inc.*, 346 US 356, 357 (1953) (maintaining the antitrust exemption for baseball because overruling it would upset decades of development undertaken in reliance on the exemption).

¹¹⁹ See, for example, *Payne v Tennessee*, 501 US 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules.") (citations omitted).

¹²⁰ It is not universally the case that procedural and evidentiary changes do not involve serious reliance interests. See Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash & Lee L Rev 411, 447 (2010) (providing the example of the law of attorney-client privilege).

to the lower courts. The scenarios in which the argument is strongest—when the lower courts have overwhelmingly embraced a particular view for a long time—are also the scenarios in which the Court is least likely to grant review. When the Court does take such a case, the argument for attending to a lower-court consensus is often strong, particularly when reversal would risk serious damage to reliance interests. But in other cases the Court should feel little hesitation about upsetting even what was very settled law. In *Padilla v Kentucky*,¹²¹ for example, the Supreme Court overturned the virtually unanimous view of the state and lower federal courts by holding that the Sixth Amendment right to effective assistance of counsel extends to advice about the immigration consequences of pleading guilty.¹²² Yet this break with precedent did not hold much disruptive potential. For one thing, prevailing professional norms already required such advice even though the Constitution did not.¹²³ For another, various practical and procedural obstacles would likely prevent large numbers of old convictions from being overturned.¹²⁴

E. Compliance

Although not a prominent part of the official doctrine, another group of potential institutional reasons for the Supreme Court to follow lower-court precedent involves compliance. If the Court rules in accord with what most of the lower courts are already doing, it can be fairly confident that they will keep doing as they have done. Further, if enough lower courts have decided a question, the majority of that sample should reflect the latent majority inclination of the others.¹²⁵

¹²¹ 130 S Ct 1473 (2010).

¹²² *Id.* at 1481–82 & n 9, 1487 (Alito concurring in the judgment) (noting that the decision was contrary to “the long-standing and unanimous position of the federal courts”).

¹²³ See *id.* at 1482, 1485; Brief of the National Association of Criminal Defense Lawyers, et al, as Amici Curiae in Support of Petitioner, *Padilla v Kentucky*, Docket No 08-651, *9–21 (US filed June 2, 2009) (available on Westlaw at 2009 WL 1567356).

¹²⁴ See *Padilla*, 130 S Ct at 1485–86. See also *Chaidez v United States*, 133 S Ct 1103, 1107–11 (2013) (holding that *Padilla* did not apply retroactively).

¹²⁵ See Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J Legal Stud 327, 332–33 (2002) (discussing the “polling model” of the Jury Theorem). The compliance-centric argument in the text is not making a utilitarian point that the Court can satisfy the most preferences by agreeing with the lower-court majority. One could make such an argument, but it is unclear why satisfying lower-court preferences

A concern about judicial compliance might seem strange or even perverse, given that the Supreme Court sits at the top of the hierarchy and has the power to reverse. (By contrast, worries about resistance by *nonjudicial* actors are more familiar.¹²⁶) But the power relationship between the Supreme Court and lower courts is a bit more complicated than that. The lower judiciary is large, and its output is immense compared to the Supreme Court's limited capacity to supervise. If the lower courts decided to engage in serious, widespread, and sustained defiance, the Supreme Court would not have enough writs of mandamus to keep them in line. More than that, the Supreme Court affirmatively needs the lower courts to implement, enforce, and flesh out the relatively few rulings that it does issue so as to make them the actual law of the land.¹²⁷ The need to ensure some degree of lower-court buy-in provides a reason for the Supreme Court to go along with what the lower courts already want.

Why would lower courts fail to comply with new Supreme Court precedents? Like many organizations, courts are conservative and inertial; indeed, courts in particular are *supposed to be* institutionally conservative (in the sense of favoring continuity over change).¹²⁸ Thus, they sometimes read Supreme Court decisions so as to unsettle as little existing law as possible.¹²⁹ Beyond that sort of inertial resistance, there could be some topics about which feelings on the substantive merits run high enough that purposeful resistance is a real prospect.¹³⁰ One thinks of hot-button social issues like school prayer, desegregation and

(whatever that means) would be especially valuable (as compared to aiming to maximize overall social welfare).

¹²⁶ See, for example, *Brown v Board of Education of Topeka*, 349 US 294, 301 (1955) (ordering that desegregation proceed not immediately, but "with all deliberate speed"). See also Paul Gewirtz, *Remedies and Resistance*, 92 Yale L J 585, 609–14 (1983) (explaining that the Court chose the "all deliberate speed" formulation in order to reduce anticipated resistance by states, school districts, and segregationists).

¹²⁷ See Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U Cin L Rev 771, 778, 799 (1993).

¹²⁸ See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921, 925 (1992).

¹²⁹ See, for example, Brannon P. Denning and Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark L Rev 1253, 1253–57, 1299–1310 (2003) (charting the tepid response of the lower courts to new limitations on the Commerce Clause).

¹³⁰ See Sara C. Benesh and Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 Marq L Rev 795, 795 n 1 (2009) (citing dozens of scholarly works on lower-court compliance).

busing, and the death penalty. Less obviously, one might consider issues like mandatory arbitration and access to the civil-litigation system, fields in which the Supreme Court's decisions have recently met resistance in certain precincts of the judiciary.¹³¹

Nonetheless, without totally dismissing the notion that the Supreme Court might sometimes follow the lower courts in order to improve compliance, it seems unlikely to occur very often. Inertia is real, but most lower courts will try to adjust course, even if they do not turn on a dime. As for the possibility of more active resistance, in most cases the lower courts' preferences are not so intense that trying to accommodate them would provide a major reason for choosing one view over another. Lower-court judges might have their own views on whether a floating home is a "vessel" according to the definition in 1 USC § 3,¹³² but most of them will not go to the barricades over it. When preferences are intense, they are likely to be intense on the Supreme Court too, such that the justices would not be willing to change their views as an accommodation.

Moreover, when compliance is a real concern, the Supreme Court has other strategies at its disposal besides agreeing with the larger group of lower courts. The Court can use hard-edged rules rather than flexible standards, as the former are typically thought to constrain more effectively and to make it easier to detect noncompliance.¹³³ It can shift the locus of decisionmaking authority, as has arguably happened with the Federal Arbitration Act,¹³⁴ in regard to which the Supreme Court has taken decisionmaking opportunities away from courts, especially state courts, and given them over to private arbitrators.¹³⁵ And there is always the fact that certiorari is discretionary, which provides

¹³¹ See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 NYU L Rev 1420, 1432–36, 1456–63 (2008). See also *Nitro-Lift Technologies, LLC v Howard*, 133 S Ct 500, 503 (2012) (per curiam) (vacating a state court decision that "disregard[ed]" Supreme Court precedents and evinced "hostility" toward arbitration).

¹³² That was the question at issue in *Lozman v City of Riviera Beach, Florida*, 133 S Ct 735, 739 (2013).

¹³³ See, for example, Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 Notre Dame L Rev 2045, 2048–49 (2008); Tonja Jacobi and Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J L, Econ & Org 326, 339 (2007).

¹³⁴ 9 USC § 1 et seq.

¹³⁵ See Bruhl, 83 NYU L Rev at 1470 (cited in note 131).

the Court with the option of withdrawing from the scene and letting the divided lower courts do as they wish.¹³⁶

All in all, worries about lower-court compliance are, and should be, quite low on the list of the Court's concerns.

F. Constraint

The debate over interpretive methodology remains obsessed with the quest for objectivity.¹³⁷ Originalists and textualists in particular seem fixated on constraining the willful judge who would import his or her own preferences into legal texts rather than neutrally apply the law.¹³⁸ And yet evidence from actual judicial practice casts doubt on originalists' and textualists' claims that careful analyses of language and textual canons have much constraining effect.¹³⁹

If one really wants constraint, the lower courts furnish a way to achieve it. Instead of reaching its own decisions on the merits, the Supreme Court could simply tally up the "votes" of the lower courts—five circuits say the statute means *X*, two say the opposite—and declare which position has the most supporters. Thus could we fulfill the dream of justices as umpires or, more accurately in this vision, as scorekeepers.

The vision of the Supreme Court as scorekeeper is mostly a thought experiment, but it is not totally without appeal. Among the Court's essential functions, on many accounts, is to act as the ultimate adjudicator of the meaning of federal law.¹⁴⁰ That settlement function does not depend on the content of the Court's decisions; in principle, the Court could settle the law by flipping a coin. Of course, according to the epistemic rationale discussed earlier, the majority view of the lower courts should be

¹³⁶ Compare the withdrawal option with McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S Cal L Rev 1631, 1641–47 (1995) (developing a theory of doctrine formation according to which the Supreme Court expands the range of acceptable lower-court decisions in the face of substantial noncompliance).

¹³⁷ See Frank B. Cross, *The Theory and Practice of Statutory Interpretation* 19–22 (Stanford 2009) (identifying constraint as a key concern motivating disputes about interpretive theory).

¹³⁸ See, for example, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 9–28 (West 2012); Frank H. Easterbrook, *Foreword*, in Scalia and Garner, *Reading Law* xxi, xxii–xxiii (cited in note 138).

¹³⁹ See Cross, *Theory and Practice of Statutory Interpretation* at 166, 175–79 (cited in note 137); James J. Brudney and Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand L Rev 1, 6, 57–60 (2005).

¹⁴⁰ See, for example, Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359, 1377 (1997).

of a higher quality than the outcome one would get from flipping a coin. (The more faith one reposes in the Jury Theorem as an apt model for how the lower courts work, or the more one could shift the lower courts toward satisfying the Theorem's conditions, such as by weakening intercircuit deference, the happier one should be with treating lower-court outputs as binding.) Additionally, the model of Court-as-scorekeeper should make it easier for the Court to decide cases, so that the Court could settle more conflicts than it does today.

Still, even granting that constraint is an important goal, this is probably not the sort of constraint that many people have in mind. Justice Antonin Scalia may champion the importance of constrained decisionmaking, but he has expressly rejected the notion that the Court does or should elevate certainty and objectivity to such a degree that the Court simply ratifies lower-court consensus.¹⁴¹ In this he is surely not alone. It would seem rather bizarre to have nine justices, a marble building, and all the rest if the Court's highest function were to serve as a glorified tabulator.

Further, the scorekeeper model, if openly announced, would cause trouble in the lower courts. Presumably they should still decide cases on the merits, rather than by counting noses. (Or would the courts of appeals count up district court decisions? If so, then the content of federal law would be left to courts at the bottom of the pyramid, which inhabit the *least* favorable environment for deciding questions of law.¹⁴²) The stakes in the courts of appeals would be high in the early stages of a conflict, when it would still be unclear which view would come to represent the majority. Judges might rush to decide questions in order to amplify their influence. But then, once a clear winning position emerged, lower courts would jump on the bandwagon, as independent decisionmaking would waste time and generate (what would soon be declared to be) error. For these and other reasons, it may be that candidly announcing a policy of following the lower courts would change their behavior in such a way that one would no longer *want* to follow them.¹⁴³

¹⁴¹ See *Brogan v United States*, 522 US 398, 407–08 (1998).

¹⁴² See *Salve Regina College v Russell*, 499 US 225, 232 (1991) (explaining that appellate courts are structurally superior to trial courts at correctly deciding questions of law).

¹⁴³ See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv L Rev 625, 632–34 (1984) (exploring the possibility that less-than-candid communications between decisionmakers and the regulated audience can serve worthy social ends).

G. Summary and Examples

1. When should the lower courts matter most and when should they matter least?

As set out above, there are a number of distinct reasons for the Supreme Court to give weight to the views of lower courts. The views of the lower courts might shed light on the truth of the matter, for example, or they may simply represent a status quo that it would be unwise to upset. As we have also seen, however, some of the rationales are more powerful than others, and all of them have their limits. It is time to bring the different strands of the analysis together and see if there are any broader conclusions to be drawn. I see three such conclusions, which concern the *size* of the lower-court majority, its *duration*, and the *type of legal question* involved.

First, and probably most clearly, the force of the case for following lower courts depends on how decisively the lower courts have settled on one view over another. If the lower courts have overwhelmingly ruled one particular way, that will often provide a good reason to endorse that view, but a narrower majority should rarely merit the Supreme Court's respect. This is so for a few reasons. To begin with, the stability argument is quite powerful when most courts (including, to add more nuance, the courts that represent the bulk of the regulated public) have adopted one view, but it has little force when any Supreme Court decision on the merits would change the law in much of the country anyway. Acquiescence, though rarely a powerful argument even in the case of lower-court consensus, loses practically all its force when the lower courts are so closely divided that there is no single view in which Congress could acquiesce. I have explained why the epistemic argument has limited scope, but it is more powerful the more unevenly the lower courts are divided. It is true that on the constraint rationale—according to which the Supreme Court should simply declare the majority view the winner—even a narrow advantage makes a winner, but exalting the bare value of constraint per se fits too poorly with our current practices to be very persuasive.

Second, and for somewhat similar reasons, duration matters. The duration of lower-court views clearly matters on the stability rationale, because reliance interests grow as law becomes more entrenched. Arguments based on pragmatism also require that some time has passed, in order to let consequences

manifest themselves. Duration plausibly counts as a plus factor on the acquiescence rationale and the compliance rationale, though the latter in particular should not carry much weight in any event. Duration seems ambiguous on the epistemic rationale, in the sense that one can come up with stories that cut either way.

Third—and here there is more to say—the type of question before the Court matters. The Court should be less willing to follow lower-court views in constitutional cases than in cases involving statutory interpretation and common law. There are several reasons for this. To begin with, the optimal balance between the values of judicial accuracy and judicial settlement differs because of the divergent legislative roles across the two contexts.¹⁴⁴ Although one should hesitate before concluding that Congress has blessed a particular judicial interpretation through inaction,¹⁴⁵ legislative revision of statutory interpretations and common law is at least a real possibility. Additionally, legislatures can provide reliance-protecting transitional relief that courts often cannot. These factors provide some reason for the Supreme Court to adhere to settled lower-court positions in nonconstitutional domains. By contrast, were the Supreme Court to embrace an erroneous constitutional position by following the lower courts, correction via the onerous Article V amendment process would be the only nonjudicial remedy.

An additional reason why lower-court decisions should carry less weight in constitutional cases is that judicial decisionmaking in constitutional cases looks quite different at different levels of the hierarchy. Virtually every field of constitutional law is thick with Supreme Court precedent. Statutory cases tend to be less cluttered with precedent, if for no other reason than the vast number of statutes—with new ones always cropping up and old ones being amended—which means that the Supreme Court can address only a fraction of the interpretive questions. Lower-court decisionmaking in constitutional cases is therefore especially doctrinal in character, focusing largely on parsing the holdings (and dicta) of prior Supreme Court cases.¹⁴⁶ The Supreme

¹⁴⁴ For a similar observation regarding the Court's willingness to overrule its *own* decisions, see *Burnet v Coronado Oil & Gas Co*, 285 US 393, 406–08 (1932) (Brandeis dissenting).

¹⁴⁵ See Part II.C.

¹⁴⁶ See Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 Harv L Rev 145, 150 (2008) (“[I]n many cases lower courts are not even trying to directly engage the Constitution, but are instead simply parsing the Court’s case law—something that

Court's own constitutional decisionmaking, in contrast, has a freer character, because the Court can overrule its precedents and more easily disregard inconvenient dicta.¹⁴⁷ Thus, it is especially common in constitutional cases for the question in the Supreme Court to look different, and more open, than the question appeared in the lower courts. To the extent that the Supreme Court is engaged in a different enterprise than the lower judiciary, the value of attending to the latter's decisions declines, especially on the epistemic rationale.

To be sure, from time to time the lower courts do address a constitutional question on a relatively blank slate. In such cases, lower courts often (though not always) turn to originalism. A leading recent example of lower-court originalism is the DC Circuit's decision invalidating President Barack Obama's recess appointments to the National Labor Relations Board.¹⁴⁸ The court's opinion endeavored to find the original meaning of the relevant constitutional text and relied heavily on early history, eschewing more recent practice and sister-circuit precedents.¹⁴⁹ Originalism is an interpretive method that might ask too much of all judges—even those assisted by the most-able clerks and most-erudite historical amicus briefs¹⁵⁰—but the method is especially difficult in resource-constrained lower courts. This is another reason why the lower courts are relatively less likely to have useful input in constitutional cases.

Although the discussion so far has grouped common law and statutory law together, distinguishing both of them from constitutional law, it may be that common law cases (to the extent

the Court thinks it can usually do quite well on its own, thank you.”); Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 Conn L Rev 843, 849–50 (1993). This is not to deny the heavy emphasis on doctrine and precedential analysis even in the Supreme Court. See Amar, 122 Harv L Rev at 147 (cited in note 146); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 883–84 (1996). The balance between different modes of analysis is a matter of degrees, not absolutes.

¹⁴⁷ See, for example, *Central Virginia Community College v Katz*, 546 US 356, 363 (2006). See also *Knox v Service Employees International Union, Local 1000*, 132 S Ct 2277, 2299 (2012) (Sotomayor concurring in the judgment) (charging the majority with recharacterizing an “explicit holding” as an “offhand remark”).

¹⁴⁸ See *Noel Canning v NLRB*, 705 F3d 490, 514 (DC Cir 2013).

¹⁴⁹ See *Noel Canning*, 705 F3d at 500–02, 505–12.

¹⁵⁰ Even some judges have acknowledged that sophisticated historical research may be beyond their ken. See, for example, *McDonald v City of Chicago, Illinois*, 130 S Ct 3020, 3121–22 (2010) (Breyer dissenting); J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* 50–52 (Oxford 2012).

that they find their way to the Supreme Court) present a special jurisprudential reason for deference to lower-court majorities. When a court considers the meaning of a statute or a constitutional provision, the court seems to aim at something outside of the judicial system, something that other courts have previously aimed at but have not themselves defined through their very acts of deciding. But if one wants to know what the common law is, the fact that most courts have for some time said that the law is *X* comes closer to establishing that *X* truly is the law. Now, to be clear, the preceding sentences contain a number of highly contestable jurisprudential propositions: a realist-inspired view could deny that any type of law has an external existence, while an opposing view could insist that even the common law is merely discovered by courts rather than created by them.¹⁵¹ Nonetheless, there is a palpable and plausible sense in which judicial decisions create the common law in a way that they do not in other domains. If so, the Supreme Court has more reason to attend to lower-court precedent in common law cases than in others. Even Justice Scalia, in an opinion generally rejecting the maxim *communis error facit jus* (that is, the idea that common error can, by virtue of its prevalence, constitute law), accepted the notion that common opinion essentially *is* the common law.¹⁵²

* * *

To summarize, then, the views of the lower courts have their greatest force when the lower courts have decisively and for a long time embraced a particular view of the law, particularly on matters of common law and statutory interpretation, and especially when there has been reliance. Many such situations arise at the certiorari stage, and usually the Court should and does deny review. At the merits stage, such circumstances will therefore appear fairly rarely, and so there will be relatively few cases in which the views of the lower courts should loom large in the Court's reasoning—though there will be some. Part III will provide a more concrete sense of how many such cases there are and how the Court responds to them.

¹⁵¹ See William Blackstone, 1 *Commentaries on the Laws of England* 69–70 (Legal Classics spec ed 1983) (“[S]ubsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.”).

¹⁵² See *Brogan*, 522 US at 407 n 3, 408.

2. Examples.

Some examples may be helpful in illustrating the circumstances in which the lower courts should or should not exert influence. For a recent example of a case in which the Supreme Court should have, but did not, follow a lower-court consensus, consider *Taniguchi v Kan Pacific Saipan, Ltd.*¹⁵³ Federal law provides that prevailing parties may recover the costs of a lawsuit, which are defined to include “compensation of interpreters.”¹⁵⁴ The question before the Court was whether such compensation includes costs associated with document translation as well as the more obviously included oral translations. Almost all of the lower courts to have considered the question had said *yes*, but the majority of the Supreme Court answered *no*.¹⁵⁵ The dissent—penned by Justice Ruth Bader Ginsburg and joined by Justices Breyer and Sotomayor—argued that allowing the costs of written translation was at least a permissible interpretation of the text, furthered the statutory purposes, and comported with the lower-court consensus.¹⁵⁶ The dissent’s call for downward deference in this case drew support from several distinct rationales. First of all, although there admittedly does not appear to be a good private-reliance argument—nobody orders their primary conduct based on whether they would later be able to recover translation costs in a lawsuit—there is a governmental-reliance argument stemming from the fact that more than a dozen federal courts had provided for the recovery of translation services in their local rules or the like.¹⁵⁷ Further, Congress did not upset these long-standing practices—and arguably blessed them—when it amended the relevant statute.¹⁵⁸ From the perspective of the pragmatic rationale, this long-standing interpretation had not revealed serious practical difficulties.¹⁵⁹ Finally, the epistemic argument seems relatively strong here given the size of the lower-court majority and the topic: a question of trial practice that lower courts arguably understand better than the Supreme Court.

¹⁵³ 132 S Ct 1997 (2012).

¹⁵⁴ *Id.* at 1999–2000, quoting 28 USC § 1920(6).

¹⁵⁵ See *Taniguchi*, 132 S Ct at 2007; *id.* at 2008 (Ginsburg dissenting).

¹⁵⁶ See *id.* at 2008–10 (Ginsburg dissenting).

¹⁵⁷ See *id.* at 2009 n 2 (Ginsburg dissenting).

¹⁵⁸ See *id.* at 2008–09 (Ginsburg dissenting).

¹⁵⁹ See *Taniguchi*, 132 S Ct at 2010–11 (Ginsburg dissenting).

For a prominent example of a case in which there was very little reason to follow the lower courts, consider *National Federation of Independent Business v Sebelius*,¹⁶⁰ the 2012 case addressing the constitutional challenge to the Patient Protection and Affordable Care Act.¹⁶¹ A majority of the courts of appeals to consider the constitutionality of the individual mandate upheld it as a valid exercise of the commerce power,¹⁶² but all of the lower-court decisions were necessarily very recent, so nothing like a settled view had developed. Nor had enough time passed to observe the consequences of the different approaches, especially since the mandate itself was not even scheduled to take effect for a few years.¹⁶³ Finally, the fact that this case touched on constitutional questions of tremendous moment means that the lower courts were unlikely to offer much useful guidance.¹⁶⁴ And so, although the Court did end up agreeing with the lower-court majority that the mandate was constitutional—though, famously, because it was a tax rather than a regulation of “commerce”¹⁶⁵—there is no reason to think that the lower courts’ decisions should have had any authoritative value. (Further, given the political stakes in the case, it is hard to imagine that the Supreme Court would have followed the lower courts even if it should have.)

As the previously discussed case of *Padilla v Kentucky* shows, sometimes even an overwhelming consensus of the lower courts merits little respect. As observed earlier, there was no serious reliance problem with overturning the settled law in *Padilla*.¹⁶⁶ But neither did the lower-court consensus require deference based on other rationales. In a constitutional case such as this, acquiescence has little relevance, and the lower courts’ parsing of the implications of the Supreme Court’s prior decisions holds little value for the Supreme Court itself.

¹⁶⁰ 132 S Ct 2566 (2012) (“NFIB”).

¹⁶¹ Pub L No 111-148, 124 Stat 119 (2010).

¹⁶² One court of appeals struck down the mandate on the merits, two upheld it on the merits, and one declined to reach the question on jurisdictional grounds. *NFIB*, 132 S Ct at 2581.

¹⁶³ See *id.* at 2580, quoting 26 USC § 5000A(b)(1) (noting that penalties for noncompliance with the mandate would begin in 2014).

¹⁶⁴ See, for example, *Thomas More Law Center v Obama*, 651 F3d 529, 559 (6th Cir 2011) (Sutton concurring in part) (explaining that “the Supreme Court has considerable discretion in resolving this dispute [over the ACA],” but that “lower court judges [have] the duty to respect the language and direction of the Court’s precedents”).

¹⁶⁵ *NFIB*, 132 S Ct at 2608 (Roberts) (plurality).

¹⁶⁶ See notes 123–24 and accompanying text.

III. DESCRIBING AND MEASURING THE CURRENT SUPREME COURT'S PRACTICES

With the benefit of the theoretical framework and categories developed above, let us now consider the Supreme Court's practices.

Some years ago, Professor Arthur Hellman described the apparent emergence of an "Olympian" Supreme Court that was in various respects quite different from, and detached from, the more ordinary courts below it.¹⁶⁷ One way in which such aloof detachment can manifest itself is through an indifference toward the lower courts' struggles to resolve the difficult questions that eventually find their way onto the Supreme Court's docket. And, indeed, the impression of some informed observers is that the Supreme Court has, for at least the last few decades, not cared much about the views of the lower courts. In 1998, one of the nation's most accomplished appellate litigators wrote that the Supreme Court was "less concerned about lower-court precedent than at anytime in the twenty years that I have been watching this Court. The only real precedent that matters to this Supreme Court is this Court's precedent."¹⁶⁸ Some lower-court judges, writing at around the same time, shared that assessment.¹⁶⁹ Similarly, Professors Eskridge and Frickey, in their study of the Court's 1993 Term, discerned a tendency for the Court to disregard settled law—including long-standing lower-court precedent—in the pursuit of a dogmatic form of textualism that elevated idiosyncratic readings of text over rule-of-law values like stability and predictability.¹⁷⁰ All of these observers were well informed, but it would be valuable to consider the situation today

¹⁶⁷ Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 S Ct Rev 403, 432–38.

¹⁶⁸ Carter G. Phillips, *Advocacy before the United States Supreme Court*, 15 Cooley L Rev 177, 180 (1998).

¹⁶⁹ Consider the impression of Judge Patricia Wald of the DC Circuit, who in 1993 observed "little indication the Justices found in [lower-court] decisions a prolific source of analyses or insights. . . . One senses that the Justices are, more and more, reacting to each other and to the implications of their decisions rather than drawing on the wisdom of lower court rationales." Wald, 61 U Cin L Rev at 792 (cited in note 127). Writing twenty years before that, Judge Friendly saw things similarly but was less troubled by the possibility that the Supreme Court would mostly overlook the lower courts' insights: "If a case involves questions of federal law of such importance as to be reviewed by the Supreme Court, the views of the court of appeals count, and should count, for little." Henry J. Friendly, *The "Law of the Circuit" and All That: Foreword to the Second Circuit 1970 Term*, 46 St John's L Rev 406, 407 (1972).

¹⁷⁰ See Eskridge and Frickey, 108 Harv L Rev at 76–81 (cited in note 30).

and, if possible, to provide an account that is more systematic. Are the lower courts an important input in contemporary Supreme Court decisionmaking? To the extent that the lower courts do matter, which of the rationales explored in Part II do the current justices find persuasive?

To answer those questions, I set out to investigate, in both qualitative and quantitative terms, the current Supreme Court's use of lower-court precedent. Although some of my research and conclusions cover longer periods, I focus most heavily on three recent Supreme Court terms that cover the period from October 2010 through June 2013. These terms capture the first three years of the Court as currently constituted—that is, since Justice Kagan replaced Justice Stevens. I used a combination of various approaches, including running word searches in electronic databases and skimming every case from those years to look for results that the search terms may have missed.¹⁷¹

I investigated both what the Court does (voting) and what it says (reasoning). Both inquiries are important. Relying simply on what the Court says in its opinions is obviously risky, as the Court might use lower-court opinions opportunistically, invoking them when it is convenient but ignoring them when they stand in the way. Or perhaps the Court is influenced without acknowledging it. Yet focusing solely on counting votes creates a problem of causal interpretation: if the Court usually agrees with the majority of the lower courts on an issue, that need not indicate any deference or even influence but may just prove that the law supplies a pretty clearly correct answer that most jurists

¹⁷¹ More precisely, I emphasized different approaches for different aspects of the study. For Part III.A's analysis of how the Supreme Court ruled in circuit splits, I skimmed every opinion looking for mention of how the lower courts were divided. I also electronically searched each opinion for citations to the Federal Reporter (that is, "F.") to assist in this task. For Part III.B, which examines invocations of the lower courts in the Supreme Court's reasoning, I relied primarily on word searches in the Westlaw Supreme Court database. I first ran the following search: "(universal! or uniform! or consensus or every or majority or most or unanim! or minority or bulk or practice or numerous or all or other or almost or settled) /s ("lower court" or circuit or "other court" or "court of appeals" or "other judge" or "state court" or "state supreme court" or "state high court")." I then followed up with searches targeted at particular rationales for invoking the lower courts, using terms like "acquiesc!" and "consequence." All of these database searches were substantially overinclusive, returning many false positives that had to be eliminated. But because the Court need not use any particular formula of words when it relies on lower-court precedent, nor even cite particular decisions, no word search can catch every instance, so skimming all of the decisions caught some additional cases. Despite the multiple approaches, I certainly cannot rule out having missed some relevant invocations of the lower courts.

independently select.¹⁷² Ideally, one would perform an experiment in which the Supreme Court is blinded to what happened in the lower courts. If the rate of agreement decreased in the blinded condition, that would provide some evidence of causal influence. Unfortunately, no such experiment seems possible. But perhaps what the Court says about lower-court precedent can help us decide which interpretation of the facts—*influence or mere coincidental correspondence*—is correct. While acknowledging the limits of any particular type of evidence, we might gain some confidence in our conclusions if we are able to combine multiple strands of qualitative and quantitative evidence, along with a convincing jurisprudential account of the findings.

The investigation of the Court's practices yielded a variety of findings, some expected and some more surprising. I recount them below, beginning with the Supreme Court's voting behavior. Then I turn to the Supreme Court's statements and attempt to identify and categorize every instance since the appointment of Justice Kagan three years ago in which the Supreme Court has invoked the support of lower courts.

A. The Court's Voting Behavior

Although it is widely recognized that the Supreme Court issues far more reversals than affirmances—it reversed in around 70–75 percent of the cases argued before it in recent years¹⁷³—that simple observation actually tells us very little about how often the Court agrees with the lower courts. When the Court reverses the decision directly under review, the Court might be indirectly “affirming” several other courts that had come out on the other side of the legal question at issue. Indeed, the decision being reversed might have represented the minority view in the lower courts. A more meaningful measure of the Court's behavior would take this phenomenon of indirect or

¹⁷² See, for example, *Tinklenberg*, 131 S Ct at 2018 (Scalia concurring in part and concurring in the judgment):

The clarity of the text is doubtless why, as the Court's opinion points out, every Circuit disagrees with the [decision under review]. That is the direction in which the causality proceeds: Clarity of text produces unanimity of Circuits—not, as the Court's opinion would have it, unanimity of Circuits clarifies text.

(citation omitted).

¹⁷³ Lee Epstein, et al, *The Supreme Court Compendium: Data, Decisions, and Developments* 271 (Sage 5th ed 2012).

parallel review into account, and several scholars have recently published studies that attempt to do so.¹⁷⁴

To briefly summarize some key findings from that literature: Professors Stefanie Lindquist and David Klein, in a methodologically sophisticated study of circuit-conflict cases from 1985–95, found that the justices were more likely to vote for a particular position as the relative support in the lower courts for that position increased.¹⁷⁵ Studies of circuit splits from more recent years reach similar conclusions. Although the precise figures vary depending on the years studied and the methodology employed, these measures show that the Supreme Court tends to resolve splits by siding with the majority of the circuits.¹⁷⁶

If the goal is to investigate the potential influence of lower courts (versus mere independent correspondence of results), not all splits are equally informative. When the circuits are closely divided on some issue, splitting 3–2 or 7–5, it is hard to see why that would provide much reason for the Supreme Court to agree with the slight majority. Such a close division hardly represents any clear consensus but rather just suggests that the question involved is particularly difficult. Nor could one accuse the Court of upsetting a settled equilibrium whichever way it ruled. It is therefore particularly worth examining the Court's handling of more lopsided splits, such as 7–1. To be clear, a finding that the Supreme Court usually sides with lopsided lower-court majorities does not necessarily show causal influence. It may simply show that courts independently tend to converge on legally correct answers in easy cases. Indeed, Lindquist and Klein treated lower-court support as a proxy for legal soundness, as they aimed to test the relative importance of legal soundness versus ideology as competing determinants of Supreme Court decisions.¹⁷⁷

¹⁷⁴ See, for example, Tom Cummins and Adam Aft, *Appellate Review*, 2 *J Legal Metrics* 59, 68–72 (2012); Hansford, Note, 63 *Stan L Rev* at 1146, 1154–61 (cited in note 64); Stefanie A. Lindquist and David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 *L & Soc Rev* 135, 151–57 (2006); John S. Summers and Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 *USLW* 393, 394–96 (2011).

¹⁷⁵ See Lindquist and Klein, 40 *L & Soc Rev* at 144, 148 (cited in note 174).

¹⁷⁶ See Tom Cummins and Adam Aft, *Appellate Review II: October Term 2011*, 3 *J Legal Metrics* 37, 38 (2013); Hansford, Note, 63 *Stan L Rev* at 1165 (cited in note 64); Summers and Newman, 80 *USLW* at 395 (cited in note 174). The Supreme Court's agreement rate is lower if one considers all cases rather than only those resolving splits; that is because nonsplit cases are often exercises in error correction. See Summers and Newman, 80 *USLW* at 395 (cited in note 174).

¹⁷⁷ See Lindquist and Klein, 40 *L & Soc Rev* at 141–43 (cited in note 174).

If one wants to get at the role of lower-court decisions *as influences*, then potentially the most revealing cases are those in which the Supreme Court *rejects* a lopsided majority. In such cases, other factors—perhaps ideology or perhaps the justices’ independent assessment of legal correctness—trump lower-court consensus. Such rejections of the lower courts do not mean that the lower courts exerted no influence at all, but if there are many such rejections, it would at least show that the influence is not great. Again, somewhat firmer inferences become available when one supplements this Section’s study of the Court’s voting behavior with Part III.B’s study of what the Court’s opinions say about the force of lower-court precedent.

1. Findings from a study of recent terms.

Measuring the Supreme Court’s handling of lopsided splits requires both a definition of lopsidedness and a method for identifying lopsided splits. Regarding the definition, any particular cutoff is somewhat arbitrary, but let us define a lopsided division as one in which one side of the dispute has at least four more circuits (or state high courts) than the other side (for example, a 7–3 split), including cases in which the lower courts are not divided at all (for example, 4–0 “splits”). Note that this Section uses the lower court as the unit of analysis for measuring divisions, rather than calculating divisions in terms of how many judges are on each side, how much of the nation’s population is represented by the relevant courts, or other metrics. The various rationales for deferring to the lower courts can prioritize different units of measurement. But the court is the most common unit and the one that the Supreme Court itself seems to treat as the most meaningful when it reports lower-court conflicts.

To identify the cases, I began by examining the Supreme Court’s opinions. That effort included searching concurrences and dissents for splits that majority opinions did not reveal. By actually looking at the opinions, one captures some cases that would be missed if one relied solely on Professor Harold Spaeth’s Supreme Court Database to identify splits.¹⁷⁸ A more difficult

¹⁷⁸ See *Supreme Court Database: 2013 Release 01* (July 17, 2013), online at <http://supremecourtdatabase.org/data.php?s=2> (visited Aug 12, 2014). The Database, which is widely used in the empirical literature, codes each case for many variables, including the reason (if any) that the Court gave for granting certiorari. See Harold Spaeth, et al, *Supreme Court Database Code Book* *34, 94 (July 17, 2013), online at http://supremecourtdatabase.org/_brickFiles/2013_01/SCDB_2013_01_codebook.pdf (visited

methodological choice is whether one should go outside the four corners of the decisions (that is, by consulting briefs and lower-court opinions) in an effort to (1) challenge the Supreme Court's characterization of splits, or (2) detect additional splits. The issue of which materials to consult is an important one, and I discuss the competing considerations of accuracy and objectivity below.¹⁷⁹ For purposes of Table 1, I relied on the decisions themselves to characterize a split; that is, if an opinion presented a split as 5–1, I did not go behind that characterization in order to see whether my sense of the “true” circuit count was instead 4–1 or 3–3.¹⁸⁰ (In a few cases, the language in the opinion clearly signaled a lopsided split but did not purport to provide a full accounting; Table 1 includes these without listing a specific count.) Likewise, Table 1 does not include lopsided splits that could be identified only by considering sources extrinsic to the Court's opinions. I did look beyond the four corners of the opinions for other purposes, as discussed later.

Using the method described above, one can arrange the lopsided splits based on how lopsided the lower courts were and which way the Supreme Court ruled. In Table 1, the cases are listed according to the size of the lower-court differential. That is, +7 means that one side of the split had seven more lower courts than the other, and the Supreme Court sided with that lopsided majority; negative numbers mean that the Court sided with the lower-court minority. The table shows (via bullet points) which justices sided with the lower-court majority on the point that is the subject of the split.¹⁸¹ (Recusals are indicated by a “-”.) The table also indicates the ideological direction of the Supreme Court's decision on the relevant issue when there is a

Aug 12, 2014). Relying on the Database's coding undercounts circuit splits because the Database does not code a case as resolving a split unless the Supreme Court expressly describes that as the reason for the grant, even when the Court points out the division of authority in close proximity to the mention of the grant. Further, I am interested in capturing cases that are not necessarily splits, such as cases in which several lower courts have all answered the question the same way.

¹⁷⁹ See Part III.A.2.

¹⁸⁰ If the majority opinion and other opinions explicitly disagreed on the count, I deferred to the majority rather than taking sides. However, I followed a separate opinion's characterization if it was not controverted by the majority opinion.

¹⁸¹ I report the voting lineups on the question that is the subject of the lopsided split. Those lineups do not necessarily coincide with votes on the case disposition; for example, a concurrence in the judgment might actually agree with the dissent on the question that divided the lower courts.

clear ideological aspect.¹⁸² For example, in *Lafler v Cooper*,¹⁸³ from October Term 2011, Justice Anthony Kennedy joined the Court's liberal camp (Justices Ginsburg, Breyer, Sotomayor, and Kagan) in a liberal decision that agreed with all ten of the lower courts to have addressed a particular question.¹⁸⁴ It is thus scored +10. An appendix on file with the author and the editors provides additional details on how the results were derived.

¹⁸² Here I employ conventional criteria for ideology; for instance, liberal votes are those that favor employees, consumers, tort plaintiffs, and criminal defendants over employers, businesses, tort defendants, and prosecutors, respectively. See Lee Epstein and Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (but We're Not Sure Why)*, 13 U Pa J Const L 263, 272 (2010). Note that the table records the direction of the decision on the issue that was the topic of the split. Thus, *Martel v Clair*, 132 S Ct 1276 (2012), is listed as liberal because of the Court's pro-criminal-defendant ruling on the legal standard at issue, even though the Court went on to apply that standard to deny habeas relief on the particular facts before it. Id at 1284–89.

¹⁸³ 132 S Ct 1376 (2012).

¹⁸⁴ As *Lafler* illustrates, a given case can present multiple legal questions (or subquestions), some of which might feature lopsided splits and others not. The *Lafler* Court agreed with all of the circuits regarding whether a criminal defendant's receipt of poor advice resulting in the rejection of a plea agreement can constitute ineffective assistance of counsel (thus the +10 rating), though the Court vacated the decision below because it disagreed with how the violation at issue had been remedied. See id at 1385, 1391. A similar situation is presented by *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694, 701–02, 707 (2012), in which the Supreme Court agreed with the court below (and other circuits) that there existed a "ministerial exception" to antidiscrimination laws but disagreed with the court below regarding how to apply the exception to the litigant before it.

TABLE 1. LOPSIDED CASES AS REVEALED IN THE SUPREME COURT'S OPINIONS: 2010, 2011, AND 2012 TERMS

Case / Conflict Differential	Voting with Lower-Court Majority									Ideology of Ruling
	JGR	AS	AMK	CT	SAA	RBG	SCB	SS	EK	
Supreme Court Agreement with Lopsided Majority, by Size of Differential										
<i>Martel v Clair</i> (OT11)										
large	•	•	•	•	•	•	•	•	•	lib
<i>CSX v McBride</i> (OT10)										
large				•		•	•	•	•	lib
<i>Borough of Duryea v Guarnieri</i> (OT10)										
large	•		•		•	•	•	•	•	cons
<i>Hosanna-Tabor v EEOC</i> (OT11)										
+12 (12-0)	•	•	•	•	•	•	•	•	•	cons
<i>Lafler v Cooper</i> (OT11)										
+10 (10-0)			•			•	•	•	•	lib
<i>United States v Tinklenberg</i> (OT10)										
+10 (11-1)	•	•	•	•	•	•	•	•	-	cons
<i>Perry v New Hampshire</i> (OT11)										
+8 (11-3)	•	•	•	•	•	•	•		•	cons
<i>Coleman v Court of Appeals of Maryland</i> (OT11)										
+7 (7-0)	•	•	•	•	•					cons
<i>Harrington v Richter</i> (OT10)										
+7 (7-0)	•	•	•	•	•	•	•	•	-	cons
<i>Abbott v United States</i> (OT10)										
+6 (8-2)	•	•	•	•	•	•	•	•	-	cons
<i>Sossamon v Texas</i> (OT10)										
+5 (6-1)	•	•	•	•	•	•			-	cons
<i>Peugh v United States</i> (OT12)										
+4 (5-1)			•			•	•	•	•	lib

Kasten v Saint-Gobain (OT10)

+4 (6-2) • • • • • • • • lib

**Supreme Court Disagreement with Lopsided Majority,
by Size of Differential**

Bailey v United States (OT12)

large • • • lib

Taniguchi v Kan Pacific Saipan, Ltd (OT11)

-6 (1-7) • • • cons

Cullen v Pinholster (OT10)

-5^a • • cons

Florence v Board of Chosen Freeholders (OT11)

-4 (4-8) • • • • cons

Williamson v Mazda Motor of America, Inc (OT10)

-4 (0-4) • • • lib

Kiobel v Royal Dutch Petroleum Co (OT12)

-4 (0-4) • • • • cons

FTC v Actavis, Inc (OT12)

-4^b • • • • unclear

Mims v Arrow Financial Services (OT11)

-4 (2-6) • • • • unclear

An appendix on file with the author and the editors provides additional details regarding where in the opinions the splits are revealed as well as other information concerning the interpretation of the split.

Notes:

a The Supreme Court majority disagreed with both sides of the circuit split, departing from the views of at least five circuits (and probably more). See *Cullen v Pinholster*, 131 S Ct 1388, 1417 (2011) (Sotomayor dissenting) (“The majority charts a third, novel course that, so far as I am aware, no court of appeals has adopted.”).

b The Supreme Court majority charted a middle course that disagreed with both sides of the circuit split, departing from the views of at least four circuits that had taken more categorical views on either side. See *Federal Trade Commission v Actavis, Inc*, 133 S Ct 2223, 2230, 2237 (2013).

Using the methods just described, one can see that the Supreme Court sided with the lower-court majority in 13 out of 21 lopsided splits (62 percent), including all of the most extremely lopsided splits. One should be cautious about putting too much faith in the precision of any figures of this sort, for reasons that I

will expand on shortly, but the results are nonetheless instructive in several ways.

The obvious question is whether lower-court consensus exerts a constraining effect on the justices' behavior, leading them to vote in ways that they otherwise would not. It is hard to speak with certainty, of course, because Supreme Court decisions likely reflect a tangled combination of factors, including the formally authoritative legal materials, ideological preferences, and (maybe) some degree of deference to lower courts. As for the role of ideology, that factor cannot completely explain the results in Table 1, as there are a number of cases in which a significant group of justices side with the lower-court consensus despite the expected pull of conflicting ideological inclinations. Two such examples are *Tinklenberg* and *Abbott v United States*,¹⁸⁵ in which all of the participating liberal justices voted against the criminal defendant and joined opinions that explicitly invoked the lower-court consensus.¹⁸⁶ Indeed, although detailed analysis of the justices' reasoning awaits the next Section, it is worth noting that the large majority of the cases in Table 1 feature one or more opinions expressly claiming support from most lower courts, which arguably suggests that the lower courts played some role in the justices' deliberations. (Or at least that the lower courts played a role for certain justices; I return to the interesting matter of differences between justices in Part III.B.3.) Still, when the justices affirm the lower-court consensus, as in those cases in the top half of Table 1, it is hard to know whether the consensus is having any causal effect or whether the alignment merely reflects multiple independent recognitions that one answer is clearly better. Agreement with lopsided majorities is what one would expect in either scenario.

Potentially more revealing are the cases in the bottom half of Table 1. The fact that the Court is willing—not in the majority of instances, but in an important minority—to buck the lower

¹⁸⁵ 131 S Ct 18 (2010).

¹⁸⁶ *Tinklenberg*, 131 S Ct at 2014–15 (Breyer) (joined by Kennedy, Ginsburg, Alito, and Sotomayor); *Abbott*, 131 S Ct at 23 (Ginsburg) (unanimous). In the majority of the instances of counterideological voting in Table 1, it is the Court's liberal members who vote against type. It is hard to form conclusions at this point, but this seems consistent with Lindquist and Klein's study, which found that the liberals on the Court in 1985–95 were more likely to align with lower-court views than were the conservatives. See Lindquist and Klein, 40 L & Soc Rev at 152 (cited in note 174). More defensible conclusions about differences between the two camps can be drawn once the voting behavior is supplemented with a consideration of the justices' statements and other evidence.

courts shows, if evidence were needed, that the lower courts are not controlling on the justices. Put differently, perhaps the headline is that the Court *disagrees* with lopsided lower-court majorities so often.¹⁸⁷ Indeed, as I explain in the next Section, there is some reason to worry that the Court's self-reporting *understates* the rate at which it disagrees with lower courts.

Some of the Court's decisions that depart from the lower courts likely reflect ideological preferences. Classic left-right splits are evident, for example, in *Kiobel v Royal Dutch Petroleum Co*¹⁸⁸ (which concerned the reach of the Alien Tort Statute¹⁸⁹) and *Florence v Board of Chosen Freeholders of County of Burlington*¹⁹⁰ (which concerned the constitutionality of strip searches of detainees¹⁹¹). More interestingly, however, other cases rejecting lopsided lower-court majorities are unanimous or otherwise not ideologically divided (and there would be more such cases had I used a more lenient definition of lopsidedness), which arguably demonstrates that conflicting ideological preferences cannot explain all of the justices' repudiations of the lower courts. In some appreciable number of cases, the bulk of the lower courts have simply gotten it wrong, at least from the Supreme Court's perspective, and the fact that the lower courts had largely settled on one view was not enough to persuade the Court to follow them.

It is worth reiterating at this point that the Supreme Court's merits docket is just a small window into the law. Most questions generate consensus or outright unanimity in the lower courts. If the Court is inclined to agree with the prevailing view, there is little reason to grant review, and therefore such cases should rarely make their way onto the merits docket—though,

¹⁸⁷ My data are not directly comparable to the 1985–95 data collected by Lindquist and Klein, because they identified circuit splits through the Database, which finds fewer cases than my method. See note 178. If I reexamined my data using their method, my dataset would contain fewer cases, but it would still show the Court agreeing with lopsided lower-court majorities just slightly more than half the time. That rate of agreement is much less than the rate one can derive from their older data, which would show the Court agreeing with lopsided lower-court majorities about 70 percent of the time. (I thank Lindquist and Klein for sharing their data, which I used to perform that calculation.) I am reluctant to put too much stock in this comparison across time periods, given the limitations of the data, which are discussed in the next Section, but the evidence is at least consistent with a scenario in which the Court today is even less concerned about the lower courts' views than it was twenty years ago.

¹⁸⁸ 133 S Ct 1659 (2013).

¹⁸⁹ 28 USC § 1350.

¹⁹⁰ 132 S Ct 1510 (2012).

¹⁹¹ *Id* at 1513.

as the top of Table 1 shows, they sometimes actually do.¹⁹² If the Court is inclined to disagree with the prevailing view, it might still deny review (especially in matters that are regarded as unimportant or that are amenable to correction by others). Sometimes, though, the Court will disagree with the prevailing view *and* be moved to grant review, perhaps in order to undo what it views as the damage being done by so many errant lower courts. The Court's desire to correct widespread error probably influences the selection of the few issues that make their way onto the merits docket out of the many contenders, even if "mere" error correction in isolated cases does not play much of a role. So, while the existence of any appreciable number of Supreme Court decisions rejecting lopsided majorities calls out for explanation, one should not assume that the Supreme Court would disagree with the lower courts in almost half of all the lopsided splits that do *not* make it onto the merits docket.

2. Difficulties in measuring circuit splits—and what those difficulties reveal.

Table 1 comes with several caveats. Although I began this project believing that it was more revealing to see what the Court *does* with lower-court precedent through its voting behavior than what it *says* about the value of lower-court precedent in its opinions, I no longer feel very confident that one can get a good grasp on what the Court does. The measurement problems extend to the prior literature on circuit performance as well, and indeed they will beset just about any attempt to measure the Court's behavior in resolving circuit splits.¹⁹³ Notably, the methodological difficulties derive in part from the Court's practices,

¹⁹² The Court's docket included several cases in which it affirmed positions that the lower courts had unanimously embraced, which at first glance makes for a surprising use of the Court's certiorari discretion. In some of those cases—*Martel* and *Harrington v Richter*, 131 S Ct 770 (2011), come to mind—it seems that the Court probably granted certiorari in order to correct what it regarded as errant results in particular cases (in these two examples, from the Ninth Circuit), but along the way it had to address an antecedent question of law that had not proven particularly controversial. Thus, the Court did not grant certiorari in those cases in order to ratify the prevailing law—as it apparently did in *Coleman v Court of Appeals of Maryland*, 132 S Ct 1327 (2012)—but rather the ratification was merely the by-product of trying to reverse a problematic outcome.

¹⁹³ For an elaboration on these methodological issues, see Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 3 J Legal Metrics *2–12 (forthcoming 2014), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443312 (visited Aug 12, 2014).

practices that show a degree of disregard for the lower courts—a finding interesting in itself.

To elaborate: it turns out that identifying and counting circuit splits is harder than one might think. One complicating factor—and one that suggests that the Court is not overly concerned with exactly how many courts line up on either side of a circuit split—is that the Court sometimes does not purport to list each court of appeals that has weighed in on a question, instead citing an apparent sample of the conflicting decisions¹⁹⁴ or just stating that the lower courts are split without citing any of them.¹⁹⁵

More problematic are situations in which the fact of a split is not even revealed within any of the Supreme Court's opinions in a particular case. Quite a few majority opinions state that the Court granted certiorari to answer a particular question or simply state that the Court granted certiorari, period.¹⁹⁶ In many of those cases, a significant history of lower-court disagreement goes unmentioned, as if it had never happened.¹⁹⁷ The justices

¹⁹⁴ For instance, the Court's opinion in *Henderson v United States*, 133 S Ct 1121 (2013), uses "compare, e.g." and reveals only three circuits as participating in the split, id at 1125, but the solicitor general's briefing as respondent at the certiorari stage admitted a broader circuit split. See Brief for the United States, *Henderson v United States*, Docket No 11-9307, *13–15 (US filed May 23, 2012) (available on Westlaw at 2012 WL 7069951).

¹⁹⁵ See, for example, *Smith v United States*, 133 S Ct 714, 718 (2013); *Rehberg v Paulk*, 132 S Ct 1497, 1501 (2012). *Smith* is striking because it appears that all or nearly all of the circuits had previously addressed the question presented, see Brief for the United States in Opposition, *Smith v United States*, Docket No 11-8976, *24–26 (US filed May 14, 2012) (available on Westlaw at 2012 WL 3027176), but none of those numerous decisions is cited by the Supreme Court.

¹⁹⁶ See, for example, *Greene v Fisher*, 132 S Ct 38, 43 (2011).

¹⁹⁷ For a notable recent example, see *City of Arlington, Texas v Federal Communications Commission*, 133 S Ct 1863 (2013), which concerned whether *Chevron* deference applies to an agency's determinations of its own jurisdiction. Id at 1866. That question had been dividing the lower courts and provoking commentators for years, but Justice Scalia's opinion for the Court does not reveal this history. See *City of Arlington, Texas v FCC*, 668 F3d 229, 248 & nn 91–93 (5th Cir 2012) (citing conflicting cases stretching back nearly twenty years). Similarly, the decision in *Staub v Proctor Hospital*, 131 S Ct 1186 (2011), which concerned the cat's paw theory of liability for employment discrimination, did not reveal that virtually every circuit had weighed in on how to apply that theory under several antidiscrimination statutes, that various tests had developed, and so forth. See Brief for the United States as Amicus Curiae, *Staub v Proctor Hospital*, Docket No 09-400, *9 (US filed Mar 16, 2010) (available on Westlaw at 2010 WL 3611711) ("Staub Amicus Brief") (mentioning conflicting decisions from twelve circuits). Professor Wayne Logan, in a valuable study of Fourth Amendment circuit splits, similarly observed that the Supreme Court's merits decisions often fail to mention the existence of long-standing divisions of authority, much less meaningfully engage with the competing views. See Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 Vand L Rev 1137, 1167–69 (2012).

differ in their habits in this regard. Justice Scalia has been especially likely *not* to mention the existence of a split even when one exists.¹⁹⁸ This is perhaps not surprising, given his principled opposition to giving weight to the views of the lower courts.¹⁹⁹ But one can hold that methodological position and still make it a practice to state that the Court is resolving a question that has divided the lower courts—and, better still, cite at least some of the conflicting decisions. Doing so should hasten the legal system's realization (through citation services and otherwise) that some cases are no longer good law.

To return to Table 1: because its calculations reflect the state of the world as reported in the Supreme Court's opinions, some lopsided splits could be missed. And, indeed, my own investigations beyond the four corners of the opinions show that quite a few splits, including at least a few lopsided splits, are not revealed within the opinions. Mere undercounting of splits is not necessarily problematic, but the greater worry is that the data could be biased in systematic ways. One obvious possibility is that opinions tend to mention strong support from lower courts when doing so bolsters the opinion but obscure lower-court views when they are unsupportive. Some tentative support for that suspicion comes from the fact that several cases in the bottom half of Table 1 appear there only because the Supreme Court majority's departure from the prevailing view in the lower courts is revealed in a dissent. In *Bailey v United States*,²⁰⁰ the majority opinion states that the lower courts were divided but does not list them;²⁰¹ not until reading the dissent does one learn that the bulk of the circuits had adopted a view contrary to that of the *Bailey* majority.²⁰² There are other similar instances in which a

¹⁹⁸ Both *City of Arlington* and *Staub*, discussed in the previous footnote, are Scalia opinions. My observations about Scalia's tendencies accord with those of Professor Arthur Hellman, who reported on this feature of Scalia's opinions some time ago. See Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U Pitt L Rev 81, 149 (2001). Note that Chief Justice Roberts and Justice Kennedy also tended to have few opinions revealing circuit splits in the years that I studied, though it may be that their respective roles as chief justice and frequently decisive swing justice garner them a disproportionate share of the assignments in high-profile constitutional cases in which splits are less important (versus technical statutory questions that divide lower courts).

¹⁹⁹ See Part III.B.3.

²⁰⁰ 133 S Ct 1031 (2013).

²⁰¹ See *id.* at 1037.

²⁰² See *id.* at 1048 (Breyer dissenting) (“[A]most every Court of Appeals to have considered the matter has taken the Second Circuit’s approach.”). See also Brief for the United States, *Bailey v United States*, Docket No 11-770, *22–23 (US filed Sept 20, 2012)

majority opinion does not mention that it is rejecting the bulk of lower-court authority or describes the split in such a way as to obscure the extent of the Court's break with the lower courts.²⁰³ Perhaps dissents are common when the majority departs from prevailing views, but one naturally wonders what happens when there is no dissent to flag the issue.

These suspicions led me to investigate further, and I found lopsided splits that were not hinted at in the Supreme Court's opinions at all. For example, in *Thompson v North American Stainless, LP*,²⁰⁴ the Supreme Court reversed the Sixth Circuit but did not mention that the Sixth Circuit's view was, apparently, in accord with the unanimous position of the handful of other published circuit court decisions addressing the matter—information that comes to light only by reading the decisions below and the briefing.²⁰⁵ That is worrying because it feeds the suspicion that the lower courts are invoked or ignored in a strategic way. And yet, as a counterexample, there is *Staub v Proctor Hospital*,²⁰⁶ in which Justice Scalia's opinion for the Court probably could have claimed to side with the large majority of the lower courts but did not even mention the split.²⁰⁷

(available on Westlaw at 2012 WL 4259480) (claiming uniform support from the courts of appeals).

²⁰³ Compare *Kiobel*, 133 S Ct at 1663 (omitting prior precedent on the question presented), with *id* at 1675 (Breyer concurring in the judgment) (citing several cases from the courts of appeals). See also text accompanying notes 11–12 (discussing *Taniguchi*).

²⁰⁴ 131 S Ct 863 (2011).

²⁰⁵ Compare *id* at 867 (stating that the Court granted certiorari to review the Sixth Circuit's decision, but not mentioning other circuits), with *Thompson v North American Stainless, LP*, 567 F3d 804, 811 (6th Cir 2009) (stating that the Sixth Circuit agreed with three other circuits and that "no circuit court of appeals" had held to the contrary); Brief for the United States as Amicus Curiae, *Thompson v North American Stainless, LP*, Docket No 09-291, *6–7 (US filed May 25, 2010) (available on Westlaw at 2010 WL 2101919) ("Thompson Amicus Brief") ("Four courts of appeals have considered third-party retaliation claims asserted by employees in the position of petitioner under Title VII or statutes with substantially identical anti-retaliation provisions, and all four have rejected them."). I emphasize that judgments about the circuits' positions are debatable. As the solicitor general noted, some of the decisions according with the Sixth Circuit's used different rationales or involved parallel language in different discrimination statutes. See *Thompson Amicus Brief* at *7.

²⁰⁶ 131 S Ct 1186 (2011).

²⁰⁷ The Seventh Circuit, which was reversed in *Staub*, had taken a strict approach that only one other circuit embraced. See *Staub Amicus Brief* at *8–9. The other circuits were more lenient, though they used varying language, which makes it hard to give an exact circuit lineup. See *id* (discussing the law in various circuits). Further, because the Supreme Court's opinion did not address those other circuits, it is hard to say definitively what the Court meant to endorse (beyond the fact that it clearly did not endorse the strict view).

As the above discussion shows, my own investigations have often taken me beyond the four corners of Supreme Court opinions. So why not eschew reliance on what the Court says about splits and instead report what is really going on? Unfortunately, that effort would not get at the whole truth either. Going outside of the Court's opinions in order to determine the actual circuit breakdowns in a purported split introduces much more complexity and subjectivity regarding whether decisions conflict: Are certain cases really in conflict or are they distinguishable? Are the allegedly conflicting rules dicta or holdings? Would the lower courts involved in a split still reach the same decisions today given intervening Supreme Court rulings? What about intracircuit conflicts and the like? Indeed, the justices themselves sometimes disagree about the true circuit breakdown.²⁰⁸ Further, there is no clear stopping point once one departs from the four corners of the Court's opinions. One cannot be certain that the certiorari filings are comprehensive and trustworthy. (Those petitioning for certiorari may exaggerate conflicts, while respondents may deny or minimize them.) Lower-court opinions often collect cases on either side of a split, but there is no guarantee that those counts are accurate and complete either. One would have to research all of the legal questions independently, which is time-consuming and is by no means guaranteed to yield an objective answer.

Because of these difficulties, one should not put too much faith in *any* purportedly precise measures of the Supreme Court's resolutions of circuit splits. There are at least a few lopsided cases that the Court's opinions do not reveal, though one should not expect very many to go unmentioned given that an opinion (whether for the majority or a separate opinion) that aligns with a lopsided lower-court majority can bolster its argument by saying so. I believe that the 62 percent figure reported above as the rate at which the Court agrees with lopsided lower-court majorities more likely overestimates the Court's agreement with the lower courts than underestimates it. That is because it is plausible to suspect that an authoring justice is more likely to

²⁰⁸ See generally, for example, *Milner v Department of the Navy*, 131 S Ct 1259 (2011). The majority insisted that the case involved a roughly even division in the lower courts, while the dissent accused the majority of joining the wrong side of a lopsided split. Compare *id* at 1268–69 (majority), with *id* at 1274 (Breyer dissenting). I have deferred to the majority, so *Milner* is not in Table 1. If the majority had ignored the lower-court precedent or failed to dispute the dissent's characterization, I probably would have included it in the table, as with the cases discussed in the text accompanying notes 202–03.

mention and accentuate the extent of agreement with the lower courts than the opposite. For the same reason, there is some basis to worry that the rates of agreement between the Supreme Court and lower courts reported by other studies²⁰⁹ are also too high (and they are certainly inexact).²¹⁰

B. Invocations of the Lower Courts in the Justices' Reasoning

A more complete and confident understanding of the issue requires that we also look at what the justices say in their opinions. Do they state that they are influenced by lower-court precedent? If so, which of the rationales explored in Part II—stability, epistemic authority, pragmatism, and so on—do the justices find compelling? And which justices?

In order to answer those questions, I attempted to identify and categorize every instance, over the last three Supreme Court terms, in which an opinion invoked or relied on the views of the lower courts as support for its position on the question presented. That does not include every instance in which a lower court is cited on any point of law. For example, a Supreme Court opinion will sometimes cite lower-court precedent on a point that is being assumed for purposes of argument or on a point that is tangential to the question actually before the Court.²¹¹ Such references do show some appreciation for the views of the lower courts, but it is hard to evaluate their significance. For one thing, it is sometimes unclear whether an opinion is actually taking a position on some tangential point or merely accepting it *arguendo*. Moreover, any given question presented involves countless tangentially related questions on which there might (or might not) be a majority view that the Supreme Court might (or might not) decide to mention. Thus, if one finds, say, ten mentions of consensus on tangential points, that could be ten mentions out of twenty opportunities to observe a consensus, or it could be ten out of one hundred opportunities. To avoid these and related difficulties, I report only the justices' observations

²⁰⁹ See note 174.

²¹⁰ For more thoughts on these issues, see generally Bruhl, 3 J Legal Metrics (cited in note 193).

²¹¹ See, for example, *Gonzalez v Thaler*, 132 S Ct 641, 649 n 5 (2012) (citing a lower court for the proposition that “[t]he courts of appeals uniformly interpret ‘circuit justice or judge’ to encompass district judges,” a question at most tangentially related to the question presented); *Douglas v Independent Living Center of Southern California, Inc.*, 132 S Ct 1204, 1211–12 (2012) (Roberts dissenting); *Pepper v United States*, 131 S Ct 1229, 1248 n 16 (2011).

about what the lower courts have done with the actual question presented. I do, however, include the justices' observations about lower-court views on what might be called "subquestions" within the question presented and on questions that are phrased at a somewhat higher level of generality than the question presented.²¹² Naturally this requires some judgment calls, so the counts cannot pretend to absolute precision.

Table 2 summarizes the results, divided into the particular rationales for deference involved, along with a category for brief, unelaborated invocations of the lower courts and a category for comments rejecting reliance on lower courts as a methodological matter.

²¹² See, for example, *Global-Tech Appliances, Inc v SEB SA*, 131 S Ct 2060, 2070 & n 9 (2011) (defining the "willful blindness" standard in a patent case by referring to lower-court cases articulating the standard in other contexts).

TABLE 2. INVOCATIONS OF LOWER-COURT SUPPORT, GROUPED BY RATIONALE AND JUSTICE: 2010, 2011, AND 2012 TERMS

Case	Location of Invocation	Authoring Justice
Significant Reliance on Lower Courts without Emphasizing Particular Grounds		
<i>Janus Capital v First Derivatives Traders</i>	131 S Ct 2296, 2311–12 (2011)	Breyer dissenting
<i>J. McIntyre Machinery v Nicastro</i>	131 S Ct 2780, 2801–02, 2804–06 (2011)	Ginsburg dissenting
Epistemic		
* <i>United States v Tinklenberg</i>	131 S Ct 2007, 2014 (2011)	Breyer
<i>Nevada Commission on Ethics v Carrigan</i>	131 S Ct 2343, 2349 (2011)	Scalia
Modest Pragmatic		
** <i>Koonitz v St. Johns River Water Management District</i>	133 S Ct 2586, 2602 (2013)	Alito
** <i>Vance v Ball State University</i>	133 S Ct 2434, 2453 (2013)	Alito
<i>Johnson v Williams</i>	133 S Ct 1088, 1097 (2013)	Alito
** <i>Bullock v BankChampaign, NA</i>	133 S Ct 1754, 1761 (2013)	Breyer
* <i>Kiobel v Royal Dutch Petroleum Co</i>	133 S Ct 1659, 1675–77 (2013)	Breyer concurring
** <i>Henderson v United States</i>	133 S Ct 1121, 1130 (2013)	Breyer
<i>Bailey v United States</i>	133 S Ct 1031, 1048 (2013)	Breyer dissenting
<i>Florence v Board of Chosen Freeholders</i>	132 S Ct 1510, 1530 (2012)	Breyer dissenting
* <i>United States v Tinklenberg</i>	131 S Ct 2007, 2014–15 (2011)	Breyer
* <i>Milner v Department of the Navy</i>	131 S Ct 1259, 1276 (2011)	Breyer dissenting

<i>Los Angeles County v Humphries</i>	131 S Ct 447, 453 (2010)	Breyer
** <i>Kirtsaeng v John Wiley & Sons, Inc</i>	133 S Ct 1351, 1389–90 (2013)	Ginsburg dissenting
* <i>Taniguchi v Kan Pacific Saipan, Ltd</i>	132 S Ct 1997, 2010–11 (2012)	Ginsburg dissenting
** <i>Mims v Arrow Financial Services, LLC</i>	132 S Ct 740, 753 (2012)	Ginsburg
* <i>CSX Transportation, Inc v McBride</i>	131 S Ct 2630, 2641, 2643–44 (2011)	Ginsburg
** <i>Skinner v Switzer</i>	131 S Ct 1289, 1299 (2011)	Ginsburg
<i>Martel v Clair</i>	132 S Ct 1276, 1285, 1288 (2012)	Kagan
<i>Lafler v Cooper</i>	132 S Ct 1376, 1385, 1389–90 (2012)	Kennedy
<i>Hosanna-Tabor v EEOC</i>	132 S Ct 694, 705, 707, 710 (2012)	Roberts
<i>Perry v New Hampshire</i>	132 S Ct 716, 737–38 (2012)	Sotomayor dissenting
<i>Freeman v United States</i>	131 S Ct 2685, 2698 n 3, 2700 n 9 (2011)	Sotomayor concurring
** <i>Schindler Elevator Corp v United States</i>	131 S Ct 1885, 1894–95 (2011)	Thomas
Acquiescence		
* <i>Kiobel v Royal Dutch Petroleum Co</i>	133 S Ct 1659, 1675–77 (2013)	Breyer concurring
* <i>Milner v Department of the Navy</i>	131 S Ct 1259, 1274–75 (2011)	Breyer dissenting
* <i>Taniguchi v Kan Pacific Saipan, Ltd</i>	132 S Ct 1997, 2008–09 (2012)	Ginsburg dissenting
* <i>CSX Transportation, Inc v McBride</i>	131 S Ct 2630, 2641 (2011)	Ginsburg
<i>Microsoft Corp v i4i Limited Partnership</i>	131 S Ct 2238, 2252 (2011)	Sotomayor ^a

Stability

<i>*United States v Tinklenberg</i>	131 S Ct 2007, 2014–15 (2011)	Breyer
<i>*Milner v Department of the Navy</i>	131 S Ct 1259, 1276–78 (2011)	Breyer dissenting
<i>Maracich v Spears</i>	133 S Ct 2191, 2222 (2013)	Ginsburg dissenting
<i>*Taniguchi v Kan Pacific Saipan</i>	132 S Ct 1997, 2008–09 (2012)	Ginsburg dissenting
<i>*CSX Transportation, Inc v McBride</i>	131 S Ct 2630, 2640–41 (2011)	Ginsburg
<i>Lozman v City of Riviera Beach, Florida</i>	133 S Ct 735, 753–55 (2013)	Sotomayor dissenting
<i>Southern Union Co v United States</i>	132 S Ct 2344, 2357 (2012)	Sotomayor

Opinion Claims Support from a Majority of Lower Courts without Elaboration^b

<i>Hosanna-Tabor v EEOC</i>	132 S Ct 694, 714 (2012)	Alito concurring
<i>Global-Tech Appliances, Inc v SEB SA</i>	131 S Ct 2060, 2069–70 (2011)	Alito
<i>Lozman v City of Riviera Beach, Florida</i>	133 S Ct 735, 743 (2013)	Breyer
<i>Fowler v United States</i>	131 S Ct 2045, 2050 (2011)	Breyer ^c
<i>Abbott v United States</i>	131 S Ct 18, 23 (2010)	Ginsburg
<i>Arizona Christian School v Winn</i>	131 S Ct 1436, 1453 (2011)	Kagan dissenting
<i>United States v Home Concrete</i>	132 S Ct 1836, 1852 (2012)	Kennedy dissenting ^d
<i>Florence v Board of Chosen Freeholders</i>	132 S Ct 1510, 1518 (2012)	Kennedy ^e
<i>Coleman v Court of Appeals of Maryland</i>	132 S Ct 1327, 1332 (2012)	Kennedy
<i>Borough of Duryea v Guarnieri</i>	131 S Ct. 2488, 2491–93, 2495 (2011)	Kennedy
<i>Harrington v Richter</i>	131 S Ct 770, 784 (2011)	Kennedy

<i>Arizona Free Enterprise Club v Bennett</i>	131 S Ct 2806, 2823 (2011)	Roberts
<i>Ransom v FIA Card Services, NA</i>	131 S Ct 716, 730 (2011)	Scalia dissenting
<i>Cullen v Pinholster</i>	131 S Ct 1388, 1417 (2011)	Sotomayor dissenting
<i>Sossamon v Texas</i>	131 S Ct 1651, 1662 n 9 (2011)	Thomas

Negative Comments about Relying on Lower Courts

<i>Milner v Department of the Navy</i>	131 S Ct 1259, 1268 (2011)	Kagan
<i>Global-Tech Appliances, Inc v SEB SA</i>	131 S Ct 2060, 2073 (2011)	Kennedy dissenting
<i>CSX Transportation, Inc v McBride</i>	131 S Ct 2630, 2650 (2011)	Roberts dissenting
<i>United States v Tinklenberg</i>	131 S Ct 2007, 2018 (2011)	Scalia concurring

* Opinion cites multiple rationales.

** Opinion invokes the pragmatic rationale but does not clearly claim a majority of lower courts in support. The logic of the pragmatic rationale can apply even in the absence of majority support. See Part III.B.2.

Notes:

a In this case, the Court inferred congressional acquiescence in a long-standing interpretation of the Federal Circuit, which has exclusive jurisdiction in the field.

b Several of the cases listed in the preceding categories also contain a separate passing reference to lower-court support, but I have not included them again in this category. This category is for cases that contain only a brief invocation of lower-court precedent without mentioning particular grounds for attending to lower-court views.

c Breyer's opinion for the Court contended that "[n]o [c]ircuit" had adopted the position of Scalia's concurrence, but it was not clear whether most circuits agreed with the Court's own position. See *Fowler v United States*, 131 S Ct 2045, 2050 (2011).

d The opinion claimed support from "several" decisions in the courts of appeals but did not explicitly call them a majority, so it is debatable whether to include this case. *United States v Home Concrete & Supply, LLC*, 132 S Ct 1836, 1852 (2012). It appears, based on other sources, that the "several" cases did in fact constitute a majority, though it was a fairly narrow one. See Brief for the Respondent, *Beard v Commissioner of Internal Revenue*, Docket No 10-1553, *19-20 (US filed July 27, 2011) (available on Westlaw at 2011 WL 3202962).

e Kennedy did not claim support from a majority of all of the courts of appeals but claimed support from all of those to have ruled on the issue in the decade leading up to the Court's decision. See *Florence*, 132 S Ct at 1518.

The results can be analyzed along several dimensions: how often the Supreme Court invoked the lower courts, which rationales the Court most commonly employed, and which justices were most likely to rely on lower-court support.

1. Overall frequency of use.

Invocations of support from the lower courts are not unusual, but neither are they routine. Looking at the Court's entire output over the last three terms, one finds invocations of the lower courts in about forty cases, or around one-sixth of the merits decisions. For comparison, that is more often than the Supreme Court cited *The Federalist* (seventeen citing cases) or Blackstone's *Commentaries* (eighteen citing cases) during the same period.²¹³ Of course, comparing citation rates has limited value, because different types of sources are potentially relevant in different cases. *The Federalist* is not a plausible source for most ERISA cases, and the weight of lower-court opinion is not available when there is no clear majority view.

Not all invocations of the lower courts are equal. In around one-third of the cases invoking lower-court support, the discussion is brief and unelaborated; at the minimal end, it may amount to nothing more than a passing mention of agreement with the majority of the lower courts.²¹⁴ Such mentions show that the Court is part of a larger judicial enterprise, but they do not necessarily reflect that the opinion even purports to give lower-court views any weight as authority. In the remaining two-thirds of the invocations of the lower courts, the views of the lower courts are presented as having more value: the opinion either mentions lower-court views repeatedly with a suggestion that some weight is given, or the invocation of the lower courts is tied to some particular reason to care about what the lower courts think.

It is striking how many of the invocations of lower-court majorities appear in dissents. This provides more evidence that the lower courts have at best modest influence on the Supreme Court. Many of these dissents were authored by the Court's liberals, which suggests a connection to interpretive methodology and ideology more broadly, a topic discussed again shortly.²¹⁵

²¹³ This statement is based on a search of the Westlaw Supreme Court database for "Federalist" and "Blackstone" for the period October 2010 through June 2013. Some false positives were excluded (such as references to "federalist principles" or business entities with "Blackstone" in the name).

²¹⁴ See, for example, *Coleman*, 132 S Ct at 1332 ("In agreement with every Court of Appeals to have addressed this question, this Court now holds . . .").

²¹⁵ See Part III.B.3.

2. Different rationales for relying on the lower courts.

By far the most common basis for invoking the lower courts—among the cases with more than passing references—was the pragmatic rationale. That argument posits that, once the lower courts have created a certain state of the law, the Supreme Court can observe the consequences that flow from it; if no terrible consequences appear, the Court has reason to prefer that state of affairs to a less tested alternative.²¹⁶ Justice Breyer's fondness for this sort of reasoning is not surprising given his embrace of evaluating practical consequences as one aspect of sound judicial decisionmaking.²¹⁷ But, as these results show, other members of the current Court, even more formalist justices, also incorporate consequences into their reasoning.²¹⁸

Before getting carried away with the surprising prevalence of pragmatism, one should remember that one characteristic of the pragmatic rationale uniquely inflates its incidence in the Court's opinions. In particular, the logic of modest pragmatism, unlike that of other rationales, makes sense whether or not one's favored position has been adopted by most of the courts to have addressed the matter. As long as some critical mass of courts has adopted a particular view for a while, one can plausibly advance the argument that any seriously negative consequences inherent in that view would have manifested themselves. Table 2 uses two asterisks to indicate cases in which an opinion invokes the pragmatic argument without claiming that the opinion's preferred interpretation of the law represents a clear majority position. In some cases, it is a narrow majority view, though in a few it is actually a minority view. Still, the pragmatic rationale remains the most popular even without those cases.

Another feature that may help to explain pragmatism's relative prevalence is that it can serve as a rebuttal to a consequentialist argument from the briefs or an opposing opinion. That is, if one opinion says that a certain interpretation will

²¹⁶ See Part II.B.

²¹⁷ See Stephen Breyer, *Making Our Democracy Work: A Judge's View* 82 (Knopf 2010) (describing his approach as "pragmatic—as that concept is broadly used to encompass efforts that consider and evaluate consequences").

²¹⁸ See Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 *Miss L J* 129, 173–80, 188–89 (2008) (showing that Scalia frequently relies on consequentialist arguments and his sense of statutory purposes); Jane S. Schacter, *Text or Consequences?*, 76 *Brooklyn L Rev* 1007, 1009, 1012–15 (2011) (explaining that consequentialist arguments are common even among textualists).

have bad consequences, that charge can be rebutted by showing that the interpretation has already been tried out and has, in fact, not been so bad after all.²¹⁹ Thus, an opinion's author might use the pragmatic argument defensively in response to actual or anticipated counterarguments.

Although the stability/reliance argument for following the lower courts figures prominently in the scholarly commentary,²²⁰ it appears only rarely in the cases that I examined. Perhaps that is because, as proposed above, the argument is most forceful in cases that do not regularly appear on the Supreme Court's docket (for example, when there is a long-standing consensus on a question that engenders serious reliance interests).²²¹

The last three years also saw few opinions citing the acquiescence rationale, which is the notion that one can infer congressional approval from the failure to legislatively override long-standing and unequivocal lower-court precedent. Acquiescence arguments used to be more common, and their decline can be traced to two factors. The first is the appointment of Justice Scalia to the Supreme Court.²²² His brand of textualism makes him a committed opponent of arguments that draw inferences from congressional silence.²²³ His views have perhaps proved persuasive to some of his colleagues and, in any event, his willingness to write a separate opinion objecting to such arguments²²⁴ may dissuade hassle-averse opinion writers from including them even when the writer finds them compelling.²²⁵ Second, and more recently, the departure of Justice Stevens

²¹⁹ See, for example, *Vance v Ball State University*, 133 S Ct 2434, 2452–54 (2013). See also David S. Law and David Zaring, *Law versus Ideology: The Supreme Court and the Use of Legislative History*, 51 Wm & Mary L Rev 1653, 1736–38 (2010) (finding that citation to legislative history in a Supreme Court opinion is correlated with the presence of citations to legislative history in another opinion in the same case—a “tit-for-tat” effect).

²²⁰ See text accompanying notes 112–14.

²²¹ See Part II.D.

²²² Writing twenty-five years ago, Eskridge noted that then-recently appointed Justice Scalia's criticisms of inaction arguments had already significantly raised the temperature of the debate over using acquiescence and related arguments. See Eskridge, 87 Mich L Rev at 67–68, 92 & n 152 (cited in note 99).

²²³ For one of his particularly vehement early statements against imputing acquiescence, see *Johnson v Transportation Agency, Santa Clara County, California*, 480 US 616, 671–72 (1987) (Scalia dissenting).

²²⁴ See, for example, *Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S Ct 1605, 1625–26 (2010) (Scalia concurring in part and concurring in the judgment).

²²⁵ A similar dynamic may be at work in the Court's use of legislative history, another Scalia-disfavored interpretive resource. See James J. Brudney and Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 Berkeley J Empl & Labor L 117, 160–71 (2008).

means that the Court has lost one of its chief supporters of acquiescence arguments.²²⁶

3. Differences among the justices and the role of interpretive methodology.

The justices' propensity to rely on the lower courts tends, roughly, to track their overall political ideologies. Although neither side of the Court is monolithic, the more conservative justices mostly do not invoke lower-court consensus for support, while the more liberal justices tend to cite it more frequently. Moreover, there is some evidence that the liberals' statements are not just cheap talk. Referring back to Table 1, recall that there were instances in which a significant number of justices sided with the lower-court consensus despite ideological inclinations that would be expected to pull them in the other direction. In the majority of those instances it was the Court's liberal members who voted against type, which is consistent with some prior research.²²⁷

If there is in fact a tendency for the liberals to be influenced by lower-court precedent more than the conservatives—and I emphasize again the measurement difficulties that plague the study of circuit splits—what would explain that difference? There are a number of possibilities, some of which involve individual idiosyncrasies or historical contingencies,²²⁸ but one can construct a plausible explanation that links the difference to the underlying interpretive commitments of the two groups. The Court's conservatives tend to be originalist in constitutional cases, but lower courts mostly parse the Court's holdings and dicta; moreover, when the lower courts do undertake originalist research, it is unlikely to be very persuasive.²²⁹ To the extent that some prevailing constitutional doctrine is still the product of prior, more liberal eras of jurisprudence (like the Warren Court), the conservatives would also be more willing to overrule precedent,

²²⁶ For prominent examples of Stevens's invocation of acquiescence, see *Morrison v National Australia Bank Ltd*, 130 S Ct 2869, 2890–91 (2010) (Stevens concurring in the judgment); *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*, 511 US 164, 196–98 (1994) (Stevens dissenting).

²²⁷ See note 186 and accompanying text.

²²⁸ For instance, it may be that the length of one's prior service on a lower court increases one's receptivity to following the lower courts. That explanation has some appeal, though it cannot explain all of the data points (Kennedy, for example, served for more than a decade on the Ninth Circuit).

²²⁹ See text accompanying notes 146–50.

further distancing them from lower courts, which lack that option. In statutory interpretation, the conservatives are more likely to believe in the primacy, even the exclusivity, of the enacted text. And although one might suppose that the lower courts could serve as reliable interpreters of the ordinary meaning of language, such that they would usually reach the correct interpretation, the brand of textualism actually practiced by those like Justice Scalia is extremely complex: it eventually finds “clear” meanings, but the route to clarity involves complicated “whole code” reasoning that may be anything but obvious.²³⁰ The Court’s more liberal members, by contrast, are more open to ambiguity and evolving meanings, and they tend to be methodologically eclectic. Just as they are willing to depart from the most linguistically obvious reading of text in the name of purpose or intent or policy, they can also find a place in their methodology to let semantics yield to lower-court consensus, which reflects settled practices (stability) and passes the test of workability (modest pragmatism).

It is interesting to juxtapose the conservatives’ relative indifference to lower-court precedent with the professed textualist aim of reading texts (particularly statutes) so as to make the law as coherent and consistent as possible.²³¹ The conservatives evidently believe that the goal of coherence is better achieved not through consistency with lower-court decisions, but by drawing on broader, background principles of law, often those rooted in the common law. That is, they appear to prioritize what Professor Anita Krishnakumar has called “landscape coherence,” even when doing so may be suboptimal for the particular question at hand.²³² A nice illustration comes from *CSX Transportation, Inc v McBride*,²³³ which concerned the standard of causation under the Federal Employers’ Liability Act²³⁴ (FELA). The majority opinion by Justice Ginsburg relied heavily on the fact that the

²³⁰ Bruhl, 97 Cornell L Rev at 442–43, 477–78 (cited in note 45) (explaining that, for Scalia, the linguistic frame of reference is the entire US Code, not just the particular act at issue).

²³¹ See *Green v Bock Laundry Machine Co*, 490 US 504, 528 (1989) (Scalia concurring in the judgment) (stating that statutory terms should be read so as to be “most compatible with the surrounding body of law”). See also Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (Princeton 1997) (referring to integrating a statute with “the remainder of the *corpus juris*”).

²³² Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 Hastings L J 221, 221, 225–26 (2010).

²³³ 131 S Ct 2630 (2011).

²³⁴ 45 USC § 51 et seq.

vast majority of lower courts had understood the standard in a particular way for decades.²³⁵ The dissent, authored by Chief Justice Roberts and joined by Justices Alito, Scalia, and Kennedy, relied from beginning to end on a different source of wisdom: “accumulated common law history” in the form of the “enduring common law concept” of proximate cause.²³⁶ One would suppose that the lower-court cases concerning FELA causation would have considered that common law background too, along with more statute-specific factors, and yet the dissent largely bypassed those on-point decisions in order to appeal to broader principles that pervade the general law of torts.²³⁷ In this sort of case, the conservatives’ preference for continuity with the common law and general background principles is hard to defend from the point of view of the deeper rule-of-law values like predictability that one would expect them to invoke.

The correspondence between ideology and attitudes toward lower-court precedent is certainly not perfect. Although it is too early to form firm conclusions about her methodological commitments, Justice Kagan seems less interested in relying on the lower courts than her colleagues on the Court’s liberal wing or her predecessor, Justice Stevens.²³⁸ Her opinions dutifully note circuit splits (and, as the most junior justice, she probably receives more than her fair share of complicated-but-dry statutory cases), but so far she rarely purports to give weight to lower-court views or explain why their views might be worthy of deference.²³⁹ Further, she joined the conservatives in the text-trumps-long-standing-practice

²³⁵ See *McBride*, 131 S Ct at 2634, 2640–41.

²³⁶ *Id.* at 2644–45, 2652 (Roberts dissenting). Justice Thomas joined the majority opinion in part.

²³⁷ *Staub* presents another example of using lower courts to provide background guidance rather than specific guidance. Scalia’s opinion for the Court cited several lower-court cases from unrelated contexts in order to divine general principles of agency law. See *Staub*, 131 S Ct at 1191–92. The opinion did not cite the many lower-court cases that had addressed the particular Title VII issue before the Court. See note 197.

²³⁸ We have only a few years in which to observe, and the sample size for Kagan is further reduced because she recused herself from about one-third of the cases in her first term, October Term 2010. Stephen Wermiel, *Justice Kagan’s Recusals*, SCOTUSblog (Oct 9, 2012), online at <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals> (visited Aug 12, 2014).

²³⁹ Apart from the two cases noted in Table 2, there are a few instances in which Kagan (like her colleagues) cites lower courts as authorities on points tangential to the question presented. See, for example, *US Airways, Inc v McCutchen*, 133 S Ct 1537, 1550 n 8 (2013) (Kagan). See also *National Meat Association v Harris*, 132 S Ct 965, 974 (2012) (Kagan) (citing and distinguishing lower-court cases).

opinion in *Taniguchi*.²⁴⁰ And although *Milner v Department of the Navy*²⁴¹ was decided by a vote of 8–1, with only Justice Breyer championing the DC Circuit’s long-standing-but-textually-tenuous interpretation of the Freedom of Information Act,²⁴² Kagan’s majority opinion not only disputed Breyer’s contention that the DC Circuit’s view had commanded widespread approval in many lower courts but, before doing that, claimed that Breyer’s position “would be immaterial *even if true*, because we have no warrant to ignore clear statutory language on the ground that other courts have done so.”²⁴³ In some sense she is of course correct, but the statement does present things in quite a stark, black-and-white way.

Among the more conservative justices, Scalia appears particularly opposed to crediting the views of the lower courts. When he does mention lower-court precedent, it is often to explicitly reject the soundness of following it.²⁴⁴ As noted above, his opinions often do not even reveal that there is a split, which is unhelpful. To his credit, he does not appear to be opportunistic about mentioning lower courts: I found several instances in which he neglects to mention lower-court views even when he is apparently following a lower-court majority.²⁴⁵

Scalia did rely on lower courts in a significant, albeit unusual, way in *Nevada Commission on Ethics v Carrigan*.²⁴⁶ The Nevada Supreme Court had invalidated on First Amendment grounds a state law requiring state legislators to recuse themselves from votes in which they had a conflict of interest.²⁴⁷ The US Supreme Court reversed.²⁴⁸ Scalia’s opinion for the Court observed that “[t]he Nevada Supreme Court and [the respondent] have not cited a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace

²⁴⁰ See *Taniguchi*, 132 S Ct at 1999. See also text accompanying notes 153–59.

²⁴¹ 131 S Ct 1259 (2011).

²⁴² 5 USC § 552.

²⁴³ *Milner*, 131 S Ct at 1268 (emphasis added).

²⁴⁴ For notable examples from before the period covered by this study, see *Morrison*, 130 S Ct at 2878–81; *Brogan v United States*, 522 US 398, 407–08 (1998).

²⁴⁵ See generally, for example, *Smith*, 544 US 228; *City of Arlington*, 133 S Ct 1863; *Staub*, 131 S Ct 1186. In each of these instances, I am following the solicitor general’s characterization of the split. In *Staub*, the circuit split was arguably not even close, such that it would have been tempting to mention that fact. See note 207.

²⁴⁶ 131 S Ct 2343 (2011).

²⁴⁷ *Id* at 2346.

²⁴⁸ *Id* at 2352.

for over 200 years.”²⁴⁹ Relying on old state court cases, old statutes, and other materials, Scalia’s opinion revealed a tradition of regulating legislators, a tradition sufficient to approve the challenged law’s constitutionality.²⁵⁰ In fact, Scalia found the old cases and sources more persuasive as authorities than some more recent decisions “from the 1980’s and afterwards” that the respondent relied on.²⁵¹ This perhaps makes sense for a constitutional originalist: old decisions have greater epistemic value because they were closer to the relevant original understandings.

One can contrast Justice Scalia’s fairly dependable disregard of the lower courts with the less consistent stance taken by some other members of the Court. For example, Justice Kennedy has quite often mentioned, in passing, that his view accords with the majority (or all) of the lower courts.²⁵² But the lower-court decisions do not appear to be doing much work in his reasoning, for he does not linger to explain the significance of such agreement (stability, congressional acquiescence, deference to expertise, and so forth), and he has authored or joined opinions that explicitly reject reliance on lower-court consensus as an interpretive method.²⁵³

CONCLUSION: PRECEDENT, EQUILIBRIUM, AND DIRECTIONS FOR FURTHER RESEARCH

This Article has considered how lower-court precedent does and should figure into the Supreme Court’s decisionmaking. Yet the cases that make their way onto the Supreme Court’s merits docket represent just a small fraction of the judiciary’s business. This Article concludes by considering the role of lower-court precedent from a more systemic perspective. Doing so generates some interesting implications and points the way toward some fruitful topics for further investigation.

To begin with, the use of lower-court precedent provides an example of how judicial decisionmaking differs substantially across courts. Lower-court precedent enjoys at most modest influence on the Supreme Court, but it looms large within the lower

²⁴⁹ *Id.* at 2348.

²⁵⁰ See *Nevada Commission on Ethics*, 131 S Ct at 2347–49.

²⁵¹ *Id.* at 2349.

²⁵² See Table 2.

²⁵³ See, for example, *Global-Tech Appliances*, 131 S Ct at 2073 (Kennedy dissenting) (“[C]ounting courts in a circuit split is not this Court’s usual method for deciding important questions of law.”).

courts themselves. The federal courts of appeals are not formally bound by out-of-circuit precedents, yet they give them serious consideration and some degree of authority. Lower courts frequently make statements to the effect that they are reluctant to create or exacerbate a split of authority absent good reason.²⁵⁴ Probably the main justification for the circuits to give weight to one another's precedents is the promotion of geographic uniformity.²⁵⁵ Nationally uniform application of federal law promotes the equal treatment of similarly situated parties, facilitates the operations of multistate actors, and fosters predictability.²⁵⁶ Although there may be reasons for the Supreme Court to follow lower courts in certain situations, promoting geographic uniformity is generally not one of them, as whatever decision the Court makes will (at least in theory) be uniform throughout the land.²⁵⁷

Thus, we currently have a system in which the lower courts tend to follow a model of horizontal coordination while the Supreme Court mostly charts its own course. Is that the best way to run a judicial system? From the perspective of institutional design, one could imagine quite different possibilities, including some systems that essentially flip those two tendencies. For example, perhaps the lower courts should act more independently, exercising their own best judgment rather than showing deference to others. If they did so, that would increase the value of their views on the epistemic rationale, which in turn would give the Supreme Court some additional reason to honor the majority view that emerged, thus creating a quite different system than we have now. But let us suppose, as seems more likely, that we retain a system broadly like our own, in which lower courts value persuasive precedent much more highly than

²⁵⁴ See, for example, *Admiral Financial Corp v United States*, 378 F3d 1336, 1340 (Fed Cir 2004) (“[W]e do not create conflicts among the circuits without strong cause.”) (quotation marks omitted); *United States v Auginash*, 266 F3d 781, 784 (8th Cir 2001). See also Klein, *Making Law* at 89–91 (cited in note 42).

²⁵⁵ See, for example, *James v Sunrise Hospital*, 86 F3d 885, 889 (9th Cir 1996) (observing that “we have been much influenced in the construction we adopt by the desire to avoid intercircuit conflict” and that “there is virtue in uniformity of federal law as construed by the federal circuits”).

²⁵⁶ But see Frost, 94 Va L Rev at 1579–1606 (cited in note 16) (summarizing and critically assessing the various arguments that are offered in support of geographic uniformity).

²⁵⁷ An exception to the statement that the Supreme Court need not worry about geographic uniformity arises in connection with the interpretation of treaties. Maintaining uniform understandings on such matters has value in itself. See *Abbott v Abbott*, 560 US 1, 16 (2010).

does the Supreme Court. Some interesting practical and theoretical problems arise from this divergence.

Perhaps most importantly, the divergence raises questions about how to maintain systemic stability. Surprisingly, the system can actually work pretty well—despite the differences between courts—if each level plays its role properly. By giving sister circuits' decisions a degree of deference and showing a willingness to reconsider old circuit law that is out of step with an emerging consensus, the lower courts can mostly maintain uniformity all by themselves. Some splits will (and should) develop, of course, but a wise administration of the Court's certiorari policy would tolerate some harmless splits (for example, local procedural variations that do not threaten substantial rights). For the rare question that proves to be both divisive and important, the Court can step in. When it does so, it can usually use the blank slate approach because, as Part II explains, most situations that require the Court's attention do not strongly implicate the values potentially served by downward deference. Thus, even if the Supreme Court rejects the view that had prevailed in the majority of the lower courts, the system will usually work just fine.

Trouble can enter the system from either end. Sometimes there will be good reasons for the Supreme Court to defer to lower-court consensus on the merits, but it will fail to do so. Other times the Court might unnecessarily disrupt the system by granting certiorari when it should not. Consider in this regard the case of *Taniguchi*, the translation-fees dispute discussed above.²⁵⁸ Most of the lower courts had allowed prevailing plaintiffs to recover translation expenses as part of the costs of the litigation, but the Supreme Court disagreed. The Court's merits decision, had it been the first word on the subject, would have been fine enough, though it did compromise Congress's purpose in the name of a textual reading that was probably not compelled. But *Taniguchi* might represent one of those instances in which various considerations—stability concerns stemming from the fact that many lower courts had allowed translation expenses and even enacted local rules to that effect, epistemic deference to the lower courts' expertise in litigation procedure, and so on—should have led the Court to follow the bulk of lower-court precedent.²⁵⁹ Perhaps even more importantly, it is unclear

²⁵⁸ See text accompanying notes 153–59.

²⁵⁹ See text accompanying notes 157–59.

why the Court needed to hear the case at all. The question at issue was the sort of procedural detail that can vary across circuits without doing substantial harm.

The lower courts can also cause trouble, especially when they mistake the Supreme Court's blank slate approach for the approach that *they* should take. When a lower court breaks from its peers for the sake of pursuing a "better" interpretation—often, these days, in the name of textualism—that can upset the whole system. It would be valuable to know more about how lower-court interpretive methodology affects the creation of circuit splits, for such work might shed light on the systemic costs and benefits of various interpretive approaches *as practiced in the lower courts*. For example, it may be that Professors Eskridge and Frickey's indictment of stability-flouting textualism in the Supreme Court applies just as well—or indeed better—to textualism in the lower courts.²⁶⁰

In the meantime, for an illustration of what one might uncover, consider a Fifth Circuit case concerning the proper interpretation of the Packers and Stockyards Act.²⁶¹ One provision of the statute prohibits meatpackers from engaging in certain conduct, as described in several distinct subsections.²⁶² Three of those subsections outlaw conduct only when it has an anticompetitive effect on the market or restrains commerce.²⁶³ But two other subsections, in apparent contrast, refer merely to unfair, deceptive, or discriminatory practices, without mentioning any harm to the market at large.²⁶⁴ One might therefore suppose, on textual grounds, that these two subsections reach the specified injurious conduct whether or not it has any broader anticompetitive effect; their text does not expressly require any market effect, and that omission seems especially meaningful in light of the language of the neighboring subsections. Indeed, that is how the Fifth Circuit panel majority saw it, and the court therefore allowed a plaintiff to sue based on individual injury without proving anticompetitive effects.²⁶⁵

²⁶⁰ See text accompanying note 170.

²⁶¹ 7 USC § 181 et seq. See also generally *Wheeler v Pilgrim's Pride Corp*, 536 F3d 455 (5th Cir 2008) ("Wheeler I"); *Wheeler v Pilgrim's Pride Corp*, 591 F3d 355 (5th Cir 2009) (en banc) ("Wheeler II").

²⁶² See 7 USC § 192.

²⁶³ See 7 USC § 192(c)–(e).

²⁶⁴ See 7 USC § 192(a)–(b).

²⁶⁵ See *Wheeler I*, 536 F3d at 456.

What made the case hard was that several courts of appeals, relying largely on legislative history and the statute's antitrust background, had previously read *all* of the subsections as requiring proof of anticompetitive impact on the market.²⁶⁶ According to the Fifth Circuit panel majority, those prior courts had fallen into error by deviating from the plain text.²⁶⁷

The Fifth Circuit then ordered rehearing en banc and reversed course.²⁶⁸ Most interesting here is the crux of the en banc opinion's reasoning:

The law rules best by being predictable and consistent. It is predictability that enables people to plan their investments and conduct, that encourages respect for law and its officials by treating citizens equally, and that enables an adversary to settle conflict without going to court in the hope of finding judges who will choose a favored result. . . .

How then would an informed person predict the case before us to be decided? He would begin by expecting us to look to the opinions of other circuits for persuasive guidance, always chary to create a circuit split. . . . [H]e could not expect a judge to interpret the statute by looking only at the bare words of [the subsections at issue]. Surely he would predict that the next court judgment would be consistent with the judgments of the other circuits.²⁶⁹

The en banc majority thus appealed to cardinal rule-of-law values like predictability in order to follow not text, but instead non-binding precedent.

What is the predictability-minded jurist to do when confronted with a conflict between text and nonbinding precedent? There may not be a right answer to these sorts of questions,²⁷⁰

²⁶⁶ See id at 460–61.

²⁶⁷ Id at 461 (“[O]ur sister Circuits have fallen into the very legislative history pitfall that the Supreme Court identified.”).

²⁶⁸ *Wheeler II*, 591 F3d at 357.

²⁶⁹ Id at 363. A concurrence contended that the text also supported this result, at least if read in the proper historical context and in light of prior judicial constructions of similar language in other statutes. See id at 364 (Jones concurring).

²⁷⁰ The separate matter of the tension between original meaning and precedent in the context of the Supreme Court's constitutional decisionmaking has spawned a voluminous literature, and it is fair to say that no consensus has emerged. For a few contrasting positions, see generally Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 Const Comment 257 (2005); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 Minn L Rev 1173 (2006); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U Pa J Const L 155 (2006).

but cases such as this illustrate the possibility that no answer can exist independent of one's position in the judicial hierarchy. According to the en banc opinion, the predictability-minded judge should follow sister-circuit precedent instead of "the bare words" of the text.²⁷¹ That may well be right, in a lower court. Yet one cannot help but speculate that, were the Supreme Court ever to address the question that was before the Fifth Circuit, the Court might well come out the other way, relying largely on the type of textual argument that persuaded the original Fifth Circuit panel, despite all of the lower-court precedent to the contrary. Of course, the Supreme Court is unlikely to take up the issue as long as the lower courts remain in agreement. The precedent-following but text-defying lower court is correct, if it is correct, not because it has anticipated how the Supreme Court would rule. Rather, it is correct because its adherence to precedent *prevents* the Supreme Court review that might result in a reversal.

* * *

Parts II and III presented an examination, along normative and positive dimensions, of the Supreme Court's use of lower-court precedent. This Conclusion, which traced some further implications, has been necessarily tentative. But I hope that it shows the value of studying how methodological choices made at different levels of the system do and should differ and, even more importantly, how those choices interact. There is much to discover about even familiar topics like precedent, and it is easier to identify new insights when one takes a step back and looks at the judicial system as a whole.

²⁷¹ *Wheeler II*, 591 F3d at 363.

